



**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: Deryl Emerson Francis Thompson**

Heard: June 1, 2021 by electronic hearing in Edmonton, Alberta  
Decision: June 1, 2021  
Reasons for Decision: August 4, 2021

**REASONS FOR DECISION**

Hearing Panel of the Prairie Regional Council:

Sherri Walsh  
Richard R. Sydenham  
Sean Shore

Chair  
Industry Representative  
Industry Representative

Appearances:

|                                |   |                                           |
|--------------------------------|---|-------------------------------------------|
| Justin Dunphy                  | ) | Senior Enforcement Counsel for the Mutual |
|                                | ) | Fund Dealers Association of Canada        |
|                                | ) |                                           |
|                                | ) |                                           |
| Zachary Pringle                | ) | Counsel for the Respondent                |
|                                | ) |                                           |
|                                | ) |                                           |
| Deryl Emerson Francis Thompson | ) | Respondent                                |
|                                | ) |                                           |
|                                | ) |                                           |

## I. INTRODUCTION

1. On May 18, 2021, the Mutual Fund Dealers Association of Canada (“MFDA”) issued a Notice of Settlement Hearing pursuant to Section 24.4 of MFDA By-law No. 1 in respect of Deryl Emerson Francis Thompson (the “Respondent”).
2. The Settlement Hearing related to a Settlement Agreement dated May 5, 2021 entered into between the Respondent and MFDA Staff (“Staff”), pursuant to which the Respondent agreed to a proposed settlement of matters for which he could be disciplined under Sections 20 and 24.1 of MFDA By-law No. 1 (the “Settlement Agreement”).
3. On May 27, 2021, the MFDA published a News Release announcing that it had issued the Notice of Settlement Hearing dated May 18, 2021.
4. The News Release contained information about: the allegations which formed the subject of the proposed Settlement Agreement; the date of the Settlement Hearing; and the manner in which members of the public who would like to obtain particulars, could contact the MFDA.
5. The Settlement Hearing was heard on June 1, 2021 by video conference, by a Hearing Panel of the MFDA Prairie Regional Council (the “Panel”). Both the Respondent and his legal counsel attended the hearing.
6. At the commencement of the hearing, Staff brought a motion asking the Panel to abridge the time required under the MFDA’s *Rules of Procedure* regarding the notice period required for publishing a Notice of a Settlement Hearing (the “abridgement motion”).
7. Specifically, the *Rules of Procedure* require:

### **15.2 Notice and Public Access**

- (1) Except where a settlement is reached after the commencement of the hearing of a proceeding on its merits, a Hearing Panel shall not consider a Settlement Agreement unless at least 10 days notice of the settlement hearing has been given by the Corporation in the same manner as a notice of penalty pursuant to section 24.5 (Publication of Notice and Penalties) of MFDA By-law No. 1 specifying:
  - (a) the date, time and place of the settlement hearing; and
  - (b) the purpose of the settlement hearing with sufficient information to identify the Member or person involved and the general nature of the allegations which are the subject matter of the settlement.
8. The *Rules* also allow a Panel to extend or abridge the time for the performance of any obligation under the *Rules*:

## **2.2 Extension or Abridgment of Time**

- (1) The time for the performance of any obligation under these Rules may be extended or abridged:
  - a) by a Panel, at any time on such terms as it considers appropriate;
  - b) on consent of the parties prior to the expiration of the prescribed time.

9. In seeking the abridgement motion, Enforcement Counsel told the Panel that on May 20 and 21, 2021, he gave notice of the Settlement Hearing to: the Respondent and his counsel; the Member who employed the Respondent at the relevant time; the Securities Commission of Alberta; and NF - the individual complainant who is identified in the facts which are set out in the Settlement Agreement.

10. Enforcement Counsel advised the Panel that the only parties who did not receive notice of the Settlement Hearing ten days before the date of the hearing, therefore, were members of the public — the News Release having only been published on May 27, 2021.

11. Enforcement Counsel submitted that since all parties were ready to proceed with the Settlement Hearing, the benefit to proceeding on that date outweighed any potential harm caused by the failure to issue the public notice at least ten days before the Hearing commenced.

12. The Respondent's counsel consented to Staff's motion and the Panel granted the abridgement motion.

13. Enforcement Counsel then requested an order that the Settlement Hearing be held in the absence of the public pursuant to *Rule of Procedure* 15.2(2) and Section 20.5 of MFDA By-law No. 1. The Panel granted that motion as well and the Settlement Hearing proceeded.

14. At the conclusion of the hearing, the Panel accepted the Settlement Agreement and issued an Order to that effect. These are the Panel's reasons for that Order.

## **II. CONTRAVENTIONS**

15. In the Settlement Agreement, the Respondent admitted to having committed the following violations of the MFDA's By-laws, *Rules* or Policies:

- a) between 2008 and until at least July 2016, he failed to use adequate due diligence to ensure that investment recommendations that he made to clients were suitable when he recommended that the clients concentrate all or substantially all of their

investment holdings in precious metals sector mutual funds, contrary to MFDA Rules 2.2.1 and 2.1.1;

- b) between 2008 and until at least July 2016, he failed to accurately record the essential KYC factors relevant to each client and to each order and account that he accepted, but instead recorded KYC information for each client that would be consistent with his investment recommendations to those clients in order to ensure that the investments appeared to be suitable, contrary to MFDA Rules 2.2.1 and 2.1.1; and
- c) between 2008 and until at least July 2016, he failed to adequately explain to clients the risks of holding investments concentrated in precious metals sector mutual funds and thereby failed to present the investment recommendations to clients in a fair and balanced manner, contrary to MFDA Rules 2.2.1 and 2.1.1.

