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 Anthony Ryan

Heard: March 21, 2011 in Toronto, Ontario
Decision and Reasons: April 6, 2011

DECISION AND REASONS

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.	Chair
Paul M. Moore, Q.C.	Industry Representative
Glenda S. Towle	Industry Representative

Appearances:

Lyla Simon	)	For the Mutual Fund Dealers Association of Canada
Michael Anthony Ryan	)	Not in attendance or represented by counsel

Background

1. Michael Anthony Ryan, the Respondent, was a salesman with Aegon Dealer Services Canada ("Aegon"). He resigned from Aegon on July 5, 2008 when faced with dismissal concerning alleged improper dealings with his client DG. The client had died at the end of May that year and DG's estate subsequently brought matters alleging impropriety to the attention of Aegon.

2. The Mutual Fund Dealers Association of Canada ("MFDA") commenced an investigation and issued a Notice of Hearing against the Respondent on November 5, 2010. Subsequently, further information came to light and, with the permission of the hearing panel and after notice to the Respondent, a further allegation was added to the Notice of Hearing. The allegations in the amended Notice of Hearing read:

> **Allegation #1**: Commencing on or about September 14, 2003 and continuing to May 30, 2008, the Respondent accepted and held a general power of attorney from client DG in favour of himself, contrary to MFDA Rules 2.3.1(a) and 2.1.1.
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> **Allegation #2**: Between 2005 and 2008, the Respondent engaged in personal financial dealings with client DG by accepting a total of $32,000 from client DG, thereby placing his own interests ahead of the client's interests and creating a conflict or potential conflict of interest that the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1.
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> **Allegation #3**: In or about August 2003, the Respondent borrowed $40,000 from client DG which he has failed to repay or otherwise account for, contrary to MFDA Rules 2.1.4 and 2.1.1.
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> **Allegation #4**: Commencing May 19, 2010, the Respondent has failed to provide MFDA Staff with answers to undertakings given at his interview during the course of an investigation, contrary to section 22 of MFDA By-law No. 1.

3. The Respondent told Staff of the MFDA by e-mail prior to the hearing that he did not intend to appear at the hearing, and he did not appear. The MFDA rules permit the hearing to proceed in the Respondent's absence and permit proceedings against him even though he is no longer an Approved Person, that is, a person licensed by the province to sell securities. Throughout the investigation, the Respondent hindered the MFDA's ability to obtain and review

the relevant facts. Although the Respondent participated in the required interview with the MFDA investigator, he failed to disclose important information.

4. He undertook at the interview to provide Staff of the MFDA, as a follow-up, with specific important documentary information. The information he eventually provided did not significantly assist the MFDA Staff or this panel to understand some of the key issues in the case. So Staff and this panel did not have a full and accurate picture of the relationship between the Respondent and DG, who is now deceased. Although the MFDA has access to DG's mutual fund trading records through Aegon, it does not have access to his bank statements and other investments, if any, or to the Respondent's personal bank statements, documents which might show other money received by the Respondent from DG. A civil action for damages has been brought by DG's trustee on behalf of the estate. The MFDA Staff did not request information from DG's trustee. The admitted facts we now have, and the inferences that we are able to draw from the material, are sufficient for us to make our decision.

5. The Respondent became a mutual fund salesman in 1993 and joined Aegon in early 2003. DG, a friend of his parents, had become the Respondent's client in 1999. In 2000, DG moved his mutual fund business to another agency, but switched his mutual fund business back to the Respondent a number of months later. The Respondent was apparently not anxious to have him back as a client. DG was always calling him and was, the Respondent says, a difficult client. However, the Respondent's mother wanted him to take DG back as a client and the Respondent did so.

Power of Attorney: Allegation #1

6. In September 2003 DG gave the Respondent a general power of attorney over his financial affairs. The Respondent had drafted the form himself, using as a model a power of attorney drafted by a lawyer for DG some months earlier, which had not made the Respondent the attorney for financial matters. Up until then, the Respondent only had DG's power of attorney over health matters.

7. The MFDA has a clear rule against a Member or Approved Person accepting or using a power of attorney. MFDA Rule 2.3.1 states:

> 2.3.1 (a) **Prohibition.** No Member or Approved Person shall accept or act upon a general power of attorney or other similar authorization from a client in favour of the Member or Approved Person....

