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: Brian Walter Wilkinson

Heard: October 13-16, 2020 by electronic hearing in Toronto, Ontario
Decision (Misconduct) and Reasons: January 29, 2021

DECISION (MISCONDUCT) AND REASONS

Hearing Panel of the Central Regional Council:

W. A. Derry Millar	Chair
Kenneth P. Mann	Industry Representative
Joseph Yassi	Industry Representative

Appearances:

Brendan Forbes Alan Melamud	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Brian Wilkinson	)	Respondent

I. INTRODUCTION

1. By Notice of Hearing dated February 10, 2020, Staff of the Mutual Fund Dealers Association of Canada ("MFDA") alleged that Brian Walter Wilkinson (the "Respondent") violated the By-laws, Rules or Policies of the MFDA set out below:

> **Allegation #1**: Between about June 2006 and October 2017, the Respondent failed to inform clients about the risks of holding investments concentrated in precious metal sector funds, contrary to MFDA Rules 2.2.1 or 2.1.1.
>
> **Allegation #2**: Between September 2010 and April 2015, the Respondent sent written communications to clients which contained misleading or incomplete information, made unwarranted or exaggerated claims or conclusions or failed to identify material assumptions made in arriving at the conclusions, or were detrimental to the interests of the clients or the Member, contrary to MFDA Rules 2.8 or 2.1.1.
>
> **Allegation #3**: Between March 2017 and July 2017, the Respondent issued an advertisement which had not been reviewed and approved by the Member, contrary to the Member's policies and procedures, and MFDA Rules 2.7.3, 2.1.1, 1.1.2, or 2.5.1.

2. Staff called as witnesses and filed the affidavits of Sheila Daneshvaziri, Michael Stanley, Tania Czajkiwsky and Mike Ford. Michael Stanley is the President of Sterling Mutuals Inc. ("Sterling Mutuals") and has been since July 2017. Tania Czajkiwsky was the Chief Compliance Officer at Sterling Mutuals from December 2014 to January 2020. Sheila Daneshvaziri is an Investigator in the Enforcement Department of the MFDA and conducted the investigation into the complaint against the Respondent. Mike Ford is the Manager – Investigations at the MFDA.

3. The Respondent appeared in person and testified. The Respondent called John Gallimore as a witness. Mr. Gallimore is a Senior Investigator in the Enforcement Department of the MFDA. Mr. Gallimore investigated a complaint against the Respondent in 2011 which did not result in any disciplinary action. That complaint and the investigation did not deal with diversification or over-concentration issues.

4. It was agreed at the hearing on the merits that the issue of misconduct and penalty, if any, would be bifurcated with the hearing on the merits proceeding first and then, subject to the determination of the Panel whether misconduct was found, proceed to a penalty hearing.

II. FACTS

5. Between March 29, 1999 and January 21, 2012, the Respondent was registered with FundEX Investments Inc. ("FundEX"), a Member of the MFDA.

6. In late January 2012, the Respondent moved to Sterling Mutuals, a Member of the MFDA. Sterling Mutuals' records indicate that the Respondent was registered as an Approved Person with it from late January 2012 to June 29, 2018.

7. The Respondent conducted business from a branch office located in the Kitchener, Ontario area.

8. The Respondent completed the Canadian Securities Course in 2000. The Respondent acknowledged that he learned in that course, the risks of over concentration in one asset class.

9. The Respondent over the years took many courses and studied the role of gold in banking and the currency system. The Respondent became both well educated about gold bullion and also very committed to mutual funds holding gold bullion as opposed to mutual funds holding shares in gold-mining stocks.

10. Clients DD and BD are married and live in Dundas, Ontario. Client DD contacted the Respondent in 2006 as he was interested in investing in gold bullion. Client DD's brother was a client of the Respondent and had recommended the Respondent to client DD.

