

Re Sloan

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada (IIROC)**

and

David Edward Sloan

2014 IIROC 35

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario District)

Heard: July 18, 2014
Decision: July 22, 2014

Hearing Panel:

Martin L. Friedland, C.C., Q.C. (Chair), Charles F. Macfarlane and Colleen F. Wright

Appearances:

Natalija Popovic, Senior Enforcement Counsel, IIROC

David E. Sloan, in attendance by teleconference; not represented by counsel

REASONS FOR DECISION

INTRODUCTION

¶ 1 Staff of the Investment Industry Regulatory Organization of Canada (“IIROC”) and the Respondent, David Edward Sloan (“Sloan” or “the Respondent”), entered into the attached Settlement Agreement, dated July 10, 2014.

¶ 2 The Settlement Agreement was presented to the Hearing Panel for acceptance on July 18, 2014.

¶ 3 On July 8, 2014, Martin Friedland had been the Presiding Officer at a Pre-hearing Conference under Rule 9 of IIROC’s Rules of Practice and Procedure. That Conference led to the present Settlement Agreement. Rule 9.2 provides that “A Presiding Officer shall not be a member of the Hearing Panel presiding over the subsequent hearing of the same proceeding unless all parties consent in writing. Both parties have consented in writing to have Martin Friedland chair the present hearing.

¶ 4 After hearing counsel for IIROC and the Respondent and considering the material filed, the Hearing Panel issued an order accepting the Settlement Agreement. These are our reasons for making that order.

SETTLEMENT AGREEMENT

¶ 5 The Respondent became a registrant of IIROC Dealer Member Edward Jones in June 2007. The events outlined in the Settlement Agreement took place at the Respondent’s office in the Town of Amherstburg, near Windsor Ontario. His employment with Edward Jones was terminated in February 2013 on the basis of a failure to meet a specific production target. He is currently not registered with an IIROC Member firm. We were informed by the Respondent that when the present charges have been dealt with satisfactorily, another Dealer Member is prepared to employ him.

¶ 6 Mr. Sloan admits to the following contraventions of IIROC Dealer Member Rules, Guidelines, Regulations or Policies:

Count 1 In or about December 2012, the Respondent engaged in conduct unbecoming or detrimental to the public interest in that he engaged in unauthorized trading in a client account, contrary to IIROC Rule 29.1.

Count 2 Between January and December 2010 the Respondent failed to use due diligence to ensure that recommendations he made for several clients were suitable, contrary to IIROC Rule 1300.1 (q).

¶ 7 Staff and the Respondent agreed to the following terms of settlement:

- (1) a fine of \$13,000;
- (2) a suspension for 1 month from the date of acceptance of this Settlement Agreement;
- (3) a requirement to successfully re-write the Conduct and Practices Handbook exam within 6 months of acceptance of this Settlement Agreement;
- (4) strict supervision for a period of 1 year (monthly strict supervision reports to be maintained within the firm); and
- (5) costs in the amount of \$2,000.

¶ 8 Details about the factual background to the two counts is contained in the Settlement Agreement.

¶ 9 In brief, the first count relates to trades that the Respondent made on or about December 28, 2012, in the Registered Savings Plan account of PM. He executed eight sales and two purchases with a value in excess of \$30,000, without any consultation with the client. PM learned of the trades when she saw her month-end statement. She complained to Edward Jones. The Respondent admitted to Edward Jones and later to IIROC that he had not spoken to her for a considerable period of time before placing the orders.

¶ 10 This conduct is contrary to IIROC policy and is contrary to IIROC Rule 29.1 which provides that “Dealer Members and each...Investment Representative and employee of a Dealer Member: (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest...”

¶ 11 The second count relates to unsuitable recommendations that the Respondent made between January and December 2010 in recommending to twenty clients the purchase of a particular mutual fund, the Hartford Fund, with a 5% front-end fee, without giving them the option of purchasing the funds through a deferred sales charge (where the fee is progressively lower, the longer the fund is held), or of setting the fee at a lesser rate, as provided in the prospectus and in Edward Jones’ policies. These options would have been financially more advantageous to his clients than a front-end fee. The purchases involved a total of about \$250,000. The Respondent also inappropriately used a dollar-cost averaging system which was also acknowledged by the Respondent to be inappropriate for these investments because of the lower interest rate for some period of time. The clients were for the most part seniors – some were in their 90s – and most had limited investment knowledge.

¶ 12 This conduct breached IIROC Dealer Member Rule 1300.1(q), which provides:

“Each Dealer Member, when recommending to a client the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such client based on factors including the client’s current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts’ current investment portfolio composition and risk level.”

