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: Kenneth George Russell

Heard: April 1, 2022 by electronic hearing in Toronto, Ontario
Decision: April 1, 2022
Reasons for Decision: April 27, 2022

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Linda J. Anderson	Industry Representative
Cheryl Hamilton	Industry Representative

Appearances:

Brendan Forbes	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Michael Mantle	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Zachary Pringle	)	Counsel for Respondent
Kenneth George Russell	)	Respondent

I. INTRODUCTION

1. By Notice of Settlement Hearing, dated March 9, 2022, the Mutual Fund Dealers Association of Canada ("MFDA") gave notice that an electronic hearing would be held before a hearing panel of the Central Regional Council of the MFDA ("Hearing Panel") on April 1, 2022, to consider whether, pursuant to Section 24.4 of MFDA By-law No. 1, the Hearing Panel should accept the settlement agreement entered into between Staff of the MFDA and Kenneth George Russell (the "Respondent").

2. Due to the existence of COVID-19, and with the consent of the parties, the Settlement Hearing was conducted electronically by videoconference on April 1, 2022.

3. At the commencement of the Settlement Hearing, the Hearing Panel granted the joint request of the parties to move the proceedings "in camera" so that the Settlement Agreement could be considered in the absence of the public. This procedure is consistent with Rule 15.2(2) of the MFDA *Rules of Procedure*.

4. The Hearing Panel then considered the provisions of the Settlement Agreement. After hearing submissions, both as to the applicable law and as to why this particular Settlement Agreement met the appropriate criteria, the Hearing Panel retired to consider whether we were in a position to accept the Settlement Agreement on the basis of the material before us.

5. After carefully considering the Settlement Agreement and the submissions of the parties, the Hearing Panel unanimously accepted the Settlement Agreement. We made an Order to this effect on April 1, 2022. At that time, we advised that written Reasons would follow. These are those Reasons.

II. SETTLEMENT AGREEMENT

6. The salient portions of the Settlement Agreement are as follows:

> "**II. CONTRAVENTIONS**
>
> 4. The Respondent admits to the following violations of the By-laws, Rules or Policies of the MFDA:
>
> a) Between approximately June 2016 and May 2019, the Respondent misrepresented or failed to adequately and accurately explain to two clients who were spouses the tax liability consequences associated with a mutual fund investment that he recommended that the clients purchase in the

clients' joint account, thereby failing to ensure that the investment was suitable for the clients and was in keeping with their investment objectives, contrary to MFDA Rules 2.2.1[1] and 2.1.1;

b) Between approximately May 2017 and December 2019, the Respondent failed to report to the Member that he received complaints from the two clients who alleged that he had failed to accurately explain the tax liability associated with a mutual fund investment that he had recommended, and directly paid compensation to the complainants in respect of the tax liability without the knowledge or written consent of the Member, contrary to the Member's policies and procedures, MFDA Rules 2.1.4[2], 2.1.1, 1.4(b), 1.1.2 and 2.5.1, and MFDA Policy No. 3 and MFDA Policy No. 6; and

c) In June 2016, the Respondent completed a Know-Your-Client form on behalf of a client using information obtained from the client's spouse without communicating with the client, thereby failing to use due diligence to:

i) learn and accurately record the essential facts relative to the client;

ii) ensure that orders accepted in respect of the account were within the bounds of good business practice; and

iii) ensure that each order accepted for the account was suitable,

prior to making investment recommendations and accepting investment orders for the client's account, contrary to MFDA Rule 2.2.1 and 2.1.1.

