Re Vickers

IN THE MATTER OF:

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

and

Bryan Andrew Vickers

2014 IIROC 26

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

Heard June 10, 2014
Decision: June 19, 2014

Hearing Panel:
Martin L. Friedland, C.C., Q.C. (Chair), Debbie Archer, Charles Macfarlane
Appearances:
Diana Iannetta, IIROC Senior Enforcement Counsel
Jeremy Devereux, for the Respondent

DECISION AND REASONS

INTRODUCTION

¶ 1 Bryan Andrew Vickers (the "Respondent" or "Vickers") was first registered with the Investment Dealers Association ("IDA") in 1994 and became a registrant of the Investment Industry Regulatory Organization of Canada ("IIROC") in June 2008. Since July 1995 he has been employed with Royal Bank Canada Dominion Securities ("RBC DS") in London, Ontario, first as a Registered Representative ("RR") and then as a Branch Manager. Since 2011 he has been an RR and not a Branch Manager.

¶ 2 After investigation by the Enforcement Department of IIROC, the Respondent was charged by IIROC with a contravention of its Rule 38.4. The charge alleges:

> "From April 2010 to August 2011...Vickers failed to adequately supervise a registered representative ("RR") and certain of his client accounts, when the RR recommended certain inverse exchange-traded funds to clients, contrary to IIROC Dealer Member Rule 38.4.

¶ 3 The Respondent admits the allegation and agrees to the facts outlined in an Agreed Statement of Facts ("Agreed Statement"), dated June 9**,** 2014, which is appended to this decision.

¶ 4 The parties could not agree on what the penalty should be. This is the task of the Panel. (See Dealer Member Rule 20.33.)

FACTUAL BACKGROUND

¶ 5 RBC DS is a Dealer Member with its head office in Toronto. Derek Axford ("Axford") was a Registered Representative employed by RBC DS in its London Ontario branch office. The branch manager, Bryan Vickers, was his supervisor.

¶ 6 Axford recommended the purchase of certain inverse exchange-traded funds ("IETF"), which were described in their prospectuses, in the words of the Agreed Statement (paragraph 34), as "riskier or highly speculative securities", to clients who had only a medium or medium-high risk tolerance noted on their New Account Application Forms ("NAAF"s)(paragraph 8).

¶ 7 Axford discussed the proposed strategy with Vickers, his branch manager, before recommending it to clients. Vickers did not advise against the strategy, and as a result 37 clients with only medium or medium-high risk tolerance noted on their NAAFs purchased the IETFs.

¶ 8 Vickers responded promptly to an inquiry from the head-office Compliance department regarding Axford's trading in these securities. Although he advised the Compliance department that he was likely going to call some of Axford's clients directly, he only spoke about those issues with two or three clients, in the course of other discussions.

¶ 9 In 2012 prior to any investigation or review by IIROC, RBC DS instructed Axford to recommend to clients that they discontinue the strategy.

¶ 10 The Agreed Statement acknowledges (paragraph 10) that Vickers "failed to ensure that, during the relevant period, Axford's recommendation to his clients to purchase the IETFs was suitable for those clients, and as a result, Vickers failed to adequately fulfill his responsibilities to supervise Axford."

OTHER PROCEEDINGS

¶ 11 One year earlier, on June 10, 2013, Axford was disciplined by an IIROC panel (*Re Axford* 2013 IIROC 36), which accepted a proposed Settlement Agreement between IIROC and Axford, in which the parties agreed that there be:

(a) a suspension from approval in any registered capacity with IIROC for a period of four months;

(b) a fine of $30,000;

(c) a requirement that Axford successfully complete the Conduct and Practices Handbook ("CPH") course prior to seeking re-registration;

(d) a requirement that Axford be placed under close supervision for a period of six months upon re-approval; and

(e) that Axford pay costs to IIROC in the amount of $2,500.

¶ 12 On June 10, 2014, the same day that this disciplinary hearing took place, we accepted a Settlement Agreement concerning RBC DS in which the Staff and the Respondent agreed to a fine of $90,000 and costs of $2,500 (2014 IIROC 25).

IETFS AND AXFORD'S STRATEGY

¶ 13 In early 2010, Axford formed the view, based on research and analysis he had undertaken, that stocks were overvalued and that the market was going to decline. As a result of his analysis, he recommended to clients that they re-balance their portfolios by selling their long equity positions and investing the proceeds in a combination of cash, low risk securities, and IETFs. Pursuant to this strategy, the positions in the IETFs were the largest of the three categories, often comprising over 50% of the clients' accounts.