11. In 2006, client DD opened an investment account with FundEX. Client DD transferred into the account June 12, 2006, investments consisting of various mutual funds which did not include any precious metal bullion funds. After the transfer of client DD's investments to FundEx in June 2006, some of the units in the existing mutual funds were sold and commencing on June 29, 2006, client DD began to purchase precious metal bullion funds, BMG BullionFund Series A. As of December 31, 2006, the value of the investments in client DD's account was $13,850.68, of which $6,736.22 was invested in the BMG BullionFund Series A and the balance in various mutual funds none of which were precious metal bullion funds. The precious metal bullion fund amounted to approximately 48.6% of the total value of client DD's portfolio.

12. In March 2008, clients DD and BD opened a joint investment account with FundEX. In January 2010, client BD opened an investment account with FundEX. The New Account Application Forms ("NAAFs") and Know-Your-Client ("KYC") information for the joint account

and the BD account indicated that their net worth was over $200,000; their investment objectives were "Growth"; and that their Portfolio Risk Rating was "Moderate to High." No NAAF was located for client DD's investment account opened in 2006.

13. The Respondent met with clients DD and BD and reviewed with them their personal circumstances, including their retirement goals, investment experience, investment objectives, and their assets and liabilities.

14. The Respondent prepared and provided clients DD and BD a "Retirement Planning" document dated May 2007.[1] This document reviewed the information provided by clients DD and BD and the Respondent's comments and recommendations. In the document, the Respondent also provided comments under the headings: (1) Strategic Asset Allocation including equity versus fixed income and volatility; (2) Investment Return is Far More Dependent on Investor Behavior Than Fund Performance; and (3) Diversification Reduces Volatility and Increases Returns.

15. Under the heading (3) Diversification Reduces Volatility and Increases Returns, the document stated:

> Diversification means different things to different people and so I will clarify. When balancing the need for income and growth inside your portfolio we will seek to diversify the portfolio by holding both fixed income and equity investments. This will have the effect of reducing the overall volatility of your portfolio as well as *reducing the overall return.* To think that diversifying an equity portfolio with fixed income investments will increase returns is to assume that one can time the market and this just isn't so.
>
> The type of diversification we are talking about here is holding different types of asset classes within the equity asset class at large. For example, we know investments in Smaller Capitalized stocks have historically both outperformed investments in Larger Capitalized stocks and experienced a higher degree of volatility. Therefore if you were to structure all of your investments in Small Cap stocks you would, over time, outperform the market as a whole and in doing so, experience greater volatility.

16. In June 2008, the Respondent prepared and provided his clients either through a review in person or by email, including clients DD and BD, a PowerPoint presentation entitled "Why Gold Is Still Cheap @$1000 - Incredibly Cheap."[2] On the presentation the first "Cheap" has a large red

[1] Exhibit 13.
[2] Exhibit 17.

"X" superimposed on "Cheap." The presentation contains four "modules" entitled: (1) Gold's Role in Banking & The US Dollar Standard; (2) The US Trade Deficits & Debt; (3) Global Imbalances & Inflation; and (4) Determining Gold's True Value.

17. While clients of FundEX, the Respondent recommended that clients DD and BD concentrate their investment holdings in precious metal bullion mutual funds. Throughout the time when clients DD and BD were clients of FundEX, their investment accounts were concentrated in precious metal bullion mutual funds holding gold bullion held in the vaults at Scotiabank in Toronto.

18. The evidence disclosed that at the end of 2011, the year proceeding the transfer of their accounts in early 2012 from FundEX to Sterling Mutuals, client DD held 100% of his portfolio of $38,686.19 in precious metal bullion mutual funds; client BD held $23,156.99 or 75.1% of her portfolio of $30,817.97 in precious metal bullion mutual funds; and the joint account of DD and BD held 70.5% of their total portfolio of $92,524.44 in precious metal bullion mutual funds in the amount of $65,190.22.

19. While at FundEX, the value of clients DD's and BD's investments in the precious metal bullion funds increased by $41,622.78.