III. TERMS OF SETTLEMENT

5. Staff and the Respondent agree and consent to the following terms of settlement:

a) the Respondent shall pay a fine in the amount of $26,000 in certified funds upon acceptance of the Settlement Agreement, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;

b) the Respondent shall pay costs in the amount of $5,000 in certified funds upon acceptance of the Settlement Agreement, pursuant to s. 24.2 of MFDA By-law No. 1;

c) the payment by the Respondent of the fine and costs shall be made and received by MFDA Staff in certified funds as follows:

i. $10,500 (Fine) upon acceptance of the Settlement Agreement by the Hearing Panel;

ii. $5,000 (Costs) upon acceptance of the Settlement Agreement by the Hearing Panel;

iii. $5,500 (Fine) on or before the last business day of the first month following the date of the Settlement Agreement;

iv. $5,000 (Fine) on or before the last business day of the second month following the date of the Settlement Agreement; and

[1] On December 31, 2021, amendments to MFDA Rule 2.2.1 came into effect. As the conduct addressed in this proceeding pre-dated the amendment to the Rule, all contraventions of MFDA Rule 2.2.1 that are addressed in this Settlement Agreement are of the version of MFDA Rule 2.2.1 that was in effect between December 5, 2013 and December 31, 2021.

[2] On June 30, 2021, amendments to MFDA Rule 2.1.4 came into effect. As the conduct addressed in this proceeding, pre-dated the amendment to the Rule, the contravention of MFDA Rule 2.1.4 that is addressed in this Settlement Agreement is of the version of MFDA Rule 2.1.4 that was in effect between February 27, 2006 and June 30, 2021.

v. $5,000 (Fine) on or before the last business day of the third month following the date of the Settlement Agreement.

d) the Respondent shall complete an ethics or professional conduct course or another course acceptable to Staff prior to becoming an Approved Person of a Member of the MFDA, pursuant to s. 24.1.1(f) of MFDA By-law No. 1;

e) the Respondent shall in the future comply with MFDA Rules 2.2.1, 2.1.1, 1.4(b), 2.1.4, 1.1.2, 2.5.1 as well as MFDA Policies No. 3 and No. 6; and

f) the Respondent shall attend in person or by videoconference on the date set for the Settlement Hearing.

6. Staff and the Respondent agree to the settlement on the basis of the facts set out in this Settlement Agreement herein and consent to the making of an Order in the form attached as Schedule "A".

IV AGREED FACTS

Registration History

7. From August 2010 to February 2020 in Ontario, and between January 2020 and February 2020 in Alberta, the Respondent was registered as a dealing representative with Sun Life Financial Investment Services (Canada) Inc. (the "Member"), a Member of the MFDA.

8. On February 10, 2020, the Member terminated the Respondent after discovering the conduct described in this Settlement Agreement. The Respondent is not currently registered in the securities industry in any capacity.

9. At all material times, the Respondent conducted business in the London, Ontario area.

Misrepresenting the Tax Consequences With Respect to a Purchase of a Mutual Fund

10. At all material times, clients FM and MM (spouses) were clients of the Member whose investment accounts were serviced by the Respondent. Clients FM and MM had limited investment experience and no previous investment experience with mutual funds.

11. In June 2016, clients FM and MM were 65 and 63 years of age respectively, and, by virtue of their age, were vulnerable clients.

12. In or about June 2016, client FM met with the Respondent about investing in mutual funds. Client FM advised the Respondent that he and his wife, client MM, wished to:

a) obtain a higher rate of return than investments they held previously;

b) preserve the principal of their investment; and

c) obtain returns which would be tax deferred into the future.

13. Based upon his discussion with client FM, the Respondent recommended that clients FM and MM invest in the CI Investments G5/20i mutual fund (the "Fund").

14. During discussions with client FM, the Respondent represented that:

a) investing in the Fund would preserve 100 percent of the principal investment of clients FM and MM;
b) the Fund had a distribution phase of 20 years;
c) clients FM and MM would receive a minimum of 5% of the principal amount invested per year over the 20 year distribution phase of the Fund in addition to any returns generated by the Fund greater than 5% on a yearly basis; and
d) any taxes payable by clients FM and MM on distributions received from the Fund would be deferred until after the 20 year distribution phase of the Fund.

15. However, contrary to what the Respondent told client FM, any portion of distributions received by investors in a year that exceeds the 5% yearly return of capital is taxable in the year in which such amounts are received, rather than deferred until after the 20 year distribution phase, when held in a non-registered account.

