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: Bradley John Gascho

Heard: July 31, 2018 in Toronto, Ontario
Decision: July 31, 2018
Reasons for Decision: August 21, 2018

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.	Chair
Kenneth P. Mann	Industry Representative
Joseph Yassi	Industry Representative

Appearances:

Michelle Pong	)	Counsel for the Mutual Fund Dealers Association of Canada
Ellen Bessner	)	Counsel for the Respondent
Bradley John Gascho	)	Respondent, in person

Background

1. This is a Settlement Hearing under Section 24.4 of By-law No. 1 of the Mutual Fund Dealers Association of Canada ("MFDA"). The hearing was held on Tuesday, July 31, 2018. The full Settlement Agreement, dated June 22, 2018, entered into between Staff of the MFDA and Bradley John Gascho ("Respondent") is available on the MFDA website. The Respondent appeared in person at the hearing with counsel.

2. The Panel accepted the proposed Settlement Agreement on July 31, 2018, with reasons to follow. These are our reasons for the decision.

3. The Respondent has been registered in the mutual fund industry since 1993. From February 5, 2002 to March 18, 2016, the Respondent was registered in Ontario as a mutual fund salesperson (now known as a dealing representative) with FundEX Investments Inc. ("FundEX"), a Member of the MFDA. At all material times the Respondent conducted business in Kitchener, Ontario.

4. On March 19, 2016, FundEX terminated the Respondent as a result of the conduct described below. The Respondent is not currently registered in the securities industry in any capacity.

Contraventions

5. The Respondent's contraventions involved recommendations by the Respondent and the subsequent purchase by his clients of investments in gold and/or precious metals sector funds. As of April 2, 2015, seventy-three of his clients held over 25% of their investment holding in such funds. Thirty-nine of the clients were age 60 and over.

6. There are five specific contraventions set out in paragraphs 41 to 45 of the Settlement Agreement. Paragraph 41 involved all seventy three clients and states:

> "The Respondent admits that between 2002 and March 18, 2016, the Respondent recommended to at least 73 clients that the clients concentrate at least 25% of their investment holdings in gold and/or precious metals sector funds, without conducting adequate due diligence to assess the suitability of his investment recommendations, having regard to the essential KYC ["Know Your Client") factors relevant to each individual client, including the client's age, risk tolerance, ability to withstand investment losses, and investment knowledge and experience, contrary to MFDA Rules 2.2.1 and 2.1.1."

7. The other contraventions involved specific clients, WA. and EJ. Paragraphs 42, 44, and 45 of the Settlement Agreement involve client WA, a senior, where it is admitted by the Respondent that he did not explain the risk of such investments, did not adequately record the KYC factors of WA and did not use due diligence to ensure that the recommendations were suitable for client WA. These admissions were as follows:

> Paragraph 42: "The Respondent admits that between September 2007 and November 2014, the Respondent misrepresented, failed to fully and adequately explain, or omitted to explain the risks and benefits of investing in gold or precious metals sector funds to a senior client, WA, thereby failing to ensure his recommendations were suitable for client WA, contrary to MFDA Rules 2.2.1 and 2.1.1."
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> Paragraph 44: "The Respondent admits that between September 2007 and November 2014, the Respondent failed to use due diligence to learn and accurately record the essential KYC factors relative to a senior client, WA, prior to making investment recommendations, contrary to MFDA Rules 2.2.1 and 2.1.1."
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> Paragraph 45: "The Respondent admits that between September 2007 and November 2014, the Respondent failed to use due diligence to ensure that each recommendation made to a senior client, WA, was suitable for Client WA, when he recommended that client WA concentrate her investment holdings in gold and precious metals sector funds, contrary to MFDA Rules 2.2.1 and 2.1.1."

8. A further contravention involved client EJ, also a senior: Paragraph 43 states:

> "The Respondent admits that in July 2015, the Respondent increased the risk tolerance of a senior client, EJ, on her account forms in order to ensure that the KYC information for client EJ matched his investment recommendations to concentrate a substantial portion of client EJ's investment holdings in gold or precious metals sector funds, contrary to MFDA Rules 2.2.1 and 2.1.1."

9. Details with respect to the concentration in gold and precious metals sector funds for these clients can be found in paragraphs 11 to 40 of the Settlement Agreement.

