

**Decision and Reasons (Penalty)**

**File No. 201415**



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

**IN THE MATTER OF A DISCIPLINARY HEARING  
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF  
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

**Re: Michael Andrew Harrigan**

Heard: April 16, 2019 in Halifax, Nova Scotia  
Decision and Reasons (Penalty): September 19, 2019

**DECISION AND REASONS  
(PENALTY)**

Hearing Panel of the Atlantic Regional Council:

Edward W. Keyes, QC  
Ann C. Etter  
Robert Malcolm

Chair  
Industry Representative  
Industry Representative

Appearances:

Lyla Simon	)	Enforcement Counsel for the Mutual Fund
	)	Dealers Association of Canada
	)	
	)	
Michael Andrew Harrigan	)	Respondent, in person
	)	
	)	

## Introduction

1. By Notice of Hearing dated May 12, 2014 the Mutual Fund Dealers Association of Canada (“MFDA”) alleged that Michael Andrew Harrigan (the “Respondent”) committed the following violations of the By-Laws, Rules, or Policies of the MFDA:

**Allegation #1:** Between 2005 and 2008, the Respondent misrepresented the know-your-client (“KYC”) information on the account opening and loan application documents of seven clients, thereby engaging in conduct unbecoming an Approved Person and failing to observe high standards of ethics and practice in the conduct of business, contrary to MFDA Rules 2.2.1 and 2.1.1.

**Allegation #2:** Between 2005 and 2008, the Respondent misrepresented, failed to fully and adequately explain, or omitted to explain, the risks, benefits, material assumptions, costs and features of a leveraged investment strategy that he recommended and implemented in the accounts of seven clients, including the risks that:

- a) The underlying investments might decline in value such that the clients might incur investment losses and would be unable to rely on the sale proceeds of the investments to pay back their investment loans; and
- b) The underlying investments might reduce, suspend or cancel altogether the distributions paid to investors upon which the clients were relying to make the payments on their investment loans.

thereby failing to ensure that the leveraged investment strategy was suitable and appropriate for the clients and in keeping with their investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1.

**Allegation #3:** Between 2005 and 2008, the Respondent recommended and facilitated the implementation of a leveraged investment strategy in the accounts of seven clients without performing the necessary due diligence to learn the essential facts relative to the clients and without ensuring that the leveraged investment strategy was suitable for the clients and in keeping with their investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1.

2. After a contested hearing on the merits we found that allegations 1, 2, and 3 had been proven in that between 2005 and 2008, the Respondent recommended and facilitated the implementation of a leveraged investment strategy in the accounts of six clients without performing the necessary due diligence to learn the essential facts relative to the clients and without ensuring that the leveraged investment strategy was suitable for the clients and in keeping with their investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1. On November 28, 2018, we released our Reasons for Decision (Misconduct). It is unnecessary to reproduce in detail our findings as our earlier reasons provide much of the factual reasons for our decision as to the penalty that should be imposed on the Respondent.

3. On April 16, 2019 we heard submissions on Penalty and reserved our decision. These are our decision and written reasons.

### **Relevant Considerations**

4. Recent MFDA panel decisions have held that there are five factors which should be considered when determining an appropriate penalty:

- The protection of the investing public;
- The integrity of the securities market;
- Specific and general deterrence;
- Protection of the governing body's membership; and
- Protection of the integrity of the governing body's enforcement processes.

*Re Larson*, 2009 LNCMFDA 30

*Re Popovich*, 2015 LNCMFDA 60

*Re Pretty*, 2015 LNCMFDA 56

5. Of these factors, the most important to consider in arriving at an appropriate penalty is the protection of the investing public. The penalty needs to deter both the Respondent (specific deterrence) and others in the industry (general deterrence) from committing similar misconduct in the future. The penalty must also foster improved compliance with the applicable Rules, Policies, and By-laws of the industry. It should serve to promote confidence by the investing public in not

only the securities industry and its participants but also in the securities markets and regulatory system as a whole. The penalty arrived at must be fair and proportional to the misconduct, taking into consideration the specific circumstances of the situation while considering any mitigating circumstances, all with a view to ensuring the protection of the public.