20. The Respondent on a regular basis provided his clients, including DD and BD, with a newsletter entitled "The Human Browser", which provided information on stocks and gold bullion. The Respondent testified that he provided his newsletters to all his clients, including clients DD and BD, until they moved their accounts at the end of October 2017 to another firm. The newsletters marked as exhibits were supportive of gold bullion as an investment. For example, Exhibit 43, The Human Browser dated March 2012, was entitled "Gold Presents a Buying Opportunity"; Exhibit 44, The Human Browser dated April 2014, spoke of the US Federal Reserve and other central banks printing money and its potential impact on the equity markets and the benefits of gold bullion as an investment; and Exhibit 25, The Human Browser dated April 2017, compared the performance of stocks and gold bullion between January 1, 2002 and April 1, 2017 and indicated gold bullion outperformed stocks.

21. In early 2012, the Respondent moved to Sterling Mutuals. Clients DD and BD moved their accounts to Sterling Mutuals with him.

22. After the transfer of the accounts of DD and BD to Sterling Mutuals, a portion of the investments held in the joint account of DD and BD were transferred to client DD's account. After this transfer, the value of client DD's account was $99,177.06 of which $93,965.32 was invested in precious metal bullion funds, a concentration of 94.7%. The value of the joint account was $58,530.85 of which $37,791.43 was invested in precious metal bullion funds, a concentration of 64.6%. The value of client BD's account was $30,817.60 of which 100% was now invested in precious metal bullion funds.

23. After the transfer of their accounts to Sterling Mutuals, clients DD and BD made no additional investments into their accounts. On June 12, 2012, clients DD and BD in their joint account and client DD in his RRSP account sold units in a bond fund and purchased additional units in two gold bullion mutual funds which they held. In 2016, clients DD and BD sold units in a bond fund and three gold bullion funds in their joint account and withdrew $25,242.57.

24. Clients DD and BD completed NAAFs dated April 10, 2012 which recorded the KYC information for them for the three accounts opened at Sterling Mutuals. The NAAFs indicated that their net worth was approximately $640,000 of which $10,000 were liquid assets. The individual accounts of clients DD and BD were RRSPs and in the NAAFs, they both indicated that their risk tolerance was "Medium" and that their investment objectives were 100% growth. The joint account NAAF indicated that their risk tolerance was 75% "Medium High" and 25% "High" and that their investment objective was 100% growth.

25. When the accounts were transferred to Sterling Mutuals, Sterling Mutuals did no review of the accounts for diversification or concentration. In 2012, Sterling Mutuals had no formal concentration guidelines. The Respondent testified that at the time of his move to Sterling Mutuals the CEO of Sterling Mutuals looked at his assets under management and investment strategy and had no issue with his concentrated book of business.

26. Throughout the time when clients DD and BD were clients of Sterling Mutuals, their investment accounts were concentrated in precious metal bullion mutual funds.

27. At no time did the Respondent explain the risks of concentration in precious metal bullion mutual funds to clients DD and BD.

28. As noted below, clients DD and BD expressed concern to the Respondent that their investments were concentrated in precious metal bullion mutual funds on several occasions. The

Respondent did not recommend that clients DD and BD diversify their investment holdings at any time.

29. Beginning in July 2010, clients DD and BD through DD raised questions with the Respondent about their portfolio and whether they should re-balance their accounts. The Respondent's recommendation as set out in the emails was to remain invested in precious metal bullion mutual funds. The responses by the Respondent to certain of the emails during the period between September 24, 2010 and April 9, 2015 are set out below:

a) On September 24, 2010, the Respondent made the following written statement to clients DD and BD:

> "We could move any of your Mackenzie funds that are currently in Bonds into the Gold Bullion fund. Other than that I don't have any new ideas for you. The prospects for another severe decline in stocks is very real so I'm not looking to enter that arena until we see a healthy correction. Likely by next spring we should have another buying opportunity.
>
> In the meantime the precious metals are not only a safe haven but also have been generating the most growth. This trend is due to continue."

b) On October 7, 2010, the Respondent made the following written statement to clients DD and BD:

> "…I think Gold will see persistent and relentless demand over the next few months."

c) On January 10, 2011, the Respondent made the following written statement to clients DD and BD:

> "…I expect the Bullion to continue to outperform any other asset class."