Terms of Settlement

10. The Respondent agreed to the following terms of settlement in paragraph 46 of the Settlement Agreement:

a) "the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFA Member shall be prohibited for a period of three months from the date of the order, pursuant to section 24.1.1(e) of MFDA By-law No. 1;
b) the Respondent shall pay a fine in the amount of $35,000, payable in six monthly instalments of $5,833.33 each, commencing one month from the date the Settlement Agreement is accepted by the Hearing Panel, pursuant to section 24.1.1(b) of MFDA By-law No. 1;
c) the Respondent shall pay costs in the amount of $5,000, payable on or before the date of the settlement hearing, pursuant to section 24.2 of MFDA By-law No. 1;
d) the Respondent shall in the future comply with all MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulation made thereunder, including MFDA Rules 2.1.1 and 2.2.1; and
e) the Respondent will attend in person, on the date set for Settlement Hearing."

Acceptance of Settlement Agreement

11. 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..

12. The conduct in this case was serious. The Respondent knew or should have known that the concentration of investing in any high risk product requires great care to know the client, to ensure that the product is suitable for the client and that the risks are carefully explained to the client. See the cases cited in paragraph 18 below in proceedings brought for similar conduct by IIROC and the MFDA. The importance of diversification is well known in the industry.

13. Many of the clients were seniors. Some had few resources to draw on in their retirement and therefore had no business investing in a high risk fund. WA's investment in gold and precious metals was particularly serious. She and her husband retired with a modest annual income of between $30,000 and $50,000. He then died. As of April 2015 she had about $165,00 invested in gold and precious metals sector funds, which comprised 43% of her portfolio. She incurred a loss of a little over $10,000 from her investments in gold and precious metals sector funds. As the Settlement Agreement states in paragraph 31: "Given her age and level of income, client WA did not want to lose money and wanted safe investments." As of February 2016 she incurred a loss of a little over $10,000 from her investments in gold and precious metals sector funds. She was then 78 years old and complained to FundEX, which later in 2016 paid her just over $20,000 for her investment losses, including her investments in gold and precious metals sector funds.

14. Mitigating factors include the fact that the Respondent has been in the securities industry since 1993 and had not previously been the subject of any disciplinary proceedings. Moreover, during his time at FundEX the Respondent serviced approximately 282 clients with assets under administration totaling approximately $25,000,000 as of April, 2015. Out of these clients, 73 – about a quarter of his clients – were heavily invested in the gold and precious metal sector funds.

15. Again in mitigation, most gold and precious metal sector funds had not been considered high risk in earlier periods. So the wrongdoing was as much about, and perhaps more about, not taking the clients out of the product as it was about putting them into it in the first place. As the Settlement Agreement states (paragraphs 13, 17, and 19): "The majority of the gold and/or precious metals sector funds consisted of two BMG funds which were rated as moderate risk at the time of investing. In or around, November 2017 these BMG funds were re-rated from moderate to high risk…Despite the Clients holding over 25% of their investment holdings in gold and/or precious metals sector funds, the Respondent did not recommend that the Clients reduce their concentration in gold and/or precious metals sector funds…When the value of gold and precious metals sector funds started to decline, the Respondent failed to recommend to the Clients that they reduce their concentration in gold and/or precious metal sector funds."

16. The three-month prohibition from conducting securities related business with any Member of the MFDA is a significant penalty and along with the substantial monetary fine of $35,000 will serve as a general deterrent to others in the industry and a specific deterrent, if one is needed, to the Respondent. Moreover, the Respondent will have been out of the industry for over two years, which is a form of penalty that should be taken into account in mitigation.

17. The monetary penalty is in line with the many cases cited to us by counsel. See *Re Geraldine Mannings* (2015 LNIIROC22); *Re Roland Lemay* (MFDA File No. 201634); *Re Christopher J. Singer* MFDA File No. 201636); *Re Boyd Dean Yahn* (MFDA File No. 201746); and *Re Shelley Willow Will* (MFDA File No. 201763). It is also consistent with the MFDA Penalty Guidelines, which suggest that a $10,000 fine is the minimum penalty in such cases.

18. Further, by entering into a Settlement Agreement the Respondent has accepted responsibility for his misconduct, recognizes its seriousness, and has exhibited remorse. And by entering into the Agreement, the Respondent saved the MFDA the time, resources and expense associated with conducting a full hearing of the allegations.

19. Settlements can be important and useful in achieving outcomes which further the goals of the securities regulatory context. The British Columbia Court of Appeal stated with respect to a settlement by the B.C. Securities Commission (*B.C. Securities Commission v. Seifert* [2007] B.C.J. No. 2186, para. 49 (B.C.C.A.)):

> "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."

20. 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.

21. 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." This is particularly so, we would add, when experienced counsel have been the negotiators, as in the present case.

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

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

DATED this 21st day of August, 2018.

"Martin L. Friedland"

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

"Kenneth P. Mann"

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