### **III. TERMS OF SETTLEMENT**

16. Staff and the Respondent agreed to the following terms of settlement:

- a) the Respondent shall be permanently prohibited from conducting securities related business in any capacity while in the employ or associated with an MFDA Member, pursuant to Section 24.1.1(e) of MFDA By-law No. 1;
- b) the Respondent shall pay a fine of \$10,000 in accordance with the schedule set out sub-paragraph 47 d. below, pursuant to Section 24.1.1(b) of MFDA By-law No. 1;
- c) the Respondent shall pay costs in the amount of \$3,750 in certified funds upon acceptance of the Settlement Agreement, pursuant to Section 24.2 of MFDA By-law No. 1;
- d) the payment by the Respondent of the Fine and Costs shall be made and received by Staff as follows:
  - i. \$3,750 (Costs) in certified funds upon acceptance of the Settlement Agreement by the Panel;
  - ii. \$1,668 (Fine) on or before the last business day of the first month following the date of the Settlement Agreement;
  - iii. \$1,668 (Fine) on or before the last business day of the second month following the date of the Settlement Agreement;
  - iv. \$1,666 (Fine) on or before the last business day of the third month following the date of the Settlement Agreement;

- v. \$1,666 (Fine) on or before the last business day of the fourth month following the date of the Settlement Agreement;
  - vi. \$1,666 (Fine) on or before the last business day of the fifth month following the date of the Settlement Agreement;
  - vii. \$1,666 (Fine) on or before the last business day of the sixth month following the date of the Settlement Agreement; and
- e) the Respondent will attend the Settlement Hearing in person or via videoconference.

#### **IV. AGREED FACTS**

17. The facts which Staff and the Respondent agreed would form the basis for the Settlement Agreement are set out at paragraphs 6-45 of that agreement and are reproduced below as follows:

- 6. From 1997 to May 2018, the Respondent was registered in the securities industry.
- 7. From April 1997 to April 2004, the Respondent was registered in Alberta as a dealing representative with PFSL Investments Canada Ltd. (“PFSL”). Effective January 31, 2002, PFSL became a Member of the MFDA and the Respondent became an Approved Person of PFSL.
- 8. From April 2004 until August 2011, the Respondent was registered in Alberta as a dealing representative with Professional Investment Services (Canada) Inc. (“PIS”), a Member of the MFDA, and its predecessors.<sup>1</sup>
- 9. From August 2011 until May 2018, the Respondent was registered in Alberta<sup>2</sup> as a dealing representative with Portfolio Strategies Corporation (“PSC”), a Member of the MFDA.
- 10. On May 2, 2018, PSC terminated the Respondent, and he is no longer registered in the securities industry in any capacity.
- 11. At all material times the Respondent conducted business in the Edmonton, Alberta area.

##### **The Precious Metals Strategy**

- 12. Between 2008 and at least until 2016, the Respondent recommended an investment strategy whereby clients concentrated their investment portfolio in precious metals sector mutual funds, in particular, the BMG Bullion Fund<sup>3</sup> and other bullion based mutual funds (the “Precious Metals Strategy”).
- 13. The Respondent believed that, among other things, as a result of government monetary and debt policies, the Precious Metals Strategy would provide clients with a long term safe haven for their capital.
- 14. In the course of recommending the Precious Metals Strategy to clients, the Respondent represented that, among other things, if a client invested in a mutual fund that held multiple types of precious metals such as gold, silver, and platinum, the client’s portfolio would be sufficiently diversified because each type of precious metal would respond differently to economic conditions. The Respondent

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<sup>1</sup> Commencing April 2004, the Respondent was registered with Generation Financial Corp., which underwent a name change to PIS on November 9, 2006.

<sup>2</sup> The Respondent was also registered in Ontario at various times until May 2018.

<sup>3</sup> The BMG Bullion Fund is currently rated high risk, but at the time of the recommendations was rated as a medium risk fund.

did not inform clients of the risks of concentrating their investment portfolios in a single sector of the economy.

15. Following the implementation of the Precious Metals Strategy, the investment accounts of clients who were serviced by the Respondent were heavily concentrated in precious metals sector mutual funds. As of July 2016, the Respondent serviced 371 investment accounts owned by 174 clients. As of July 2016, approximately 98% of the \$7.19 million in assets under administration held in accounts serviced by the Respondent were invested in precious metals sector mutual funds. Approximately 86% of the assets invested in precious metals were invested in a single mutual fund: the BMG Bullion Fund.

16. In November 2014, PSC conducted a branch review of the Respondent's branch location, where PSC identified and brought to the Respondent's attention that a high proportion of the clients serviced by the Respondent were heavily invested in precious metals sector mutual funds. No action was taken to address the concerns raised by the Member.

