Re CIBC World Markets

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

AND

CIBC World Markets Inc.

2022 IIROC 34

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

Heard: December 20, 2022
Decision: December 20, 2022
Written Reasons: December 29, 2022

Hearing Panel:
Marvin J. Huberman, Chair, Mary Savona and Shaine Pollock
Appearances:
Sally Kwon, Senior Enforcement Counsel for IIROC
David Di Paolo, Counsel for the Respondent
Stephanie Gagne, Counsel for the Respondent
Bill Lyons, on behalf of the Respondent
Fiona Campbell, on behalf of the Respondent

REASONS FOR ACCEPTANCE OF SETTLEMENT AGREEMENT

Settlement Agreement

¶ 1 On December 20, 2022, Senior Enforcement Counsel for the Enforcement Staff of the Investment Industry Regulatory Organization of Canada ("IIROC") and Counsel for CIBC World Markets Inc. (the "Respondent") submitted a settlement agreement between the Staff of IIROC and the Respondent, dated December 5, 2022 (the "Settlement Agreement"), to the Hearing Panel for acceptance or rejection pursuant to Section 8215 of IIROC's Consolidated Enforcement, Examination and Approval Rules (the "IIROC Rules"). At the conclusion of the settlement hearing, which was conducted via videoconference, the Hearing Panel accepted the Settlement Agreement with written reasons to follow. These are our reasons for acceptance of the Settlement Agreement, a copy of which is attached.

Contravention

¶ 2 The Respondent agreed that it committed the following contravention:

> Between 2014 and 2021, the Respondent failed to establish and maintain a system of controls and supervision to ensure client fee agreements were accurately recorded in its fee management systems and clients were charged appropriately, contrary to IIROC Dealer Member Rules 38.1 and 2500.

Agreed Penalties

¶ 3 The Respondent agreed:

(a) to a fine of $119,000 and costs of $5,000,

(b) to provide its first report on the execution of the Remediation Plan to Staff by December 30, 2022 and as thereafter required by Staff to ensure the Remediation Plan is completed satisfactorily, and

(c) if the Settlement Agreement is accepted by the Hearing Panel, to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

¶ 4 The agreed penalties reflect a 30% reduction of the fine that Enforcement Staff agreed to based on the proactive and exceptional cooperation of the Respondent, the remedial measures implemented, compensation to clients, and the Respondent's willingness to resolve this matter in a timely manner, all of which led to an early resolution of this matter.

The Role of the Hearing Panel

¶ 5 Under subsection 8215(5) of the IIROC Rules, the Hearing Panel may only accept or reject the Settlement Agreement. It cannot modify it. In *Milewski*[1], referred to by Staff Enforcement Counsel, the District Council stated that:

> 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.

¶ 6 In *Re Johnson*[2], the panel described the standard for reviewing a settlement agreement as follows:

> 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.

¶ 7 In *Re Donnelly*[3], the panel observed in accepting a settlement agreement that:

> It is usually in the public interest that matters be settled where possible rather than be determined through contested hearings. The reasons for this are often that an earlier determination of a dispute is better than a later determination. Settlements are usually less expensive than contested litigation, and there is less congestion in the dispute settling system when matters are taken out of the system through settlements. Finally, where both parties agree, the result is often more palatable to the parties and society than in a contested hearing where the winner takes all.
>
> For these reasons, a panel considering the acceptance of a settlement agreement will try to reach a determination of acceptance. It will recognize that settlements are often hotly debated with much compromise and give-and-take between the parties in order to reach an acceptable position agreeable to both parties. Furthermore, the panel will recognize that it is not privy to all the facts and the motivations and considerations that each of the parties have

[1] [1999] I.D.A.C.D. No. 17 at p. 10
[2] 2012 IIROC 19
[3] 2016 IIROC 23

in coming to a solution of the dispute that is agreeable to them.

[…]

[…] Where both parties to a settlement agreement are represented by counsel, and have the means to undergo a contested hearing, but have reached a settlement, it is unlikely that a panel would ever conclude that the settlement was unfair and not reasonable.

¶ 8 In determining whether to accept the Settlement Agreement, the Hearing Panel should also be satisfied in respect of the following three considerations described in *Re Donnelly*[4] and cited with approval in *Re Price*[5], each of which we address below:

a) The agreed penalties must be fair and reasonable, that is, proportional to the seriousness of the contravention, and considering all relevant circumstances;

b) the agreed penalties must be within an acceptable range, taking into account similar cases; and

c) the agreed penalties should serve as a deterrent to the Respondent and to industry.