¶ 14 As is well-known, exchange-traded funds ("ETFs") are securities that trade on an exchange that track the performance of an underlying benchmark or index. "Inverse" or "short" ETFs, however, seek to deliver the inverse or the opposite of the performance of the index or benchmark they track. If the market goes *down*, the inverse ETFs – in theory – go *up*.

¶ 15 Axford believed that this strategy would decrease the clients' risk exposure and that the products were not highly speculative.

¶ 16 The two ITEFs used by Axford were the Horizons IETF and the ProShares IETF, the latter of which inversely tracked the S & P 500. The prospectus of the former states (see paragraph 17 of the attached Agreed

Statement of Facts): “Units of the ETFs are highly speculative and involve a high degree of risk, some not traditionally associated with mutual funds.” The latter prospectus states (see paragraph 18 of the Agreed Statement) that “the Fund may not be suitable for all investors and should be used only by knowledgeable investors who understand the potential consequences of seeking daily inverse investment results.”

¶ 17 The risk of such products was the subject of an IIROC Notice dated June 11, 2009, which states, in part:

> “Exchange-traded funds (ETFs) that offer leverage or that are designed to perform inversely to the index or benchmark they track, or both, are growing in number and popularity. While such products may be useful in some sophisticated trading strategies, they are highly complex financial instruments that are typically designed to achieve their stated objectives on a daily basis. Due to the effects of compounding, their performance over longer periods of time can differ significantly from their stated daily objective. Therefore, leveraged and inverse ETFs that are reset daily typically are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets.”

¶ 18 Prior to executing his strategy, Axford discussed his strategy in detail with his branch manager, Vickers, and advised him that he intended to implement the strategy in the accounts of several of his clients. Vickers agreed with Axford that the IETFs were not high risk investments. Vickers believed that the IETFs were significantly less risky than leveraged ETFs. He did not advise against the strategy, or advise Axford of the statements in the prospectuses regarding risks, or that these IETFs may not be suitable for clients who had no tolerance for high risk as recorded on their NAAFs.

AB’S ACCOUNTS AND OTHER CLIENTS ACCOUNTS

¶ 19 AB was one of the clients to whom Axford recommended the purchase of the IETFs. As outlined in the Agreed Statement, she is currently age 77. She had several accounts with RBC DS: a Registered Retirement Investment Fund (“RRIF”), a cash account, and a Tax Free Savings Account (“TFSA”).

¶ 20 In 2008, Axford asked AB to update her New Account Application Form, which she did, showing 0% high risk for both the RRIF account and the TFSA. Her NAAF indicated that she had “limited” investment knowledge.

¶ 21 The result of Axford’s strategy was that IETFs comprised 57% of AB’s RRIF account and almost 100% of her TFSA. The accounts subsequently decreased in value (the markets went up) and in April 2011 AB instructed Axford to sell the IETFs in both accounts. AB suffered losses on the sales of the IETFs, but achieved a positive annualized return on her overall portfolio for the entire period of time that Axford was her Registered Representative.

¶ 22 As a result of her complaint, she was compensated by RBC DS for the losses on the sales of the IETFs. Vickers agrees (paragraph 34 of the Agreed Statement) that “Large position in these securities were not suitable for AB based on the risk tolerance recorded on her NAAFs.”

¶ 23 Thirty-six other clients with no tolerance for high risk investments recorded on their NAAFs also purchased the IETFs, a number of whom suffered losses on the IETFs.

FAILURE TO SUPERVISE

¶ 24 Supervision of retail accounts is very important in regulating the securities industry. IIROC Rule 2500 provides in some detail the “Minimum Standards for Retail Customer Account Supervision.” It sets out in Part IV a two-tiered review process for Dealer Members with multiple business locations. The first level review will normally be conducted by a Supervisor at each branch. Vickers filled that role at the London branch. A number of Panels have stressed the importance of the branch manager. In *Re Mills* ([2000] IDACD. No. 41) the Panel stated: “Branch managers have an important role under the self-regulatory system in our securities markets. The obligations requiring supervision of retail client accounts are intended to ensure appropriate handling of client accounts for the benefit of both the client and the firm.” (Cited in *Re Youden* ([2005 IDACD. No. 52 at paragraph 95) and *Re Brunet* (2013 IIROC 34 at paragraph 11.)