d) On January 10, 2011, the Respondent made the following written statement to clients DD and BD:

> "…Currently my Model Portfolio is at 100% Bullion so I don't have any problem increasing you to these levels.
>
> I still believe the Bullion will continue to outperform regardless of the market environment."

e) On December 13, 2012, the Respondent made the following written statement to clients DD and BD:

"…In the larger view Gold should be substantially higher than it is, what I hear from those that study these things is that the price is being manipulated. Someday they will run out of ammunition for limiting its price and at that point we could see some spectacular price movements."

f) On December 10, 2014, the Respondent made the following written statement to clients DD and BD:[3]

"You have bought Gold because it is a safe store of wealth, risk free because Gold has no counterparty risk.

This will turn out for the better for you and me. And you won't have to wait an eternity for it to happen, it will happen sooner than you think."

g) On April 9, 2015, the Respondent made the following written statement to clients DD and BD:

"…I read that article and have seen other predictions on lower Gold prices as well. No one knows for sure how this all plays out day to day, month to month.

We know how it ends though and thats (*sic*) with significantly higher Gold prices."

30. While the Respondent in the some of the emails suggested that client DD call him if he had any questions or offered to meet with clients DD and BD at their home, after 2012 the Respondent did not call clients DD and BD about their accounts. All their communication was by email.

31. On October 30, 2017, clients DD and BD submitted a complaint to Sterling Mutuals with respect to the Respondent's investment advice, which stated, in part:

As I was explaining to you on the phone, we believe that he has sold us funds that were not right fit for us, quite risky and volatile. They were almost all in gold bullion and precious metals. We were uncomfortable with our investments and quite stressed.

When we asked to diversify our portfolio and buy into stock and bond market he would always say that it was not a right time, to be patient that gold would go up. He didn't recommend equities and would say that they are due for sharp correction.

We persevered, waited under his instructions but have lost about 30% of our money since 2012. which Is a lot since we are both retired, 66 and 67 years of age.

[3] The email from client DD and BD dated December 10, 2014, stated, in part: "When we got involved in gold, we did it without fully understanding it all and I must admit we still don't. …We got ourselves into a higher risk investment, beyond our comfort level at the time nearing retirement..."

> Again, we feel that our advisor has ill advised us from the beginning, didn't have our best interest at heart, was very persuasive in convincing us to stay invested in gold even after numerous attempts to diversify.

32. Clients DD and BD transferred their accounts to another MFDA member following their complaint.

33. At the time of the complaint at the end of October 2017, the concentration of DD's account in precious metal bullion funds was 92.4%; the concentration of BD's account in precious metal bullion funds was 100%; and the concentration in the joint account was 67.1%.

34. Sterling Mutuals conducted reviews of the Respondent's business practices in 2013 and 2017. No issues were raised by the reviewers of the concentration of investments in his client accounts.

35. Sterling Mutuals determined after the receipt of the complaint that as of October 30, 2017, the Respondent managed $11,140,070.92 in assets under administration and that the Respondent had facilitated the investment of $9,670,298.80 of those assets under administration in precious metal bullion mutual funds managed by BMG Bullion Management Services Inc. Sterling Mutuals determined that at least 86.8% of the money held in client accounts managed by the Respondent were invested in precious metal bullion mutual funds.

36. Sterling Mutuals implemented a concentration policy in November 2017 which provided that client accounts should not have more than 25% of plan assets invested in one asset category, such as a precious metal mutual funds. The evidence of Sterling Mutuals' witnesses was that the purpose of the Concentration Guidelines was "to codify Sterling Mutuals' long-standing position that concentration in certain asset categories, including precious metal mutual funds, could create an unnecessary risk in clients' portfolios and therefore make such portfolios unsuitable for clients." Their evidence was that the Concentration Guidelines were being developed prior to the complaint made by clients DD and BD on October 30, 2017.

37. Sterling Mutuals determined that the loss in the three accounts from investments in precious metal bullion funds while the accounts were at Sterling Mutuals was $49,971.60. During the period of time clients DD and BD were invested in precious metal bullion funds with the Respondent while at FundEX and Sterling Mutuals, they suffered a net loss of $8,340.82 after taking into account the gain of $41,622.78 in the precious metal bullion funds while their accounts were at FundEX.