16. On June 29, 2016, the Respondent completed a New Account Application Form ("NAAF") to open Tax-Free Savings Accounts ("TFSAs") for each of clients FM and MM, and a joint non-registered account. Without communicating with client MM, the Respondent completed the NAAF relating to client MM's TFSA and the joint non-registered account based on information provided to him about client MM by client FM.

17. Based on the Respondent's recommendation to purchase the Fund and his explanation that taxes would be deferred for 20 years, clients FM and MM invested a total of $600,000 in the Fund, which they held in their individual TFSAs and the joint non-registered account.

Failure to Report a Complaint to the Member and Paying Compensation to Clients

18. At all material times, the Member's policies and procedures required Approved Persons to immediately report any client complaint, verbal or written, to their manager no later than 2 days after being informed about the complaint.

19. At all material times, the Member's policies and procedures stated that all monetary and non-monetary benefits provided to clients must flow through the Member and further stated that Approved Persons were not permitted to write cheques directly to clients.

20. In or about May or June 2017, client FM received a tax slip informing him that some of the distributions that he had received from the Fund in 2016 were taxable. Client FM contacted the Respondent and complained that he had incurred a tax liability in 2016 with respect to returns that he had earned from the Fund contrary to the Respondent's explanation which had informed him that no tax would be payable on distributions from the Fund during the 20 year distribution phase.

21. In response to the complaint from client FM, the Respondent stated that he would look into the matter.

22. The Respondent did not report the 2017 complaint from client FM to the Member at that time.

23. As a result of the Respondent's failure to report the complaint to the Member, the Member was not able to fulfill its obligations to handle the complaint promptly and fairly and to supervise the Respondent's conduct including his dealings with clients FM and MM.

24. In 2017, client FM did not receive distributions from the Fund that were taxable.

25. In or about May or June 2019, client FM received a tax slip informing him that some of the distributions that he had received from the Fund in 2018 were taxable. Client FM contacted the Respondent and complained that he had incurred a tax liability totaling approximately $1,900 associated with returns that he had received from the Fund. Client FM informed the Respondent that he was considering commencing a lawsuit against the Respondent and the Member to seek compensation for the tax liability described above.

26. The Respondent did not report the 2019 complaint from client FM to the Member within 2 days.

27. On December 30, 2019, the Respondent informed the Member of client FM's complaint.

28. In 2016, when he recommended that clients FM and MM invest in the Fund, the Respondent had misrepresented or had failed to adequately and accurately explain to clients FM and MM the potential tax liability consequences associated with distributions from the Fund which the Respondent had advised the clients to purchase, thereby failing to ensure that the investment was suitable for the clients and in keeping with their investment objectives.

29. The Respondent did not inform the Member about the complaints received from client FM in 2017 or in 2019 within 2 business days of receiving the complaints, contrary to the Member's policies and procedures and MFDA Rules.

30. In June 2019, without the knowledge or prior written consent of the Member, the Respondent directly compensated clients MM and FM by directly paying them approximately $1,900 to reimburse them for the tax liability that they had incurred in connection with distributions that clients FM and MM had received from the Fund in 2018.

Completing a Know-Your-Client Form without Communicating with the Client

31. As described in paragraph 16 above, in June 2016, the Respondent completed NAAFs to open client FM's TFSA, client MM's TFSA, and a non-registered account that was opened in the joint names of clients FM and MM.

32. The Respondent completed the KYC information on the NAAF pertaining to client MM's TFSA and the joint non-registered account using information provided by client FM, without communicating with client MM.

33. The Respondent provided client FM with the NAAF in order to obtain client MM's signature on the NAAF.

34. By completing the NAAFs without communicating with client MM, the Respondent failed to use due diligence to:

a) learn and accurately record the essential facts relative to client MM;
b) ensure that orders accepted in client MM's TFSA were within the bounds of good business practice; and
c) ensure that each order accepted for the account of client MM was suitable,
d) prior to accepting orders for investments held in client MM's TFSA.

