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: Roland Lemay

Heard: February 2, 2017, in Vancouver, British Columbia
Reasons for Decision: February 28, 2017

REASONS FOR DECISION

Hearing Panel of the Pacific Regional Council:

Robert G. Ward, Q.C.	Chair
Liz Chichka	Industry Representative
Bob Sokugawa	Industry Representative

Appearances:

Christopher Corsetti	)	Counsel for the Mutual Fund Dealers Association of Canada
Thomas S. Newnham	)	Counsel for the Respondent

Background

1) This hearing was duly constituted by the Mutual Fund Dealers Association of Canada (the "MFDA"). The disciplinary hearing was originally set to commence on July 13, 2016, later being adjourned to be heard February 1 to 3, 2017. In the interim, and subject to a decision of the Hearing Panel, a settlement agreement ("Settlement Agreement") dated January 12, 2017, was entered into between staff of the MFDA ("Staff") and Mr. Lemay (the "Respondent"). On February 2, 2017, the Settlement Agreement between the Staff and the Respondent was considered by this Panel. The proposed Settlement Agreement concerns allegations that:

a) between January 2007 and December 30, 2014, the Respondent recommended to at least 142 clients that the clients concentrate all, or a substantial portion, of their investment holdings in precious metals sector funds, without conducting adequate due diligence to assess the suitability of his investment recommendations on a client-by-client basis having regard to the essential Know-Your-Client ("KYC") 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 Rule 2.2.1 and 2.1.1;

b) between January 2007 and December 30, 2014, the Respondent recorded that at least 142 clients had "high" risk tolerance on account forms in order to ensure that the KYC information for the clients matched his investment recommendations to concentrate all, or a substantial portion, of the clients' investment holdings in precious metals sector funds, contrary to MFDA Rule 2.2.1 and 2.1.1;

c) between January 2007 and December 30, 2014, the Respondent failed to fully explain the risks and benefits of investing in precious metals sector funds, thereby failing to ensure that his recommendations were suitable for the clients and in keeping with their investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1;

d) between January 2007 and December 30, 2014, the Respondent failed to use due diligence to learn and accurately record the essential KYC factors relative to clients DH and FH prior to making investment recommendations and accepting

investment orders from clients DH and FH, contrary to MFDA Rule 2.2.1 and 2.1.1; and

e) between January 2007 and December 30, 2014, the Respondent failed to use due diligence to ensure that each order accepted and recommendation made to clients DH and FH was suitable for the clients and in keeping with their investment objectives when recommended that the clients concentrate all of their investment holdings in a single precious metal sector fund, contrary to MFDA Rule 2.2.1 and 2.1.1.

2) On February 2, 2017, the Hearing Panel considered the Settlement Agreement to determine whether or not the Settlement Agreement should be accepted. Both the MFDA Staff, represented by Mr. Corsetti and the Respondent, represented by Mr. Newnham made submissions, which the Panel also considered and found helpful in in its analysis.

3) By unanimous order, the Settlement Agreement was accepted.

FACTS

4) The MFDA and the Respondent agreed to certain facts for the purpose of this Settlement Agreement. Contained in sub-paragraphs 6 to 40 inclusive hereof are the facts, as agreed to between the MFDA and the Respondent, taken verbatim from the Settlement Agreement:

Registration

6. The Respondent has been registered in the securities industry since 1981.

7. From June 1, 2004 to December 12, 2014, the Respondent was registered in British Columbia as a mutual fund salesperson (now known as a dealing representative) with HollisWealth Advisory Services Inc. ("HollisWealth"), a Member of the MFDA.

8. From February 9, 2015 to August 31, 2015, the Respondent was registered in British Columbia as a dealing representative with Investia Financial Services Inc. ("lnvestia"), a Member of the MFDA. On August 31, 2015, Investia terminated the Respondent as a result of the conduct described below.

9. The Respondent is not currently registered in the securities industry in any capacity.

10. At all material times the Respondent conducted business in Vancouver, British Columbia.

Concentration in Precious Metals Sector Funds

11. While registered with HollisWealth, the Respondent serviced 142 clients with assets under administration totaling approximately $9,000,000. Based upon the Respondent's recommendations, these clients held all, or a substantial portion, of their investment holdings in precious metals sector funds.