¶ 25 The Agreed Statement outlines (paragraphs 38 to 44) the various steps taken by Vickers and RBC DS.

Vickers discussed the issue with Axford, but did not advise him against the strategy for any of his clients.

¶ 26 RBC DS head-office Compliance department contacted the branch shortly after the purchases began. It made inquiries of Vickers and noted that most, if not all, of Axford's accounts were now concentrated in two IETFs and a fixed income fund. About 40% of Axford's complete book of business was invested in one of these IETFs, the Horizons IETF.

¶ 27 The Assistant Branch Manager, on behalf of Vickers, advised the Compliance department that he and Vickers were aware of these issues and were continuing to review them with Axford. Vickers again discussed the issue with Axford, who was asked to explain in writing his strategy and what he told his clients.

¶ 28 Neither Vickers or the Compliance department asked Axford to recommend to any of the clients that they discontinue the strategy he had recommended to them. The Compliance department made no further inquiries of Axford or Vickers at the time.

¶ 29 Paragraph 44 of the Agreed Statement states:

> "Based on the foregoing, during the material time, Vickers failed to use due diligence to ensure that Axford's recommendations to certain of his clients were suitable based on those clients' investment objectives and risk tolerance as recorded on their NAAFs, contrary to Dealer Member Rules 38.4."

¶ 30 Rule 38.4(a) provides that "A Supervisor must fully and properly supervise each ...Registered Representative...so as to ensure their compliance with the Rules of the Corporation and all other laws, regulations and policies applicable to the Dealer Member's securities ...business."

SUBMISSIONS ON PENALTY

¶ 31 Staff submitted that the appropriate sanctions in this case should be the following:

1. Suspension from approval as a Supervisor for one and half years:
2. Fine of $40,000; and
3. Re-write of Supervisor's course upon re-approval."

¶ 32 Staff counsel stated as part of her detailed submission to the Panel:

"In determining the appropriate sanction to be imposed in this case, three questions need to be considered:

"1. Will the sanction be sufficient to prevent the Respondent from engaging in similar conduct in the future?
2. Will the sanction be sufficient to keep other registrants from engaging in similar conduct?
3. Will the sanction allow the public to maintain its confidence in the markets and IIROC's regulation of them?"

She submitted: "IRROC's proposed sanction answers all of these in the affirmative. The sanction sought by Staff meets the objectives of specific and general deterrence and is in the public interest."

¶ 33 Counsel for the Respondent submits that the appropriate sanctions should be:

1. A fine of no more than $15,000; and
2. A requirement to re-write the Supervisor's course upon re-approval as a Branch Manager.

¶ 34 The Respondent's counsel stated as part of his detailed submission:

> "The sanctions sought by Staff are disproportionate to the contravention admitted. They are significantly greater than the sanctions imposed on Mr. Axford, the RR whose recommendations to clients are at issue. The sanctions sought are contrary to the principles in the IIROC *Disciplinary Sanction Guidelines* and in the decisions of other IDA and IIROC Panels, and would be unjust. In particular, there should be no suspension from approval as a Supervisor for any period of time."

OUR DECISION

¶ 35 We have considered counsel's helpful submissions and the material that they presented and have concluded that the appropriate penalty in this case is:

1. a fine of $30,000,
2. a suspension and prohibition on Vickers becoming a Supervisor for six months (Dealer Member Rule 20.33(2)(c) and (e); and
3. a requirement that Vickers re-write the Supervisor's course before again becoming a Branch Manager.

Both counsel agree that the Respondent should pay $3,000 for costs.

¶ 36 What follows is an analysis of why we imposed these penalties.

DETERRENCE

¶ 37 The issue of specific and general deterrence is of importance in many, if not most, disciplinary cases. The Dealer Member Disciplinary Sanction Guidelines of March 2009 discusses deterrence in section 2 of the guidelines. The case that is prominent in the guidelines and a great number of IIROC decisions is *Re Mills* ([2001] 1 IDACD. No 7).