#### **The Respondent Failed to Ensure Recommendations were Suitable**

17. The Respondent failed to ensure that the recommendations that he made to clients to implement the Precious Metals Strategy were suitable for each client and in keeping with each client's investment objectives.

18. In particular, the Respondent failed to ensure that the investment recommendations that he made to each client provided the clients with sufficient diversification to limit the risks of concentration that would result from investing all or substantially all of their investable assets in precious metals sector mutual funds.

19. The Respondent engaged in a practice of recommending that clients concentrate their investment holdings in precious metals sector mutual funds based upon his optimistic expectations as to how these mutual funds would perform.

20. The Respondent failed to adequately consider whether it was suitable for each client to hold a portfolio that was comprised of investments that were heavily or exclusively concentrated in the precious metals sector of the economy.

#### **The Respondent Failed to Learn and Accurately Record Know Your Client Information**

21. In the course of implementing the Precious Metals Strategy, the Respondent engaged in a practice of recording the uniform KYC information for clients. As a result of this practice:

- a. 85% of client accounts had a time horizon of "10 years" or greater;
- b. 97.5% of client accounts had an investment objective of "growth";
- c. 99% of client accounts had a risk tolerance of "medium" or higher.

22. The Respondent recorded the KYC information described in paragraph 21 above, regardless of whether or not the clients genuinely had a long time horizon, a medium or greater risk tolerance, or a growth investment objective.

23. The Respondent engaged in this practice in order to ensure that the KYC information that he had recorded for each client supported his investment recommendations to concentrate all, or a substantial portion, of the clients' investment holdings in precious metals sector mutual funds so that those funds that were purchased in each client account would appear to be suitable for the clients.

#### **The Respondent Failed to Fully Explain the Risks of the Precious Metals Strategy**

24. As described above, in the course of recommending the Precious Metals Strategy to clients, the Respondent represented that, among other things, investing in precious metals sector mutual funds and in particular, the BMG Bullion Fund, would provide sufficient investment diversification as a result

of the fact that the underlying investments held in the BMG Bullion Fund included gold, silver and platinum.

25. The Respondent failed to adequately explain the risks of holding investments concentrated in precious metals sector mutual funds (i.e., a single economic sector) and the risk that the Precious Metals Strategy would not perform as well as he had represented that it would, contrary to his suitability obligations.

26. To the extent that the Respondent explained some of the risks of investing in precious metals sector mutual funds, he failed to provide a fair and balanced presentation of the risks of the Precious Metals Strategy.

#### **Client NF**

27. At all material times, client NF was a client of PIS and subsequently PSC, and her accounts were serviced by the Respondent.

28. In or around 2008 when client NF became a client of PIS, client NF had limited investment knowledge and wanted a medium risk investment that would provide a consistent source of income for her that she could rely upon when she retired.

29. In 2008, the Respondent recommended that client NF implement the Precious Metals Strategy. Based on this advice, client NF redeemed the investments that she held prior to dealing with him and invested 100% of the proceeds from the sale of the investments that were previously held in her Locked In Retirement Account (“LIRA”) into the BMG Bullion Fund.

30. In September 2011 when client NF became a client of PSC, the Respondent continued to recommend the Precious Metals Strategy and client NF continued to hold only the BMG Bullion Fund in her LIRA. When client NF transferred her LIRA to PSC in September 2011, the value of the account was \$23,676.

31. In or around June 2014, client NF opened a Registered Retirement Savings Plan (“RRSP”) account at PSC.

32. Commencing in October 2014, the Respondent implemented a pre-authorized contribution plan (“PAC”) for client NF’s RRSP account to facilitate transfers of a consistent monthly contribution amount into the account, which were then invested into the BMG Bullion Fund.

33. The Respondent failed to adequately explain to client NF the risks of concentrating all of her retirement savings in a single mutual fund comprised exclusively of investments in a single economic sector rather than diversifying her portfolio so that the investments held in it included investments other than precious metals. Consequently, the Respondent failed to provide client NF with a fair and balanced presentation of the Precious Metals Strategy.

34. In 2017, in accordance with the Respondent’s recommendations, client NF continued to hold the BMG Bullion Fund in her LIRA and made monthly contributions to her RRSP account, which were also used to purchase additional units of the BMG Bullion Fund. Based upon advice received from the Respondent, client NF also made switches in her LIRA and in her RRSP from the BMG Bullion Fund into another precious metals sector mutual fund that primarily held silver (the “BMG Silver Fund”) and she also made additional monthly purchases in her RRSP into the BMG Silver Fund.

35. Up until May 2018 when PSC terminated the Respondent, in accordance with the recommendations of the Respondent, client NF held exclusively precious metals sector mutual funds in her LIRA and RRSP accounts.

36. Client NF was disappointed with the performance of her RRSP and LIRA. Between September 2011 and March 31, 2018, the total value of client NF’s combined LIRA and RRSP accounts declined by approximately 17%.

37. On or about July 2018, client NF submitted a complaint with respect to the Respondent's conduct and the performance of her accounts.

38. In or around August 2018, a different Approved Person was assigned to service the investment accounts of client NF and the holdings in the Respondent's RRSP and LIRA accounts were re-balanced into a global balanced fund and a broadly diversified Canadian / US equity fund.