6. In *Lamoureux (Re)*, [2002] A.S.C.D. No. 125, the Alberta Securities Commission identified a broad list of non-exhaustive factors also to be considered in determining an appropriate penalty:

- The seriousness of the allegations proven;
- The Respondent's past conduct, including prior sanctions;
- Mitigating factors;
- The Respondent's experience in the capital markets, and the level of the Respondent's activity in the capital markets;
- Whether the Respondent recognizes the seriousness of the improper activity;
- The harm suffered by investors as a result of the Respondent's activities;
- The benefits received by the Respondent as a result of the improper activity;
- The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in those markets;
- The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
- The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets, and
- Previous decisions made in similar circumstances.

7. The recently released MFDA Sanction Guidelines offer further guidance to hearing panels in determining an appropriate penalty by providing a framework of applicable regulatory principles. The factors set out in the Guidelines include:

- General and specific deterrence;
- Public confidence;
- The seriousness of the allegations proved against the Respondent;
- Whether the Respondent recognizes the seriousness of the misconduct;
- The benefits received by the Respondent as a result of the misconduct;
- The harm suffered by investors as a result of the Respondent's misconduct;
- The Respondent's past conduct, including prior sanctions;
- Whether a sanction was imposed on the Respondent for the same misconduct by the Member or other regulator;
- Previous decisions made in similar circumstances;
- For multiple violations, the total or cumulative sanction should appropriately reflect the totality of the misconduct;
- Ability to pay is a consideration when imposing an appropriate monetary sanction;
- Whether the Respondent voluntarily implemented corrective measures after the misconduct;
- Whether the Respondent made voluntary acts of compensation, restitution or disgorgement to remedy the misconduct; and
- The Respondent's proactive and exceptional assistance to the MFDA.

8. In arriving at our decision on an appropriate penalty, we have considered all of the factors stated in *Lamoureux*, as well as, the non-binding MFDA Sanction Guidelines. In the context of this case, general deterrence figures prominently, though not exclusively, in our determination.

### **Parties Positions**

9. Staff proposes that we prohibit the Respondent from conducting securities related business in any capacity for a period of at least five years. They submit that a fine in the amount of at least \$50,000, and costs of at least \$30,000 are appropriate in the circumstance of this case.

10. The Respondent takes a markedly different view on what he believes the penalty should be. He argues that he should only be banned from conducting securities related business in any capacity for a period of one year while imposing a permanent prohibition banning him from any

leveraging activities with clients, including but not limited to recommending or applying for investment loans. The Respondent also proposes a fine of no more than \$25,000 and costs in the amount of \$10,000.

## **Analysis**

11. The proven allegations against the Respondent are very serious and have had a significant impact on the Respondent's clients. His clients came to him with very little knowledge or experience with the capital markets and suffered significant financial losses as a result of the Respondent's misconduct. It is clear that the impact of this financial hardship will be long-lasting on each one of them.

12. The Respondent has had a lengthy career in the financial industry, some thirty plus years, as he attested to during his submissions. While we are aware that this is the Respondent's first disciplinary matter, we note that his misconduct began in 2005 and continued until the Respondent's registration was terminated in 2011. Notwithstanding his lack of a disciplinary record, the passage of time since his misconduct and the Respondent's personal and family circumstances, the seriousness and duration of his misconduct far outweigh these possibly mitigating factors in the panels' opinion.

