Re Milne

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Anne Elizabeth Milne

2018 IIROC 02

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

Heard: December 20, 2017 in Toronto, Ontario
Oral Decision: December 20, 2017
Written Decision: January 30, 2018

Hearing Panel:
Peter Hambly, Chair, Shaine Pollock and Guenther Kleberg
Appearances:
Rob DelFrate, Senior Enforcement Counsel
Melissa MacKewn, for Anne Elizabeth Milne
Anne Elizabeth Milne, present by telephone

REASONS FOR DECISION

Introduction

¶ 1 On December 7, 2017 the Investment Industry Regulatory Organization of Canada ("IIROC") issued a Notice of Application for a Settlement Hearing before a Hearing Committee of IIROC to consider a Settlement Agreement ("the Agreement") between Anne Elizabeth Milne ("Milne") and Staff of IIROC pursuant to Section 8428 of the Consolidated Enforcement. Examination and Approval Rules of IIROC.

¶ 2 Milne was a Registered Representative with IIROC from 1996 until January 19, 2017 when she resigned from Industrial Alliance Securities Inc. IIROC alleges that she committed the following contraventions of IIROC's Rules:

a) Between November 2009 and May 2016, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to leveraged Exchange-Traded Funds ("LETFs"), contrary to Dealer Member Rule 1300.1(a).

b) Between November 2009 and May 2016, the Respondent failed to use due diligence to ensure that her recommendations were suitable for her clients, contrary to Dealer Member Rule 1300.1(q).

¶ 3 Milne admits the allegations and the facts which are set out in detail in the Agreement which is attached hereto as Appendix A. The parties propose that the following sanctions and costs be imposed on Milne:

1. A global fine of $15,000,inclusive of disgorgement of commissions (approximately $3,000);
2. $1,500 in costs;
3. a suspension from approval in any registered capacity for 6 months;
4. a requirement to successfully rewrite the Conduct and Practices Handbook course prior to seeking re-registration; and
5. one month of close supervision upon any re-approval.

Background

¶ 4 Milne purchased for her clients leveraged exchange traded funds ("LETFs"). Their value goes up when markets decline and conversely their value goes down when markets go up. Between 2009 and 2016 Milne believed that the market would go down. In fact it went up.

¶ 5 The prospectuses of these funds described them as "highly speculative," "involving a high degree of risk," and "may only be suitable for persons who are able to assume the risk of losing their entire investment." IIROC published a Guidance Note on June 11, 2009 which advised that LETF's were highly complex financial instruments which were unsuitable for long term investment. Milne did not review the prospectuses or the Guidance note. She recommended to her clients that they purchase LETF's for months and years.

¶ 6 OG is presently age 62. She has been a client of Milne since 1996. She has a high school education. She is a single mother of 3 children who are now adults. OG opened accounts with Milne for her 3 children and for herself. She completed a New Client Application Form ("NCAFS") in 2004 in which she described for her own accounts her objectives and risk tolerances to be 20% lower-risk income-producing securities, 40% moderate to higher-risk income-producing securities and 40% moderate risk growth-oriented securities. In 2004 she described the objectives and risk tolerances for her children's' accounts to be 50% moderate to higher-risk income-producing securities and 50%«moderate-risk, growth-oriented securities.

¶ 7 In 2008 she updated for her personal accounts her objectives and risk tolerances to be l0% lower-risk income-producing securities, 40% moderate to higher-risk-income producing securities, 40% moderate-risk growth oriented securities and 10% higher-risk speculative securities and trading strategies.

¶ 8 May 2016, OG submitted a formal complaint to Industrial Alliance regarding her accounts. OG's accounts were liquidated and any remaining LETFs were sold. Between November 2009 and May 2016, OG sustained losses in her accounts of approximately $59,000, which represented approximately 50% of the value of OG's accounts as at November 2009.The Respondent earned approximately $1,000 in commissions as a result of her recommendations to OG to purchase the LETFs.

¶ 9 Milne recommended that other clients purchase and hold LETFs who did not have a stated tolerance or a very low tolerance for high risk investments. She recommended to these clients that they continue to hold LETFs after they experienced losses. She made approximately $1,950 in commissions as a result of these recommendations to 6 clients.

¶ 10 In August 2016 prior to her resignation Industrial Alliance imposed a fine on her of $10,000 which she paid.

¶ 11 Milne was fully cooperative with IIROC in their investigation.