12. Approximately 95% of the 142 clients were invested in a single precious metals sector fund, namely the Dynamic Precious Metals Fund (the ''DPM Fund''). The DPM Fund primarily holds shares in Canadian and international resource companies, the majority of which produce or explore for gold and other precious metals. The DPM Fund is suitable for investors with a high risk tolerance.

13. The Respondent discussed various investment options with his clients. However, the Respondent recommended precious metals sector funds to all of his clients because he believed that investing in gold based funds involved less risk than investing in the "stock market" which he predicted was going to "crash".

14. The Respondent discussed various investment options with his clients. However, the Respondent did not recommend that clients diversify their investment holdings.

15. As a result of the Respondent's investment recommendations and the instructions provided by the Respondent's clients to the Respondent, the clients' investment holdings were concentrated in precious metals sector funds, with many clients' investment holdings being concentrated in a single fund, the DPM Fund.

Allegation #1 – The Respondent Failed to Assess Suitability on a Client by-Client Basis

16. The Respondent did not fully assess the suitability of his recommendations to purchase precious metals sector funds on a client-by-client basis, having regard to the essential KYC factors relevant to each individual client, prior to making the recommendations to the clients.

17. Rather, the Respondent recommended to all clients that they concentrate their investment holdings in precious metals sectors funds, without

regard to each client's KYC information, based upon his views as to how these funds would perform.

18. The Respondent limited his suitability assessment to disclosing some of the risks of investing in precious metals sector funds without fulfilling his KYC obligations or applying professional judgment to determine whether precious metals sector funds were a suitable match for the client.

19. The Respondent did not fully assess whether it was suitable for each client to hold non- diversified investments.

20. By virtue of the foregoing, the Respondent recommended to at least 142 clients that the clients concentrate all, or a substantial portion, of their investment holdings in precious metals sector funds, without conducting adequate due diligence to assess the suitability of his investment recommendations on a client-by-client basis having regard to the essential KYC 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 Rule 2.2.1 and 2.1.1.

Allegation #2 – The Respondent Recorded KYC Information to Match his Recommendations

21. The Respondent recorded the risk tolerance of each of his clients as "high" regardless of whether or not the client genuinely had a high risk tolerance. The Respondent did this to ensure the client's KYC information would match the risk profile of his investment recommendations, and his clients' instructions, to concentrate their investment holdings in precious metals sector funds. The Respondent's standard practice was to advise his clients that in order to be eligible for his investment recommendations their KYC information would have to indicate a "high" risk tolerance.

22. As a result of the Respondent's practice, all of the 142 clients serviced by the Respondent were recorded on Member account forms as having high risk tolerance.

23. By engaging in the conduct described above, the Respondent recorded that at least 142 clients had "high" risk tolerance on account forms in order to ensure that the Know-Your-Client information for the clients matched his investment recommendations to concentrate all, or a substantial portion, of the clients' investment holdings in precious metals sector funds, contrary to MFDA Rule 2.2.1 and 2.1.1.

Allegation #3 – The Respondent Misrepresented the Risks of Precious Metals Sector Funds

24. In the course of recommending that the clients invest in precious metals sector funds, the Respondent represented that the clients should invest in these

funds for "safety" and that the funds had less risk as compared to investing in the broader "stock market". The Respondent advised clients that, in his opinion, the stock market would "crash at any time" and that gold based funds represented a safer investment alternative.

25. The Respondent failed to fully explain the risks and benefits of investing in precious metals sector funds, including the risk of holding non-diversified investments and the risk that gold based funds would not perform as he represented they likely would.

26. To the extent that the Respondent explained the risks of investing in precious metals sector funds, he failed to provide a balanced presentation of the risks when he described the funds as being a safer investment alternative, in his opinion.

27. By virtue of the foregoing, the Respondent failed to fully explain the risks and benefits of investing in precious metals sector funds, thereby failing to ensure that his recommendations were suitable for the clients and in keeping with the.ir investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1.

Allegations #4 and 5 - Suitability of the Respondent's Investment Recommendations to Clients DH and FH

28. From November 30, 2010 to January 2015, clients DH and FH were clients of HollisWealth and the Respondent was the Approved Person responsible for servicing their investment accounts at HollisWealth.