13. We note that when given the chance to acknowledge the seriousness of his actions and to take responsibility, the Respondent chose instead to try and justify his client losses on the performance of the markets and to focus on the negative articles that had been published about him regarding this matter. None of these factors mitigate the Respondent's actions in our opinion. The Respondent misrepresented his clients financial situation such that lenders approved loans which allowed his clients to be placed in risky leveraging investment strategies. As set out in detail in our Decision, the Respondent, *inter alia*, misrepresented, failed to adequately explain, or omitted to explain and in fact did not understand himself, the risks, benefits, material assumptions, features and costs of the leveraged investment strategy and its underlying investments that he had recommended and implemented in his clients' accounts.

14. The excessive leveraging strategy he promoted was entirely unsuitable for his clients and caused them significant hardship. Staff submits that much of the Respondents misconduct was

specifically concealed by the Respondent from the Members. We agree. If the clients information had not been misrepresented by the Respondent on the KYC's, his misconduct might have been discovered much earlier and had less of an impact on his clients.

15. We note that the harm suffered by the Respondents clients has been significant and long lasting. Prior to dealing with the Respondent, these individuals had little experience investing and had no experience with leveraging to invest. They placed their complete trust in the Respondent and in our opinion he clearly betrayed them. The leveraged funds in question totalled approximately \$860,000 and the respondent benefited financially from the commissions that were earned on the mutual fund sales. We noted this lack of remorse first in our Reasons for Decision (Misconduct) and we again note that it has not changed in his submissions on penalty.

16. The Respondent raised in his submissions his inability to pay any penalty imposed on him by the Panel. We are cognizant of the Respondent's financial situation given the totality of the situation. In *Re Perry*, 2014 LNCMFDA 56 the Hearing Panel determined that a proper fine should offset any financial benefit that the Respondent received and that when the circumstances are just, that an additional amount may be added to reflect the deliberate and intentional disregard to the obligations and duties owed to Know-Your-Client. (at paras 28-29) The approximate amount of monies involved in this matter was \$860,000, and the Respondent did receive financial benefits in relation to this amount.

17. Under the circumstances and on considering the totality of the situation, it is clear that a substantial fine is warranted and supported by the existing jurisprudence we have reviewed in this matter. The imposition of a fine signals repudiation of the Respondent's conduct and serves the objectives of specific and general deterrence. In our view a fine of \$50,000 is appropriate taking into consideration the totality of the circumstances regarding the misconduct of the Respondent.

18. The Respondent argued that we should only prohibit him from conducting securities related business in any capacity for a period of one year while also imposing a permanent prohibition of any engagement in any leveraging activities with clients, including but not limited to recommending or applying for investment loans. Staff on the other hand submits that a five year prohibition from conducting securities related business in any capacity is appropriate.

19. The cases provided by Staff are instructive on the proper length of any suspension. A permanent prohibition is unnecessary in this case and in our opinion would be excessive. That being said, a one year prohibition, as proposed by the Respondent, is clearly insufficient and is not in line with the guiding factors on imposing sanctions. In our opinion a five year ban is both required and appropriate in this matter.

20. The Respondent proposed costs of no more than \$10,000. Staff provided a partial bill of costs and submits \$30,000 is appropriate. While we recognize that Staff's partial bill of costs does not reflect the true costs of this case, we also recognize that the MFDA should not shoulder the costs of this matter alone. In our opinion an appropriate award for costs in this matter is \$25,000.

**Order:**

21. Accordingly, we make the following Order:

- a) the Respondent is prohibited for at least five years from conducting any securities related business in any capacity as an Approved Person of, or in association with, any Member of the MFDA pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- b) the Respondent shall pay a fine in the amount of \$50,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1; and
- c) the Respondent shall pay costs of this proceeding in the amount of \$25,000, pursuant to section 24.2 of MFDA By-law No. 1.

**DATED** this 19<sup>th</sup> day of September, 2019.

“Edward W. Keyes”

Edward W. Keyes, QC  
Chair

“Ann C. Etter”

Ann C. Etter  
Industry Representative

“Robert Malcolm”

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Robert Malcolm  
Industry Representative

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