¶ 38 In the present case, counsel for the Respondent argued, relying on Mills, that "the penalty should not be increased beyond that required for specific deterrence in order to enhance the general deterrence effect." That is what Mills appears to hold. The Panel in Mills stated (paragraph 8):

> "Although the seriousness of a respondent's conduct may incline a District Council toward increasing a penalty in order to enhance its general deterrent effect, any temptation to treat general deterrence as providing an independent basis for an additional penalty should be resisted. A penalty based on general deterrence, considered separately, may result in a greater penalty than would otherwise be imposed on a respondent in order to influence the conduct of others who are not before the District Council."

Later in its reasons, the Panel stated (paragraph 55) that because it had concluded that a suspension is not necessary for purposes of specific deterrence, suspending Mr. Mills in order to send a signal to other branch managers would punish him for purposes of general deterrence and would in these circumstances be unfair to him."

¶ 39 But should this aspect of Mills guide a panel today? In our view, according to the 2004 Supreme Court of Canada case of *Cartaway Resources Corp.* ([2004] 1 SCR 672) , a panel can take into account both specific and general deterrence. The Supreme Court overruled the British Columbia Court of Appeal which had taken a position similar to Mills. Justice Louis LeBel for a unanimous Supreme Court stated (paragraph 60):

> "In my view, nothing inherent in the Commission's public interest jurisdiction...prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent [in the court of appeal]: 'The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others.'"

¶ 40 Justice LeBel noted (at paragraph 55):

> "The conventional view is that participants in capital markets are rational actors. This is probably more true of market systems than it is of social behaviour. It is therefore reasonable to assume, particularly with reference to the expertise of the Commission in regulating capital markets, that general deterrence has a proper role to play in determining whether to make orders in the public interest and, if they choose to do so, the severity of those orders."

"General deterrence as an aim of sentencing in criminal law," the court in Cartaway states, "is well established."

General deterrence is not necessarily limited by what would be appropriate for specific deterrence.

¶ 41 The Cartaway decision involved a securities commission, but there appears no reason why it should not apply to regulatory organizations such as IIROC. The MFDA's Penalty Guidelines, for example, cite Cartaway for the statement that it is "reasonable to consider general deterrence as a factor in imposing an appropriate penalty."

¶ 42 It should be noted that the Panel in Mills and many later panels brought in something akin to general deterrence by looking at what the IIROC Guidelines call "industry expectations." The Mills panel had stated (at paragraph 6): "Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understanding would lead its members to expect or the conduct under consideration, it may undermine the goals of the Association's disciplinary process."

¶ 43 In the present case we believe that the penalty we imposed achieves both specific and general deterrence.

PREVIOUS DECISIONS

¶ 44 Each counsel carefully took us through the many cases dealing with failure to supervise by Branch Managers. IRROC counsel stressed the more recent cases. The Respondent's counsel took us back to the 2001 Mills decision. It is difficult to draw clear conclusions from the cases that range widely in the penalties imposed. Each case, of course, depends on the specific facts of that case.

¶ 45 Many of the cases involve a Settlement Agreement. These are particularly difficult to interpret. In some of the Settlement Agreements, for example, the Respondent agreed to a two-year (*Re Lang* 2013 IIROC 37), three-year (*Re Brunet* 2013 IIROC 34), or even a five-year suspension from supervisory duties (*Re MacDonald* 2012 IIROC 68). The Respondent, however, might have decided that he or she never again wanted to return to being a supervisor, but wanted to remain as a Registered Representative and so might not care about a long suspension from supervisory duties. Of the ten recent cases from 2011 to the present cited by IIROC counsel, eight were settlement cases.

¶ 46 Penalties in contested cases carry more weight. The penalty we have ordered is not out-of-line with those cases. In the two contested cases from 2011 to the present, one was a suspension for 12 months (*Re Floyd* 2013 IIROC 27) and in the other there was no suspension (*Re Beaudoin* 2011 IIROC 66).

¶ 47 Counsel for the Respondent took us through the seven contested cases, including Mills, involving supervision by branch managers. In Mills the Panel did not order a suspension. As mentioned earlier, the Panel stated (paragraph 56): "As the District Council has concluded that a suspension is not necessary for purposes of specific deterrence, suspending Mr. Mills in order to send a signal to other branch managers would punish him for purposes of general deterrence and would in these circumstances be unfair." This case and many other cases which cited it were decided before the Supreme Court's 2004 Cartaway decision, discussed above. Cases decided after Cartaway continued to rely on Mills and did not cite Cartaway. See, for example, *Re Graham* ([2005] IDACD No. 21) which stated (paragraph 33):

> "There is an argument that while a period of suspension is not required for Graham in that he has 'learned his lesson', a period of suspension should be considered to 'send a signal' to others who might be inclined to pay only lip service to their supervisory responsibilities. We believe that there is some validity in that point of view and that is what creates some hesitation on our part with respect to whether or not a period of suspension is required in this matter. That said, we believe that on balance, and following the Guidelines, we should not impose a period of suspension only to address matters of general deterrence..."

