ombudsman news

from the **investment** division

Financial Ombudsman Service

February 2002

Financial Ombudsman Service

Aimed at financial firms and professional advisers – and at consumer advice agencies – we focus each month on news from one of our three case-handling divisions: banking and loans, insurance – and this month – investment.

in this issue

introduction

by **Jane Whittles**, principal ombudsman investment division

In the last investment edition of *ombudsman news*, I looked forward to reviewing the impact of N2 – the implementation from 1 December 2001 of the Financial Services and Markets Act 2000. Our aim was that the transition would be as seamless as possible and that the following months would be 'business as usual'. It is early days – but to date we seem to have achieved this ambition.

As we move through 2002, our procedures and approach will continue to develop and to be reported in *ombudsman news*. Increasingly, we will be looking to firms to submit files or relevant papers promptly, when first asked to do so. Regrettably, although many firms are very cooperative, some cause undue delay. As we look at the impact of the requirement under the new rules to treat customers fairly, we can anticipate situations where we will not delay our investigation until we have a firm's papers.

Jane Whittles, centre, with colleagues from the investment division's mortgage endowment team.

Produced by the communications team at the Financial Ombudsman Service

Reference number 145

We will also be seeking to identify and progress the cases we can deal with without the need to obtain further papers – for example – where we are familiar with the product literature and/or issues involved, or where the customer has sent us all the paperwork necessary for us to start our investigation. In such instances, we will naturally tell firms that we are looking into the complaint and they will have the opportunity to make representations and submit evidence before we resolve the matter. But, where appropriate, we will be placing increasing reliance on what the firm has done during its in-house consideration of the complaint, and on what it has told the customer in its final decision letter.

In this edition of *ombudsman news*

The last banking and loans issue of *ombudsman news* (December 2001) – available on our website at www.financial-ombudsman.org.uk – provides much helpful information for all firms wanting to learn more about our new procedures. To supplement this, on page 12 of this issue, we reiterate some of the basic principles of complaint-handling. This article should prove particularly helpful for firms that were previously regulated by the SFA, for whom N2 has brought a fundamentally different complaints arrangement. However, I hope it will be a useful source of reference for all firms.

In this edition we also discuss:

- sales made before 'A Day' – 29 April 1988, when the Financial Services Act 1986 was implemented;
- our approach to mortgage endowment cases that involve policies enhanced by windfall benefits, while we await the guidance promised by the regulator in its Regulatory Update 94 (RU94); and
- our approach to evaluating awards for non-financial loss.

As usual, we include case studies to demonstrate our current thinking on these topics, together with a round-up of some of the many different investment complaints we have dealt with in recent months.

1 complaints involving pre-'A Day' sales

A number of firms have asked us to clarify our position on pre-'A Day' complaints (those where the sale was made before the Financial Services Act 1986 came into force on 29 April 1988). Firms have also asked about the extent to which we expect them to take responsibility in these cases.

Generally, our position follows the views first set out in March 1997 in the PIA Ombudsman's *News From The Ombudsman*. We consider that firms giving advice before 'A Day' had three basic legal obligations at the time:

- a duty not to make negligent mis-statements;
- a duty (if the representative gave advice) to advise with reasonable care and skill; and
- a duty to disclose material information, if the representative gave information.

Few firms have disputed these principles. Where customers tell us they were advised to buy a particular policy, we generally believe them; in our experience, most policies are sold rather than bought. Where necessary, we also look at the customer's circumstances at the time of the sale. This will help us assess whether their statement of events is likely to be accurate. Firms are, of course, free to present any evidence that counters the customer's view.

Most of the pre-'A Day' complaints we receive concern mortgage endowment policies, and they generally fall into one of two categories: the customer considers the sale to have been unsuitable ***either***:

- because of the degree of risk involved; ***or***
- because the policy extends beyond the customer's retirement.

Both of these circumstances involve material matters that the firm should have addressed before the policies were taken out. So we will be looking at whether the firm can support its stance by providing evidence from the time of the sale to show that the level of risk was appropriate, or that the customer was aware that the policy would continue after their retirement and that the firm had established that this was appropriate.

... we will be looking at whether the firm can support its stance by providing evidence from the time of the sale.

case studies – pre-‘A Day’ sales

■ 14/01

Mrs C complained to us about the mortgage endowment policy she had been sold in 1986. She said the firm had led her to believe the policy was guaranteed to repay her mortgage and to provide her with an additional lump sum. She raised concerns, too, about the fact that the policy ran beyond the date when she retired.

The firm argued that as there were no regulations in force at the time of the sale, the legal requirement of ‘duty of care’ did not extend to informing customers that they might have difficulties maintaining payments after they retired.

We disagreed, taking the view that any firm that sold an investment product of this nature was obliged to consider whether the customer could afford the payments for the full lifetime of the policy. The customer could not reasonably have been expected to appreciate the importance of this.

We also felt that a mortgage endowment was an unsuitable choice for Mrs C, given her family commitments and financial circumstances. We awarded compensation, calculated in line with Regulatory Update 89 (RU89). This resulted in the term of the mortgage being reduced, so that it ended at Mrs C’s normal retirement date.

■ 14/02

Mr and Mrs S complained to the firm in October 2000, after learning that the with-profits endowment policy they were sold in 1987 would probably not produce sufficient funds to pay off their mortgage. They said the firm had told them that – when the policy matured – it was guaranteed to repay their £42,000 mortgage in full. They also claimed that the firm never explained the features and risks of the policy to them.

Our adjudicator explained to the couple that investment advice was unregulated at the time the policy was sold, although firms did have a common law duty to act with reasonable skill and care if they provided advice. The adjudicator asked Mr and Mrs S for any documents or other information from the time of the sale that might demonstrate that the salesman had breached his duty of care. They were unable to do this, so there were no grounds on which to uphold the complaint. Mr and Mrs S were unhappy with the situation and asked for their case to be referred to an ombudsman.

