



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: Lloyd Edward Smith

Heard: October 31, 2019 in Toronto, Ontario
Decision: October 31, 2019
Reasons for Decision: December 17, 2019

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, CC, QC
Selwyn B. Kossuth
Kenneth P. Mann

Chair
Industry Representative
Industry Representative

Appearances:

Jacklyn Neborak)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
)	
Rafal Szymanski)	Counsel for the Respondent
)	
)	
Lloyd Edward Smith)	Respondent, by teleconference
)	
)	

Background

1. This is a Settlement Hearing under Section 24.4 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the “MFDA”). The hearing was held on Thursday, October 31, 2019. The full Settlement Agreement, dated September 17, 2019, entered into between Staff of the MFDA and Lloyd Edward Smith, (the “Respondent”) is available on the MFDA website. The Respondent appeared at the Hearing by teleconference and was represented by counsel.
2. The Panel accepted the proposed Settlement Agreement at the conclusion of the hearing, with reasons to follow. These are our reasons for our decision to accept the Settlement Agreement.
3. The Respondent has been registered in the mutual fund industry since May 1998. From May 2000 to June 2018, the Respondent was registered in Ontario as a mutual fund salesperson (now known as a dealing representative) with FundEX Investments Inc. (“FundEX or the “Member”), a Member of the MFDA. The Respondent was also registered as a mutual fund dealing representative with the Member in Quebec from September 2005 to June 2018 and in Newfoundland from September 2005 to November 2014.
4. The Respondent is no longer registered in the securities industry in any capacity.
5. At all material times, the Respondent conducted business in the Ottawa, Ontario area.
6. A Notice of Settlement Hearing was issued by the MFDA on September 17, 2019, alleging that the Respondent:
 - a) between July 2007 and February 2018, altered and in some instances, used to process transactions, 30 account forms in respect of 28 clients by altering information on the account forms without having the client initial the alterations, contrary to MFDA Rule 2.1.1; and
 - b) between January 2009 and August 2017, obtained, possessed, and in some instances, used to process transactions, 215 pre-signed account forms in respect of 25 clients, contrary to MFDA Rule 2.1.1.

The Settlement Agreement

7. In Paragraph 4 of the Settlement Agreement, the Respondent admits to the violations alleged in paragraph 6 above.

8. In Paragraph 5 of the Settlement Agreement, Staff and the Respondent agree and consent to the following terms of settlement:

- a) the Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with a Member of the MFDA for a period of 6 months from the date this Settlement Agreement is accepted, pursuant to section 24.1.1(e) of MFDA By-law No. 1;
- b) the Respondent shall pay a fine in the amount \$20,000 in certified funds upon acceptance of the Settlement Agreement, pursuant to s. 24.1(b) of MFDA By-law No. 1, in instalments as follows:
 - i. \$15,000, in certified funds, upon acceptance of the Settlement Agreement by the Hearing Panel; and
 - ii. \$5,000, on or before the last business day of the sixth month following the acceptance of the Settlement Agreement by the Hearing Panel;
- c) the Respondent shall pay costs in the amount of \$2,500 in certified funds upon acceptance of the Settlement Agreement, pursuant to s. 24.2 of MFDA By-law No. 1;
- d) the Respondent shall in the future comply with MFDA Rule 2.1.1; and
- e) the Respondent will attend in person or by teleconference on the date set for the Settlement Hearing.

Agreed Facts

9. The agreed facts are set out in detail in paragraphs 7 to 25 of the Settlement Agreement and will not be repeated in full here. The conduct dealt with altered account forms and pre-signed account forms.

10. In brief, beginning in or about September 2008, the Member had policies and procedures that required clients to initial all changes made to client documents and policies and procedures prohibiting pre-signed forms.

11. Between July 2007 and February 2018, as set out in paragraphs 12 and 13 of the Settlement Agreement, the Respondent altered and in some instances, used to process transactions, 30 account forms in respect of 28 clients by altering information on the account forms without having the client initial the alterations.

12. As set out in paragraphs 15 and 16 of the Settlement Agreement, between January 2009 and August 2017 the Respondent obtained, possessed, and in some instances, used to process transactions, 215 pre-signed account forms in respect of 25 clients.

13. The Respondent had previously used a pre-signed account form. In or about April 2008, the Member conducted an audit of files maintained by the Respondent and identified one blank pre-signed account form in a client file serviced by the Respondent. On May 30, 2008, the Member had the Respondent sign an Acknowledgment and Undertaking not to use pre-signed account forms. The pre-signed account forms that are the subject of the Settlement Agreement occurred after the Acknowledgment and Undertaking.