Additional Factors

35. The Respondent has not previously been the subject of MFDA disciplinary proceedings.

36. By entering into this Settlement Agreement, the Respondent has saved the MFDA the time, resources and expenses associated with conducting a contested hearing of the allegations."

III. THE LAW

Allegation #1

Failure to Accurately Explain the Features of the Product

7. MFDA Rule 2.1.1 states, in part, as follows:

"2.1.1 **Standard of Conduct**. Each Member and each Approved Person of a Member shall:

a) deal fairly, honestly and in good faith with its clients;
b) observe high standards of ethics and conduct in the transaction of business;
c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; . . ."

8. MFDA Rule 2.2.1, as it existed at the time of the misconduct, requires:

"Each Member and Approved Person shall use due diligence:

a) to learn the essential facts relative to each client and to each order or account accepted;

b) to ensure that the acceptance of any order for any account is within the bounds of good business practice;

c) to ensure that each order accepted or recommendation made, including recommendations to borrow to invest, for any account of a client is suitable for the client based on the essential facts relative to the client and any investments within the account."

9. MFDA Rule 2.2.1 codifies the "Know-Your-Client" ("KYC") and "suitability" obligations that have consistently been recognized as "an essential component of the consumer protection scheme of [securities legislation] and a basic obligation of a registrant, and a course of conduct by a registrant involving a failure to comply with them is an extremely serious matter."

E. A. Manning Ltd. et al (Re), 1995 LNONOSC 377 (OSC) at p. 37.

Pretty (Re), 2014 LNCMFDA 6 at para. 89.

DeVuono (Re), 2014 LNCMFDA 34 at para. 3.

10. In *Lamoureux (Re)*, the Alberta Securities Commission ("ASC") referred to the KYC Rule as the "Cardinal Rule" and as a cornerstone obligation of an Approved Person's dealings with clients. The ASC further went on to find that the KYC and suitability obligations have the following three stages:

a) use due diligence to know the product and know the client;

b) apply sound professional judgment in establishing the suitability of the product for the client; and

c) disclose the negative as well as the positive aspects of the proposed investment.

Lamoureux (Re), 2001 LNABASC 433 (A.S.C.) ("*Lamoureux*") at p. 15.

11. The Hearing Panel in *Lamoureux* explained the three stage process in detail, stating that:

". . . Knowing the product involves carefully reviewing and understanding the attributes, including associated risks, of the securities that they are considering recommending to their clients.

Only after the "due diligence" of the first stage is completed, can the registrant move to the second stage in which they fulfil their obligation to determine whether specific trades or investments, solicited or unsolicited, are suitable for the client.

Suitability determinations . . . will always be fact specific. A proper assessment of suitability will generally require consideration of such factors as a client's income, net worth, risk tolerance, liquid assets and investment objectives, as well as an understanding

of particular investment products. The registrant must apply sound professional judgement to the information elicited from "know your client" inquiries. If, based on the due diligence and professional assessment the registrant reasonably concludes that an investment in a particular security in a particular amount would be suitable for a particular client, it is then appropriate for the registrant to recommend the investment to that client.

By recommending a securities transaction to a client, a registrant enters the third stage of the process. Whether a particular transaction has in fact been "recommended" is to be determined objectively, taking into consideration the content, context and manner of communication from a registrant to the client, to assess whether it could reasonably be understood as a suggestion that the customer engage in a securities transaction. At this stage, when making the client aware of a potential investment, the registrant is obligated to make the client aware of the negative material factors involved in the transaction, as well as positive factors.

The disclosure of material negative factors in the third stage of the process is intended to assist the client in making an informed investment decision…The registrant's failure may have been the result of not knowing the client, or not knowing the securities, or an error in the suitability determination but, once the improper recommendation has been made, it does not matter whether or how the registrant discloses the material negative factors, or whether the client claims to understand and accept the risks involved in the investment. The registrant has failed to fulfil their obligations."