Discussion

The Role of a Hearing Panel in Considering Whether to Accept a Settlement Agreement

¶ 12 The judgments of the District Council in Milewski (Re) [1999] I.D.A.C.D. and the hearing panel in Donnelly (Re) (2016) IIROC No. 23 set out the principles that a hearing panel must apply in considering

whether to accept a settlement agreement. The penalty should be consistent with prior decisions. It should be proportionate to the offence. It must be sufficient to act as a deterrent to the offender and members of the industry. In considering a settlement agreement a panel is in a position different to that of a panel determining an appropriate penalty after a contested hearing. Its role is to either accept or reject the proposed agreement. It can ask for additional information to permit it to decide whether to accept or reject the agreement. It also can give the parties another opportunity to come to an agreement which better reflects what the panel believes to the appropriate penalty. It cannot substitute a penalty which it deems to be more appropriate than the one proposed by the parties. These 2 decisions were cited as setting out the principles to be applied in the recent decisions of hearing panels in Re Rutledge 2017 IIROC 50 and Re Price 2017 IIROC 54.

¶ 13 The overriding concern of the panel in considering whether to accept or reject a settlement agreement is the public interest. Generally a panel should accept a settlement agreement. These principles were emphasized in the decision of Re Cavalaris]2017] IIROC 04 which stated the following:

> Settlements are to be supported as a means of encouraging negotiation and compromise to arrive at an expeditious resolution of appropriate disciplinary proceedings. Accordingly, a joint submission in the regulatory context would be rejected only where the proposal, if accepted, would lead to the conclusion that the regulatory scheme had broken down or was otherwise not in the public interest. (para. 19)

And:

> In terms of principles, the Panel recognizes that sanctions are designed primarily to protect the investing public, strengthen market integrity and improve standards and practices. In this sense, the breaches were serious and the sanctions must be ones that promote general and specific deterrence. (para. 21)

The Proposed Penalty

¶ 14 The relevant IIROC Dealer Member Rules are the following:

Rule 1300.1.

> (a) Each Dealer Member shall use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted.
>
> (q) 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

¶ 15 Clearly on the basis of the facts admitted Milne violated these 2 rules. A Hearing Committee of IIROC considering whether to implement a Settlement Agreement is in a position similar to a court considering whether to accept a joint submission on sentence in a criminal case. (see *Re:Cavalaris* at paras.15,16). In *R. v. Anthony Cook* 2016 SCC 43 the Supreme Court of Canada in the judgment of Justice Moldaver stated that the court should apply the public interest test rather than different variations of the fitness test. He described this test as follows:

> [32] Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? …
>
> [34] … Rejection denotes a submission so unhinged from the circumstances of the offence and the

offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

Result

¶ 16 The similarity of the wording of Justice Moldaver in *Cook* as the basis for rejecting a joint submission in a criminal case ("unhinged from the circumstances of the offence") and the hearing panel in *Cavalaris* as the basis for rejecting a joint submission on penalty in a prosecution by IIROC ("lead to the conclusion that the regulatory scheme had broken down") is striking. This test does not apply here. In our view the settlement proposed reflects the principles to be applied. The panel accepts it.

Dated at Toronto, Ontario this 30th day of January, 2018.

Peter Hambly

Shaine Pollock

Guenther Kleberg

APPENDIX A

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada ("IIROC") will issue a Notice of Application to announce that it will hold a settlement hearing to consider whether, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC, a hearing panel ("Hearing Panel") should accept the settlement agreement ("Settlement Agreement") entered into between the staff of IIROC ("Staff") and Anne Elizabeth Milne ("Respondent").

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement in accordance with the terms and conditions set out below.

PART III – AGREED FACTS

3. For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III of this Settlement Agreement.

Overview

4. The Respondent, Anne Elizabeth Milne, recommended the purchase and long-term holding of certain leveraged exchange traded funds ("LETFs"), which were described in their prospectuses as high risk and speculative, to clients who had little or no tolerance for high risk as noted on their New Client Applications forms ("NCAFs").

5. The Respondent did not believe the LETFs she recommended to be high risk securities and her recommendations were based on her view, as set out below, that the markets would decline.

6. For the reasons set out herein, the Respondent, failed to use due diligence to learn and remain informed about the essential facts of the LETFs she recommended and failed to ensure that her recommendations for the purchase of the LETFs were suitable for clients.

