

Re Union Securities

IN THE MATTER OF:

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

and

Union Securities Ltd.

2014 IIROC 02

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

Heard: November 8, 2013

Decision: January 8, 2014

Hearing Panel:

Alison Narod, Chair, Michael Johnson and Barbara Fraser

Appearances:

Lorne Herlin, Enforcement Counsel

Patrick Sullivan, Respondent’s Counsel

DECISION

Introduction

¶ 1 The Hearing Panel in the instant case was asked by IIROC Staff and the Respondent, Union Securities Ltd. (“Union”), to approve a settlement agreement (“Settlement Agreement”) jointly recommended by those parties. The Settlement Agreement sets out the facts and penalty agreed to by the parties.

¶ 2 Union admits that, since July 31, 2013, it has failed to have and maintain at all times Risk Adjusted Capital (“RAC”) greater than zero, contrary to IIROC Dealer Member Rule 17.1.

¶ 3 The parties agreed to the following penalty:

Union’s rights and privileges of IIROC Membership are immediately suspended and it is directed to cease dealing with the public, pursuant to IIROC Dealer Member Rule 20.34(2)(c).

The Facts

¶ 4 At the time of the Settlement Hearing, Union, whose head office is in Vancouver, British Columbia, was in the course of winding up its business.

¶ 5 As of October 15, 2012, all of Union’s client accounts and assets were transferred to another IIROC Dealer Member.

¶ 6 By letter dated November 8, 2012, Union informed IIROC that it intended to resign its IIROC membership as soon as it fulfilled all of the requirements for resignation. As of the date of the Settlement Hearing, the resignation process had not been completed, as Union had not fulfilled all that it had been requested to do by IIROC.

¶ 7 The key issue in this case related to the fact that Union’s RAC was in a deficit, contrary to IIROC

Dealer Member Rule 17.1. That rule effectively prohibits Members from allowing their RAC to fall below zero. Union's RAC deficiency was increasing and could not be remedied, due to the fact that it had ceased active business and was winding up. This situation is described in the Statement of Facts agreed to by the parties as follows:

Risk Adjusted Capital (RAC)

13. RAC is a defined measure of a Dealer Member's capital (calculated pursuant to International Financial Reporting Standards) that has been adjusted for regulatory purposes. The calculation of RAC is the primary means by which the financial status of a Dealer Member is prescribed and monitored.
14. IIROC Dealer Member Rule 17.1 requires all Dealer Members to have and maintain at all times RAC greater than zero as calculated in accordance with Form 1. If at any time the RAC of a Dealer Member is less than zero, that Dealer Member is required to immediately notify IIROC.
15. The requirement that a Dealer Member must maintain positive RAC is essential for the determination of the financial solvency of a Dealer Member and ultimately for the protection of the public, other Dealer Members, IIROC, and the Canadian Investor Protection Program.
16. Dealer Members must remedy capital deficiencies on a very timely basis. It is IIROC Staff's longstanding policy to take steps to suspend a Dealer Member if it fails to do so.

Union's Risk Adjusted Capital Deficiencies

17. As at July 31, 2013, Union had a RAC deficiency of \$141,000.
18. As at August 31, 2013, Union had a RAC deficiency of \$257,000.
19. Given that Union ceased active business operations, it is unable to remedy its RAC deficiency and it is expected to increase.
20. Union is currently subject to the Early Warning restrictions that IIROC imposed on it in November 2011 and will continue to be subject to these provisions as a suspended Dealer Member. Pursuant to these restrictions Union is, among other things, restricted from the following activities unless it obtains IIROC's prior written consent:
 - a. reducing its capital in any manner including redemption, repurchase or cancellation of any of its shares;
 - b. reducing or repaying any indebtedness which has been subordinated with the approval of IIROC;
 - c. making any payments by way of loan, advance, bonus, dividend, repayment of capital or other distribution of assets to any director, officer, partner, shareholder, related company or affiliate; or
 - d. increasing non-allowable assets, unless a prior binding commitment to do so exists, or enter into any new commitments, which would have the effect of materially increasing Union's non-allowable assets.
21. Union cooperated with IIROC staff throughout the termination process and since Union no longer holds any client accounts, no client assets are affected by the RAC deficiency.

Applicable Rules and Jurisprudence

¶ 8 IIROC Dealer Member Rule 20.35 permits IIROC Staff to negotiate a settlement agreement with any approved person or Dealer Member. The parties to a settlement agreement may agree to the imposition of certain penalties prescribed by Rule 20.33 or Rule 20.34, including those set out in 20.34(2)(c):

Suspension of the rights and privileges of Dealer Member (and such suspension may include a direction to the Dealer Member to cease dealing with the public) for any period of time and upon any conditions or terms....