Subsection (b) provides an exception for a power of attorney given by a client in favour of the Approved Person "where such client is a spouse, parent or child of the Approved Person." But even in such a case, the rules provide that the Approved Person's Member must be notified of the acceptance of the power of attorney and that someone other than the person holding the power of attorney be the Approved Person of record on the account. (See also Member Regulation Notice 0031, dated October 29, 2004.)

8. The reason for the prohibition is not specifically stated in the rules, but it is not difficult to see why such a prohibition was brought in. It is to help ensure that clients personally authorize trading, which reduces the potential for conduct that may not be in the best interest of the client. Clients will, in principle, have to direct their minds to proposed transactions. Such a rule helps prevent excessive or inappropriate trading by an Approved Person simply for the purpose of generating commissions or for some other personal advantage. The above section 2.3.1(a) was amended by the MFDA in 2008 to add the words "or engage in any discretionary trading" to make it clear that such conduct is covered by the rule, in case the words "other similar authorization" are not wide enough. There is a provision for limited trading authorization (Rule 2.3.2) but it is carefully controlled by MFDA rules to prevent discretionary trading by Approved Persons (see Member Regulation Notice 0038, dated April 15, 2005). These rules are designed to help eliminate conflicts of interest.

9. The Respondent did not disclose to Aegon that he had DG's general power of attorney. Each year he filled out a compliance certificate for Aegon and failed to state that he had such a power of attorney. Aegon's Conduct and Practices Guide – under a bold heading titled Powers of Attorney – specifically refers to the prohibition on accepting a general power of attorney. Each year the Respondent signed a certificate stating that he had read the Aegon Guide. Moreover, the form required him to acknowledge that he had disclosed all "conflicts or potential conflicts of interest." (See MFDA Member Regulation Notice 0054, dated June 22, 2006.)

10. In a branch review by Aegon in August 2005, it was discovered that the Respondent had DG's general power of attorney in addition to a power of attorney over health. He was told by Aegon officials to destroy the general power of attorney, but he did not do so. In July 2008 he admitted to Aegon that he still possessed DG's general power of attorney.

11. The Respondent said that he exercised the power of attorney on only one occasion. In 2006 he sent $50,000 of DG's funds to DG's nieces in Kentucky to assist them in purchasing a house. MFDA Staff were not aware of any other occasion in which the power of attorney was used.

12. The holding of the general power of attorney was clearly a breach of MFDA Rule 2.3.1(a). We will discuss in a later part of these reasons whether this and the other allegations also violate section 2.1.1 of the rules.

Payments to Respondent: Allegation #2

13. Respondent admitted in his interview that in each of 2005, 2006, 2007 and 2008, he received $8,000 per year directly from DG. In his brief Reply to the allegations filed in November 2010, the Respondent claimed that the sum was somewhat less than $8,000 each year and that no payment was made in 2008.

14. Staff tried to link these payments to the Respondent's accepting and holding a power of attorney in favour of himself. The panel, however, does not find that the evidence is sufficient to establish such a link. Rather, we suspect, on the basis of the Respondent's interview with Staff, the Respondent's Reply, and some documents that he provided, the payments were because the Respondent devoted considerable time and energy to the non-financial affairs of DG. DG's long-time companion had died in 1999 and he had no children. His closest relatives were his two nieces who lived in Kentucky, to whom he left his estate. He appeared to be a lonely and rather difficult person, whose health was deteriorating.

15. The Respondent visited him frequently, claiming in a recent e-mail to Staff that from 2001 to 2005 he personally visited DG a couple of times a month, on each visit travelling almost 100 kilometres roundtrip. He claims that there were daily phone calls. In 2005 the Respondent

organized DG's move into a retirement home and visited him about once a week there. The following year DG moved into a long-term care residence and the weekly visits continued. The Respondent undertook such tasks as taking him to the dentist and personally transporting DG's unwanted possessions to his relatives in Kentucky. In 2007, the Respondent organized DG's care in a Toronto hospital for a broken hip. When DG died the Respondent made the arrangements for his funeral. The Respondent claims that DG and his nieces in Kentucky had agreed to the payment of $8,000 a year, but no documents were presented to us confirming the arrangement.

16. Nevertheless, the arrangement created a potential conflict of interest. MFDA Rule 2.1.4 deals with conflicts of interest and states:

> 2.1.4 (a) Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.
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> (b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d).
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> (c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.
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> (d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4(a), (b) and (c).

In 2005, the MFDA issued Member Regulation Notice 0047 relating to "Personal Financial Dealings with Clients." The Notice states that "all monetary and non-monetary benefits provided directly or indirectly to or from clients must flow through the Member" and goes on to say that "each Member must develop policies and procedures to ensure that it is aware in advance of any personal financial or business dealings between Approved Persons and clients."