Background

7. The Respondent has been a Registered Representative since 1996.

8. The Respondent has not been registered with IIROC since January 19, 2017, when she resigned from Industrial Alliance Securities Inc.

9. The Respondent is currently employed in a non-registered capacity.

10. LETFs are investment funds that use leverage and high risk trading strategies to try to achieve either a multiple or an inverse multiple of the daily performance of an index of a reference exchange.

11. The Respondent solicited purchases of the following LETFs in her clients' accounts:

    (a) HBP S&P/TSX 60 Bear Plus ("HXD");

    (b) HBP S&P 500 Bear Plus ("HSD"); and

    (c) HBP S&P 500 VIX Short-Term Futures Bull Plus ("HVU").

12. At all material times, HXD, HSD, and HVU were each described in their prospectuses as "highly speculative," "involving a high degree of risk," and "may only be suitable for persons who are able to assume the risk of losing their entire investment." The HXD, HSD, and HVU prospectuses also indicated that each LETF was "designed to **provide daily investment results**" (emphasis in the original).

13. On June 11, 2009, IIROC published Guidance Note 09-0172 specifically concerning LETFs, and emphasizing that LETFs are highly complex financial instruments that are typically unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets.

The Respondent Failed to Use Due Diligence to Learn and Remain Informed about LETFs

14. Starting in 2009 until sometime in 2016, the Respondent believed that stocks were overvalued and that the market was going to decline.

15. The Respondent believed that the LETFs she recommended were medium risk products and, as such, appropriate for some of her clients. In assessing these LETFs as medium risk, the Respondent did not understand the risks associated with the products, including with respect to the use of leverage.

16. The Respondent understood that LETFs were short-term investments, but believed that "short-term" meant that the LETFs could be held for weeks. The Respondent recommended to her clients to hold LETFs for several months, or years.

17. By failing to review the prospectuses for the LETFs she recommended and IIROC's Guidance Note, the Respondent failed to use due diligence to learn and remain informed about the essential facts relative to these products.

The Respondent Failed to Use Due Diligence to Ensure LETFs Were Suitable

(a) OG

18. OG is currently 62 years old and had been the Respondent's client since approximately 1996. In 1996, she completed her high school education and was a single mother to her three children, who are now adults.

19. OG followed the Respondent from another firm to Industrial Alliance. In 2004, OG opened five accounts with the Respondent at Industrial Alliance's predecessor firm; a non-registered account, a registered account, and accounts in trust for each of her three children (the "ITF accounts").

20. OG trusted the Respondent. OG relied on and accepted the Respondent's recommendations for the

investments in all of her accounts.

21. In 2004, the New Client Application Forms ("NCAFs") for OG's personal accounts indicated the following objectives and risk tolerances:

    (a) 20% lower-risk, income-producing securities;

    (b) 40% moderate to higher-risk income-producing securities; and

    (c) 40% moderate-risk, growth-oriented securities.

22. In 2004, the NCAFs for OG's ITF account indicated the following objectives and risk tolerances:

    (a) 50% moderate to higher-risk income-producing securities; and

    (b) 50% moderate-risk, growth-oriented securities.

23. In 2006, the Respondent asked OG to update the NCAFs for her accounts. Based on the NCAFs, the accounts' objectives and risk tolerances remained unchanged.

24. In 2008, the Respondent asked OG to update the NCAF for her personal accounts. OG's personal accounts' objectives and risk tolerances were updated as follows:

    (a) 10% lower-risk, income-producing securities;

    (b) 40% moderate to higher-risk-income producing securities;

    (c) 40% moderate-risk, growth-oriented securities; and

    (d) 10% higher-risk, speculative securities and trading strategies.

25. Prior to November 2009, the LETFs in OG's personal account did not exceed 10%.

26. In December 2012, the Respondent asked OG to update the NCAFs for her accounts. The accounts' objectives and risk tolerances were updated to 100% speculative securities and trading strategies. The Respondent knew or ought to have known that these investment objectives and risk tolerances did not accurately reflect OG's investor profile.

27. The Respondent first recommended that OG purchase HXD in her non-registered account in November 2009. She subsequently recommended that OG purchase the following LETFs in the following accounts:

    (a) in July 2010, HSD in her non-registered account;

    (b) December 2011, HVU in her registered account and ITF accounts; and

    (c) May 2012, HVU in her registered account and ITF accounts.

28. The Respondent continued to recommend that OG purchase and hold LETFs following losses in the the first LETF that was purchased.