¶ 9 Once a settlement agreement is reached, it is presented to a Hearing Panel at a settlement hearing, at which time the Hearing Panel may either accept or reject the settlement agreement (IIROC Dealer Member Rule 20.36(1)).

¶ 10 The Hearing Panel's decision in *Re Deutsche Bank Securities Ltd.* (2013 IIROC 07) sets out a useful description of the role of a hearing panel at settlement hearings. It observes that hearing panels generally exercise their discretion by deferring to the settlement unless it clearly falls outside a range of appropriateness. The relevant passage is set out below:

¶9 It is clear from jurisprudence emanating from the courts and from Hearing Panels of IIROC, Investment Dealers Association and the Mutual Fund Dealers Association, that our task is not to decide whether, in this case, we would have arrived at the same decision as that reached by the parties. Rather, our duty is to determine whether the penalty is a reasonable one and that it meets the objectives of the disciplinary process which are to maintain the integrity of the investment industry. We cite from the recent decision of the Hearing Panel in *Re CIBC World Markets Inc.*, [2011] IIROC No. 38:

13 Finally, hearing panels will not lightly interfere with a negotiated settlement. As was said in *Re Milewski*, [1999] IDACD No. 17,

... 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.

14 Or, as put by Winkler J. (albeit in another context) in *Gilbert v. CIBC*, [2004] O.J. 4260:

There is a presumption of fairness when a proposed class settlement negotiated at arms length ...is presented to the court for approval. A court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.

The test to be applied is whether the settlement is fair and reasonable ... This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give and take.

15 In our view, the settlement, negotiated as it was by the parties assisted by capable counsel, does not clearly fall "outside a range of appropriateness" and it should therefore be, and was accepted by the panel.

Submissions

¶ 11 Counsel for IIROC Staff argued that the proposed Settlement Agreement fell within a range of appropriateness. He drew the Panel's attention to two cases with similar or somewhat similar facts. In *Re Gateway Securities Inc.*, 2009 IIROC 13, the Respondent Gateway had ceased active business operations and was in the course of winding up. Most of its client assets had been sold to another IIROC Dealer Member, all of its registered representatives had transferred elsewhere and only a few of its client accounts remained with its carrying broker. Gateway advised IIROC that it intended to resign its IIROC membership and that it no longer held any client accounts. Since it had ceased active business operations, its RAC deficiency had grown from \$73,000 to \$961,000. Gateway noted that its RAC deficiency would not be remedied.

¶ 12 Counsel for IIROC Staff maintains that the facts of that case are virtually identical to the instant case. Although that case involved an expedited hearing, rather than a settlement agreement, Gateway did not oppose the order sought by IIROC Staff, which included terms that Gateway be suspended indefinitely and that it immediately cease dealing with the public.

¶ 13 Counsel for IIROC Staff also referred the Panel to the case of *Re Prodigy Wealth Management Corp.* (2009 IIROC 51). The Respondent Prodigy no longer had a Chief Compliance Officer (“CCO”) in place. It decided not to replace its CCO and it transferred all of its client accounts to other IIROC Dealer Members. It advised IIROC of its intention to resign its IIROC membership. In a settlement agreement reached with IIROC Staff, Prodigy admitted that it had failed to designate an individual approved under IIROC’s rules to perform the functions of the COO, contrary to IIROC Dealer Member Rule 38. The agreed remedy was that Prodigy’s IIROC membership be immediately suspended and it immediately cease dealing with the public.

¶ 14 Counsel for IIROC Staff says that the terms of settlement in the Prodigy case are identical to those of the instant case.

¶ 15 In the result, counsel for IIROC Staff and counsel for Union agree that the Settlement Agreement in the instant case falls within the range of appropriateness and ought to be approved by the Hearing Panel.

Reasons

¶ 16 After due consideration of the facts and circumstances of this case, the Hearing Panel finds that the appropriate and applicable test to apply to settlement agreements is that described in *Re Deutsch Bank Securities Ltd.* Union has admitted that it has transgressed IIROC Dealer Member Rule 17.1 by failing to have and maintain at all times Risk Adjusted Capital greater than zero since July 31, 2013. It is in the course of winding up and, due to the steps it must take to do so, its RAC is progressively increasing without any likelihood of remediation in the reasonably foreseeable future.

¶ 17 The Hearing Panel finds that the agreed penalty of immediate suspension and cessation of dealings with the public falls well within the range of appropriateness and reasonableness, as reflected in the cases, *Re Gateway Securities Inc.* and *Re Prodigy Wealth Management Corp.*, referred to above.

¶ 18 In the circumstances of the instant case, the Hearing Panel approves the Settlement Agreement.

Dated this 8th day of January, 2014.