38. Sterling Mutuals compensated clients DD and BD for the losses sustained while their accounts were at Sterling Mutuals in the amount of $38,626.62. Sterling Mutuals determined that the loss as a result of over-concentration in the precious metal bullion funds after taking into account the 25% concentration limit was $35,997.05. In addition, Sterling Mutuals paid clients DD and BD the sum of $2,629.57 for losses resulting from investments in mutual funds that had a risk rating of high which exceeded their documented risk tolerance of medium or medium high in the respective accounts.

39. At all material times, the Sterling Mutuals policies and procedures manual required its Approved Persons to submit all advertisements to compliance for review, and receive written approval from the compliance department prior to their release.

40. In March 2017, the Respondent placed an advertisement on an internet search database that described his business as follows:

> "Investment Management Seasoned Independent Advice – wilkinsonfinancial.ca" and "Portfolio Management Services Seasoned Independent Advice – wilkinsonfinancial.ca"

41. In his Reply to the Notice of Hearing, the Respondent admits that he placed the above advertisement on an internet search database. At the hearing, the Respondent testified that he raised the issue of the advertisement with the Sterling Mutuals auditor conducting a review of his business practices on July 27, 2017. The advertisement made no reference to Sterling Mutuals.

42. The reviewer stated in his report dated July 29, 2017, that "The Advisor recently commenced Google ads marketing, but HO Compliance approval has not been obtained. The Advisor does in the normal course obtain pre-approval for other advertising or client communications materials. Please submit a request to HO Compliance and confirm when approval is obtained."

43. The Respondent stated in his response to a question asked by Sterling Mutuals compliance department with respect to the advertisement: "I did place Pay per Click ads on Google starting in March 2017. I did not obtain prior approval as they were for an OBA and I did not realize I needed approval until July 2017. The ads contain no mention of Sterling and the click through leads to my website, which is approved. … I confirm the ads are no longer running as I had zero results." The Respondent discontinued the advertisement in July 2017.

44. On June 29, 2018, Sterling Mutuals terminated the Respondent. The Respondent has not been registered in the securities industry in any capacity since that time.

45. At the time of the complaint, the Respondent managed the accounts of 130 clients including clients DD and BD. Sterling Mutuals wrote each of the other 128 clients after receipt of the complaint from clients DD and BD about their accounts. None of the other clients made any complaint against the Respondent.

III. ANALYSIS AND DECISION

46. The By-laws, Rules and Policies of the MFDA support its mandate to regulate the Canadian mutual fund industry to protect the investor public and strengthen public confidence in the Canadian mutual fund industry.

Allegation #1 – Failure to Disclose Risk of Concentration

47. Staff allege that:

> Between about June 2006 and October 2017, the Respondent failed to inform clients about the risks of holding investments concentrated in precious metal sector funds, contrary to MFDA Rules 2.2.1 or 2.1.1

48. Staff submit that:

a) The Respondent admits that he recommended clients DD and BD concentrate their investments in precious metal bullion mutual funds, in some instances to the point that the concentrated holdings in a single account were 100%;

b) The Respondent has further failed to explain the risks of concentrating in precious metal bullion mutual funds to clients DD and BD at any time; and

c) The Respondent was required to explain the risks of concentration to his clients when recommending a concentrated position pursuant to MFDA Rules 2.2.1 and 2.1.1. The Respondent failed to do so.