Noting the absence of any conclusive evidence about what was said at the time of the sale, the ombudsman looked at the submissions provided by both parties. He found that the policy illustration the couple were given in 1987 contained a warning that the policy would only be able to repay the mortgage if its bonus levels were maintained. In addition, the policy documentation showed that only the basic sum assured of £14,448 was guaranteed. The firm had been under no obligation to give specific risk warnings, only to ensure that it made no mis-statements or S misrepresentations. As the couple had no evidence of mis-statements or misrepresentations, the ombudsman did not uphold their complaint.

■ 14/03

In February 1987, Mrs T was sold a low-start unit-linked endowment policy that did not mature until seven years after she retired. She maintained that she had been given no documentation at the time of the sale, other than a graph that the adviser had drawn by hand. She said the adviser never told her there was any possibility of the policy not producing enough to pay the mortgage. She also claimed that when she queried the length of the policy, the adviser said the policy would produce enough to repay the mortgage early, so she would not need to make any payments after she retired.

As part of our investigation into the complaint, we asked Mrs T to complete a questionnaire. This showed that she was clearly averse to taking any risks with her money. She had no understanding of endowment policies, no other investments, and was a first-time buyer when she took out the policy.

Mrs T had signed the declaration on the application form, confirming that she had been given a policy illustration. She told us that the adviser had completed the application form and had asked her to sign it right away, not giving her any opportunity to read the form properly. She noted that she had, in any event, presumed that the 'illustration' referred to in the declaration was the hand-drawn graph.

The firm repeatedly denied any responsibility for the sale, on the grounds that it had taken place before the introduction of financial services legislation. It rejected our adjudicator's view that, by selling a policy that was unsuitable for Mrs T's circumstances and extended seven years into her retirement, the adviser had failed to meet the proper duty of care owed to his customer.

The firm asked for an ombudsman's decision. At this point, in line with our usual procedure, the adjudicator offered Mrs T the opportunity to comment on the firm's submissions before they were referred to the ombudsman, and to make any further submissions of her own. She sent us a pay slip from around the time of the sale. From this, it was clear that there had been no need for the 'low-start' facility and that she could easily have afforded the premiums if the policy had been for a shorter term, ending when she retired. Mrs T also produced a brochure that the firm had sent her, in response to her request for official documentation. This was dated several months after the sale. When we brought these items to the firm's attention, it acknowledged its liability.

The ombudsman upheld Mrs T's complaint and awarded compensation which put her in the position she would have been in if, instead of taking the mortgage endowment policy, she had taken a repayment mortgage over a shorter term, to coincide with the date when she expected to retire.

2 regulatory update 94 and policies that were enhanced by windfall benefits

This article concerns our position on the treatment of enhancements made to a policy – as a result of windfall benefits – when assessing loss in mortgage endowment cases.

Regulatory Update 94 (RU94) advised firms that when they make offers in mortgage endowment cases, they should not take the value of any windfall benefits (including policy augmentations) into account. It also advised that, where they have already made an offer that ***does*** take these benefits into account, they should withdraw it, explaining that they have done this pending further guidance from the regulator.

However, some firms have interpreted this guidance as prohibiting the payment of redress in any case where a policy has been augmented as a result of a windfall. In our view, this is not the position. RU94 does not instruct firms to place on hold all cases that involve a windfall payment in the form of augmentation; it merely prohibits them from taking advantage of the augmentation to pay their customers less than their full entitlement.

In cases referred to us, we have encouraged firms to try to resolve the dispute by ***either***:

- deducting the value of any policy enhancement from the offer made to the customer, with the clear proviso that the firm will adjust the amount of redress if eventual regulatory guidance results in a different sum being payable; ***or***

- making an offer that uses the policy's current surrender value, on the basis that if there is eventual guidance stating that enhancements should be disregarded, the firm will then pay any additional sum due.

The customer is, of course, under no obligation to finalise the dispute with the firm on either of these bases. However, we consider that firms should at least offer to resolve matters in this way. We do not think it reasonable that, for the sake of a relatively small adjustment, customers whose complaints have been upheld should:

- fail to receive the compensation they are due; and– critically –
- continue to be locked into an inappropriate product that has been mis-sold to them.

Without the compensation they are due, these customers cannot take steps to transfer to a repayment mortgage.

The Financial Services Authority has confirmed that it does not regard our approach as conflicting with its guidance. We are now making decisions based on the above interpretation of RU94 and we are making awards on either of the above bases, if it is reasonable to do so. We therefore expect firms to progress cases in the same way. And, where appropriate, product providers should provide independent financial advisers with current policy surrender values, so they can proceed to pay redress.

Obviously, it is important that both parties to the dispute fully understand the basis on which any such settlement has been achieved, and the implications. However, the degree of care required in progressing these cases should not mean that firms make no attempt to reach a speedy settlement.

case studies – regulatory update 94 and policies enhanced by windfall benefits

■ 14/04
When Mr and Mrs J were aged 59 and 47 years, respectively, they were sold a mortgage endowment policy with a term of 12 years. They said they had been given to understand that the policy would provide a lump sum of £6,000, in addition to the amount they needed to repay their mortgage.

When they discovered that the proceeds of the policy might not even be enough to repay the mortgage, they complained, noting that once they had retired, they would be unable to afford any additional payments to make up the anticipated shortfall.

The firm said that the policy had been arranged to mature before Mrs J retired and it claimed that the couple had been fully aware of this and had understood the risks in using an endowment policy to repay their mortgage.

We issued a provisional decision, establishing the firm's liability for mis-selling the policy, on the grounds that the policy was unsuitable for these customers because of the element of risk.

We also decided that the firm should pay Mr and Mrs J £150 for distress and inconvenience. The firm said that as the couple's policy had been augmented by a windfall bonus, it was unable to calculate redress until the regulator issued further guidance.