17. The arrangement was never discussed with Aegon, even though the Respondent must surely have been aware that receiving payments from a client created a potential conflict of

interest and should have been discussed with the Member. Aegon's Conduct and Practices Guide for 2005 states:

> Where there is uncertainty as to whether a conflict of interest exists, the advisor and/or branch manager should discuss the issue with the Provincial or Head Office Compliance Officer to assess the situation.

How the matter would have been handled by Aegon if the arrangement had been raised by the Respondent is uncertain. The payment appears to us to be reasonable for the work undertaken. The firm may well have been sympathetic to the arrangement, but would, however, likely have introduced some safeguards concerning the Respondent's business dealings with DG. They certainly would have required that the arrangement be put in writing.

Borrowing from his client: Allegation #3

18. In 2003, the Respondent borrowed $40,000 from his client DG. He gave DG a promissory note, promising to repay the debt to DG's estate. This loan was not disclosed to Aegon. Nor was it disclosed in the interview with the MFDA investigator. It only came to light shortly before the hearing and after the Notice of Hearing had been issued. The Respondent has not repaid the loan. A claim was brought by DG's estate for the amount of the loan. The Respondent did not file a statement of defence to the action and the estate obtained judgment against the Respondent in September 2010.

19. Borrowing money from a client has consistently been held by other panels to be a conflict of interest under Rule 2.1.4. (See, for example, *Tonnies* in 2005, *Smiechowski* in 2010, and *Jones* in 2011), even though borrowing is not specifically mentioned in the Rules.

20. The MFDA Member Regulation Notice 0047, dated October 3, 2005, takes a hard line on borrowing from clients, stating:

> Borrowing from a client by either the Member or Approved Person raises a significant and direct conflict that in almost all cases will be impossible to resolve in favour of the client. While such activity is not explicitly prohibited under MFDA rules, MFDA Staff are unaware of any circumstances where Members or Approved Persons proposing to enter into any such arrangements would be able to demonstrate that the conflict has been properly dealt with.

21. The Investment Industry Regulatory Organization of Canada ("IIROC") has recently provided in its rules that borrowing is prohibited. IIROC followed the Law Society of Upper Canada rule that permits borrowing in two situations: when the lender's business includes lending money to the public, if the borrowing is in the normal course of the client's business, and borrowing from a client who is a Related Person. But even in the latter case, safeguards are introduced requiring disclosure and approval by the Member. (See IIROC notice 10-0155, May 28, 2010.)

22. We conclude that the Respondent is in breach of Rule 2.1.4.

Failure to Cooperate: Allegation #4

23. The interview with the MFDA investigator took place in January 2010. At that time, four undertakings were given by the Respondent to Staff. These were:

> i) A copy of any and all agreements between the Respondent and [DG] regarding fees charged by the Respondent, including how much was paid and when;
> ii) Notes of the number of times that the Respondent met with and/or provided services to [DG];
> iii) Documentation relating to the moneys forwarded to [DG's] nieces as a down payment for the home; and
> iv) A copy of the Respondent's expenses for going to see [DG].

24. For over a year the MFDA tried to get the Respondent to respond to the undertakings, without success. E-mails were sent in January, February and March 2010 requesting answers to the undertakings. Registered mail, which was unclaimed, was sent in May 2010. In June 2010, the Respondent was personally served with a letter advising that the MFDA was contemplating issuing a Notice of Hearing and giving July 2, 2010 as the deadline. Again there was no response. In an e-mail in early March 2011, a further request for answers to the undertaking was made. Again no response. The MFDA prepared an affidavit dated March 9, 2011 stating that "the Respondent's failure to answer his undertakings as given at his MFDA interview have prevented

Staff from determining the full nature and extent of the Respondent's misconduct regarding [DG], as well as relating to other possible clients or individuals."

25. At the hearing, however, counsel for the MFDA stated that a week before the hearing commenced a document was e-mailed to the MFDA by the Respondent. The document does not assist the panel to any considerable extent in determining the nature of the agreement for payment of $8,000 a year. The Respondent simply stated: "Our arrangement was that I was to be paid at the end of each year. I was paid for 2005, 2006, and 2007. I do not have a copy of the agreement." In answer to undertakings ii) and iv), the Respondent gave a detailed list of visits made. These were clearly not contemporaneous records. They consisted of 14 handwritten pages in the Respondent's handwriting, using what appeared to us to be the same pen. It is possible that these were made from other records that the Respondent still has. If so, it would have been valuable to see those diaries or other records. As to the undertaking about the money forwarded to the nieces under the power of attorney, all that the Respondent said was: "I used my P.O.A. in April of 2006 to send $25,000 each for the purchase of a new home." The answers to the undertakings do not advance our understanding of the Respondent's affairs and did not give the investigator the opportunity to ask the Respondent questions. As stated above, the Respondent chose not to appear at the hearing.