#### **Additional Factors**

39. The Respondent has not been the subject of previous MFDA disciplinary proceedings.

40. On May 2, 2018, PSC terminated the Respondent's mutual fund registration and he ceased to be an Approved Person of PSC. The clients that had previously been serviced by the Respondent were re-assigned to different Approved Persons of PSC.

41. Commencing in May 2018, the Member initiated a review of the Respondent's book of business due to concerns about the suitability of the accounts that he serviced which were all heavily concentrated in precious metals sector mutual funds.

42. Following the termination of the Respondent in May 2018, PSC instructed the Approved Persons who took over responsibility for servicing client accounts that had previously been serviced by the Respondent to review KYC information with clients and encourage rebalancing of client portfolios.

43. The Respondent has cooperated fully with Staff during the course of the investigation, and by agreeing to this settlement, has avoided the time and expense of a contested hearing on the merits.

44. With the exception of client NF, no clients have complained with respect to the Respondent's conduct.

45. The Respondent states that he is retired from the financial services industry, is primarily on a fixed income, and also contributes expenses towards a child with a medical disability, and as a result he is limited in his ability to pay financial penalties. The Respondent acknowledges that absent his limited ability to pay, it would have been appropriate for him to be subject to a penalty that included a higher fine as a consequence of the misconduct that is admitted in this Settlement Agreement.

## **V. ANALYSIS**

### **Role of the Panel**

18. The role a Hearing Panel performs at a Settlement Hearing is fundamentally different from the role it performs at a Contested Hearing.

19. When considering a Settlement Agreement, a Hearing Panel has only two options: either to accept or reject the Settlement Agreement.

MFDA By-law No. 1, s. 24.4.3

20. As stated by the Hearing Panel in *Sterling Mutuals Inc. (Re)* citing the I.D.A. Ontario District Council in *Milewski (Re)*:

...while in a contested hearing the Panel attempts to determine the correct penalty, in a settlement hearing the Panel "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." [1999] I.D.A.C.D. No. 17 at page 12

21. Hearing Panels have acknowledged that one of the reasons that settlement agreements which have been worked out by the parties should be respected, is because Hearing Panels do not know what led to the settlement, or what was given up by the parties during the course of their negotiations. The presence of experienced legal counsel during the negotiation of a settlement agreement, as was the case in this matter, is also a factor for the Panel to consider.

*Fike (Re)*, MFDA File No. 2017102, Hearing Panel of the Central Regional Council, Decision and Reasons dated December 7, 2017, at paras. 22 and 23

22. The rationale for respecting settlements of the nature found in the Settlement Agreement in this case, was further articulated by the British Columbia Court of Appeal:

"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. Enforcement is rarely a concern because the settlement is voluntary. A person who is the subject of an investigation retains the option of refusing to settle and proceeding to a hearing. Settlements are also efficient. Both parties can forego the time and expense of a hearing. Or, they can settle some matters, and direct their resources to the matters that are in dispute, and therefore to be resolved by way of a hearing."

*British Columbia (Securities Commission) v Seifert*, 2007 BCCA 484, para. 31

23. Although the *Seifert* decision, *supra*, dealt with an agreement that was before the British Columbia Securities Commission, the case has been frequently cited by Hearing Panels in MFDA Settlement Hearings.

### **Factors Concerning Acceptance of a Settlement Agreement**

24. Hearing Panels have repeatedly expressed the view that generally, settlement agreements should be accepted bearing in mind the following criteria:

- a) That it is in the public interest to do so and that the penalties proposed will be sufficient to protect investors;
- b) That the agreement is reasonable and proportionate, having regard to the conduct of the Respondent;
- c) That the agreement addresses the issues of both specific and general deterrence;
- d) That the agreement is likely to prevent the type of conduct set out in the facts;
- e) That the agreement will foster confidence in the integrity of the Canadian capital markets;
- f) That the agreement will foster confidence in the integrity of the MFDA; and

- g) That the agreement will foster confidence in the regulatory process itself.

*Sterling Mutuals Inc. (Re)*, *supra*, at para.36

### **Appropriateness of the Proposed Penalty**

25. The primary goal of all securities regulation is investor protection.

*Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at paras. 59 & 68

26. In addition to investor protection, the goals of securities regulation include fostering public confidence in the capital markets and in the securities industry, as a whole.

*Pezim v British Columbia (Superintendent of Brokers)*, *supra*, at paras.59 & 68

27. In determining the appropriateness of a proposed penalty, Hearing Panels frequently cite the decision in *Breckenridge (Re)*, where the Hearing Panel stated that sanctions "... should be preventative, protective and prospective in nature ..." taking into account the following considerations:

- a) the protection of the investing public;
- b) the integrity of the securities markets;
- c) specific and general deterrence;
- d) the protection of the MFDA's membership; and
- e) protection of the integrity of the MFDA's enforcement processes.