We decided that redress ***could*** be calculated. Until the firm paid Mr and Mrs J the redress due to them, they would be locked into an inappropriate product. The proportion of the policy value that was attributable to the policy augmentation was small, compared to the total compensation payable. We decided it was not reasonable for the firm to delay putting the couple in a position where they could switch to a more suitable method of repaying their mortgage.

We therefore awarded redress, calculated in accordance with Regulatory Update 89 and based on a 12-year mortgage period. We also required the firm to:

- increase to £250 the amount of compensation for distress and inconvenience, recognising that the couple suffered a further delay before being able to restructure their mortgage arrangements;

- provide a life insurance policy, on the same terms that would have been available to Mr and Mrs J when they took out the mortgage endowment policy; and

- pay the administration fee that the couple would incur when converting their mortgage to a repayment basis.

Finally, we required that, when guidance on the treatment of windfall augmentations becomes available, the firm should calculate any increased compensation due to Mr and Mrs J, and pay it, with interest.

3 awards for distress and inconvenience

We recently published on our website (**www.financial-ombudsman.org.uk**), a briefing paper about our approach to awarding compensation for distress and/or inconvenience and for other non-financial loss. It has long been the practice of ombudsman schemes to make awards for distress and inconvenience but this is likely to be a new development for the firms previously regulated by the Securities and Futures Authority.

We consider it important that firms should compensate their customers, on top of making good any financial loss, if they cause the customers distress and inconvenience. Many firms commonly offer what they term 'ex gratia' payments, where they recognise that their service has fallen short of the standards they seek to provide.

Our briefing paper sets out the factors we consider when deciding, in any particular case, whether an award for distress or inconvenience is appropriate. We hope this information will help firms to resolve – satisfactorily and without our direct involvement – cases where such awards are appropriate. By doing this, firms can not only improve the service they provide, but also avoid the inevitable delays and costs that can result from having to refer a complaint to us.

'**Distress**', in this context, includes embarrassment, anxiety, disappointment and loss of expectation. The degree of distress involved can vary widely; it can be little more than a relatively minor annoyance or, in certain cases, may cause serious worry, loss of sleep or even prolonged ill-health.

■ 14/05

Mr D and Miss M complained about the mortgage endowment policy they were sold by an independent financial adviser in 1996. They said they had wanted to take out a repayment mortgage but the adviser had dissuaded them. He had told them that taking an interest-only mortgage with a mortgage endowment policy would be no more expensive but would provide them with an additional lump sum when the policy matured.

The adviser maintained that the policy was suitable for the couple's needs, and that the product literature he gave them was sufficiently explicit that they could have been in no doubt about the risk involved.

However, we concluded that the policy was ***not*** suitable for these customers and we awarded redress calculated in accordance with Regulatory Update 89. The policy had been enhanced by a windfall payment of 98p. Given that this is such a small sum, and in the absence of guidance on the treatment of such enhancements, we decided that the firm could deduct it from the policy's current surrender value when it calculated the redress payable.

'**Inconvenience**' can include any expenditure of the customer's time and/or effort that has resulted from the firm's conduct. Again, in relatively minor cases this may not amount to a significant burden. But it can include severe disruption and a great deal of wasted time.

The briefing paper provides full details of our approach but, in essence, we consider that awards may be made where:

- an award for a financial loss fails sufficiently to recognise the distress, inconvenience or other non-financial loss that the firm has caused the customer; or

- the firm has caused distress and/or inconvenience to a customer, even though it has not caused the customer financial loss through its maladministration, injustice or service failure.

Although we decide all cases on their own merits and in the light of the particular circumstances of the dispute, we hope that the general issues raised in the following case studies will be helpful.

... after her husband's funeral, she received a letter from the firm, addressed to her husband and offering condolences on *her* death.

case studies – awards for distress and inconvenience

- 14/06

Mrs A's complaint concerned poor administration on the part of the firm that sold her and her husband a joint life assurance policy. Immediately after her husband's death, she wrote to tell the firm what had happened. Unfortunately, a few days after her husband's funeral, she received a letter from the firm, addressed to her husband and offering condolences on ***her*** death. Mrs A's son called the firm to inform it of the error and was assured this would be corrected. However, Mrs A then received a second letter from the firm, again addressed to her late husband. This time the firm was contacting him as 'executor of Mrs A's estate', to discuss a home insurance policy held in Mrs A's sole name.

The firm sent Mrs A three letters of apology over a period of a month, together with some flowers. However, Mrs A felt that the firm had not dealt with her complaint satisfactorily and she referred the matter to us.

Our investigation revealed a straightforward – if very unfortunate – administrative error, whereby the firm had removed the wrong name from its records. We did not support Mrs A's view that the firm had caused excessive delays in handling the complaint. The available evidence suggested that the complaints had all been dealt with promptly. However, we did conclude that the firm could have attached greater importance to the situation and dealt with it more sympathetically. We felt that its letters did not offer a sufficiently detailed explanation or apology for the errors made.

The firm admitted full liability for its errors, but did not think it would be appropriate to offer financial compensation. We did not agree. We recommended that the firm should offer compensation for the distress and inconvenience it had caused. Initially, the firm offered £100, but after negotiation it increased the offer to £150 and Mrs A accepted.

■ 14/07

Following her divorce, Mrs W and her children moved out of the family home where her ex-husband continued to live. She wrote to advise the firm of the move in January 2000. However, in June of that year the firm sent to her old address the statement of account for an investment she had made for her children. Mrs W telephoned the firm and was reassured that everything would, in future, be sent to her new address.

Mrs W telephoned the firm again in December 2000 to stress that the difficult circumstances of the divorce made it particularly important that mail was not sent to her old address. Following this, the firm sent letters to Mrs W's old address on three further occasions. One of these letters was an apology for sending mail to the wrong address.

