Re Park

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Seongho (Steve) Park

2023 CIRO 13

Canadian Investment Regulatory Organization
Hearing Panel (Pacific District)

Heard: June 29, 2023, in North Vancouver, British Columbia by videoconference
Decision: June 29, 2023
Reasons for Decision: August 28, 2023

Hearing Panel:
Susan E. Ross, Chair, Darryl Gossen and Barbara Fraser
Appearances:
Brendan Forbes, Enforcement Counsel
Seongho (Steve) Park, present

DECISION ON ACCEPTANCE OF SETTLEMENT AGREEMENT

INTRODUCTION

¶ 1 On June 29, 2023, this Hearing Panel held a settlement hearing to consider whether to accept a Settlement Agreement dated April 24, 2023, between Enforcement Staff of the New Self-Regulatory Organization of Canada, now the Canadian Investment Regulatory Association ("CIRO")[1], and the Respondent Seongho (Steve) Park.

¶ 2 We made a preliminary consent order under Mutual Fund Dealer Rule 1.5(b) abridging the 10-day time requirement for notice of the settlement hearing which, by oversight, had only been given on June 28, 2023. We found no prejudice in abridging the settlement hearing notice period as timely notice of the hearing of this matter on its merits on June 29, 2023, had been given on March 7, 2023.

¶ 3 In the Settlement Agreement, the Respondent admitted contravening Member policies and procedures and MFDA Rules by opening a tax-free savings account ("TFSA") and processing two mutual fund purchases for a client who was a non-resident of Canada.

¶ 4 In the Settlement Agreement the Respondent agreed to:

(a) pay a fine in the amount of $10,000 and costs in the amount of $5,000 in certified funds on the acceptance of the Settlement Agreement;

[1] On January 1, 2023, the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada ("MFDA") were consolidated into the single self-regulatory organization now called CIRO, and the MFDA Rules were incorporated into CIRO's Mutual Fund Dealer Rules.

(b) comply in the future with MFDA Rules 2.2.1, 2.1.1, 1.1.2 and 2.5.1 (now Mutual Fund Dealer Rules 2.2.1 (1), 2.1.1, 1.1.2 and 2.5.1); and

(c) attend the settlement hearing by videoconference.

¶ 5 At the conclusion of the hearing, we accepted the Settlement Agreement with reasons to follow. These are our reasons for decision.

AGREED FACTS

¶ 6 The agreed facts are set out in full in Part IV of the attached Settlement Agreement.

¶ 7 From May 2016 to February 2019, the Respondent was registered in British Columbia as a dealing representative with BMO Investments Inc. (the "Member"). In February 2019, he resigned from BMO Investments Inc. and is currently registered with Royal Mutual Funds Inc. The Respondent conducted business in the North Vancouver area at all material times.

¶ 8 On August 19, 2016, the Respondent assisted client SD with opening a new TFSA. He reviewed SD's identification on file with the Member, which included a U.S. Permanent Resident Card, and became aware that SD was a non-resident of Canada.

¶ 9 The new account application form that the Respondent submitted to open the TFSA recorded a North Vancouver address for SD. On SD's instruction, the Respondent processed a $46,500 contribution into the TFSA and used that amount to purchase the BMO Balanced EFT Portfolio. The Respondent's failure to ensure that SD's primary address was accurately recorded had the effect of concealing from the Member that SD was a non-resident of Canada and therefore not eligible to open a TFSA or make purchases in the account.

¶ 10 On April 18, 2017, the Respondent informed SD that she had $5,500 additional contribution room in her TFSA and processed her additional purchase of $5,500 into the BMO Select Trust Balanced Portfolio in the TFSA.

¶ 11 In October 2019, the Member locked the TFSA on instructions from the Canada Revenue Agency ("CRA") that it had imposed a tax penalty on SD for holding and contributing to a TFSA while being a non-resident of Canada.