The Misconduct

14. MFDA Hearing Panels have consistently held that such conduct – altering account forms and using pre-signed forms – constitutes contravention of the standard of conduct under MFDA Rule 2.1.1. See *Re Price* 2011 CanLII 72458; *Re Singh* 2014 LNCMFDA 12; *Re Symes* 2017 LNCMFDA 104; *Re Owen* 2017 LNCMFDA 287; *Re Oh* 2018 LNCMFDA 252; *Re Nash* 2019 LNCMFDA 15 and *Re Brenchley* 2019 LNCMFDA 113.

15. Using these forms are proscribed because their use adversely affects the integrity and reliability of account documents, leads to the destruction of the audit trail, has a negative impact on Member complaint handling, and has the potential for misuse in the form of unauthorized trading, fraud, and misappropriation. See *Re Brenchley* 2019 LNCMFDA 113.

16. For a number of years, the MFDA has been warning Approved Persons against the use of pre-signed, altered, and re-used account forms. See MFDA Staff Notice, MSN-0066, dated October 31, 2007 (updated January 26, 2017); and MFDA Staff Notice MSN-035, dated December 10, 2004 (updated March 4, 2013); MFDA Bulletin #0661 – E (October 2, 2015).

Acceptance of the Settlement Agreement

17. As stated above, the Panel accepted the terms of the Settlement Agreement. A Panel can either accept or reject a Settlement Agreement. It cannot modify it.

18. The conduct in the present case is serious. Altered forms are especially serious because, unlike pre-signed forms that the client knows are blank when he or she signs the form, an alteration may be done without the client's knowledge.

19. This is not an isolated case. The conduct went on for many years with many clients.

20. The conduct is particularly serious because, as set out in paragraph 18, the Respondent had been warned about his conduct and signed an Acknowledgement and Undertaking not to use pre-signed forms.

21. There are a number of mitigating factors. On April 27, 2018, the Member sent a letter to all clients serviced by the Respondent requesting that clients report any deficiencies. No clients reported any concerns.

22. The Respondent has not previously been the subject of MFDA disciplinary procedures.

23. There is no evidence that the Respondent received any benefit from the conduct set out beyond the commissions or fees he would ordinarily be entitled to receive had the transactions been carried out in the proper manner. Moreover, shortly before the Respondent resigned, the Member imposed a monthly financial penalty, which was deducted directly from the Respondent's commissions. About \$7,000 has thus far been deducted.

24. By entering into the Settlement Agreement, the Respondent has saved the MFDA the time, resources, and expenses associated with conducting a full hearing on the allegations and by entering into a Settlement Agreement has accepted responsibility for his actions.

25. The penalty of \$20,000 is not out-of-line with the new Sanctions Guidelines as well as the cases cited to us by counsel: *Re Sharma* 2018 LNCMFDA 33; *Re Brenchley* 2019 LNCMFDA 113; *Re Burchill* 2017 LNCMFDA 170; *Re Mills* 2019 LNCMDA, and *Re Owen* 2017 LNCMFDA 287.

26. The monetary penalty and the six-month prohibition provide a significant measure of specific and general deterrence.

27. Settlements can be important and useful in achieving outcomes which further the goals of the securities regulatory context. The British Columbia Court of Appeal affirmed the British Columbia Supreme Court's statement with respect to a settlement by the British Columbia Securities Commission at paragraph 49 of *British Columbia Securities Commission v. Seifert* [2006] BCJ No. 225, aff'd [2007] BCCA No. 484:

“Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation.”

28. Hearing Panels should respect settlements worked out by the parties. A Panel does not know what led to a settlement, what was given up by one party or the other in the course of the negotiations, and what interest each party has in agreeing to resolve the matter. The Panel cannot go beyond the Settlement Agreement. There are almost always facts that play a role in the settlement which are not set out in the Settlement Agreement or brought to the attention of the Panel. Respecting settlements is particularly desirable in cases, such as this one, where experienced counsel were involved.

29. As a Panel stated (*Re Keshet*, File No. 201419 at paragraph 7), to take one of many such cases: “It is well established that hearing panels should not interfere lightly in negotiated settlements and should not reject a settlement agreement unless it views the proposed penalty clearly falling outside a reasonable range of appropriateness.” There are many similar statements by MFDA Panels, stemming from the leading decision of *Re Milewski* [1999] I.D.A.C.D. No. 17, which stated:

“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.”

30. The penalty and the costs agreed to in this case fall within “a reasonable range of appropriateness.”

31. For the above reasons the Panel accepted the Settlement Agreement.

DATED this 17th day of December, 2019.

“Martin L. Friedland”

Martin L. Friedland, CC, QC
Chair

“Selwyn B. Kossuth”

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Industry Representative

“Kenneth P. Mann”

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