Application to the Facts

¶ 9 In considering whether the agreed penalties are fair and reasonable, we have taken into account:

a) the circumstances of the contraventions, the causes of the issues, the identification of Fee Issue and Internal Review of System Deficiencies, the Remediation, including the Client Remediation and the Issue Remediation described in the Settlement Agreement and by counsel for the parties; and

b) mitigating factors, including that:

(i) the Respondent demonstrated proactive conduct and exceptional cooperation and has been forthcoming with Enforcement Staff in respect of the issues raised in the Settlement Agreement;

(ii) corrective action was initiated by the Respondent and significant remedial measures were implemented;

(iii) a comprehensive Remediation Plan was voluntarily developed and is being implemented by the Respondent, as detailed in the Settlement Agreement;

(iv) the Settlement Agreement and agreed penalties are in keeping with IIROC's mandate to set and enforce high quality regulatory and investment industry standards, protect investors and strengthen market integrity while maintaining efficient and competitive capital markets, and

(v) the agreed penalties are within a reasonable range of appropriateness when considering IIROC's *Sanction Guidelines* and previous IIROC decisions.

¶ 10 Having reviewed the Settlement Agreement and the Settlement Book, filed, and hearing the submissions of Counsel for Enforcement Staff, we find that the agreed penalties are fair and reasonable, that is, proportional to the seriousness of the contravention, in all the relevant circumstances of this case.

¶ 11 As to whether the agreed penalties are within an acceptable range, we have considered:

a) IIROC *Sanction Guidelines*, including the Purpose of Sanction Guidelines, Sanction Principles

[4] *Supra,* footnote 3
[5] 2017 IIROC 54 at p. 2

for IIROC Disciplinary Proceedings, and Key Factors in Determining Sanctions, with a focus on:

(i) Factor 1 - The number, size and character of the transactions at issue;

(ii) Factor 3 - Whether the Respondent engaged in the misconduct over an extended period of time;

(iii) Factor 11 - Whether the Respondent accepted responsibility for and acknowledged the misconduct to the regulator prior to detection and intervention by the regulator;

(iv) Factor 13 - Whether the Respondent voluntarily employed subsequent corrective measures to revise general and/or specific procedures to avoid recurrence of misconduct;

(v) Factor 14 - Whether the Respondent made voluntary acts of compensation; and

(vi) Factor 15 - Whether the Respondent provided proactive and exceptional assistance to IIROC in the investigation of the misconduct.

b) The five cases submitted to us by the parties, *Re IPC Securities*[6]*, Re Scotia Capital*[7]*, Re Canaccord Genuity*[8]*, Re Worldsource Securities*[9]*,* and *Re PEAK Securities*[10]*.* These cases, for the purposes of precedent, set out helpful general principles about settlement agreements and settlement hearings, and set out specific amounts of penalties, taking into account a variety of factors, including the length of time of the occurrences, the magnitude of the contraventions, the technical nature of the violations, a contravention involving a lack of supervisory controls to detect and prevent excess billing in fee-based accounts, the overcharging of fees in the context of double billing, and they involve remedial measures and mitigating factors which do not rise to the same level as in the present case, which affords us some measure of guidance and comparison.

¶ 12 In our view, the agreed penalties, which were negotiated and agreed upon by Counsel for the parties, are within a reasonable range of appropriateness, taking into account the IIROC *Sanction Guidelines* and applicable general principles in previous IIROC cases. We so find.

¶ 13 We have also considered whether the agreed penalties would serve as a deterrent to the Respondent and to industry. According to the IIROC *Sanction Guidelines*[11]:

> The purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. In order to achieve this, sanctions should be significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence).

¶ 14 In *Re Mills*[12], the hearing panel stated:

> Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process;

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[6] 2016 IIROC 32
[7] 2021 IIROC 37
[8] 2021 IIROC 35
[9] 2018 IIROC 48
[10] 2020 IIROC 36
[11] IIROC *Sanction Guidelines* February 2, 2015 at para. 1 of Part I
[12] [2001] I.D.A.C.D. No. 7 at p. 3

similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the Hearing Panel in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention, rather than punishment.

¶ 15 We find on the facts and materials before us that the agreed penalties are appropriate to the conduct at issue and the Respondent, and that they are significant enough to serve as a deterrent to the Respondent and to industry.

Conclusions

¶ 16 For the foregoing reasons, we have concluded that the agreed penalties described in the Settlement Agreement are fair and reasonable, are within an acceptable range, and should serve as a deterrent to the Respondent and to industry.

¶ 17 In consequence, the Hearing Panel has concluded that it is in the public interest for us to accept the Settlement Agreement. And we therefore accept it.

Dated at Toronto, Ontario this 29 day of December, 2022.