The Know-Your-Client and Suitability Obligations

49. MFDA 2.2 deals with Client Accounts. Rule 2.2.1 states:

> 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;

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

d) to ensure that, notwithstanding the provisions of paragraph (c), where a transaction, including a transaction involving the use of borrowed funds, proposed by a client is not suitable for the client based on the essential facts relative to the client and the investments in the account, the Member or Approved Person has so advised the client before execution thereof and the Member or Approved Person has maintained evidence of such advice;

e) to ensure that the suitability of the investments within each client's account is assessed:

(i) whenever the client transfers assets into an account at the Member;

(ii) whenever the Member or Approved Person becomes aware of a material change in client information, as defined in Rule 2.2.4; or

(iii) by the Approved Person where there has been a change in the Approved Person responsible for the client's account at the Member; and

where investments in a client's account are determined to be unsuitable, the Member or Approved Person so advises the client and makes recommendations to address any inconsistencies between investments in the account and the essential facts relative to the client and the Member or Approved Person maintains evidence of such advice and recommendations;

(f) to ensure that the suitability of the use of borrowing to invest is assessed:

(i) whenever the client transfers assets purchased using borrowed funds into an account at the Member;

(ii) whenever the Member or Approved Person becomes aware of a material change in client information, as defined in Rule 2.2.4; or

(iii) by the Approved Person where there has been a change in the Approved Person responsible for the client's account at the Member;

and, where the use of borrowing to invest by the client is determined to be unsuitable, the Member or Approved Person so advises the client and makes recommendations to address the inconsistency between the use of borrowed funds and the essential facts relative to the client and the Member or Approved Person maintains evidence of such advice and recommendations

50. We agree with Staff that MFDA Rule 2.2.1 codifies the "Know-Your-Client" ("KYC") and "Suitability" obligations that have consistently been recognized as "an essential component of the consumer protection scheme of [securities legislation] and a basic obligation of a registrant and a course of conduct by a registrant involving a failure to comply with them is an extremely serious matter."[4]

51. Staff submit and we agree that under MFDA Rule 2.2.1 (c): "Each Member and Approved Person shall use due diligence: (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".

52. Staff submit and we agree that MFDA Rules should be interpreted purposively and with a broad scope, so as to best ensure the primary goal within the securities industry of protecting the investing public.[5]

53. Staff submit that in *Lamoureux (Re)*, the leading case concerning the KYC and suitability obligations, the Alberta Securities Commission ("ASC") referred to the KYC Rule as the "Cardinal Rule" and as a cornerstone obligation of an Approved Person's dealings with clients. The ASC further went on to find that the KYC and suitability obligations have the following three stages[6]:

a) Due Diligence – Involves an Approved Person engaging in due diligence to know the clients and the products involved.
b) Applying Judgment – Involves an Approved Person using information obtained under the "Know Your Client" and "Know Your Product" obligations, and applying "sound professional judgment" to identify appropriate investment products or strategies for particular clients.
c) Disclosure of Material Risks and Benefits – Involves an Approved Person disclosing the material negative and positive factors involved in the transaction to the client for the purpose of assisting them in making an informed decision about whether to proceed.

[4] *Pretty (Re)*, [2014], Hearing Panel of the Atlantic Regional Council, MFDA Hearing No. 201128, Decision on Misconduct dated January 30, 2014 at para. 89.
[5] *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 (SCC) at paras 59 and 68; *Ironside (Re)*, [2002] LNABASC 24, at paras 18-19.
[6] *Lamoureux (Re)*, [2001] ASCD No. 613 (ASC) at pp. 11-12, 16-17 ("*Lamoureux*").

54. Staff submit and we agree that the same three stage analysis has been adopted by the Ontario Securities Commission and MFDA Hearing Panels.[7]

55. Staff submit and we agree that as held in *Lamoureux (Re)*, each step of the suitability process must be carried out to avoid recommending improper products and to avoid tailoring KYC information to meet specific products or investments.[8]

Disclosure of Material Risks

56. Staff submit and we agree that the issue in this case under Allegation #1 is whether the Respondent satisfied the third stage – disclosure of material risks.

57. The disclosure obligation requires an Approved Person to advise the client of the existence of all material risks, and to do so meaningfully, so that the Approved Person can ensure the client understands the risks and is making an informed decision about an investment. As stated by the MFDA Hearing Panel in *Popovich (Re)*[9]:

> 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.

58. We agree that MFDA Hearing Panels have held that an Approved Person cannot rely on having a client simply sign a disclosure or waiver form in a perfunctory fashion.[10]

59. Staff submit and we agree that merely providing a client with the simplified prospectus for a mutual fund, with nothing more, is inadequate to satisfy the disclosure of risks obligation.

