Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

IN THE MATTER OF A SETTLEMENT HEARING
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: MD Shakirul Alam

Heard: June 29, 2020 by electronic hearing in Toronto, Ontario
Decision: June 29, 2020
Reasons for Decision: July 24, 2020

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, CC, QC	Chair
Edward V. Jackson	Industry Representative
Guenther W. K. Kleberg	Industry Representative

Appearances:

Paul Blasiak	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
MD Shakirul Alam	)	Respondent

Background

1. This is a Settlement Hearing under Section 24.4 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the "MFDA"). The hearing was held on Monday, June 29, 2020. The full Settlement Agreement, dated February 16, 2020, entered into between Staff of the MFDA and MD Shakirul Alam ("Mr. Alam" or the "Respondent") is available on the MFDA website. Mr. Alam appeared in person and was not represented by counsel.

2. The Panel accepted the proposed Settlement Agreement at the conclusion of the June 29, 2020 hearing, with reasons to follow. These are our reasons for the decision.

3. From April 2017 to April 2018, the Respondent was registered in Ontario as a dealing representative (formerly known as a mutual fund salesperson) with CIBC Securities Inc. ("the Member"), a Member of the MFDA. On April 11, 2018 the Respondent was terminated by the Member and is not currently registered in the securities industry in any capacity. At all material times, the Respondent conducted business in the Greater Toronto Area, Ontario.

Misconduct

4. The allegations in the Notice of Settlement Hearing dated February 18, 2020 state that the Respondent, on February 14, 2018 engaged in personal financial dealings with a client by:

a) soliciting and borrowing $15,000 from the client: and

b) engaging in a transaction with the client whereby the client paid $17,000 to the Respondent and at approximately the same time a third party paid the equivalent of $17,000 CAD to the client's brother outside Canada;

and that this conduct gave rise to a conflict or potential conflict of interest that the Respondent failed to disclose to the Member or address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the policies and procedures of the Member and MFDA Rules 2.1.4, 2.1.1, 2.10, 2.5.1 and 1.1.2.

5. In paragraph 25 of the Settlement Agreement, the Respondent admits the allegations set out in the previous paragraph.

The Facts

6. The facts, which the Respondent agrees to, are set out in detail in paragraphs 10 to 21 of the Settlement Agreement.

7. Client SH was a client of the Member whose accounts were serviced by the Respondent and other Approved Persons of the Member. The Respondent also provided banking services to clients of the bank affiliated with the Member (the "Bank") in his capacity as an employee of the Bank.

8. On February 14, 2018 the Respondent met with client SH. During the meeting, the Respondent:

a) solicited and borrowed $15,000 from client SH (the "SH Loan"): and
b) engaged in a transaction with client SH (the "SH Transaction") whereby client SH paid $17,000 to the Respondent and at approximately the same time, a third party individual who the Respondent was acquainted with paid the equivalent of $17,000 CAD to client SH's brother outside of Canada.

9. In both cases, Client SH transferred the funds from lines of credit with the Bank.

10. The solicitation of the SH Loan and SH Transaction gave rise to a conflict or potential conflict of interest.

11. The Respondent did not provide any disclosure in writing to client SH informing client SH that the solicitation of the SH Loan or the SH Transaction gave rise to a conflict or potential conflict of interest.

12. The Respondent did not document the terms of the SH Loan or SH Transaction in writing and the Respondent did not disclose to the Member that he had solicited and accepted money from client SH by means of the SH Loan or the SH Transaction.

13. As noted in paragraph 8(b) above and as noted in paragraph 12(b) of the Settlement Agreement, at approximately the same time or shortly after, $17,000 was provided to the

Respondent in respect of the SH Transaction, a third party acquaintance of the Respondent paid an equivalent amount to client SH's brother in a foreign country.

Settlement Agreement

14. Staff and the Respondent agreed to the following terms of settlement set out in paragraph 26 of the Settlement Agreement:

a) the Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of 6 months from the date that this Settlement Agreement is accepted by a Hearing Panel, pursuant to section 24.1.1(e) of MFDA By-law No.1;

b) the Respondent shall pay a fine in the amount of $7,500, pursuant to s. 24.1.1(b) of MFDA By-law No. 1, which shall be payable in certified funds on the date that this Settlement Agreement is accepted by a Hearing Panel;

c) the Respondent shall pay costs in the amount of $3,750, pursuant to s. 24.2 of MFDA By-law No. 1, which shall be payable in certified funds on the date that this Settlement Agreement is accepted by a Hearing Panel;

d) the Respondent shall in the future comply with MFDA Rules 2.1.4, 2.2.1, 2.10, 2.5.1 and 1.1.2; and

e) the Respondent will attend in person on the date set for the Settlement Hearing.