STANDARD FOR REVIEWING A SETTLEMENT AGREEMENT

¶ 13 The standard for reviewing a Settlement Agreement was well-stated in a Pacific District hearing, *Re Johnson* (2012 IIROC 19), where the panel stated:

“The test applicable to a decision whether to accept or reject a settlement is well-known. Simply put, a panel should accept such an agreement unless it considers the penalty provided for clearly to fall outside

a reasonable range of appropriateness.”

¶ 14 There are many similar statements. See, for example, *Re Dirani* (2014 IIROC 09); *Re Taggart* (2013 IIROC 24); *Re Scotia Capital* (2013 IIROC 38); *Re Jiwa and Hoffar* (2012 IIROC 9); *Re Rotstein and Zackheim* (2012 IIROC 27); *Re Portfolio Strategies Securities Inc.* (2012 IIROC 36), *Re Ast* (2012 IIROC 38), all stemming from *Re Milewski* ([1999] I.D.A.C.D. no. 17), where the panel stated:

“A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.”

CONCLUSION

¶ 15 The penalty agreed to in the unique circumstances of this case does not fall “outside a reasonable range of appropriateness.”

¶ 16 The penalty may appear to be on the low side, but the Respondent has already paid a heavy price for his admitted transgressions. He has been unemployed for 18 months, which can, in part, be attributed to these charges. He cannot re-enter the securities industry until the proceedings are concluded. The delay in proceeding was because of related matters that were beyond the Respondent’s control.

¶ 17 As a result of not finding employment, the Respondent has been unable to pay his present debts, which are substantial, and will have difficulty paying any monetary sanction imposed. He has demonstrated his financial hardship to IIROC staff. A number of IIROC cases have taken into account the financial circumstances of the respondent in imposing a monetary penalty. See, for example, *Re Klemke* (2011 IIROC 14, paragraph 43) and *Re Magna Partners Ltd.* (2010 IIROC 49, paragraph 6).

¶ 18 The 18 months without employment can, in a sense, be considered a lengthy period of suspension.

¶ 19 Moreover, the lack of employment has probably contributed to what we are told are significant and serious family issues.

¶ 20 There are other mitigating factors that we have taken into account. None of the 20 persons for whom the Respondent purchased the Hartford Fund complained to the Dealer Member or to IIROC. Clients were not hurt in the process, except that they paid somewhat more in the way of fees than they otherwise would have paid. The Respondent was not enriched in a significant way.

¶ 21 Moreover, the Respondent has no prior history of wrongdoing, accepted responsibility for his conduct, and cooperated with IIROC.

¶ 22 Arriving at a reasonable settlement is to be encouraged. We agree with the statement in *Re Portfolio Strategies Securities Inc.* (2012 IIROC 36 at paragraph 10) that “the settlement process is an important one which should be encouraged and supported.”

¶ 23 For the above reasons, the Panel accepted the Settlement Agreement.

Dated at Toronto this 22nd day of July 2014

Martin L. Friedland,

Charles F. Macfarlane

Colleen F. Wright

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff (“Staff”) and the Respondent, [David Edward Sloan], consent and agree to the settlement of this matter by way of this agreement (the “Settlement Agreement”).
2. The Enforcement Department of IIROC has conducted an investigation (“the Investigation”) in the conduct of David Edward Sloan.
3. The Investigation discloses matters for which the Respondent may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1, Schedule C.1, Part C (the “Hearing Panel”).

II. JOINT SETTLEMENT RECOMMENDATION

4. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.
5. The Respondent admits to the following contraventions of IIROC Dealer Member Rules, Guidelines, Regulations or Policies:

Count 1 In or about December 2012, the Respondent engaged in in conduct unbecoming or detrimental to the public interest in that he engaged in unauthorized trading in a client account, contrary to IIROC Rule 29.1.

Count 2 Between January and December 2010 the Respondent failed to use due diligence to ensure that recommendations he made for several clients were suitable, contrary to IIROC Rule 1300.1 (q).

6. Staff and the Respondent agree to the following terms of settlement:
 - a) a fine of \$13,000;
 - b) a suspension for 1 month from the date of acceptance of this Settlement Agreement
 - c) a requirement to successfully re-write the Conduct and Practices Handbook exam within 6 months of acceptance of this Settlement Agreement;
 - d) strict supervision for a period of 1 year [monthly strict supervision reports to be maintained within the firm]; and
 - e) costs in the amount of \$2,000

III. STATEMENT OF FACTS

(i) Acknowledgment

7. Staff and the Respondent agree with the facts set out in this Section III and acknowledge that the terms of the settlement contained in this Settlement Agreement are based upon those specific facts.