29. In May 2016, OG submitted a formal complaint to Industrial Alliance regarding her accounts. OG's accounts were liquidated and any remaining LETFs were sold. Between November 2009 and May 2016, OG sustained losses in her accounts of approximately $59,000, which represented approximately 50% of the value of OG's accounts as at November 2009.

30. The Respondent earned approximately $1,000 in commissions as a result of her recommendations to OG to purchase the LETFs.

(b) Other Clients

31. In addition to OG, the Respondent recommended the purchase and holding of LETFs in the accounts of

other clients who did not have a stated tolerance for high risk, or had up to 10% tolerance for high risk as recorded on their NCAFs. In certain cases, this resulted in concentrations of LETFs being purchased in these accounts that exceeded the clients' risk tolerance as set out in the applicable NCAFs.

32. The Respondent recommended that these clients continue to hold LETFs after they started to experience losses. The total realized net losses experienced by these clients as a result of purchasing and holding the LETFs were in excess of $63,000.

33. The Respondent earned approximately $1,950 in commissions as a result of her recommendations to these six clients to purchase LETFs.

34. Based on the foregoing, the Respondent failed to use due diligence to ensure that her recommendations were suitable for these clients based on their investment objectives and risk tolerance as stated on their NCAFs, contrary to Dealer Member Rule 1300.1(q). She also failed to use due diligence to learn and remain informed about the essential facts relative to LETFs, contrary to Dealer Member Rule 1300.1(a).

Internal Discipline

35. In August 2016, Industrial Alliance imposed internal discipline measures on the Respondent consisting of a fine in the amount of $10,000 and close supervision for a period of six months.

36. The Respondent paid the $10,000 fine and completed five months of close supervision without incident before she resigned as an IIROC registrant.

Mitigating Factors

37. The fine and costs set out in the Terms of Settlement described in paragraph 41 herein have been reduced in consideration of the Respondent's current circumstances and in consideration of the internal disciplinary measures that have already been imposed by Industrial Alliance.

38. At an early juncture of the IIROC investigation, the Respondent approached IIROC Staff indicating that she wished to resolve the matter on a fully cooperative basis, thereby reducing the costs incurred in resolving this matter.

39. The Respondent believed that she was acting in the best interests of her clients.

PART IV – CONTRAVENTIONS

40. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:

    (a) Between November 2009 and May 2016, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to leveraged Exchange-Traded Funds ("LETFs"), contrary to Dealer Member Rule 1300.1(a).

    (b) Between November 2009 and May 2016, the Respondent failed to use due diligence to ensure that her recommendations were suitable for her clients, contrary to Dealer Member Rule 1300.1(q).

PART V – TERMS OF SETTLEMENT

41. The Respondent agrees to the following sanctions and costs:

    (a) A global fine of $15,000, inclusive of disgorgement of commissions (approximately $3,000);

    (b) $1,500 in costs;

    (c) a suspension from approval in any registered capacity for 6 months;

    (d) a requirement to successfully rewrite the Conduct and Practices Handbook course prior to seeking

re-registration; and

(e) one month of close supervision upon any re-approval.

42. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

43. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondent in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the paragraph below.

44. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondent. These proceedings may be based on, but are not limited to, the facts set out Part III of this Settlement Agreement.

PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT

45. This Settlement Agreement is conditional on acceptance by the Hearing Panel.

46. This Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing in accordance with the procedures described in Sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.

47. Staff and the Respondent agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing. If the Respondent does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.

48. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.

49. 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 based on the same or related allegations.

50. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.

51. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full of copy of this Settlement Agreement on the IIROC website. IIROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement Agreement.

52. If this Settlement Agreement is accepted, the Respondent agrees that neither she nor anyone on her behalf, will make a public statement inconsistent with this Settlement Agreement.

53. The Settlement Agreement is effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

54. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.

55. A fax or electronic copy of any signature will be treated as an original signature.

DATED this "7th" day of "December", 20"17".

"Witness"	"Anne Milne"
Witness	Respondent
"Sheila Khakhar"	"Rob DelFrate"
Witness	Enforcement Counsel on behalf of Enforcement Staff of the Investment Industry Regulatory Organization of Canada

The Settlement Agreement is hereby accepted this *"20th"* day of "December", 20"17" by the following Hearing Panel:

Per: "Peter B. Hambly"
Panel Chair

Per: "Shaine Pollock"
Panel Member

Per: "G. W. K. Kleberg"
Panel Member