Mr W then stopped making maintenance payments, apparently because he had discovered how much money his ex-wife had been investing on behalf of the children. Mrs W had understood this information to be confidential between her and the firm. However, she claimed that someone from the firm had telephoned Mr W at home and discussed with him the details of a withdrawal she had made from the children's investment account.

In response to her complaint, the firm made Mrs W an ex-gratia payment of £25. Mrs W rejected this, as she believed the stress and financial hardship warranted a larger payment. She was worried about the detrimental effect this matter could have on future relations with her ex-husband.

We thought that the firm probably ***had*** disclosed details of Mrs W's investments to her former husband. However, it was difficult to establish the exact influence this had on Mrs W's subsequent problems and financial difficulties. The firm got matters badly wrong concerning her change of address. There were also several serious breaches of confidentiality. Although the firm made Mrs W a further offer of £125 to bring this matter to a close, we believed it was reasonable to pay her a total of £400. The firm agreed.

■ 14/08

Acting on the advice of an independent financial adviser, in 1988, Mr and Mrs C took out an endowment policy. In January 2001, they surrendered the policy and shortly afterwards they received a letter from the adviser. He was angry that they had not contacted him before surrendering the policy and he claimed that their actions had resulted in his losing £1,038. This was because the product provider had asked him to return the commission he made from the sale. The adviser warned the investors that unless they arranged to take out a new policy, he would take them to court.

The couple complained to the network to which the adviser was linked. Shortly after this, the adviser wrote to them again. He said that unless they paid him the £1,038 within seven days, he would arrange for a summons to be served on them and would apply for 'arrestment' of Mrs C's wages. Concerned about possible embarrassment at Mrs C's place of employment, the couple contacted a solicitor.

Meanwhile, the network upheld the complaint. Mr and Mrs C had not entered into any agreement that they would compensate the adviser for lost commission if they surrendered the policy. The network offered the couple £100 as compensation for their distress. However, Mr and Mrs C believed that they should be offered a larger sum, and that their solicitor's fees should be met, so they brought their case to us.

We reached agreement with the network that it should pay the solicitor's fees, as well as a total of £200 for distress and inconvenience. We considered the increased award for distress and inconvenience to be appropriate, in view of the severity of the distress caused by the threat of court action.

■ 14/09

Mr Y decided to transfer his policies to a different firm. He contacted the representative of his existing firm for help in arranging the transfer. This apparently angered the representative to such an extent that he rang Mr Y and threatened to 'break his legs'. Mr Y was understandably upset, not least because – a year earlier – someone had assaulted him in his own home and the representative was aware that this had happened.

We only had Mr Y's word for it that the representative had made the threatening phone call. However, there were tape recordings of Mr Y's subsequent telephone conversations with the representative, in which the threat made in the earlier call was discussed. These tapes did not provide conclusive proof, but they indicated that Mr Y's account of the original call was likely to be correct.

In view of the seriousness of the threat and the distress it caused, we considered that an award of £1,500 – together with a letter of apology from the representative – was appropriate. The firm agreed.

■ 14/10

Mr and Mrs R took out a 15-year mortgage endowment policy in November 1993, with a sum assured of £5,500. In October 1994, they increased the sum assured to £33,000 and extended the term to 25 years. The firm issued an endorsement to the policy, but failed to alter the details of the policy's maturity date. This was still shown as 2 November 2008 – 15 years after the start of the original policy.

The couple failed to notice the error at the time. They said that when they reviewed all the paperwork – several years later – they had thought the maturity date was correct. They had forgotten that they extended the policy's term to 25 years. It was only when the firm contacted them about the policy – in June 2000 – that they realised the error.

They complained to the firm, suggesting that it should repay their mortgage at the end of the 15-year term, provided they maintained their premium payments at the existing level. The firm rejected the complaint, on the basis that both the application form for the increased amount and the 'fact-find', completed at the time of the sale, clearly showed a term of 25 years, starting from 1994. However, the firm did offer to pay £200 compensation for its administrative error.

Our adjudicator suggested that the error entitled Mr and Mrs R to cancel the contract. The firm did not accept that Mr and Mrs R were unaware of the actual policy term at the time of the amendment, but it did offer to increase to £400 its offer for distress and inconvenience.

The adjudicator advised Mr and Mrs R to accept the offer. She explained that if the complaint went forward for an ombudsman's decision, it was unlikely to succeed if the ombudsman concluded they had been aware of the 25-year term at the time they extended the policy. Even if the complaint succeeded, the ombudsman could not require the firm to honour the contract that the couple ***thought*** they had taken out. The appropriate remedy would be to cancel the policy and refund the premiums, with interest. This was unlikely to help Mr and Mrs R, since they needed a means of repaying their mortgage – and that had been the purpose of the endowment policy. After consideration, Mr and Mrs R accepted the firm's revised offer in settlement of their dispute.

4 the changes in complaints-handling procedures

On 1 December 2001, when the Financial Services and Markets Act 2000 came into force, the Financial Ombudsman Service acquired the formal powers to deal with disputes that were formerly handled by the Office of the Investment Ombudsman, the Personal Investment Authority Ombudsman Bureau and the Securities and Futures Authority Complaints Bureau.

We have received a number of queries about the new complaints-handling procedures, especially from firms that were previously regulated by Securities and Futures Authority (SFA), which are finding that the new regime has brought significant changes.

Here, we set out the answers to some of the questions we are most commonly asked.

firms' internal complaints-handling procedures

The rules under which we operate require firms to have their own internal complaints-handling process and to make this available to customers. Generally speaking, firms have to give the customer a final response within eight weeks of receiving the complaint.

what is meant by a 'final response'?
The final response should set out a firm's final view on the issues raised in the complaint and tell the customer about the right to refer the dispute to the Financial Ombudsman Service within six months, if they remain unhappy with the outcome.