¶ 12 MFDA Rule 2.2.1, known as Know-Your-Client ("KYC"), required the Respondent to take reasonable steps to the learn the essential facts relative to each client and each order or account accepted. Rule 2.1.1 prescribed the general standards requiring the Respondent to deal fairly, honestly and in good faith with clients; observe high standards of ethics and conduct in the transaction of business; and not engage in business conduct or practice unbecoming or detrimental to the public interest. Rule 1.1.2(b) required the Respondent to comply with MFDA Bylaws and Rules and applicable securities legislation respecting the operations, standards and conduct of business of the Respondent and Member. Rule 2.5.1 required the Member to establish policies and procedures to ensure the handling of its business in accordance with MFDA Bylaws and Rules and applicable securities legislation.

¶ 13 At all material times, the Member's policies and procedures required the Respondent to use due diligence to learn KYC information about each client and account accepted with the Member. They also prohibited clients who did not reside in Canada from opening a TFSA or purchasing the Member's mutual funds which were not registered for sale outside Canada.

¶ 14 Had the Respondent ensured that SD's primary address was accurately recorded or updated in her account information, the Member's controls and supervisory processes likely would have detected that SD, as a non-resident of Canada, was not eligible to open a TFSA or purchase investments through the Member.

¶ 15 In November 2019, SD complained to the Member about the CRA tax penalty she had incurred because of the Respondent's advice to open and contribute to a TFSA when she was not eligible as a non-resident of Canada. SD asked the Member to liquidate the TFSA to apply the proceeds towards payment of the tax penalty and accepted the Member's offer to compensate her in respect of the penalty.

Analysis

Role of the Hearing Panel

¶ 16 A hearing panel may accept or reject a settlement agreement, after a settlement hearing (Mutual Fund Dealer Rule 7.4.4.3). We are not tasked with deciding whether we would have imposed the same sanctions as those negotiated by the parties in the Settlement Agreement. Our role is to decide whether the proposed sanctions fall within a reasonable range of appropriateness. The principles that guide our role are well-established and stem from *Re Milewski*, [1999] IDACD No. 17, where the hearing panel stated that:

> Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. 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.

¶ 17 In exercising our role, we considered the facts in the Settlement Agreement, the CIRO Sanction Guidelines, the parties' submissions, and the relevant disciplinary decisions provided to us by Enforcement Counsel.

Sanction Considerations

¶ 18 In the Settlement Agreement, the Respondent agreed to:

(a) pay a fine in the amount of $10,000 and costs in the amount of $5,000 in certified funds upon the acceptance of the Settlement Agreement;

(b) comply in the future with MFDA Rules 2.2.1, 2.1.1, 1.1.2 and 2.5.1 (now Mutual Fund Dealer Rules 2.2.1 (1), 2.1.1, 1.1.2 and 2.5.1); and

(c) attend the settlement hearing by videoconference.

¶ 19 Enforcement Counsel addressed relevant disciplinary decisions and considerations in the CIRO Sanction Guidelines.

¶ 20 The recording of an inaccurate or false address in client account documents, including where an account is opened using a Canadian address with knowledge that the client does not in fact live in Canada, is an established contravention of the standards of conduct in MFDA Rule 2.1.1. This type of misconduct can undermine member systems for ensuring compliance with policies and procedures and regulatory requirements when servicing accounts. It can also interfere with contacting and sending account statements and cheques to the client and facilitate the misappropriation of client funds.

> *Re Collymore*, [2022] Hearing Panel of the Central Regional Council, MFDA Hearing No. 202214, Reasons for Decision dated December 14, 2022
>
> *Re Pekel*, [2021] Hearing Panel of the Central Regional Council, MFDA Hearing No. 202007, Reasons for Decision dated January 7, 2021

¶ 21 Recording and maintaining the client's accurate address is also a basic part of KYC in MFDA Rule 2.2.1 that is critical to assessing client suitability for investment products.