*Breckenridge (Re)*, MFDA File No. 200718, Hearing Panel of the Central Regional Council, 2007 LNCMFDA 38, at paras. 75 & 76

28. The Hearing Panel in *Breckenridge (Re)* set out the following additional factors which a Hearing Panel should consider, having regard to the specific circumstances of the case:

- a) the seriousness of the allegations proved against the respondent;
- b) the respondent's experience in the capital markets;
- c) the level of the respondent's activity in the capital markets;
- d) the harm suffered by investors as a result of the respondent's activities;
- e) the benefits received by the respondent as a result of the improper activity;
- f) the risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;

- g) the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities;
- h) 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;
- i) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in capital markets; and
- j) previous decisions made in similar circumstances.

*Breckenridge (Re), supra*, at para. 77

29. Hearing Panels also consider as a mitigating factor, circumstances where: a respondent has cooperated with the Member; and with the MFDA in its investigation of the matter which prompted the issuance of a Notice of Hearing.

### **MFDA Sanction Guidelines**

30. On November 15, 2018, the MFDA issued Sanction Guidelines to assist Staff and Respondents in conducting disciplinary proceedings and negotiating settlement agreements and to assist Hearing Panels in determining the fair and efficient disposition of settled and contested disciplinary proceedings, having regard to the imposition of appropriate sanctions.

31. The Sanction Guidelines, as their name suggests, are not mandatory. They state, under the heading "Purpose of the Sanction Guidelines":

"... The determination of the appropriate sanction in any given case is discretionary and a fact specific process. The appropriate sanction depends on the facts of a particular case and the circumstances of the conduct. The Sanction Guidelines are intended to provide a summary of the key factors upon which discretion may be exercised consistently and fairly in like circumstances, but are not binding on Hearing Panels. The list of key factors in the Sanction Guidelines is not exhaustive, and Hearing Panels may consider other aggravating and mitigating factors as appropriate.

Hearing Panels should always exercise judgement and discretion, and consider appropriate aggravating and mitigating factors in determining appropriate sanctions in every case. In addition, Hearing Panels should identify the basis for the sanctions imposed in the Reasons for Decision."

32. The Sanction Guidelines identify a number of factors which a Hearing Panel may consider in determining whether a sanction is appropriate.

33. In cases involving the type of misconduct involved in the present case, the Panel agrees with Staff's submission that the following factors set out in the Sanction Guidelines, are relevant to the Panel's decision:

- a) General and specific deterrence;
- b) Public confidence;
- c) Seriousness of the allegations proven against the respondent;
- d) The respondent's recognition of the seriousness of the misconduct;
- e) Harm suffered by the investor;
- f) Previous decisions made in similar circumstances; and
- g) Ability to pay.

Excerpts from the MFDA Sanction Guidelines

## **Application of the Factors Listed Above to the Present Case**

### **Seriousness of the Misconduct**

34. The Panel agrees with Staff's submission that the misconduct at issue in the present case, involving the "Know-Your-Client" ("KYC") rule and an Approved Person's suitability obligations, was extremely serious.

35. MFDA *Rule 2.2.1* codifies the KYC and suitability obligations with which Approved Persons must comply. MFDA hearing panels have found that these obligations are an essential component of consumer protection and as such are a basic obligation imposed on registrants. A course of conduct by a registrant which involves a failure to comply with these obligations, therefore, is an extremely serious matter.

*Pretty (Re)*, MFDA File No. 201128, Hearing Panel of the Atlantic Regional Council, Decision and Reasons (Misconduct) dated January 20, 2014, at para. 89

36. The KYC rule has been described by the Alberta Securities Commission as the "cardinal rule" and the cornerstone obligation of an Approved Person's dealings with clients.

*Lamoureux (Re)* [2001] ASCD No. 613 (ASC), at pp. 11-12

37. The version of that rule which was in effect prior to December 3, 2010, states in part:

**2.2.1 "Know-Your-Client".** 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; and
- (c) to ensure that each order accepted or recommendation made for any account of a client is suitable for the client and in keeping with the client's investment objectives; and

- (d) to ensure that, notwithstanding the provisions of paragraph (c), where a transaction proposed by a client is not suitable for the client and in keeping with the client's investment objectives, the Member has so advised the client before execution thereof.

38. Staff confirmed to the Panel that because the facts set out in the Settlement Agreement commenced in 2008, this is the version of the *Rule* which is applicable to these proceedings.

39. The facts and the Respondent's admission set out in the Settlement Agreement, show that the Respondent failed to:

- a) use adequate diligence to ensure that investment recommendations to clients were suitable;
- b) learn and accurately record the KYC information of clients; and
- c) adequately explain the risks of holding investments concentrated in precious metals sector mutual funds.

40. The Respondent engaged in a practice of recording clients' KYC information in a uniform manner in order to be consistent with the investment recommendations he was making, regardless of whether that information represented the clients' actual information.

41. The Panel agrees with Staff's submission that the collection of accurate information when filling out a KYC document is of paramount importance and an Approved Person's failure to accurately record KYC information in an effort to ensure that a proposed investment strategy appears suitable, amounts to a breach of that person's KYC obligations.

42. An Approved Person's explanation of material risks of an investment strategy must also be meaningful so that they can confirm that the client actually understands the risks.