It is helpful if firms also include in their final response:

- an expression of regret or apology
- a summary of the complaint
- a summary of the outcome of the firm's investigation
- whether the firm acknowledges that it has been at fault in some way
- details of any offer a firm is making to settle the complaint
- how long the offer will remain open
- if appropriate, why the firm considers the complaint is outside our rules – but explaining that it is for us, not the firm, to decide this.

what happens if the customer complains first to the Financial Ombudsman Service?

If we conclude that the firm has not had an adequate opportunity to respond to the customer's complaint, we will write to it, setting out the concerns the customer has raised with us. We will ask the firm to resolve the matter, and we will let the customer know that we have done this.

when does the eight-week period start?

The eight-week period starts from the date the customer first makes clear to the firm that he or she has a complaint. If we, rather than the customer, are the first to notify the firm of the complaint, then the eight-week period starts when we pass on the customer's complaint to the firm.

what happens if the firm can't resolve the complaint within eight weeks?

There will, of course, sometimes be situations where, for good reason, firms may need extra time. This may happen – for example – if the customer has significantly delayed providing information that is vital to the firm's consideration of the complaint. In many cases, so long as customers are kept informed of progress and understand the reasons for any delay, they will agree to allow the firm additional time to produce its decision letter.

We ask firms to let us know as soon as possible if they wish to have extra time to resolve the complaint. Such requests should, however, only be made in exceptional circumstances. We will consider the situation and, if appropriate, may recommend that the customer allows the firm extra time before we start our formal investigation. Our correspondence will make clear what stage the case has reached.

initial contact

If a firm has already sent the customer its final response, or the eight-week period has already expired by the time the customer contacts us, then we will notify the firm that we have received the complaint and, subject to jurisdiction checks where necessary, will convert the complaint to a 'case' and ask for the firm's file papers.

what do we mean by 'file papers'?

These are copies of any documents, or recordings of any telephone calls, that concern the customer and may be relevant to our investigation, or on which the firm may wish to rely, in connection with the complaint.

We generally settle complaints based on the paperwork that the firm and the customer send us at this stage in the process. So it is important that firms respond promptly and carefully to our request for the 'file papers', and that they set out clearly their view of the complaint, explaining why they believe that we should not decide in the customer's favour.

must firms use recorded delivery when forwarding file papers?

We suggest that firms do this, particularly if they are sending us original or sensitive information. However, this is a matter for firms to decide.

will the information that firms provide be treated as confidential?

We will have regard for rights of privacy when we handle information that firms provide. But – in general – firms should assume that we may disclose to the customer any information sent to us about the complaint. If a firm believes that some information should be kept confidential between us, it should mark the information clearly and tell us why it does not think we should pass it on to the customer. We will consider such requests – but we may not agree to them, unless there is a strong case for confidentiality, such as security reasons.

can firms initiate legal proceedings against the customer once the complaint has been referred to us?

While a complaint is with the ombudsman service, we do not expect firms to take any legal action against the customer in relation to the dispute. Firms should tell us about any action they may be proposing.

can firms continue to deal with the customer once the complaint has been referred to us?

While we are considering a complaint, firms should continue to deal with the customer as normal – for example, executing dealing orders. But obviously, if firms do anything that is relevant to the complaint, they should inform us.

investigation of complaints

will the Financial Ombudsman Service try to resolve complaints by conciliation?

Our aim is to resolve the complaint as quickly as possible. If the complaint involves an issue that we deal with frequently, then we can usually tell the firm and the customer at an early stage what the outcome is likely to be. If we consider that the firm has treated the customer fairly, we will say so.

If we cannot resolve the matter in this way, we will begin a full investigation of the complaint. At this stage there may still be an opportunity to resolve matters through conciliation. But if not, then once we have finished our investigation, we will contact the firm and the customer to set out how the complaint should be resolved.

are the views of the Financial Ombudsman Service binding on firms at this stage?

The views we express during conciliation and investigation are not legally binding on firms. But they reflect the view an ombudsman would be likely to take, if the complaint went to an ombudsman for a final decision.

how long will this take?

Most complaints are resolved within six months. But a few can take longer, particularly if we need to make further enquiries.

ombudsman's decisions

We envisage that, in most cases, both parties will accept the adjudicator's conclusions. However, both the firm and the customer have the right to ask for those conclusions to be referred to an ombudsman. The ombudsman will review the papers and issue a final decision.

how does the ombudsman reach a decision?

The ombudsman will decide what is fair and reasonable in the circumstances of each individual complaint. In doing so, the ombudsman takes into account the law, industry standards and codes and – where appropriate – what the ombudsman considers to be good industry practice at the relevant time.

will firms have to attend a hearing?

Our process is not like going to court. We can get to the bottom of most complaints by writing to or phoning the people involved. We do not hold hearings with sworn witnesses, cross-examination and formal submissions.

Occasionally, we may decide that bringing all the parties together at an informal hearing could help us to resolve a complaint. A firm can also write to us requesting a hearing, if it believes that this might help settle matters. We may decline to hold a hearing if we do not think one is necessary.

what sort of awards may the ombudsman make?

The maximum money award we can make is £100,000, although if we consider that an amount more than the maximum is required, as fair compensation, then we may recommend that the firm pays the balance. The limit on the maximum money award has no bearing on any steps an ombudsman may require a firm to take (regardless of whether a court could order the firm to take those steps).

If the decision is in the customer's favour, then the ombudsman can, exceptionally, also award any legal or professional costs the customer has incurred. For the purposes of calculating the monetary limit of any award, an award of costs does not form part of the award itself.

and finally...

who should firms contact if they still have questions?

For queries about the ombudsman's practice and procedures, please phone our technical advice desk on 020 7964 1400.