See, to the same effect, *Re Schillaci* ([2007] IDACD. No. 6) and *Re Youden* ([2005] IDACD. No. 52). Note, however, that Cartaway has been cited by panels for the proposition that general deterrence can be taken into account: see, e.g., *Re Deeb* (2013 IIROC 8 at paragraph 224) and *Re Pope* (2011 IIROC 68 at paragraph 15).

¶ 48 We find that the prior cases, both contested and Settlement Agreements, do not give clear guidance on

the appropriate penalty for this case.

RESPONDENT'S CONDUCT

¶ 49 The Respondent's conduct was, of course, the main focus of our attention. It was not egregious. It was not a complete abdication of responsibility, as discussed in some of the cases, which would warrant a penalty at the higher end of the range. (See *Re Corrigan* 2005, unreported, at paragraph 5 and *Re Floyd and McDonald* 2013 IIROC 4 at paragraph 156.) Vickers had discussions with Axford throughout the relevant period. He agreed with Axford that the products being recommended were not high risk, in spite of what the prospectuses stated. He supported Axford's strategy.

¶ 50 The agreed statement of facts does not indicate what knowledge the Respondent had about what the prospectuses stated. If he knew what they stated, then his conduct showed a serious error of judgment. If he did not know, then he was at least negligent in not knowing. The same is true about his knowledge of the IIROC Notice of guidance for these types of securities, discussed above. If he did not know about the Notice, he ought to have known about it. It was an official IIROC published notice.

¶ 51 Vickers could have done more than he did. When the head-office Compliance department contacted Vickers, he advised the Compliance department that he was likely going to call some of Axford's clients directly, but he only spoke about the issues with two or three clients in the course of other discussions.

OTHER FACTORS CONSIDERED BY THE PANEL

¶ 52 We looked at the Sanction Guidelines, particularly section 4.3 relating to Failure to Supervise. The monetary fine we are imposing is within the range of financial penalties for supervisors. The possible sanction also includes "period of suspension or permanent bar from director/officer/supervisory and or compliance responsibilities." IIROC counsel argues that in other cases mentioned in Sanctions Guideline 4.3, the rule specifically talks of suspension in "egregious cases," but does not do so in this case. Therefore, counsel argues, the conduct does not have to be "egregious" to warrant suspension. Counsel for the Respondent responds by pointing to section 4.2.1, which describes the type of cases where suspension may be appropriate, which suggests that suspension should not be automatic in this case.

¶ 53 All in all, we have concluded that the Respondent's conduct was closer to negligence or an error of judgment than it was to "conduct that involves manipulative, fraudulent or deceptive conduct." (See section 3.2 of the Sanctions Guidelines.)

¶ 54 We compared the penalty we are imposing with that imposed upon Axford, set out in para 11**.** It is difficult to compare the two, particularly because in Axford's case it was a Settlement Agreement and we do not know what might have motivated him to settle for those terms. Moreover, it is not clear whether the penalty for a supervisor should be higher or lower than the penalty for the RR. Perhaps it should depend on the precise details of the case and might vary from case to case. A supervisor plays an important role in protecting the public from improper conduct and the reputation of the securities industry. As stated above, Vickers could have done more than he did. In any event, the Vickers penalty that we are imposing is not out-of-line with that given to Axford. (Axford's was a total ban on being in in any registered capacity for four months; Vickers will be able to continue as an RR during his period of suspension or prohibition from supervisory positions.) The monetary penalty is the same. Nor is the penalty out-of-line with that imposed on RBC DS, set out in paragraph 12 above, which was also a Settlement Agreement.

¶ 55 What harm was caused by the Respondent's conduct? We know that the inverse exchange-traded funds were, admittedly, not suitable for AB, based on the risk tolerance recorded on her NAAFs. She lost money and was subsequently reimbursed by RBC DS. The other thirty six persons who purchased the securities also lost money. The average loss for each client on IETFs was about $17,000, with a total loss for all clients of about $600,000. There is no admission in the agreed statement of facts, however, that the securities were unsuitable for the other thirty six persons, even though they had also no tolerance for high risk investments recorded on their NAAFS. All we can say is that the securities *may* have been unsuitable. They did not complain to RBC DS or to IIROC about their losses.