43. As the Hearing Panel in *Popovitch* stated:

... the completion of a KYC form alone does not insulate advisors from a finding that the first stage of the suitability process has not been performed. The KYC form is merely one tool to facilitate fulfillment of the advisor's obligation. Of course, a KYC form filled out by or with the involvement of the advisor in a perfunctory, incomplete, or inaccurate way undermines the validity of the suitability analysis. Equally important, the mischaracterization by an advisor of the client's experience, investment horizon or objectives in a way that is designed to validate an otherwise unsuitable investment recommendation amounts to a serious breach of an advisor's obligation to act in the client's best interests. Similarly, the completion of inadequately explained forms such as acknowledgements or waivers does not mean that the advisor has met his or her disclosure obligation. Disclosure must be provided in a meaningful way so that the advisor can competently determine that the client both understands the risks and features of the products and strategies that are being recommended and is making an informed decision to proceed. [Emphasis added]

44. The facts set out in the Settlement Agreement show that the Respondent placed his clients in highly concentrated positions in precious metals sector mutual funds.

45. In doing so the Respondent failed to ensure that the investment recommendations that he made to each client provided the client with sufficient diversification to limit the risks of concentration that would result from investing all or substantially all of their investable assets in precious metals sector mutual funds. Overall, the Respondent failed to adequately consider whether it was suitable for each client to hold a portfolio that was comprised of investments that were heavily or exclusively concentrated in the precious metals sector of the economy.

46. The Panel agrees with Staff's submission that the Respondent's recommendation of highly concentrated client portfolio positions, after having failed to discharge his suitability responsibilities, compounds the seriousness of his misconduct. Highly concentrated positions in any sector have been found to be volatile and unduly risky.

47. As a Hearing Panel of the MFDA Pacific Regional Council stated:

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.

*Lemay (Re)*, MFDA File No. 201634, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated February 28, 2017, at para. 26

48. An IROC Hearing Panel has also addressed this issue, stating:

In regard to the RESPONDENT having over-concentrated the securities holdings of his five Clients here, the Canadian investment industry has always recognized the inherent danger of an investor concentrating his/her holdings of securities in a given sector of the economy; let alone in the volatile securities of only one or two issuers in that given sector.

That principle recognizes the old saying: "Don't put all your eggs in one basket". Diversification is the key. That is why relatively small and, more importantly, inexperienced/unsophisticated investors are generally better-off in professionally managed conservative mutual funds, and even there in those that are more-diversified rather than less-diversified.

*Biduk (Re)*, 2013 IIROC 19, at paras. 86 and 87

49. In his submission, Enforcement Counsel stressed to the Panel that the concept of concentration risk is not a new idea. It is a factor which always has, and always must be, part of both the know-your-client process and the determination of the suitability of recommendations made by an Approved Person.

50. The Panel agrees. When determining suitability an Approved Person must always take into consideration the risks associated with a recommendation that places clients in highly concentrated positions — in any sector.

51. In this case, as of July 2016, approximately 98% of the \$7.19 million in assets under administration held in accounts serviced by the Respondent were invested in precious metals sector mutual funds. Approximately 86% of the assets invested in precious metals were invested in a single mutual fund: the BMG Bullion Fund.

52. Accordingly, the Respondent's conduct breached MFDA *Rule 2.2.1* regarding his know-your-client and suitability obligations.

53. Hearing Panels have confirmed that when an Approved Person fails to comply with their know-your-client obligations such conduct is also a violation of the standard of conduct required under MFDA *Rule 2.1.1*.

*Lemay (Re), supra*

*Will (Re) MFDA File No. 201763, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated February 1, 2018*

54. *Rule 2.1.1* is the general standard of conduct rule and says:

**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; 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.

55. Accordingly, the Respondent's conduct which violated MFDA *Rules 2.2.1* and *2.1.1* was serious misconduct.

**The Respondent's Past Conduct and Experience in the Capital Markets**

56. The Respondent was experienced in the securities industry having been registered in it from 1997 until May 2018.

57. During the time of his registration, he was not subject to any other discipline by the MFDA.

### **Recognition by the Respondent of the Seriousness of the Misconduct**

58. By entering into the Settlement Agreement, the Respondent has accepted responsibility for his misconduct and has enabled the MFDA to avoid the necessity of incurring the additional time and expense of a full contested hearing – one which would have involved complex factual and legal issues.

### **Harm Suffered by Investors and Benefits Received by the Respondent**

59. The Respondent's conduct resulted in his clients' portfolios being overly concentrated in high risk and potentially unsuitable precious metals sector mutual funds. The clients were, therefore, exposed to market risks and volatility to which they would not otherwise have been exposed had they held more diversified portfolios.

60. In the case of client NF, the evidence indicated that she suffered an overall loss of 17% of her portfolio as a result of the Respondent's investment strategy.

61. There was no evidence that the Respondent received any benefit as the result of his misconduct.

### **Deterrence**

62. Both the Supreme Court of Canada and MFDA Hearing Panels have held that deterrence is an appropriate factor to be taken into account when determining an appropriate penalty.

*Cartaway Resources Corp (Re)*, [2004] 1 SCR 672 (SCC), at paras. 52-62

*Tonnies (Re)*, MFDA File No. 200503, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated June 27, 2005, at para. 47

63. As the Supreme Court identified, the effect of general deterrence should advance the goal of protecting investors. The penalty levied should be sufficient so as to affirm public confidence in the regulatory system and to ensure that the misconduct is not repeated by others in the industry:

A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction ... The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged ...