To discuss any general issues concerning your firm's relationship with the ombudsman service, contact our liaison manager, Caroline Wells, who will also be happy to assist with liaison visits and training.

Contact Caroline on 020 7964 0648
or by email at
caroline.wells@financial-ombudsman.org.uk

5 a selection of recent cases – *illustrating the wide range of complaints dealt with in the investment division*

complaints about 'guarantees' for mortgage endowment policies

■ 14/11

Mr and Mrs B complained about the mortgage endowment policy they were sold in 1991. They said the adviser had not mentioned that there was any risk of the policy not producing the sum they needed. He had told them that the policy would not only enable them to repay their mortgage in full, but also provide them with a lump sum.

The firm accepted liability since there was insufficient evidence from the time of the sale to establish whether the adviser had properly assessed the couple's attitude to risk. It made them an offer in accordance with Regulatory Update 89.

Initially, the couple rejected this offer and referred the matter to us. However, after we wrote to Mr and Mrs B to confirm that the firm had calculated redress appropriately and that – in our view – the offer was fair and reasonable, they accepted it.

■ 14/12

When Mr and Mrs D were sold an endowment policy in 1986, the adviser gave them a handwritten 'quotation', setting out the amount they would receive when the policy matured. They complained after receiving a 're-projection' letter from the firm, telling them that the policy might not pay off their mortgage. Mr and Mrs D felt that the firm should honour the amount on the 'quotation'.

The 'quotation' was set out on the firm's headed paper, and said:

> ***Return = £23,612 MIN @ 25 yrs***
> ***Mortgage = £11,000***
> ***£12,612 Cash in hand tax-free.***

The figures were based on the value of similar policies that had matured in 1986, and the firm felt they did not constitute a guarantee. However, there was no evidence that the adviser had provided any disclaimers that could have brought the 'quotation' into doubt.

There was also no evidence to suggest that, at the time of sale, Mr and Mrs D's occupations, or investment experience, would have given them sufficient knowledge to question the advice they received.

The sale took place before the Financial Services Act 1986 came into force, so the sales procedure and documentation were much less detailed than they are now. This, allied to Mr and Mrs D's lack of experience in financial matters, led us to the view that they could not reasonably have been expected to know that the information they were given was incorrect, or that the firm did not provide guarantees for this product.

We upheld the complaint. We decided that the firm should honour its 'guarantee' and pay the couple at least £23,612, provided the couple maintained their payments until the policy matured.

■ 14/13

In September 1990, Miss K was advised to take out a unit-linked endowment policy to cover her mortgage. She said she was told that the policy did not carry any risk and was guaranteed to repay her mortgage. She was a single, first-time buyer, on an average income and not in the position to take any risk with her money.

She was therefore alarmed to learn, in August last year, that the policy was not guaranteed to repay her mortgage and was forecast to produce less than she needed. This prompted her to complain about the advice she was given.

The firm upheld her complaint, as it was unable to trace any documents from the time of the sale. It offered Miss K a refund of the premiums, plus interest at the rates we recommend. Miss K decided to refer the matter to us.

Since the firm appeared to have accepted liability, we looked at whether its offer was appropriate. We found it had not followed the guidance in Regulatory Update 89 when it carried out the calculations for compensation. As a result, it had offered Miss K less than the amount she was entitled to. The firm revised its offer and Miss K accepted.

complaints about other investment matters

■ 14/14

Mr and Mrs N obtained a staff mortgage through Mrs N's employer, at a substantially discounted interest rate. Mrs N received commission on the sale. No financial advice was given to the couple, but it was a condition of the deal that employees had to take out an endowment policy with a named company.

Mr and Mrs N complained when they subsequently received a re-projection letter indicating that the policy would not produce enough to repay their mortgage.

Our adjudicator's initial view was that the complaint would not succeed, as the sale had been an 'execution-only' transaction (one involving no financial advice). Mr and Mrs N rejected that view, as they felt they should have been offered advice. Unlike his wife, Mr N was not an employee of the firm and he felt he was owed a duty of care.

The case was referred to the ombudsman for a final decision. He did not uphold the complaint. The sale had been properly conducted on an 'execution-only' basis. Mrs N had sufficient knowledge of investments to understand the implications of investing on this basis, and there was no evidence that she had felt any need to seek advice before proceeding with the deal.

She had benefited from the sale by receiving commission and both she and her husband had benefited from the discounted mortgage interest rate.

■ 14/15

Mr Y is a stockbroker. He took out a loan against the future value of an endowment policy he had taken out several years earlier. He agreed to repay it no later than the date when the policy matured. However, he did not pay any of the interest on the loan, so by the time the policy reached maturity, the accrued interest, together with the capital amount he had borrowed, made up a very substantial sum. Mr Y claimed that, until the policy matured, he had been unaware of the amount of interest he owed.

Mr Y had taken independent financial advice some five years earlier, resulting in his making increased payments into a personal pension plan. He alleged that the adviser should, instead, have advised him to repay the outstanding loan.

There was no evidence that Mr Y had told the adviser of the existence of the loan and, from the information he gave the adviser about his personal circumstances, the advice Mr Y received appeared to have been entirely appropriate.

Mr Y confirmed that he had received annual interest notices, setting out the amount of interest due, and he admitted that he had misread them.

Mr Y enjoyed considerable earnings and we were satisfied that he had sufficient disposable income to be able to pay both the outstanding interest on the loan and the pension contributions. We did not uphold the complaint.

■ 14/16

In 1996, Mr R bought a PEP (Personal Equity Plan) through an independent financial adviser. The sale was made on an 'execution-only' basis as no advice was given. Mr R subsequently discovered that German-owned. He complained of misrepresentation because the product literature did not mention this. He explained that, for personal reasons, he would not have bought the PEP if he had known of the German connection.