> *Re Pretty*, [2014] Hearing Panel of the Atlantic Regional Council, MFDA Hearing No. 201128, Decision on Misconduct dated January 30, 2014, at para. 89
>
> *Re Lamoureux*, [2001] A.S.C.D. No. 613, Decision of the Alberta Securities Commission Panel dated August 10, 2001, at p. 14
>
> *Re Laurie*, [2015] Hearing Panel of the Atlantic Regional Council, MFDA Hearing No. 201301, Reasons for

Decision dated October 26, 2015, at para. 30

Re Daubney, [2008] LNONOSC 338, at paras. 18-19

¶ 22 The Respondent's misconduct also breached the Member's policies and procedures in contravention of MFDA Rules 1.1.2 and 2.5.1.

¶ 23 The Sanction Guidelines outline principles and a list of factors that are commonly relevant in imposing sanctions. The sanction should be both significant enough to prevent and discourage future misconduct by the respondent and to deter others from engaging in similar misconduct. An appropriate balance should be struck between the respondent's specific misconduct and industry expectations of an appropriate sanction for such misconduct. The sanction should be proportionate to the respondent's misconduct, similar to sanctions imposed for similar contraventions in similar circumstances, and adjusted for relevant mitigating and aggravating factors.

¶ 24 The reasonable range of sanctions depends on the facts and circumstances of each particular case. Several factors are relevant for this case.

¶ 25 The Respondent's failure to know the client and properly record SD's KYC information were serious contraventions. His opening of an investment account for a U.S. resident without having adequate training, proficiency, or experience to advise the client on the regulatory implications of investing in Canada, and inaccurate recording of SD's true country of residence when the Respondent had her U.S. Permanent Resident Card, prevented the Member from supervising and applying its policies and procedures to the circumstances and led to the client incurring a Canadian tax penalty.

¶ 26 The Respondent's misconduct was not malicious and, although this matter proceeded as far as the issuance of a notice of hearing on the merits, by entering into the Settlement Agreement the Respondent has taken responsibility for the misconduct and saved CIRO the further time, resources, and expenses of a contested disciplinary hearing. The Respondent has no prior discipline history. In the settlement hearing, he expressed deep regret for his mistakes and assured us that they would not happen again.

¶ 27 Enforcement Counsel referred to four comparable settlement decisions.

Re Collymore, *supra*

Re Hristova, [2022] Hearing Panel of the Central Regional Council, MFDA Hearing No. 202232, Reasons for Decision dated October 11, 2022

Re Mark, [2019] Hearing Panel of the Pacific Regional Council, MFDA Hearing No. 201915, Reasons for Decision dated June 10, 2019

Re Sunkara, [2021] Hearing Panel of the Pacific Regional Council, MFDA File No. 202142, Reasons for Decision dated November 10, 2021

¶ 28 In these decisions, the fines ranged from $7,500 to $15,000, the number of clients and transactions varied, all respondents had no prior disciplinary history, and the misconduct was not malicious.

¶ 29 Enforcement Counsel submitted that *Re Collymore* is most comparable to this case. The fine in *Re Collymore* was $7,500. It is not clear whether the settlement in *Re Collymore* was reached before the issuance of a notice of hearing on the merits. Only one client was involved but after becoming aware that the client was a non-resident of Canada, the respondent in *Collymore* conducted more transactions over a longer period than the Respondent in the present case.

¶ 30 Based on the relevant principles, guidelines, and cases, we concluded that the proposed $10,000 fine is at the high end for the particular, isolated circumstances of the Respondent's misconduct. It nonetheless sits squarely in the middle of the range of comparable settlement decisions. Exercising respect for a negotiated settlement, where there may be factors of give and take between the parties that are not known to us, we approved the settlement as fair and reasonable.

Conclusion

¶ 31 We approved the Settlement Agreement on June 29, 2023, the date of the settlement hearing.

¶ 32 In accordance with the terms of the Settlement Agreement, the agreed fine and costs were payable in certified funds upon our acceptance of the Settlement Agreement.

Dated at North Vancouver, British Columbia this 28th day of August 2023.

Susan E. Ross, Chair

Darryl Gossen, Industry Representative

Barbara Fraser, Industry Representative