*Cartaway Resources Corp (Re)*, *supra*, at para. 61

64. The Panel agrees with Staff's submission that the proposed penalties set out in the Settlement Agreement are necessary in order to communicate to other Approved Persons that the misconduct engaged in by the Respondent has no place in the mutual fund industry.

65. A permanent prohibition is the most serious penalty to which an Approved Person can agree and is considered the "strongest tool in the MFDA's penalty toolbox".

*Comeau (Re)*, MFDA File No. 201609, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated October 31, 2017, at paras. 34 and 37

66. The permanent removal of the Respondent from the mutual fund industry eliminates any future possibility of misconduct and supports investor protection. Clearly, therefore, it satisfies the goals of both specific and general deterrence.

67. The proposed penalties are also in keeping with the MFDA's purpose to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct from Members and Approved Persons.

### **Financial Considerations**

68. The MFDA Sanction Guidelines indicate that a Panel may consider a Respondent's ability to pay in determining the appropriate monetary sanction to be imposed.

69. In this case, the evidence established that the Respondent is retired from the financial services industry, is primarily on a fixed income, contributes to expenses for a child with a medical disability and as a result is limited in his ability to pay financial penalties. The Respondent acknowledged that absent his limited ability to pay, it would have been appropriate for him to be subjected to a penalty that included a higher fine as a consequence of his admitted misconduct.

Settlement Agreement at para. 45

### **Previous Decision in Similar Cases**

70. Counsel provided the Panel with the following cases in which, he submitted, penalties had been imposed in similar circumstances:

| CASE                           | FACTS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | OUTCOME                                                                                                                                                                                                              |
|--------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Fike (Re)</i> <sup>4</sup>  | <ul style="list-style-type: none"> <li>• The Respondent failed to use due diligence to learn and accurately record the essential Know-Your-Client factors relative to 5 clients prior to making investment recommendations and accepting investment orders from the clients.</li> <li>• The Respondent failed to use due diligence to ensure that each order accepted and recommendations made to 5 clients was suitable for the clients and in keeping with their investment objectives having regard to the concentration of precious metal sector funds in the client accounts and the clients' Know-Your-Client information, including the client's investment knowledge and objectives, risk tolerance, age, and time horizon.</li> <li>• The Respondent failed to use due diligence to present a balanced explanation of the risks and benefits of investing in precious metals sector funds, thereby failing to ensure that his recommendations were suitable for clients and in keeping with their investment objectives.</li> <li>• The Respondent was retired and on a fixed income.</li> </ul>                                                                                                                                                                                                                                          | <p>The Hearing Panel approved a settlement agreement with the following terms:</p> <ul style="list-style-type: none"> <li>• Permanent Prohibition</li> <li>• Fine of \$10,000</li> <li>• Costs of \$5,000</li> </ul> |
| <i>Lemay (Re)</i> <sup>5</sup> | <ul style="list-style-type: none"> <li>• 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.</li> <li>• The Respondent also 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.</li> <li>• 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.</li> <li>• With respect to two clients in particular, the Respondent failed to accurately record their essentially KYC factors and failed to use due diligence to ensure suitability when recommending the clients concentrate their investment holdings in a single precious metal sector fund.</li> <li>• The Respondent had limited financial assets and was living on a fixed income of \$1,400 per month.</li> </ul> | <p>The Hearing Panel approved a settlement agreement with the following terms:</p> <ul style="list-style-type: none"> <li>• Permanent Prohibition</li> <li>• Fine of \$5,000</li> <li>• Costs of \$2,500</li> </ul>  |

<sup>4</sup> *Fike (Re)*, *supra*,

<sup>5</sup> *Lemay (Re)*, *supra*

| CASE                            | FACTS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | OUTCOME                                                                                                                                                                                                                                      |
|---------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Will (Re)</i> <sup>6</sup>   | <ul style="list-style-type: none"> <li>• The Respondent recommended to at least 264 clients that the clients concentrate all or a substantial portion of their investment holdings in precious metals sector funds, without using adequate due diligence to assess the suitability of her 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 risk tolerance, investment objectives and investment knowledge.</li> <li>• The Respondent recorded on account forms in respect of least 264 clients that the clients had, among other things, "100% high" risk tolerance, "100% aggressive growth" investment objectives, and "good" or better investment knowledge, in order to ensure that her investment recommendations to concentrate all or a substantial portion of the clients' investment holdings in precious metals sector funds would be suitable for each client.</li> <li>• The Respondent failed to fully and adequately explain, or omitted to explain the risks and benefits of investing in precious metals sector funds, thereby failing to ensure that her recommendations were suitable for the clients and in keeping with their investment objectives.</li> <li>• The Respondent obtained, possessed and in some cases, used to process transactions, 16 pre-signed client account forms in respect of 9 clients.</li> </ul>                                                                                                                                          | <p>The Hearing Panel approved a settlement agreement with the following terms:</p> <ul style="list-style-type: none"> <li>• Permanent prohibition</li> <li>• Fine of \$10,000, payable by installment</li> <li>• Costs of \$5,000</li> </ul> |
| <i>Gascho (Re)</i> <sup>7</sup> | <ul style="list-style-type: none"> <li>• The Respondent recommended to at least 73 clients that the clients concentrate at least 25% of their investment holdings in gold and/or precious metals sector funds, without conducting adequate due diligence to assess the suitability of his investment recommendations, 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.</li> <li>• The Respondent misrepresented, failed to fully and adequately explain, or omitted to explain the risks and benefits of investing in gold or precious metals sector funds to a senior client, WA, thereby failing to ensure his recommendations were suitable for client WA.</li> <li>• The Respondent increased the risk tolerance of a senior client, EJ, on her account forms in order to ensure that the KYC information for client EJ matched his investment recommendations to concentrate a substantial portion of client EJ's investment holdings in gold or precious metals sector funds..</li> <li>• The Respondent failed to use due diligence to learn and accurately record the essential KYC factors relative to a senior client, WA, prior to making investment recommendations.</li> <li>• The Respondent failed to use due diligence to ensure that each recommendation made to a senior client, WA, was suitable for client WA, when he recommended that client WA concentrate her investment holdings in gold and precious metals sector funds.</li> </ul> | <p>The Hearing Panel approved a settlement agreement with the following terms:</p> <ul style="list-style-type: none"> <li>• 3 month prohibition</li> <li>• Fine of 35,000, payable by installment</li> <li>• Costs of \$5,000</li> </ul>     |