29. Clients DH and FH were married. On November 30, 2010, client DH was 76 years old and client FH was 82 years old. The clients were both retired and received limited annual incomes of $17,000 per year for client DH and $28,000 per year for client FH. The clients had limited investment knowledge and experience. From 2010 to April 2013 when he passed away, client FH was in a long-term care facility being treated for dementia. The Respondent states he provided investment advice to DH and FH for the purpose of, in part, providing income for FH's ongoing care.

30. The Respondent prepared a New Account Application Form for clients DH and FH ("NAAF") dated November 30, 2010 to open a non-registered joint account for the clients, which recorded the following KYC information:

a. Investment Objective: 100% Growth;
b. Risk Tolerance: 100% High Risk;
c. Time Horizon: Long Term (Greater than 7 years); and
d. Investment Knowledge: Good.

31. The age, health and limited income of clients DH and FH was inconsistent with a long term time horizon, a high risk tolerance and a 100%

growth objective. Furthermore, client DH described herself as risk averse and she had limited investment knowledge and experience. By recording the KYC information that was set out on the November 30, 2010 NAAF, the Respondent either failed to use due diligence to obtain accurate KYC information or failed to accurately record the KYC information of DH and FH, contrary to MFDA Rules 2.2.l(a) and 2.1.1.

32. On or about July 2011, clients DH and FH sold their home and purchased a condominium. From the proceeds of the sale of their home, clients DH and FH had $200,000 available to invest. Client DH required the money and any income that it generated to pay substantial monthly costs of care for client FH. The Respondent discussed various investment options with client DH and advised client DH to invest all of the money exclusively in the DPM Fund.

33. Based upon the Respondent's recommendation, on July 13, 2011 client DH placed an order for a $200,000 purchase in the DPM Fund. The Respondent did not advise client DH to purchase any investment other than the DPM Fund in her portfolio.

34. The Respondent failed to provide clients DH and FH with a fair and balanced explanation of the risks associated with the DPM Fund or the risks of an asset allocation model that was concentrated in a single sector based mutual fund and failed to recommend that they diversify their mutual fund portfolio, contrary to MFDA Rules 2.2.1(c) and 2.1.1.

35. On March 15, 2015, DH submitted a complaint to HollisWealth alleging that the investment recommendations that she had received from the Respondent were unsuitable. At the time, client DH was 80 years old.

36. As a result of the Respondent's unsuitable investment recommendation. DH incurred losses totaling approximately $75,700. HollisWealth subsequently reached a settlement with client DH in respect of her complaint and paid compensation in respect of her investment losses.

37. By recommending to clients DH and FH that they invest 100% of their $200,000 investment in the high risk DPM Fund, the Respondent failed to ensure that the recommendation that he made and the order that he accepted was suitable for clients DH and FH and in keeping with their investment objectives, contrary to MFDA Rule 2.2.1 (c) and 2.1.1.

Additional Factors

38. The Respondent is 79 years old and retired.

39. The Respondent states that he does not own a home or car and has limited financial assets. The Respondent states he is living on a fixed income of $1,400 per month.

40. The Respondent has not previously been the subject of MFDA disciplinary proceeding.

APPLICABLE RULES AND REGULATIONS

5) MFDA Rule 2.1.1 provides standards of conduct which are applicable herein, including the obligation on each Approved Person to:

a) deal fairly, honestly and in good faith with its clients;
b) to observe high standards of ethics and conduct in the transaction of business;
c) to avoid any practices detrimental to the public interest;
d) to have experience and training consistent with the standards prescribed by the Rule and generally by the MFDA.

6) By Rule 2.2.1, each Approved Person is to use due diligence in assessing the essential facts relative to each client in each order accepted, to ensure the acceptance of an order is consistent with good business practice, to ensure that each order accepted and recommendation made is suitable for the client (or alternatively to advise the client of the lack of suitability and to maintain evidence of such advice) and to ensure the suitability of the investments in each client's account is assessed properly under the various circumstances as therein described.

7) On April 14, 2008 (revised February 22, 2013), the MFDA issued Staff Notice MSN-0069 (Suitability) providing guidance on how to establish a suitability framework in satisfying the KYC obligations.