The Law

15. There are many cases holding that borrowing from a client is improper conduct. See, for example, *Re Nunweiler* MFDA File No. 201030; *Re Maxwell* MFDA File No. 2018123; and *Re Stutz* MFDA File No. 2018129.

16. MFDA Rule 2.1.4 specifically provides for the avoidance of conflicts of interest and there is an MFDA Staff Notice (MSN-0047, dated October 3, 2005) on the topic, which states:

> "Borrowing from a client by either the Member or Approved Person raises a significant and direct conflict that in almost all cases will be impossible to resolve in favour of the client. While such activity is not explicitly prohibited under MFDA Rules, MFDA staff are unaware of any circumstances where Members of Approved Persons proposing to enter

into any such arrangements would be able to demonstrate that the conflict has been properly dealt with."

17. In *Re Nunweiler* MFDA (File No. 201030 at paragraph 17) an MFDA Panel stated:

> "Where an Approved Person borrows money from a client, or arranges investments by clients in companies in which the Approved Person has a personal interest, such conduct immediately raises a significant actual conflict of interest, a conflict that in most if not all cases will be impossible to resolve in favour of the client. It is patently obvious that facilitating investments by a client in your company, or borrowing money from a client is not the exercise of responsible business judgment in the best interests of the client."

18. The Member also has policies and procedures that prohibited the Respondent from borrowing from clients and MFDA Rule 1.1.2 requires each approved person who participates in any securities related business in respect of a Member to comply with the By-laws and Rules as they relate to the Member or Approved Person.

Acceptance of Settlement Agreement

19. As stated above, the Panel accepted the terms of the Settlement Agreement. A Panel can either accept or reject a Settlement Agreement. It cannot modify it.

20. As many Panels have stated, borrowing from a client is serious misconduct.

21. In mitigation, the Respondent has not previously been the subject of MFDA disciplinary proceedings and these two improper transactions by the Respondent are the only ones known to the MFDA.

22. Moreover, the client did not complain about the Respondent's conduct. There was no misappropriation of funds and no client harm. Between February 20, 2018 and July 2018 the Respondent repaid all of the principal amount of the SH Loan to client SH and interest totaling approximately $200.

23. By entering into the Settlement Agreement, the Respondent has accepted responsibility for his misconduct and avoided the necessity of the MFDA incurring the time and expense of conducting a full disciplinary proceeding.

24. The penalty is in line with the MFDA Sanction Guidelines and less serious than the comparable cases cited to us by counsel: *Re Toussaint* MFDA File No. 201030; *Re Smiechowski* MFDA File No. 201007; and *Re Secord* MFDA File No. 201508.

25. The penalty in the present case of $7,500 will provide a large measure of specific deterrence to the Respondent and general deterrence to others.

26. Settlements can be important and useful in achieving outcomes which further the goals of the securities regulatory context. The British Columbia Court of Appeal affirmed the British Columbia Supreme Court's statement with respect to a settlement by the British Columbia Securities Commission (*British Columbia Securities Commission v. Seifert* [2007] B.C.C.A. 484, para. 31):

> "Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation."

27. Hearing Panels should respect settlements worked out by the parties. A Panel does not know what led to a settlement, what was given up by one party or the other in the course of the negotiations, and what interest each party has in agreeing to resolve the matter. The Panel cannot go beyond the Settlement Agreement. There are almost always facts that play a role in the settlement which are not set out in the Settlement Agreement or brought to the attention of the Panel.

28. As a Panel stated (*Re Keshet*, File No. 201419 at paragraph 7), to take one of many such cases: "It is well established that hearing panels should not interfere lightly in negotiated settlements and should not reject a settlement agreement unless it views the proposed penalty clearly falling outside a reasonable range of appropriateness." There are many similar statements by MFDA Panels, stemming from the leading decision of *Re Milewski* [1999] I.D.A.C.D. No. 17, which stated: "A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness."

29. The penalty agreed to in this case clearly falls *within* "a reasonable range of appropriateness."

30. For the above reasons we accepted the Settlement Agreement.

DATED this 24th day of July, 2020.

"Martin L. Friedland"
Martin L. Friedland, CC, QC
Chair

"Edward V. Jackson"
Edward V. Jackson
Industry Representative

"Guenther W. K. Kleberg"
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