¶ 56 To what extent was Vickers enriched by the transactions? The transactions produced commissions in the normal way. There was nothing out of the ordinary. This was not churning or excessive trading. The products were to be bought and held by the clients. So there was no unwarranted enrichment.

¶ 57 It should be noted in mitigation that at no time did Vickers fail to provide any information requested by RBC DS, nor did he fail to take any steps required by the firm regarding the trading.

¶ 58 Vickers has been registered with IIROC and its predecessor, the IDA, since 1994. He has had no prior disciplinary history.

¶ 59 Moreover, Vickers has cooperated with IIROC throughout its investigation and assisted in the resolution of the hearing through the agreed statement of facts and, in particular, by agreeing that his conduct was in violation of IIROC Dealer Member Rules.

¶ 60 For the foregoing reasons, we impose, as stated above, the following penalty:

1. a fine of $30,000,
2. a suspension or prohibition on Vickers becoming a Supervisor for six months; and
3. a requirement that Vickers re-write the Supervisor's course before again becoming a Branch Manager.

¶ 61 Both counsel agree that the Respondent should pay $3,000 for costs.

Dated at Toronto this 19th day of June, 2014.

Martin L. Friedland, C.C., Q.C., Chair

Debbie Archer, Industry Representative

Charles Macfarlane, Industry Representative

AGREED STATEMENT OF FACTS

I. INTRODUCTION

1. The Enforcement Department of the Investment Industry Regulatory Organization of Canada ("IIROC") has conducted an investigation (the "Investigation") into the conduct of the Respondent, Bryan Andrew Vickers ("Vickers").
2. The Respondent consents to be subject to the jurisdiction of IIROC.
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").
4. IIROC staff ("Staff") and the Respondent admit and agree to the facts outlined below.

II. CONTRAVENTIONS

5. From April 2010 to August 2011, in the manner described herein, Vickers failed to adequately supervise a registered representative ("RR") and certain of his client accounts, when the RR recommended certain inverse exchange-traded funds to clients, contrary to IIROC Dealer Member Rule 38.4.

III. STATEMENT OF FACTS

A. Overview

6. Vickers was at all material times, a Branch Manager employed with RBC Dominion Securities ("RBC DS") at a branch located in London, Ontario.
7. Derek Axford was a Registered Representative employed by RBC DS in the same London, Ontario

branch. Vickers was the Branch Manager responsible for supervising Axford during the material time.

8. Axford recommended the purchase of certain inverse exchange-traded funds (the "IETFs"), which were described in their prospectuses at the time as riskier or highly speculative securities, to clients who had only a medium or medium high risk tolerance noted on their New Account Application form ("NAAF").

9. Axford discussed the proposed strategy with Vickers before recommending it to clients. Vickers did not advise against the strategy, and as a result, 37 clients with only medium or medium-high risk tolerance recorded on their NAAFs purchased the IETFs.

10. For the reasons set out herein, Vickers failed to ensure that, during the relevant period, Axford's recommendation to his clients to purchase the IETFs was suitable for those clients, and as a result, Vickers failed to adequately fulfill his responsibilities to supervise Axford.

B. Registration History

11. Vickers was first registered with the IDA in 1994 and became a registrant of IIROC on June 1, 2008.

12. Vickers was employed with CIBC Wood Gundy Inc. from January 1994 to July 1995. Since July 1995, he has been employed with RBC DS, first as a Registered Representative and then as a Branch Manager.

13. Vickers was registered as a Branch Manager from 1998 to 2011. He chose to cease being a Branch Manager in November 2011. Since that date he has been employed as a Registered Representative/Portfolio Manager with RBC DS.

C. IETFs and Axford's Strategy

14. Exchange-Traded Funds ("ETFs") are securities that trade on an exchange that track the performance of an underlying benchmark or index. The underlying assets of the benchmark or index may be stocks, bonds or other assets such as commodities.

15. "Inverse" or "short" ETFs, seek to deliver the inverse or opposite of the performance of the index or benchmark they track. The holdings in these funds include equities, but can also include derivatives including swaps and forward contracts.