Alison Narod, Panel Chair

Michael Johnson, Panel Member

Barbara Fraser, Panel Member

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. Staff of the Enforcement Department of the Investment Industry Regulatory Organization of Canada (IIROC) has received information from IIROC’s Financial and Operations Compliance Department regarding the Respondent, Union Securities Ltd. (Union).
2. IIROC Staff’s review of the information disclosed matters for which Union may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1 (the Hearing Panel).
3. IIROC Staff and Union consent and agree to the settlement of this matter by way of this agreement (the Settlement Agreement).

II. JOINT SETTLEMENT RECOMMENDATION

4. IIROC Staff and Union jointly recommend that the Hearing Panel accept this Settlement Agreement.
5. Union admits that since July 31, 2013 it has failed to have and maintain at all times risk adjusted capital greater than zero, contrary to IIROC Dealer Member Rule 17.1.
6. IIROC Staff and Union agree to the following terms of settlement:
 - Union's rights and privileges of IIROC Membership are immediately suspended and it is directed to cease dealing with the public, pursuant to IIROC Dealer Member Rule 20.34(2)(c).

III. STATEMENT OF FACTS

(i) Acknowledgment

7. IIROC Staff and Union 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.

(ii) Factual Background

8. Union's head office is in Vancouver.
9. As of October 15, 2012, all of Union's client accounts and assets were transferred to another IIROC Dealer Member.
10. By way of a November 8, 2012 letter, Union informed IIROC that it intends to resign its IIROC membership as soon as it fulfills all of the requirements for resignation.
11. On November 23, 2012, IIROC published IIROC Notice 12-0346 which announced that IIROC had been informed that Union intends to resign its membership and that the resignation process has been initiated.
12. To date the resignation process has not been completed because Union has not fulfilled all that it has been requested to do.

Risk Adjusted Capital (RAC)

13. RAC is a defined measure of a Dealer Member's capital (calculated pursuant to International Financial Reporting Standards) that has been adjusted for regulatory purposes. The calculation of RAC is the primary means by which the financial status of a Dealer Member is prescribed and monitored.
14. IIROC Dealer Member Rule 17.1 requires all Dealer Members to have and maintain at all times RAC greater than zero as calculated in accordance with Form 1. If at any time the RAC of a Dealer Member is less than zero, that Dealer Member is required to immediately notify IIROC.
15. The requirement that a Dealer Member must maintain positive RAC is essential for the determination of the financial solvency of a Dealer Member and ultimately for the protection of the public, other Dealer Members, IIROC, and the Canadian Investor Protection Program.
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20. Union is currently subject to the Early Warning restrictions that IIROC imposed on it in November 2011 and will continue to be subject to these provisions as a suspended Dealer Member. Pursuant to these restrictions Union is, among other things, restricted from the following activities unless it obtains IIROC's prior written consent:

- a. reducing its capital in any manner including redemption, repurchase or cancellation of any of its shares;
 - b. reducing or repaying any indebtedness which has been subordinated with the approval of IIROC;
 - c. making any payments by way of loan, advance, bonus, dividend, repayment of capital or other distribution of assets to any director, officer, partner, shareholder, related company or affiliate; or
 - d. increasing non-allowable assets, unless a prior binding commitment to do so exists, or enter into any new commitments, which would have the effect of materially increasing Union's non-allowable assets.
21. Union has cooperated with IIROC staff throughout the termination process and since Union no longer holds any client accounts, no client assets are affected by the RAC deficiency.

IV. TERMS OF SETTLEMENT

22. 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*.
23. The Settlement Agreement is subject to acceptance by the Hearing Panel.
24. The Settlement Agreement shall become effective and binding upon IIROC Staff and Union as of the date of its acceptance by the Hearing Panel.
25. 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.
26. If the Hearing Panel accepts the Settlement Agreement, Union waives its right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.
27. If the Hearing Panel rejects the Settlement Agreement, IIROC Staff and Union may enter into another settlement agreement; or IIROC Staff may proceed to a disciplinary hearing in relation to the matters disclosed in the Investigation.
28. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
29. IIROC Staff and Union 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.
30. 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.
31. This Settlement Agreement may be signed in counterparts.

AGREED TO by the Respondent, Union Securities Ltd. at the City of Vancouver in the Province of British Columbia, this day of October, 2013.

Witness

Respondent

AGREED TO by IIROC Staff at the City of Vancouver in the Province of British Columbia, this 1st day of November, 2013.

“Shannon Mathieson”

“Lorne Herlin”

Witness

Lorne Herlin

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

ACCEPTED at the City Vancouver in the Province of British Columbia, this 8th day of November, 2013, by the following Hearing Panel:

Per: “Alison Narod”
Panel Chair

Per: “Barbara Fraser”
Panel Member

Per: “Michael Johnson”
Panel Member

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