(i) Factual Background

A. Overview

8. The Respondent executed unauthorized trades in a client account with a value in excess of \$30,000. He did not discuss the trades with the client prior to execution, and the client only learned that the trades had been completed upon receipt of the month end statement for the account.
9. In the case of at least 13 clients, the Respondent failed to record accurate risk tolerance and investment objectives, when he recorded 100% high risk and 100% aggressive income respectively, when he knew or ought to have known that this information did not reflect the true profile of these clients. All of these clients were born between 1919 and 1945.
10. In the case of at least 20 clients (which include the 13 referenced above), the Respondent recommended and purchased securities on the basis of certain fees and purchase options, when less expensive options to purchase the same securities were available but were not offered to the clients. This conduct resulted in Sloan receiving the highest available compensation for the purchases.

B. Registration History

11. The Respondent became a Registered Representative at Edward Jones (“EJ”) in June 2007. His employment was terminated in February 2013 on the basis of a failure to meet a specific production target. Sloan is currently not registered with an IIROC Member firm.

C. Unauthorized Trading

12. On or about December 28, 2012 Sloan executed approximately 10 unauthorized trades in the RSP account of his client PM. In particular he executed eight sales and two purchases with a value in excess of \$30,000 without any consultation with the client.
13. PM learned of the transactions only after receipt of the December 2012 month end statement for her RSP account. On or about February 25, 2013 PM complained to EJ about the trades.
14. On or about March 11, 2013 in response to an EJ compliance staff inquiry in respect of PM’s complaint Sloan admitted that he did not speak with PM immediately prior to placing the trades and obtain her express consent to the transactions. Sloan subsequently confirmed this to IIROC Staff.

i) Commissions Earned by Sloan

15. As a result of Sloan’s unauthorized trades in this client account, he earned net commissions of approximately \$620.

D. Failure to Record Accurate Risk Tolerance and Investment Objectives

16. At various times in or about 2009 to 2010 in the case of at least 13 clients, Sloan recorded risk tolerance of 100% high risk, and investment objectives of 100% aggressive income. However he knew or ought to have known that, in light of the clients’ ages and investment knowledge (as indicated below), among other factors, this information did not reflect the true profile of these clients.

| | Client | Account Type | DOB | Investment Knowledge |
|----|---------------|---------------------|-------------|-----------------------------|
| 1 | BW | TFSA | 1937 | limited |
| 2 | WW | TFSA | 1935 | limited |
| 3 | EMS | Cash | 1920 | limited |
| 4 | TB | TFSA | 1934 | moderate |
| 5 | KHB | TFSA | 1929 | moderate |
| 6 | K&T B | Joint | 1934 & 1929 | moderate |
| 7 | MK | TFSA | 1925 | moderate |
| 8 | OFC | TFSA | 1945 | limited |
| 9 | ADB | TFSA | 1940 | very limited |
| 10 | CDB | TFSA | 1943 | very limited |
| 11 | JOG | TFSA | 1919 | limited |
| 12 | JSK | RRIF | 1927 | limited |
| 13 | RMK | Spousal RRIF | 1925 | limited |

17. Sloan admitted to IIROC Staff at an interview that in most cases he knew that the risk tolerance and investment objectives he recorded for these 13 clients “*did not make sense*” and did not reflect the clients’ true profiles; but that he recorded them to match the investments he intended to buy for these clients’ accounts.

E. Unsuitable Recommendations

18. Between January and December 2010, Sloan recommended and purchased an investment through Hartford Dollar Cost Average Program (the “DCA Program”) in 20 different clients’ accounts over 22 separate transactions. He charged his clients a 5% front-end fee for each such transaction. The DCA Program was a means of purchasing units of an underlying security, the Hartford Balanced Portfolio Fund (the “Hartford Fund”).
19. The 20 clients for whom Sloan recommended and purchased this investment included the 13 clients listed above, The additional 7 clients are as follows:

| | Client | Account Type | DOB | Investment Knowledge |
|----|---------------|---------------------|-------------|-----------------------------|
| 14 | GO | TFSA | 1929 | limited |
| 15 | CG | RSP | 1973 | limited |
| 16 | M &/or F S | Joint | 1928 & 1934 | limited |
| 17 | HD | RRIF | 1921 | limited |
| 18 | R &/or A D | Joint | 1975 & 1979 | moderate |
| 19 | AD | RSP | 1979 | moderate |
| 20 | JC | TFSA | 1947 | moderate |