Marvin J. Huberman, Chair

Mary Savona

Shaine Pollock

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 IIROC Rules, a hearing panel ("Hearing Panel") should accept the settlement agreement ("Settlement Agreement") entered into between the staff of IIROC ("Staff") and CIBC World Markets Inc. ("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.

4. The facts set out in Part III pertain to two types of fee-based accounts offered by the Respondent: Portfolio Partner Accounts and Portfolio Partner Advisor Managed Accounts.

Overview

5. When a client opens a Portfolio Partner Account or a Portfolio Partner Advisor Managed Account with the Respondent, the agreed upon fee arrangements between the advisor and client are recorded in a client account management system. The fee rates are then transferred into the Respondent's fee-billing engine, which calculates and charges fees on a monthly or quarterly basis. Ultimately, those

fees appear on clients' account statements and year-end reporting.

6. As described below, in 2021, the Respondent discovered a few instances where fees charged to clients in fee-based accounts differed from the fees documented in the client account management system. Subsequently, the Respondent identified that the issue affected more than just a few client accounts (the "Fee Issue").

7. As a result of the Fee Issue, certain accounts were overcharged, others were undercharged, and for some accounts, there was no impact on the fees ultimately charged to the client, despite the fee rate mismatch.

8. The Respondent, working with Deloitte LLP ("Deloitte"), developed a comprehensive remediation plan to identify and correct all accounts impacted by the Fee Issue and implement new controls (the "Remediation Plan"). Any client that was overcharged as a result of the Fee Issue will receive a full refund of the overcharged amount, along with opportunity cost. The Respondent has also developed process enhancements to remedy the Fee Issue and prevent it from occurring again. A technology fix was implemented to address the operational issue, and an automated process that reconciles on a weekly basis the fee rates between the client account management system and the fee-billing engine was introduced to identify human and technology errors arising during the process of transferring fee rates from the client account management system to the fee billing system.

The Respondent

9. At all material times, the Respondent was a Dealer Member of IIROC, with its head office located in Toronto, Ontario.

Identification of Fee Issue and Internal Review of System Deficiencies

10. In 2021, following the automation of the transfer of fee rates from the client management system to the fee-billing engine, and in response to four client complaints, the Respondent identified instances where fee rates agreed to by clients and recorded in the Respondent's client account management system were either not captured or were incorrectly captured by the Respondent's fee-billing engine. After further investigation, the Respondent discovered that the issues could be traced largely to a technology and transcription issue described below.

11. The predominant causes of the Fee Issue were (1) an operational issue with the Respondent's client management system involving a blackout period during a system maintenance window, during which time certain information that ought to have been automatically transmitted from the client account management system to the fee-billing engine was not being captured, and (2) manual input errors arising during the process of transferring fee rates from the client account management system to the fee-billing engine. Both of these issues resulted in discrepancies between the fee agreement reached with the client and the fees actually charged to those clients.

12. In light of these findings, the Respondent engaged Deloitte to assist in proactively ascertaining the scope of the Fee Issue and any potential impact to the Respondent's clients. In doing so, the Respondent reviewed all fee schedules stored in the client account management system during the relevant time period (the "Review"). The Respondent also proactively reported the matter to IIROC Staff.

The Remediation

13. The Respondent has proactively committed to a Remediation Plan which involves a plan to (i) remediate impacted clients who may have been overcharged as a result of the Fee Issue ("Client Remediation") and (ii) address the root causes of the Fee Issue through the implementation of system

changes and more effective internal controls ("Issue Remediation").

14. The amount of remediation is $7.02MM (combined CAD, USD, and inclusive of sales tax and 5% opportunity costs) in respect of 12,780 accounts.

15. The Client Remediation and Issue Remediation are described further, below.

(i) Client Remediation

16. As noted above, the Respondent, with the assistance of Deloitte, conducted an in-depth Review to identify and remediate impacted clients.

17. The Review included identifying mismatches in the fees between the client account management system and the fee billing engine since August 2014, when the current client account management system came into existence. Where mismatches were identified, a determination was made as to whether those mismatches resulted in an overcharge, undercharge or no financial impact at all.

18. The Respondent committed to the following to remediate impacted clients:

    (a) issuing refunds in the amount of the overcharge, plus tax and opportunity cost, to all clients with accounts that were overcharged as a result of the Fee Issue;

    (b) ensuring the Respondent's systems reflect the correct fee rates for all active accounts; and

    (c) development and roll out of comprehensive advisor outreach to ensure completeness of the Review, and ensure advisors had the necessary information to communicate with their clients about the error and the plan to correct it.