PRINCIPLES GOVERNING THE DETERMINATION OF THIS PANEL

8) By Section 24.4.3 of By-law No. 1 the Hearing Panel is to:

a) accept the Settlement Agreement; or
b) reject it.

In other words, the Panel is not to determine the penalty that it might impose, but to consider whether the Settlement Agreement is a reasonable one under the circumstances.

9) This is consistent with authorities on the topic which state that the Hearing Panel is 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. The role of the Hearing Panel at a settlement hearing is fundamentally different than its role at a contested hearing, where the Panel's duty is to determine the correct penalty.

10) A penalty is not to be rejected unless it clearly falls outside a reasonable range of appropriateness.[1] The overriding objective is the protection of the public.[2]

11) In *Re Jacobson*, 200712 MFDA, a Hearing Panel decision dated July 13, 2007 in Calgary Alberta, stated the following factors should be considered:

a) whether acceptance of the settlement agreement would be in the public interest and whether the penalty imposed will protect investors;
b) whether the settlement agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the settlement agreement;
c) whether the settlement agreement addresses the issues of both specific and general deterrence;
d) whether the proposed settlement will prevent the type of conduct described in the settlement agreement from occurring again in the future;
e) whether the settlement agreement will foster confidence in the integrity of the Canadian capital markets;
f) whether the settlement agreement will foster confidence in the integrity of the MFDA; and
g) whether the settlement agreement will foster confidence in the regulatory process itself.

[1] *Sterling Mutuals Inc.(Re),* 2008 LNCMFDA 16, at para.37;
[2] *British Columbia Securities Commission v. Siefert,* [2007] BCCA 484, para.31, citing with approval from *Regina v. 974649 Ontario Inc.,* 2001 S.C.C. 81, 2001 3 S.C.R. 575 at para.49; *Pezim v. British Columbia (Superinendent of Brokers),* [1994] 2 S.C.R. 557, paras. 59 and 68.

12) A Hearing Panel should not interfere lightly in a negotiated settlement as long as the penalties agreed upon are within a reasonable range of appropriateness having regard to the conduct of the Respondent.[3]

13) In *Re Headley*, 200509 MFDA, pages 25 and 26, factors relevant to the penalty are stated to be as follows:

a) the seriousness of the allegations proved against the Respondent;
b) the Respondent's past conduct, including prior sanctions;
c) the Respondent's experience and level of activity in the capital markets;
d) whether the Respondent recognizes the seriousness of the improper activity;
e) the harm suffered by investors as a result of the Respondent's activities;
f) the benefits received by the Respondent as a result of the improper activity;
g) the risk to investors and the capital markets in the jurisdiction were the Respondent to continue to operate in capital markets in the jurisdiction;
h) the damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
i) 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;
j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
k) previous decisions made in similar circumstances.

14) The overriding objective is the protection of the public. Settlement agreements can be an effective means of accomplishing this purpose. Thus the remedy can be flexible, efficient and inexpensive, while at the same time ensuring that the overriding objective is met.[4]

[3] *Jacobson (Re),* supra at page 10.
[4] *Regina v. 974649 Ontario Inc.,* 2001 S.C.C. 81, 2001 3 S.C.R. 575, para. 49

15) Finally MFDA penalty guidelines are relevant, having factors which may be taken into account with respect to penalty. It is emphasized however that the MFDA penalty guidelines are not binding; they are intended to assist Hearing Panels in considering the appropriate penalties.

CONSIDERATIONS OF THE PANEL

Misconduct

16) The obligations imposed upon an Approved Person in Rule 2.2.1, the "Know Your Client" (KYC) rule are fundamental to the Approved Person's obligations and a breach is very serious misconduct.

Re Daubney 2008 LNONOSC 338 (OSC) paragraph 15

Client Harm

17) The client DH suffered a loss of $75,500.00 as a result of the misconduct, although the Member compensated client DH for her investment loss.

Deterrence

18) The agreed upon monetary obligations are less than the penalties suggested by the MFDA penalty guidelines. There are, however, some mitigating factors. First the responsibility to pay a fine is limited due to the Respondent's financial circumstances. Secondly, the permanent prohibition of the Respondent's ability to conduct securities related business provides adequate specific and general deterrence. This is the most serious penalty the MFDA can impose on an Approved Person. In our judgment, the totality of the penalty is sufficient to provide both a specific and general deterrence, thus adequately protecting the public.