60. We agree with Staff that MFDA Hearing Panels have consistently held that where an Approved Person fails to warn a client about material risks of the client's investments or fails to present a balanced presentation about the risks of investing in a specific fund or strategy, the

---

[7] *Daubney (Re)*, 2008 LNONOSC 338 at para 17 ("*Daubney*"); *Lemay (Re)*, [2017] Hearing Panel of the Pacific Regional Council, MFDA Hearing No. 201634, Reasons for Decision dated February 28, 2017 at paras 23-24 ("*Lemay*").

[8] *Lamoureux*, *supra* at page 16.

[9] [2015] Hearing Panel of the Central Regional Council, MFDA Hearing No. 201240, Decision on Misconduct dated January 14, 2015 at para 161. And see: *Daubney (Re)*, *supra* at para. 201

[10] *Yahn (Re)*, [2017] Hearing Panel of the Prairie Regional Council, MFDA Hearing No. 201746, Reasons for Decision dated December 7, 2017 at paras 51-53 ("*Yahn*"); *Lamoureux*, *supra* at page 36; and *Daubney*, *supra* at para 22.

Approved Person has failed to meet their suitability obligations to the client and has violated MFDA Rule 2.2.1.[11]

Concentration as a Risk

61. We agree with Staff that concentration of investments in a single asset class or sector of the economy has long been understood as a material risk in the securities industry. In *Biduk (Re)*, the IIROC Hearing Panel commented on the risks of over-concentration in a single security, issuer or sector. The Hearing Panel noted:[12]

> [T]he 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.
>
> The 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.

62. MFDA Hearing Panel have similarly recognized the inherent dangers and risks of concentrating a client's holdings of securities in a given sector of the economy.[13]

63. Staff provided through the evidence of Mr. Ford copies of Notices and Bulletins released by the MFDA and of the Canadian Securities Authorities providing guidance that raised concerns about over concentration and highlighted the importance of diversification.[14] Staff submit that the Staff Notices and Bulletins provide evidence of ongoing and pre-existing understandings in the securities industry.

---

[11] *Lemay*, *supra*; *Gordon (Re)*, [2019] Hearing Panel of the Pacific Regional Council, MFDA Hearing No. 201849, Reasons for Decision dated December 5, 2019; and *Yahn (Re)*, *supra*.

[12] *Biduk (Re)*, 2013 IIROC 19 at paras 86-87.

[13] *Lemay (Re)*, *supra* at para 26; *Gascho (Re)*, [2018] Hearing Panel of the Central Regional Council, MFDA Hearing No. 201786, Reasons for Decision dated August 21, 2018 at para 12; *McIntyre (Re)*, [2019] Hearing Panel of the Prairie Regional Council, MFDA Hearing No. 2017113, Reasons for Decision dated March 11, 2019 at para 47.

[14] MFDA Staff Notice 0069, "Suitability", April 14, 2008, revised February 22, 2013, p. 14, Exhibit "A" to the Affidavit of Mike Ford, sworn October 8, 2020; MFDA Bulletin 0678-C, "Report on 2015 Review of Specific Policies and Procedures: Pre-Trade Disclosure, KYC Updates, Concentration Criteria, and Titles Targeting Seniors", pp. 5-7, February 4, 2016, Exhibit "B" to the Ford Affidavit; MFDA Bulletin 0713-P, "Suitability – Research Paper on Canadian Security Regulatory Authority Decisions", January 24, 2017, pp. 11-12, Exhibit "C" to the Ford Affidavit; and CSA Staff Notice 31-336, "Guidance for Portfolio Managers, Exempt Market Dealers and Other Registrants on the Know-Your-Client, Know-Your-Product and Suitability Obligations", January 9, 2014, pp. 14-17, Exhibit "D" to the Ford Affidavit.

64. Staff submit and we agree that the concept of concentration risk was not a new idea first understood and articulated in 2012 as suggested by the Respondent.