We did not uphold the complaint. There was no question of Mr R having been misled about the nature of the investment and – in the context of its investment contract with Mr R – there was no onus on the firm to disclose the nationality of the firm's owners. If Mr R had special requirements, it was up to him to make sufficient enquiries to ensure that the product met his criteria.

■ 14/17

Mr H was in dispute with the firm concerning his eligibility to receive a windfall benefit, following the firm's merger with another company. To be eligible, customers had to be 'members' of the firm at midnight on 26 May. Four days before that date, Mr H had asked for a transfer of his pension benefits from the personal pension policy he had with the firm. The transfer, and the termination of the policy, did not take place until after 26 May. Mr H therefore insisted that the firm had acted incorrectly in telling him he was not entitled to receive the windfall benefit. However, the firm said that Mr H had no longer been a 'member' by 26 May.

We rejected the complaint. Membership rights are determined by statute, which states that membership ceases when 'the benefit under a policy falls due'. Mr H had sent the firm a valid, signed request for a transfer of his policy benefits and we considered that the policy benefit was 'due' on the date the firm received the request. His membership therefore came to an end that day. The fact that the transfer was not actually carried out until after 26 May was irrelevant.

■ 14/18

Mr J complained that he had been inappropriately advised to transfer his existing investments into a 'drawdown' policy (a policy where the income is drawn from the investment fund, not from an annuity). He said the advice he was given had not taken into account the benefits he would forego by giving up his existing investments. These benefits included guaranteed annuity rates when he reached normal retirement age. The amount of money involved was significant.

The firm accepted that it had not discussed with him the loss of the guaranteed annuity rates. However, it suggested that Mr J had such an overriding need for the cash sum that he would have acted no differently had such a discussion taken place. It also said that it had discussed the other potential options with Mr J but that he had rejected them all, and no other alternative was available.

We did not uphold Mr J's complaint. The case turned on his individual financial circumstances, which were complex and included significant liabilities and substantial property assets. We concluded that, in these very specific and individual circumstances, the firm had recommended the 'drawdown' as a last resort. We saw sufficient evidence that the firm had made Mr J aware of this, and of the disadvantages, but that this had been the only feasible option acceptable to him.

■ 14/19

Mr G ran a small self-administered pension scheme on behalf of himself and several employees. One of the investments within that scheme was a trustee investment bond. Mr G's complaint concerned the advice he received to 'cash in' that bond in order to fund a tax-free cash sum for a member of the scheme who was retiring.

The majority of the cash that Mr G needed was available from other sources, so he only required a comparatively small additional amount. However, Mr G was advised to cash in the bond in its entirety. Approximately 15% was used to make up the amount to be paid to the employee and the rest was placed in the trustee bank account.

The firm accepted that its advice might not have been suitable but it found it difficult to quantify a loss or make an award of redress. When we looked in to the matter, it became clear that the firm could have offered an alternative solution that was far more appropriate. We established that Mr G had suffered a financial loss and we reached agreement between him and the firm about a suitable formula for calculating the amount of redress that was due.

■ 14/20

Mrs E, an elderly lady, complained that she had been inappropriately advised to transfer her entire savings from a building society account into an offshore high-yield fund, and to take an income from the new investment.

Although the investment generated an income, the amount of capital depreciated significantly. Mrs E said that she was not in a position to take any risk with her investment and had not been warned that the capital could depreciate.

The firm suggested that Mrs E had been advised of the risk she was undertaking and there was a note to this effect on the 'fact-find'.

We upheld the complaint. Mrs E was not an experienced investor and had previously taken no risk with her money. The product literature provided no warnings about possible capital depreciation. Moreover, the level of income that the adviser suggested was highly likely to cause the amount of capital to fall. We also noted that, before she made this investment, the adviser had told Mrs E her building society funds were at risk of falling in value, as a result of inflation.

We decided that the appropriate redress was to place Mrs E back in the position she had been in before transferring her funds out of the building society. We therefore required the firm to close the new investment and to place back in Mrs E's building society account the same amount that, acting on its advice, she had transferred out. No account was taken of the higher income Mrs E had enjoyed from the offshore fund.

complaints involving tax allowances

The failure of firms to carry out customer's instructions in connection with the end of a tax year is a regular cause for complaint.

It can be extremely difficult to establish the amount of redress firms should pay when customers lose tax allowances as a result of a firm's failure to act on instructions. Each case needs to be looked at on its own merits and, once a firm's liability has been established, conciliation is often required to establish an appropriate level of redress and settle the dispute.

It is worth noting that, for basic rate taxpayers, the loss of these allowances is not normally as significant a matter – in cash terms – as they expect. For higher-rate taxpayers, however, the position can be very different.

In view of the timing of this edition of *ombudsman news*, we hope that the following case studies may be particularly helpful.

■ 14/21

Mrs L wanted to invest in a stocks and shares ISA (Individual Savings Account) before the end of the tax year and she rang the firm in early March 2000 to ask for an application form. The form that the firm sent her was, in fact, for a unit trust holding – not for an ISA.

Mrs L assumed she had received the correct form. She filled it in and returned it to the firm on 24 March, with a cheque for £7,000. The application form had stated clearly that it was for a unit trust holding, but two sections of the form could have led her to believe that she had to buy units in the unit trust before the investment was converted to an ISA.

On 29 March, she received confirmation from the firm that it had received her application. She believed from this that she had an ISA for the 1999/2000 tax year. She was therefore very confused when, towards the end of April, the firm sent her confirmation that it had recently received her application for a stocks and shares ISA for the 2000/2001 tax year.

It appeared that although the firm had invested her money before the end of the tax year, it had, mistakenly, put it in a unit trust, not an ISA. When it realised the mistake, it made arrangements, to transfer Mrs L's investment in to an ISA for the 2000/2001 tax year.

The loss of Mrs L's 1999/2000 ISA allowance put her at a financial disadvantage and we suggested that the firm should pay compensation of £700 (10% of the original amount to be invested), together with a further £50 for distress and inconvenience. The complaint was settled on this basis.