The Respondent's Past Conduct

19) There have been no previous disciplinary proceedings.

The Respondent's recognition of the seriousness of the misconduct

20) The Respondent has cooperated with the MFDA investigation, and saved a good deal of costs and admitted his misconduct. His agreement to accept a permanent prohibition is a mitigating factor.

PRECEDENT CASES

21) There are a number of precedents which are relevant for consideration. For example, there are:

- *In the Matter of Gerald Daniel Rumball*, MFDA File No. 201521,
- *Re Popovich,* MFDA File No. 201240,
- *In the Matter of Abner Sarabia Hufanda*, MFDA File No. 201501, and
- *In the Matter of Charanjit Aul,* MFDA File No. 201429.

22) These foregoing authorities demonstrate that the proposed penalty in the Settlement Agreement is within the realm of reasonableness and, importantly, that each case turns on its own facts. The permanent prohibition combined with the Respondent's modest financial circumstances brings this case well within the "reasonableness" standard.

SUITABILITY AND RISK

23) Obligations imposed by MFDA Rule 2.2.1 are clearly essential components of the consumer protection scheme. The Alberta Securities Commission has noted that the "Know Your Client" (KYC) and "suitability" obligations are conceptually distinct. They are closely connected and interwoven such that the terms are sometimes used interchangeably.

> (*Re Daubney*, 2008 LNONOSC 338, para. 15; *Re Lamoureux*, [2001] A.S.C.D. No. 613, page 10).

24) The *Re Daubney* and *Re Lamoureux* cases show the required analysis for suitability such that the Approved Person must:

a) Use due diligence to know both the product (suitability) and the client (KYC) and whether the product and client are a match;

b) Apply sound professional judgment to establish whether or not the product is suitable; and

c) Make a recommendation disclosing not only the positive but also the negative factors which may affect the investment client's decision.

25) The analysis and due diligence required of an Approved Person with respect to the KYC and suitability analysis are set forth in detail in these two cases; *Re Daubney* at paragraph 17 and *Re Lamoureux* at page 14. Suffice it to say that the Respondent failed in both the analysis and due diligence obligations.

THE RISKS OF A NON-DIVERSIFIED PORTFOLIO (CONCENTRATION)

26) There is an inherent danger of concentrating one's holdings of securities in a given sector of the economy, particularly in the volatile securities of only one or two issuers in that given sector.

27) The risk and obligations on an Approved Person are apparent from *Re Biduk*, 2013 IIROC, particularly at paragraphs 86 – 89 inclusive, as well as from *Re Myatovic*, 2012 IIROC 47, para. 111.

28) The importance of diversification/concentration criteria has been commented upon by the MFDA in staff notices MSN-0069 (Suitability) and in Bulletin No. 0678-C (concentration criteria including industry standards).

29) The risk inherent in a non-diversified portfolio was clearly not taken into account in this case.

30) In this case, the panel has concluded that the Respondent breached the standard of conduct by:

a) Recording inaccurate know your client information, in particular by exceeding client risk tolerance to fit his investment recommendations; and

b) Withholding or not presenting negative information and providing an unrealistic and optimistic description of a highly risky investment product and strategy.

c) Failing to consider adequately or at all the risks of a non-diversified portfolio.

OPINION AND DECISION

31) It is the opinion of the Panel that the Settlement Agreement:

a) Is reasonable and proportionate having regard to the conduct of the Respondent;

b) Sufficiently addresses the issues of both general and specific deterrence; and

c) Maintains confidence in the integrity of the MFDA and the regulatory process.

32) In the result, the Settlement Agreement is approved and confirmed. The Respondent:

a) Is permanently prohibited from conducting securities related business while in the employ of, or associated with, any MFDA Member commencing from February 2, 2017;

b) Shall pay a fine in the amount of $5,000 within six months from February 2, 2017;

c) Shall pay costs in the amount of $2,500 forthwith.

DATED this 28th day of February, 2017.

"Robert G. Ward"

Robert G. Ward, Q.C.
Chair

"Liz Chichka"

Liz Chichka
Industry Representative

"Bob Sokugawa"

Bob Sokugawa
Industry Representative

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