Lamoureux, *supra* at pp. 18-19.

12. In the present case, the Respondent admits that he misrepresented or failed to fully and adequately explain the tax consequences associated with the mutual fund investment that he recommended that clients FM and MM purchase in their joint investment account.

Settlement Agreement, para. 4(a).

13. In particular, after being informed by clients FM and MM that they wished to purchase an investment that offered returns that would be tax deferred into the future, the Respondent recommended the CI Investments G5/20i mutual fund (the "Fund") and represented to clients FM, among other things that, if they purchased the Fund, any taxes payable by clients FM and MM on distributions received from the Fund would be deferred until after the 20 year distribution phase of the Fund.

Settlement Agreement, para. 14.

14. However, contrary to what the Respondent told client FM, any portion of distributions received by investors in a year that exceeded a 5% yearly return of capital was taxable in the year in which such amounts were received, rather than deferred until after the 20 year distribution phase, when held in a non-registered account.

Settlement Agreement, para. 15.

15. Consequently, the Respondent misrepresented or failed to accurately explain potential tax consequences that could impact clients FM and MM.

16. In this case, the Respondent failed to ensure that the product that he recommended was suitable, bearing in mind the tax deferral objectives of the clients, and failed to accurately explain the potential tax liability that the clients could incur if returns on the investment exceeded the return of the capital distribution amount that was promised to investors in the Fund.

17. Prior MFDA Hearing Panels have held that the failure to understand or properly convey the salient features of an investment product constitutes a contravention of the suitability requirements set out in *Lamoureux* and therefore contravene MFDA Rules 2.2.1 and 2.1.1.

Harrigan (Re), 2018 LNCMFDA 360 at paras 141-147, 158-161.

Fricker (Re), 2015 LNCMFDA 18.

18. Even if the Respondent's misrepresentation to clients FM and MM was not intentional, but instead resulted from a misunderstanding as to the tax implications of the mutual fund, the inaccurate explanation resulted in unanticipated tax consequences to clients FM and MM that were inconsistent with the objectives that they had communicated to him.

19. Therefore, the Respondent failed to ensure that the product was suitable for the clients and in keeping with the clients' investment objectives and that the risks and material negative factors of the product were accurately explained to the clients before they made their investment, contrary to MFDA Rules 2.2.1 and 2.1.1.

Allegation #2

Failure to Report a Complaint to the Member and Paying Compensation to Clients

20. MFDA Rule 1.4(b) requires every Approved Person to report certain events, such as complaints, to the Member. This rule states that:

> "Every Approved Person must report to the Member such information, in a manner and within such period of time, as may be prescribed by the Corporation from time to time relating to complaints, criminal, civil and other legal proceedings, regulatory proceedings, arbitrations, contraventions and potential contraventions of legal and regulatory requirements, disciplinary action by regulatory bodies, settlements with and compensation paid to clients, registration or licensing by any regulatory body, bankruptcies, insolvencies, garnishments and related events."

21. MFDA Policies No. 3 and No. 6 set out the complaint reporting structure for both Members and Approved Persons.

22. In particular, section 4(1)(b)(i) of MFDA Policy No. 6 requires Approved Persons to report to the Member when the Approved Person is aware of a complaint from any person, whether in writing or any other form, with respect to him or herself, or any other Approved Person involving allegations of misrepresentation.

23. MFDA Policy No. 3 defines a "complaint" broadly to include "any written or verbal statement of grievance, including electronic communications from a client…"

24. Part I, section 9 of MFDA Policy No. 3 requires that:

> All client complaints and supervisory obligations must be handled by qualified sales supervisors/compliance staff. **An individual who is the subject of a complaint must not handle the complaint** unless the Member has no other supervisory staff who are qualified to handle such complaints. (emphasis added)

25. Part 1, section 10 of MFDA Policy No. 3. States that:

> **No Approved Person shall, without the prior written consent of the Member**, enter into any settlement agreement with, **pay any compensation** to or make any restitution **to a client**. (emphasis added)

26. The Respondent admits that he contravened the MFDA Rules when he failed to report the complaint to the Member and paid compensation to the clients in an attempt to address their complaint without the Member's knowledge or authorization.