26. Every professional has an obligation to cooperate with his or her self-governing body. This was the decision of the Ontario Divisional Court in a 1990 decision: *Artinian v. College of Physicians and Surgeons of Ontario*, [1990] O.J. No. 1116. It is found in many decisions by self-regulatory bodies. If an Approved Person does not deal with diligence, honesty and integrity with his or her governing body, how then can one expect the person to deal diligently, honestly and with integrity with clients or with his or her Member?

27. Section 22.1 of MFDA By-Law No. 1 obliges the Member to cooperate with an investigation conducted under Section 21. It states:

> For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:

(a) to submit a report in writing with regard to any matter involved in any such investigation;
(b) to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and
(c) to attend and give information respecting any such matters; ...

and the Member or person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend, accordingly. Any Member or person subject to an investigation conducted pursuant to this By-law may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending before the persons conducting the investigation.

28. Although the Respondent appeared at the interview, he did not provide some significant material and never revealed the loan from DG. It took a year to receive anything concerning the undertakings and, as stated above, the information was not very helpful. We conclude that the Respondent was in breach of section 22 of MFDA By-Law No. 1.

Section 2.1.1: Standard of Conduct

29. The MFDA alleges that the first three allegations were in breach of the general Standard of Conduct provision in the rules, Rule 2.1.1 states:

Each Member and each Approved Person of a Member shall:

(a) deal fair, 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; and
(d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

30. We were not directed to any authority on this point, but it appears to us that whenever there is a breach of the rules of business conduct, there is a breach of the Standard of Conduct Rule. In any event, we find that the first three allegations are also breaches of Rule 2.1.1. Each of them fits comfortably within each of the four subsections. They certainly fit within subsections (b) and (c). The Respondent did not under subsection (b) “observe high standards of ethics and

conduct in the transaction of business" and under subsection (c) he engaged in "business conduct or practice which is unbecoming or detrimental to the public interest."

Penalty

31. The breach of the rules is clear. Indeed, the Respondent acknowledged in his interview that MFDA rules were broken. The real question in this case is what the penalty should be. The Respondent has left the profession of selling securities and claimed in the interview with the MFDA to have no interest in returning to it. Should he be permanently prohibited by this panel from ever returning under the authority of section 24.1.1(e) of MFDA By-law No. 1?

32. It is our unanimous view that the Respondent should not be allowed to return to the profession. He has forfeited his right to sell securities. The MFDA Penalty Guidelines (September 20, 2006) suggest that there be a "permanent prohibition in egregious cases." Each allegation might not be considered egregious, but collectively they are. We have looked at a number of recent cases and note that persons have been permanently barred for conduct that appears to be less serious than the Respondent's conduct. The Respondent breached four important MFDA rules. He was not forthcoming to the Member or to the MFDA. He did not cooperate with the investigation and did not appear at the hearing. His client was elderly and vulnerable and did not have independent advice. The Respondent should not be readmitted to sell securities.

33. The amount of the fine under section 24.1.1(b) of By-law No. 1 is a difficult issue. It is likely that he cannot pay a fine. Moreover, if he has funds, DG's estate should have a prior claim on those funds. And we have some sympathy for the Respondent's plight, which came about in part because he was trying to assist a family friend. We have taken these matters into account in our decision.

34. We have examined fines given in other cases. No two cases are alike. We have also found it difficult in the circumstances of this case to apportion the fine according to the money received by the Respondent.

35. Our conclusion is that a reasonable fine in this case should amount to a total of $100,000,

made up of a fine of $25,000 on each allegation.

Costs

36. In addition, we award $7,500 in costs against the Respondent under section 24.2 of By-law No. 1.

37. Finally, we are grateful to counsel, Lyla Simon, and to the investigator, John Gallimore, for their helpful presentation of the case on behalf of the MFDA.

DATED this 6th day of April, 2011.

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

"Paul Moore"
Paul M. Moore, Q.C.,
Industry Representative

"Glenda Towle"
Glenda Towle,
Industry Representative

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