(ii) Issue Remediation

19. To address the control deficiencies identified by the Review, the Respondent has taken the following action:

    (a) correction of the operational error caused by the blackout period, as described above;

    (b) implementation of a control to ensure the Respondent's systems reflect the correct fee rates, specifically, an automated weekly reconciliation between the client account management system and the fee-billing engine that will capture any manual transcription errors and any miscommunication between the systems from a technological perspective; and

    (c) an end-to-end review by Deloitte of the system through which fees are imported from the client account management system into the fee-billing engine. The review considered the new and pre-existing controls to validate that there were no other gaps in process or controls.

Failure to Supervise

20. The Respondent failed to establish and maintain a system of controls that was adequate:

    (a) to reasonably ensure that fee information being manually entered into the client account management system was accurate and consistent with the fee agreement reached with clients; and

    (b) to ensure that the fee discrepancies were identified in a timely manner.

Mitigating Factors

(i) Proactive and Exceptional Cooperation and Early Resolution

21. The Respondent self-reported the Fee Issue to IIROC in September 2021 and immediately commenced the Review and developed a plan to correct any ongoing issues and remediate clients, while providing

Enforcement Staff with regular progress updates. The Respondent commenced its client remediation in July 2022.

22. The Respondent promptly shared the detailed findings of its Review with Enforcement Staff, providing substantial assistance to Enforcement Staff's investigation. The Respondent demonstrated proactive and exceptional cooperation and has been forthcoming with Enforcement Staff in respect of the issues raised in this settlement agreement.

23. Enforcement Staff has agreed to a 30% reduction of the fine it would otherwise have agreed to based on the proactive and exceptional cooperation by the Respondent, the remediation measures implemented, the compensation paid to clients, and the Respondent's willingness to resolve this matter in a timely manner. These factors led to an early resolution of this matter.

(ii) Corrective Action Initiated

24. The Respondent initiated a comprehensive review of fee agreements dating back to 2014 as described herein after the identified instances of inconsistencies.

25. As described above, the Respondent has implemented an automated weekly reconciliation process to compare fee rates between the client account management system and the fee-billing engine.

26. The Respondent also took immediate initiative to ensure a thorough review in respect of the root causes of the Fee Issue and how they could be remedied. These initiatives included, but were not limited to, the following:

    (a) hiring an independent consultant, Deloitte, to assist with the review methodology and analysis of inconsistencies between client account management system and the fee-billing engine;

    (b) review and correction of the disruption in the daily change reports;

    (c) implementation of a control to ensure the Respondent's systems reflect the correct fee rates;

    (d) undertaking, through Deloitte, an end-to-end review of existing and new controls to confirm there were no other gaps that needed to be addressed; and

    (e) development and roll out of a comprehensive advisor outreach action plan to ensure completeness of the review and enhance its training of advisors.

27. For instances where undercharges were observed, no action was taken with respect to collecting the undercharged amounts. Moreover, where the same account had both overcharges and undercharges during the relevant period, the undercharges were not used to offset overcharges.

Remediation Plan

28. As described above, the Respondent voluntarily developed and is implementing a Remediation Plan that is based on client transaction information contained in its books and records. As of November 2022, the Respondent has remediated all active account holders and 74% of closed account holders who were overcharged between 2014 and Q3 of 2022 as a result of the Fee Issue.

29. Any fees that are not deposited by former clients or are *de minimis* in amount (less than $25.00) will be donated to a charity without benefit to the Respondent.

PART IV – CONTRAVENTIONS

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

    Between 2014 and 2021 the Respondent failed to establish and maintain a system of controls and

supervision to ensure client fee agreements were accurately recorded in its fee management systems and clients were charged appropriately, contrary to IIROC Dealer Member Rules 38.1 and 2500.

PART V – TERMS OF SETTLEMENT

31. The Respondent agrees to a fine of $119,000 and costs of $5,000.

32. The Respondent agrees to provide its first report on the execution of the Remediation Plan to Staff by December 30, 2022 and as thereafter required by Staff to ensure the Remediation Plan is completed satisfactorily.

33. 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

34. 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.

35. 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

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

37. 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.

38. 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.

39. 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.

40. 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.

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

42. 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.

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

44. 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

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

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

DATED this "5th" day of "December", 2022.

CIBC World Markets Inc.
Per: "Ed Dodig"

Name: Ed Dodig

Title: EVP & Head, Private Wealth & Wood Gundy Canada

I have authority to bind the Corporation.

"Ricki Ann Newmarch"

Witness

"Sally Kwon"

Sally Kwon

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

The Settlement Agreement is hereby accepted this "20" day of "December", 2022 by the following Hearing Panel:

Per: "Marvin Huberman"

Panel Chair

Per: "Mary Savona"

Panel Member

Per: "Shaine Pollock"

Panel Member