27. Previous MFDA Hearing Panels have held that, when an Approved Person fails to report a complaint to the Member, the Approved Person has contravened MFDA Rules 1.4(b), 2.1.4 and 2.1.1 as well as MFDA Policies No. 3 and No. 6.

> *Showalter (Re)*, 2019 LNCMFDA 101 at para. 13.
>
> *Gabrysz (Re)*, 2019 LNCMFDA 183 at para. 7.

28. In *Showalter (Re)*, the Hearing Panel explained the importance of the complaint reporting requirements placed on Approved Persons:

> "The Member is ordinarily in the best position to investigate allegations of misconduct that are made by a complainant because the Member has access to the documents and key individuals that may shed light on the allegations and are more likely to bring an impartial

and fair minded approach to the complaint handling process. It is accordingly, imperative that the dealing representative advise the Member of complaints received."

Showalter, *supra* para. 9.

29. The Respondent admitted that, in June 2019, without the knowledge or prior written consent of the Member, he directly compensated clients MM and FM by paying them approximately $1,900 to reimburse them for a tax liability that they had received from the Fund in 2018.

30. Prior MFDA Hearing Panels have held that, when an Approved Person compensates a client directly, and not through the Member, the Approved Person has contravened MFDA Policy No. 3.

Chen (Re), 2011 LNCMFDA 4.

Hayat (Re), 2013 LNCMFDA 33.

31. By failing to report the complaint to the Member and by directly compensating client FM and MM for the tax liability resulting from returns earned on their investments without the prior written authorization of the Member, the Respondent contravened MFDA Rules 1.4(b), 2.1.4 and 2.1.1, as well as MFDA Policies No. 3 and No. 6.

32. At all material times, the Member's policies and procedures required Approved Persons to immediately report any client complaint, written or verbal, to their manager no later than 2 days after being informed about the complaint.

Settlement Agreement, para. 18.

33. At all material times, the Member's policies and procedures also stated that all monetary and non-monetary benefits provided to clients must flow through the Member and further stated that Approved Persons were not permitted to write cheques directly to clients.

Settlement Agreement, para. 19.

34. Prior MFDA Hearing Panels have held that failing to report a complaint to the Member in contravention of the Member's policies and procedures is a contravention of MFDA Rules 1.1.2 and 2.5.1.

Showalter, *supra* at para 13.

Gabrysz, *supra* at para 7.

35. Prior MFDA Hearing Panels have also held that, when an Approved Persons pays compensation to a client in contravention of the Members policies and procedures, the Approved Person has contravened MFDA Rules 1.1.2 and 2.5.1.

> *Coltart (Re)*, 2019 LNCMFDA 19 at para. 12.

36. It is clear to us that, by his actions, the Respondent contravened MFDA Rules 1.1.2 and 2.5.1.

Allegation # 3

Completing a Know-Your-Client Form without Communicating with the Client

37. The Respondent admits that he failed to use due diligence to learn the essential facts regarding client MM when he completed KYC information obtained from client MM's spouse, client FM, on KYC documents for client MM without communicating with client MM directly.

38. Prior MFDA Hearing Panels have held that, when an Approved Person collects KYC information from a person other than the client, regardless of whether that person is a spouse of the client, the Approved Person has contravened MFDA Rules 2.2.1 and 2.1.1.

> *Wray (Re)*, 2017 LNCMFDA 130.
>
> *Muhima (Re)*, 2019 LNCMFDA 2.

39. MFDA Hearing Panels have noted the importance of collecting information that was provided by the client themselves, rather than a third party. As stated in *Wray (Re):*

> "In order to fulfil the Know-Your-Client obligation, an Approved Person is required to learn the essential facts about his or her client directly from the client. In the absence of a power of attorney, it is not sufficient to consult with a third party, including even the client's spouse, for the purpose of obtaining Know-Your-Client information or trading instructions."
>
> *Wray (Re)*, 2017 LNCMFDA 130 at para 32.