16. The IETFs at issue are the Horizons BetaPro S&P/TSX 60 Inverse ETF (the "Horizons IETF"), and the ProShares Short S&P 500 (the "ProShares IETF").

17. The prospectus for the Horizons IETF describes the fund as highly speculative and involving a high degree of risk.

> *Units of the ETFs are highly speculative and involve a high degree of risk, some not traditionally associated with mutual funds. No ETF by itself constitutes a balanced investment plan. An investor may lose a portion or even all of the money that he or she places in an ETF.*
>
> …
>
> *The risk of loss in trading derivatives can be substantial. In considering whether to buy Units of an ETF, the investor should be aware that trading derivatives can quickly lead to large losses as well as large gains. Such trading losses can sharply reduce the net asset value of an ETF and consequently the value of an investor's Units in the ETF. Market conditions may also make it difficult or impossible for an ETF to liquidate a position.*

18. The prospectus for the ProShares IETF at the relevant time stated that this IETF seeks investment returns that correspond to the inverse of the S&P 500 Index.

> *The Fund is different from most exchange-traded funds in that it seeks inverse returns and only on a daily basis… Accordingly, the Fund may not be suitable for all investors and should be used only by knowledgeable investors who understand the potential consequences of seeking daily inverse investment results. Shareholders should actively monitor their investments.*

19. In or about early 2010, Axford formed the view based on research and analysis he had undertaken that stocks were overvalued and that the market was going to decline. As a result of his analysis, Axford recommended to clients that they re-balance their portfolios by selling their long equity positions and investing the proceeds in a combination of: (a) cash; (b) low risk securities; and (c) the IETFs. Pursuant to this strategy the positions in the IETFs were the largest of the three categories, often comprising over 50% of the client's account.

20. In Axford's view, this strategy would decrease his clients' risk exposure.

21. Despite the statements in the prospectuses and other research, Axford was of the view that the IETFs were not riskier or highly speculative products.

22. Prior to executing his strategy, Axford discussed the strategy and the basis for the strategy in detail with Vickers. Axford advised Vickers that he intended to implement the strategy in the accounts of several of his clients. Vickers agreed with Axford that the IETFs were not high risk investments. Vickers believed that the IETFs were significantly less risky than leveraged ETFs.

23. Vickers did not advise against the strategy, or advise Axford of the statements in the prospectuses quoted above regarding risks, or that these IETFs may not be suitable for clients who had no tolerance for high risk as recorded on their NAAFs.

D. AB's Accounts

24. One of the clients to whom Axford recommended the purchase of the IETFs was AB.

25. AB is currently 77 years old, and retired from paid employment. Prior to retirement, she was a registered nurse for 45 years.

26. In late 2003, AB opened a Registered Retirement Investment Fund (RRIF) account with RBC DS. Axford was her investment advisor. In early 2005, she opened a cash account with RBC DS, also with Axford as her investment advisor.

27. In May 2008, Axford asked AB to update her NAAF. The NAAF for the RRIF account indicated that AB had "limited" investment knowledge, and recorded her Investment Objectives and Risk Factors as follows:

Investment Objectives:

20% Income

0% Long Term Growth

40% Medium Term Growth

40% Short Term Growth

Risk Factors:

20% Low

60% Medium

20% Medium-High

0% High Risk

28. In January 2009, AB opened a Tax Free Savings Account (TFSA). The NAAF for this account recorded her Investment Objectives and Risk Factors as follows:

Investment Objectives:

50% Long Term Growth

50% Short Term Growth

Risk Factors:

100% Medium-High

29. In April 2010, based on the analysis described above, Axford recommended his strategy to AB, including the purchase of the IETFs in AB's RRIF and TFSA accounts.

30. As a result, in April 2010, the IETFs comprised approximately 57% of AB's RRIF account. Horizons IETF, which was purchased in the TFSA, comprised approximately 95% of that account.

31. Four to six months after the purchase, both IETFs began to decline in value. AB became concerned about the decline and Axford advised her to continue to hold the IETFs as he viewed them as longer-term investments.

32. In or around April 2011, AB instructed Axford to sell the IETFs in both accounts. By this date, she had held them in her account for almost one year.

33. AB suffered losses on the sales of the IETFs but achieved a positive annualized return on her overall portfolio for the period of time that Axford was her Registered Representative. AB was compensated by RBC DS for the losses on the sales of the IETFs.