<sup>6</sup> *Will (Re)*, *supra*

<sup>7</sup> *Gascho (Re)*, MFDA File No. 201786, Hearing Panel of the Central Regional Council, Decision and Reasons dated August 21, 2018

| CASE                              | FACTS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | OUTCOME                                                                                                                                                                                                        |
|-----------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Gordon (Re)</i> <sup>8</sup>   | <ul style="list-style-type: none"> <li>The Respondent failed to ensure that an investment recommendation he made to at least 6 clients to invest in precious metals sector funds was suitable having regard to the clients KYC factors and the risks associated with concentrating their investment portfolio in precious metal sector funds.</li> <li>The Respondent failed to fully and adequately explain, or omitted to explain the risks and benefits of investing in precious metal sector funds to at least 6 clients.</li> <li>The clients suffered a loss totaling \$73,585, which was repaid by the Member.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <p>The Hearing Panel approved a settlement agreement with the following terms:</p> <ul style="list-style-type: none"> <li>Permanent prohibition</li> <li>Fine of \$25,000</li> <li>Costs of \$2,500</li> </ul> |
| <i>McIntyre (Re)</i> <sup>9</sup> | <ul style="list-style-type: none"> <li>The Respondent recommended to approximately 423 clients that the clients concentrate all or a substantial portion of their investment holdings in precious metals sector funds, without adequately assessing the suitability of his investment recommendations on a client-by-client basis having regard to the essential Know-Your-Client (“KYC”) information relevant to each individual client.</li> <li>The Respondent failed to accurately record the essential KYC information relevant to each client and to each order and account that he accepted, but instead recorded KYC information for each client that would be consistent with his investment recommendations to those clients to concentrate all or a substantial portion of the clients’ investment holdings in precious metals sector funds.</li> <li>The Respondent failed to fully and adequately explain, and/or omitted to accurately explain the risks of investing in precious metals sector funds that he recommended to clients, thereby failing to present the investment recommendations to the clients in a fair and balanced manner.</li> <li>The Respondent obtained and possessed 3 pre-signed client account forms and altered 19 account forms in respect of 14 clients.</li> <li>The Respondent had an adult dependent child for which he was financially responsible for which affected his ability to contribute additional amounts toward a fine or costs.</li> </ul> | <p>The Hearing Panel approved a settlement agreement with the following terms:</p> <ul style="list-style-type: none"> <li>Permanent prohibition</li> <li>Fine of \$10,000</li> <li>Costs of \$5,000</li> </ul> |

**Respondent’s Submission**

71. Counsel for the Respondent confirmed that he agreed with and had nothing to add to Staff’s submissions.

<sup>8</sup> *Gordon (Re)*, MFDA File No. 201849, Hearing Panel of the Central Regional Council, Decision and Reasons dated December 5, 2019

<sup>9</sup> *McIntyre (Re)*, MFDA File No. 2017113, Hearing Panel of the Central Regional Council, Decision and Reasons dated March 11, 2019

**VI. CONCLUSION**

72. Having reviewed the Settlement Agreement which, the Panel notes, was negotiated by experienced counsel and having considered the submissions from Staff, both written and oral, the Panel is satisfied that the penalties proposed in the Settlement Agreement are reasonable and proportionate, having regard to the Respondent’s conduct and all of the circumstances set out in the Settlement Agreement.

73. These penalties will deter the Respondent and other Approved Persons from engaging in the type of conduct that is the subject of these proceedings. They will also advance the public interest and the MFDA’s objectives to enhance investor protection and ensure high standards of conduct in the mutual fund industry.

74. The Panel, therefore, accepts the Settlement Agreement.

**DATED** this 4<sup>th</sup> day of August, 2021.

“Sherri Walsh”

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Sherri Walsh  
Chair

“Richard R. Sydenham”

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Richard R. Sydenham  
Industry Representative

“Sean Shore”

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Sean Shore  
Industry Representative

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