IV. PRINCIPLES AND FACTORS REGARDING THE ACCEPTANCE OF SETTLEMENT AGREEMENTS

40. Investor protection is the primary goal of securities regulation. Settlements play an important and necessary role in meeting this objective.

> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para. 59.

41. In our view, the role of a Hearing Panel in a Settlement Hearing is not the same as its role in making a penalty determination after a contested Hearing. In a contested Hearing, the Hearing Panel attempts to determine the correct penalty. In a Settlement Hearing, the Hearing Panel takes into account the settlement process itself and the fact that the parties have agreed to the penalties set out in the Settlement Agreement. In our view, a Hearing Panel should not interfere lightly in a negotiated settlement and should not reject a Settlement Agreement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.

42. Previous MFDA Hearing Panels have determined the factors which should be considered in determining whether a Settlement Agreement should be accepted. These include the following:

i. Whether acceptance of the Settlement Agreement would be in the public interest and whether the penalty imposed will protect investors;
ii. Whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the Settlement Agreement;
iii. Whether the Settlement Agreement addresses the issues of both specific and general deterrence;
iv. Whether the proposed settlement will prevent the type of conduct described in the Settlement Agreement from occurring again in the future;
v. Whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets;
vi. Whether the Settlement Agreement will foster confidence in the integrity of the MFDA;
vii. Whether the Settlement Agreement will foster confidence in the regulatory process itself.

> *Jacobson (Re),* [2007], Hearing Panel of the Prairie Regional Council, MFDA File No. 200712, Reasons for Decision, dated July 13, 2007, at para. 70.

43. Previous Hearing Panels have also identified a number of additional factors which should be considered when determining whether the penalty sought to be imposed is appropriate. These include:

a) The seriousness of the allegations proved against the Respondent;
b) The Respondent's past conduct, including prior sanctions;
c) The Respondent's experience in the capital markets;
d) The level of the Respondent's activity in the capital markets;

e) Whether the Respondent recognizes the seriousness of the improper activity;

f) The harm suffered by investors as a result of the Respondent's activities;

g) The benefits received by the Respondent as a result of the improper activity;

h) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;

i) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;

j) 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;

k) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in capital markets; and

l) Previous decisions made in similar circumstances.

> *Headley* [*Re*], 2006, Hearing Panel of the Central Regional Council, MFDA File No. 200509, Reasons for Decision dated February 21, 2006 at para. 85.

44. When determining whether a penalty agreed upon by the parties is appropriate, the Hearing Panel may also consider the MFDA's Sanction Guidelines ("Guidelines") which came in to effect on November 15, 2018. The Guidelines are not mandatory or binding on the Hearing Panel, but provide a summary of the key factors upon which discretion can be exercised consistently and fairly. Many of the same factors that are listed above, which have been considered in previous decisions of MFDA Hearing Panels, are also reflected and described in the Guidelines.

V. CONSIDERATIONS IN THE PRESENT CASE

45. Staff made very detailed written and oral submissions as to how these principles and factors applied to the case before us. These included the following:

(a) Nature of the Misconduct

46. Staff submitted that the totality of the Respondent's admitted misconduct is serious and that meaningful penalties need to be imposed on Approved Persons who engage in such misconduct in order to deter similar misconduct from occurring again in the future. We agree with this submission.

47. On the other hand, Staff submitted that, in its view, none of the admitted misconduct appears to have been a malicious attempt at non-compliance or motivated by the pursuit of personal

gain. Consequently, Staff submitted that the proposed penalty constitutes a reasonable and proportionate resolution in all of the circumstances.