34. Both IETFs were described in their prospectuses at the time as riskier or highly speculative securities. Each involved taking a view that the market would generally decline. Large positions in these securities were not suitable for AB based on the risk tolerance recorded on her NAAFs.

E. The IETFs Recommended to Other Clients

35. In addition to AB, pursuant to his strategy, Axford recommended and purchased the IETFs in a significant number of other accounts for clients who did not have a stated tolerance for high risk, or had a minimal tolerance for high or higher than medium risk recorded on their NAAFs. The purchases were made as part of the strategy discussed above. In most cases, this resulted in large concentrations of the IETFs in these accounts.

36. Thirty-six other clients with no tolerance for high risk investments recorded on their NAAFs purchased the IETFs.

37. A number of these clients suffered losses on the IETFs that they purchased, although the clients also achieved gains from other investments in the accounts (such as government bonds, GICs and money market funds). The average loss per client on their purchases of the IETFs was $17,303.18. While some of the clients ended up with an overall account gain and some ended up with an overall account loss, the average net loss per client was $2,131.38.

F. Steps Taken and the Failure to Supervise

38. As stated above, prior to Axford executing his strategy, he had discussions with Vickers regarding the strategy and his reasoning for implementing the strategy. Although the strategy involved the two IETFs which were described in their prospectuses at the time as high risk or speculative securities, Vickers did not advise Axford against the strategy for any of his clients.

39. In April 2010, shortly after Axford began executing his strategy and purchasing the IETFs in client accounts, RBC DS' Compliance department made inquiries of branch management and noted that most, if not all, of Axford's accounts were now concentrated in the two IETFs and in a fixed income fund. The Compliance department further noted that approximately 41% of Axford's book of business was invested in the Horizons IETF.

40. In response, Vickers' Assistant Branch Manager on behalf of Vickers, advised the Compliance department that he and Vickers were aware of these issues and were continuing to review them with Axford.

41. Vickers had a detailed discussion with Axford wherein Axford again explained his strategy. In response

to an inquiry from Compliance, Axford explained his strategy in writing. Vickers reviewed the written explanation and asked that Axford add to it the explanation he gave to his clients. The explanation offered by Axford did not refer to the statements in the prospectuses for the IETFs regarding risk.

42. Based on that written explanation, neither Vickers nor the Compliance department asked Axford to recommend to any of the clients that they discontinue the strategy he had recommended to them. This is despite the fact that several of Axford's clients had no tolerance for high risk investments recorded on their NAAFs.

43. The Compliance department made no further inquiries of Axford or Vickers at that time.

44. Based on the foregoing, during the material time, Vickers failed to use due diligence to ensure that Axford's recommendations to certain of his clients were suitable based on those clients' investment objectives and risk tolerance as recorded on their NAAFs, contrary to Dealer Member Rule 38.4.

H. Mitigating and Other Factors

45. Vickers and his Assistant Branch Manager, working under his supervision, discussed the strategy with Axford on several occasions after it was implemented. Vickers and his Assistant Branch Manager reviewed Axford's client accounts as part of their daily and monthly supervision of all branch accounts.

46. Vickers responded promptly to an inquiry from the Compliance department regarding Axford's trading. While he advised the Compliance department that he was likely going to call some of Axford's clients directly, he only spoke about these issues with two or three clients, in the course of other discussions.

47. At no time did Vickers fail to provide any information requested by the firm nor did he fail to take any steps required by the firm regarding the trading.

48. In 2012, prior to any investigation or review by IIROC, RBC DS instructed Axford to recommend to clients that they discontinue the strategy.

49. Vickers has been registered with IIROC and its predecessor since 1994, first as a securities trader, then as a Registered Representative, then a Branch Manager. He has no prior disciplinary history.

50. Vickers has cooperated with IIROC throughout its investigation.

THE FOREGOING FACTS ARE ADMITTED AND AGREED TO by the Respondent at the City of Toronto in the Province of Ontario, this _____ day of _____ , 2014.

"witness" **Bryan Andrew Vickers"**

Witness **Bryan Andrew Vickers**

Respondent

AGREED TO by IIROC staff at the City of Toronto in the Province of Ontario, this _9th__ day of __June___, 2014.

"witness" **"Diana Iannetta"**

Witness **Diana Iannetta**

Senior Enforcement Counsel on behalf of staff of the Investment Industry Regulatory Organization of Canada