20. While the underlying Hartford Fund was generally not unsuitable for these clients, Sloan’s recommendation and use of: a 5% front end fee, the DCA Program, and in some cases, the sale of preferred shares to make the purchases was unsuitable for the reasons detailed below.

i) 5% Front End Fee

21. The 22 purchases collectively totaled in excess of \$245,500. The 5% front-end fees charged to the clients for these purchases totaled approximately \$12,200.
22. However, the Hartford Fund prospectus indicated that front-end fees associated with these units were in fact negotiable over a range of 0-5%. Further, EJ policies recommended charging a minimum 3.5% front-end fee in these circumstances. Sloan failed to advise his clients that the front-end fees could be anything less than 5%.
23. According to the Hartford Fund prospectus, the units could also be purchased on a deferred sales charge (“DSC”) basis. Although Sloan was aware of the DSC option, he did not recommend that his clients use it.
24. The Hartford Fund DSC redemption schedule indicated an initial 6% fee if the units were redeemed in the first year of ownership, a 5% fee in the second year, and ultimately the fee fell to zero at the end of six years of ownership of the units.
25. Accordingly, Sloan’s clients incurred a 5% advance fee in order to avoid the possibility of paying a DSC fee that would be 5% within a year of investing in the units of the Hartford Fund.
26. Sloan admitted to IIROC Staff that none of his clients required access to their funds in a timeframe that would justify the selection of the 5% front-end fee over the DSC option.
27. By charging the full 5% front-end fee, Sloan received more compensation than he would have received than if he had charged the recommended 3.5% fee. He would have received the same compensation if the investments had been made on a DSC basis. However, Sloan admitted to Staff that under the DSC option the fee is paid by the Hartford Fund whereas the 5% front end fee was paid directly by his clients.
28. Further, under the front end fee option, Sloan received a higher trailer commission of 1% compared with

the 0.5% trailer commission available on a DSC purchase.

ii) DCA in Conjunction with 5% Front End Fee

29. Under the DCA Program the client funds were initially invested in a money market fund earning 3% interest, and were gradually invested into units of the Hartford Fund over a period of 6 months.
30. The Hartford Fund units could have been purchased directly without using the DCA Program. However by investing through the DCA Program in conjunction with paying the full front-end fee, Sloan's clients paid a 5% fee up front while receiving only 3% interest until they were fully invested in the Hartford Fund.

iii) Commissions Earned by Sloan

31. As a result, between January to December 2010, Sloan earned approximately \$4000 in net commissions.

E. Sloan's Current Status

32. Sloan has been unemployed for approximately 18 months. As a result, he has been unable to meet other significant personal debt obligations.
33. Sloan has demonstrated to Staff's satisfaction that he is experiencing financial hardship which has affected his ability to pay his monetary sanctions.

IV. TERMS OF SETTLEMENT

34. This settlement is agreed upon in accordance with IIROC Dealer Member Rules 20.35 to 20.40, inclusive and Rule 15 of the Dealer Member Rules of Practice and Procedure.
35. The Settlement Agreement is subject to acceptance by the Hearing Panel.
36. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.
37. The Settlement Agreement will be presented to the Hearing Panel at a hearing ("the Settlement Hearing") for approval. Following the conclusion of the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement.
38. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his/her/its right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.
39. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing in relation to the matters disclosed in the Investigation.
40. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
41. Staff and the Respondent agree that if the Hearing Panel accepts the Settlement Agreement, they, or anyone on their behalf, will not make any public statements inconsistent with the Settlement Agreement.
42. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.
43. Unless otherwise stated, any suspensions, bars, expulsions, restrictions or other terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

AGREED TO by the Respondent at the City of Lasalle, in the Province of Ontario, this 10th day of July, 2014.

Not Legible

"David Sloan"

Witness

David Edward Sloan

AGREED TO by Staff at the City of Toronto in the Province of Ontario, this 11th day of July, 2014.

“Dan McVicker”

“Natalija Popovic”

Witness

Natalija Popovic

Enforcement Counsel on behalf of Staff of the
Investment Industry Regulatory Organization of
Canada

ACCEPTED at the City of Toronto in the Province of Ontario, this 18th day of July, 2014, by the following
Hearing Panel:

Per: “M. L. Friedland”

Panel Chair

Per: “C. Macfarlane”

Panel Member

Per: “C. Wright”

Panel Member

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