(b) The Respondent's Past Conduct including Prior Sanctions

48. The Respondent has not previously been the subject of MFDA disciplinary proceedings.

(c) The Respondent's Recognition of the Seriousness of his Misconduct

49. By entering into the Settlement Agreement, the Respondent has recognized the seriousness of the misconduct and accepted responsibility for his actions, and has saved the MFDA the time, resources and expenses associated with a contested disciplinary hearing.

(d) Client Harm

50. Clients FM and MM incurred a tax liability of approximately $1,900 after the Respondent had incorrectly informed them that all tax payable in connection with the product would be deferred for 20 years. The Respondent has repaid the financial harm done to his clients by his misconduct albeit the direct payment was itself a contravention of MFDA Rules.

(e) Deterrence

51. Deterrence is intended to capture both specific deterrence of the wrongdoer as well as general deterrence of other participants in the capital markets in order to protect investors.

52. In our view, the proposed penalty will specifically deter the Respondent from engaging in similar activity by imposing a meaningful sanction upon him which reflects the seriousness of the misconduct at issue.

53. The proposed penalty will also deter others in the mutual fund industry from engaging in similar activity to that described in the Settlement Agreement.

(f) Previous Decisions Made in Similar Circumstances

54. Staff provided the Hearing Panel with a detailed chart seeking to show that the proposed resolution is within the reasonable range of appropriateness with regards to other decisions made by MFDA Hearing Panels in similar circumstances.

55. The following cases were discussed:

Fricker, 2015 LNCMFDA 18.

Griffith, 2014 LNCMFDA 59.

Showalter, 2019 LNCMFDA 101.

Chen, 2011 LNCMFDA 4.

Hayat, 2013 LNCMFDA 33.

Muhima, 2019 LNCMFDA 2.

Wray, 2017 LNCMFDA 130.

VI. DECISION

56. After a thorough review of the factors by which we should be guided, and the facts of this case, as reflected in the Settlement Agreement, we were, unanimously, of the view that this Settlement Agreement was reasonable and in the public interest and should be accepted by the Hearing Panel. We so informed the parties at the conclusion of the Settlement Hearing.

VII. ORDER

57. After accepting the Settlement Agreement, we made the following Order:

a) The Respondent shall pay a fine in the amount of $26,000 in certified funds upon acceptance of the Settlement Agreement, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;

b) he Respondent shall pay costs in the amount of $5,000 in certified funds upon acceptance of the Settlement Agreement, pursuant to s. 24.2 of MFDA By-law No. 1;

c) The payment by the Respondent of the fine and costs shall be made and received by MFDA Staff in certified funds as follows:

   i. $10,500 (Fine) upon acceptance of the Settlement Agreement by the Hearing Panel;

   ii. $5,000 (Costs) upon acceptance of the Settlement Agreement by the Hearing Panel;

   iii. $5,500 (Fine) on or before the last business day of the first month following the date of the Settlement Agreement;

   iv. $5,000 (Fine) on or before the last business day of the second month following the date of the Settlement Agreement; and

v. $5,000 (Fine) on or before the last business day of the third month following the date of the Settlement Agreement.

d) The Respondent shall complete an ethics or professional conduct course or another course acceptable to Staff prior to becoming re-registered as an Approved Person, pursuant to s. 24.1.1(f) of MFDA By-law No. 1;

e) The Respondent shall in the future comply with MFDA Rules 2.2.1, 2.1.1, 1.4(b), 2.1.4, 1.1.2, 2.5.1 as well as MFDA Policies No. 3 and No. 6; and

f) If at any time a non-party to this proceeding, with the exception of the bodies set out in section 23 of MFDA By-law No. 1, requests production of or access to exhibits in this proceeding that contain personal information as defined by the MFDA Privacy Policy, then the MFDA Corporate Secretary shall not provide copies of or access to the requested exhibits to the non-party without first redacting from them any and all personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*.

DATED this 27th day of April, 2022.

"Thomas J. Lockwood"
Thomas J. Lockwood, Q.C.
Chair

"Linda J. Anderson"
Linda J. Anderson
Industry Representative

"Cheryl Hamilton"
Cheryl Hamilton
Industry Representative

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