■ 14/22

Mrs H decided to top up her 2000/2001 ISA in order to bring the amount in the account up to the limit of £7,000. She therefore arranged to transfer £5,055 into her ISA from other funds she held with the same firm. It appears, however, that the firm gave Mrs H incorrect bank details. This resulted in the transfer not taking place and in her subsequently missing the deadline for the tax year.

The firm admitted its fault and offered to pay Mrs H £150 for the distress and inconvenience caused. However, it then compounded its error by telling Mrs H that if she sent in a cheque, it would be added to the ISA, even though the deadline had passed. The firm later had to withdraw this offer, as it would have breached Inland Revenue rules if it had added the additional funds at that time.

Mrs H said that she had intended to hold the ISA for 5 years and she asked for compensation in the region of £1,000. This was the amount of tax (at the higher rate) that she said she would have paid, assuming a 10% growth rate over that 5-year period.

We were satisfied that Mrs H would have held the ISA in question for at least 5 years and that she intended to use her full ISA allowance in each year. We therefore considered that the firm's failure to provide the correct information had resulted in the permanent loss of £5,055 ISA allowance.

The firm agreed to pay compensation based on the loss of tax-free income for the year 2000/2001, compounded over the five-year period, together with payment of the sum of £150 that they had already offered. Mrs H agreed to settle on this basis.

■ 14/23

Mrs D's complaint concerned the firm's delay in processing her application for a stocks and shares ISA for the following tax year. The firm apologised and offered to set up a unit trust for her, at the price she would have obtained if the ISA had gone through. It also offered to pay her £100 for the distress and inconvenience it had caused.

Dissatisfied with this, Mrs D referred the complaint to us. We were able to settle the matter by conciliation. We pointed out to Mrs D that if her ISA application had gone ahead, her money would have been invested in the same unit trust that the firm was now offering to put her money in. All she would have lost was the tax-free status provided by the investment's ISA 'wrapper'. She told us that she had planned to keep the ISA for five years. Since she was a basic-rate taxpayer, it was exceptionally unlikely that she would have gained sufficient income from her investments over five years to become liable for Capital Gains Tax. So the loss of the tax-free status was, in fact, negligible.

Mrs D decided to go ahead with the unit trust investment and to accept the sum that the firm offered for distress and inconvenience.

... the failure of firms to carry out customer's instructions in connection with the end of a tax year is a regular cause for complaint.

out and about

Explaining our role and how we operate is an important part of our work. In recent months we have organised a number of presentations for Citizens Advice Bureaux, Trading Standards departments and local advice agencies.

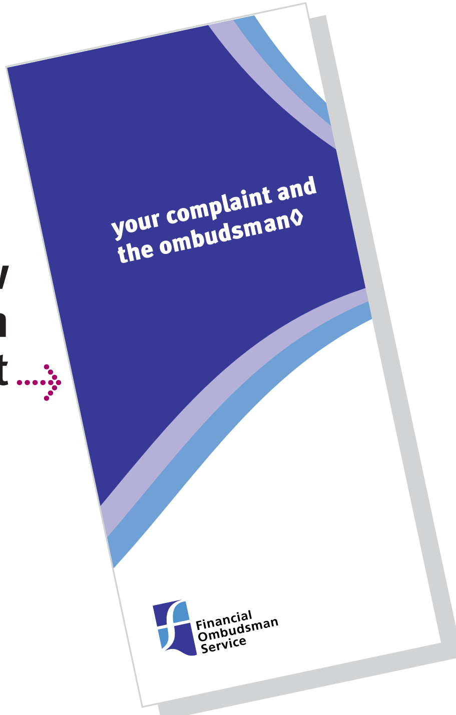
We have also provided training on the new complaints-handling rules and related ombudsman issues for a wide range of financial firms – from large corporations to small firms of stockbrokers and independent financial advisers.

If you would like us to arrange a workshop, training day or other event for your firm or organisation, just contact

liaison.team@financial-ombudsman.org.uk

phone 020 7964 0132

the new ombudsman leaflet



Your complaint and the ombudsman is the new explanatory leaflet that the FSA rules require firms to give to customers with complaints.

It came into use from 30 November 2001 and replaces all previous leaflets issued by the former ombudsman schemes.

To order copies, please contact us by email giving your name, address and telephone number and stating the number of copies you need. Send your order to publications@financial-ombudsman.org.uk (phone 020 7964 0092).

services for professional complaints-handlers and consumer advisers

our external liaison team can

- visit you to discuss issues relating to the ombudsman service
- arrange for your staff to visit us
- organise or speak at seminars, workshops and conferences

phone 020 7964 0132
email liaison.team@financial-ombudsman.org.uk

our technical advice desk

- provides general guidance on how the ombudsman is likely to view specific issues
- explains how the ombudsman service works
- answers technical queries
- explains how the new ombudsman rules will affect your firm

phone 020 7964 1400
email technical.advice@financial-ombudsman.org.uk

The technical advice desk provides informal guidance, based on information provided by *one* of the parties to the dispute. It cannot decide cases. That is for the ombudsman, who considers representations made by both parties to the dispute.

Informal guidance is provided by the technical advice desk on the understanding that this guidance is not binding on the ombudsman service if the case is subsequently referred to it. When writing to consumers, or telephoning them, firms or advisers should not refer to any informal guidance they may have obtained.

Contact us
Financial Ombudsman Service
South Quay Plaza
183 Marsh Wall
London E14 9SR

0845 080 1800

switchboard 020 7964 1000
website www.financial-ombudsman.org.uk
technical advice desk 020 7964 1400

how to get our publications:

- see the publications page of our website www.financial-ombudsman.org.uk
- call us on 020 7964 0092 to request additional copies or join our mailing list