65. Staff submit and we agree that on cross-examination, the Respondent admitted that even in the absence of any Staff Notices or Bulletins to guide him, from at least the year 2000 when he took the Canadian Securities Course, he was aware of concentration risk and that a client should not be exposed to concentration risk in equity mutual funds.

66. Staff submit that the fact that the Respondent may have not appreciated the significance of the risk of concentration due to his personal views on the merits of investing in precious metals bullion is irrelevant. As stated by the MFDA Hearing Panel in *Yahn (Re)*:[15]

> Even after an Approved Person reasonably determines that an investment strategy would be appropriate and has proceeded to recommended it to the client, he or she remains obligated to disclose all the salient material relevant to this strategy, including negative factors involved in the transaction prior to executing the trade on the client's behalf. **This means a risk assessment based on an Approved Person's optimism in the venture or his or her own judgment, is not an objective assessment of the risk. It is not sufficient unless it is based on a realistic an [*sic*] objective assessment of the circumstances of the investment and the investor.** [Emphasis added. Citations removed.]

67. Staff submit that the Respondent, by not meaningfully disclosing the risks of concentration to clients DD and BD, contravened MFDA Rule 2.2.1.

Standard of Conduct

68. Staff submit and we agree that MFDA Rule 2.1.1 requires Approved Persons to uphold a standard of conduct applicable to all registrants in the mutual fund industry. The Rule requires, among other things, that:

> "Each Member and Approved Person of a Member shall: deal fairly, honestly and in good faith with its clients; observe high standards of ethics and conduct in the transaction of business; and not engage in any business conduct or practice which is unbecoming or detrimental to the public interest."

69. Staff further submit and we agree that ensuring clients are able to make a meaningful decision about their investments is undeniably a cornerstone of an Approved Person's obligations.

[15] *Yahn (Re)*, *supra* at para. 52. See also: *Bilinski (Re)*, 2002 LNBCSC 99 at para 13.

70. Staff submit that by failing to disclose the risks of concentration to clients DD and BD, the Respondent cannot be said to have dealt fairly with his clients, observed the high standards of ethics and conduct expected of all Approved Persons, and has engaged in conduct that is unbecoming or detrimental to the public interest. Staff submit that the failure to disclose material risks to a client contravenes the standard of conduct required by MFDA Rule 2.1.1 as has been held by MFDA Hearing Panels.[16]

Position of Respondent re Disclosure of Material Risks and Concentration as a Risk

71. The Respondent submits as set out in his written submissions that:

a) The MFDA Staff Notice dated April 14, 2008 and revised February 22, 2013, only applies to "Exempt Securities" and that the other Staff and Canadian Securities Administrators Notices and Bulletins postdate the purchases of clients DD and BD. The precious metal bullion funds at issue in this proceeding were medium risk and not Exempt Securities.

b) The MFDA Staff and Canadian Securities Administrator Notices and Bulletins "underscores there was no requirement to make disclosure to client of concentration specifically in relation to precious metals until at least 2016."

c) Prior to 2016 general disclosures of concentration risk were only an implied requirement which he met in his 2007 Retirement Report to client DD and BD.

d) The MFDA in the Cautionary Letter dated November 11, 2011, did not raise any issue with the bullion positions in his accounts which were concentrated. He submits that the MFDA "were aware of and scrutinized my Bullion positions in 2011, which were concentrated, and found no breach of MFDA rules."

e) The BMG Advantage Gold Bullion Fund was approved by the Ontario Securities Commission as an income fund in 2012 "suitable for investors seeking monthly income with a Medium Risk tolerance."

f) Neither FundEX nor Sterling Mutuals had concentration guidelines prior to January 2017 and November 2017 respectively and that Sterling Mutuals did not enforce concentration guidelines prior to November 2017.

g) Based on *Lamoureux* regarding suitability, it is improper and unreasonable to enforce concentration disclosure specific to only precious metals retroactively prior

[16] *Lemay (Re)*, *supra*; *Gordon (Re)*, *supra*, and *Yahn (Re)*, *supra*.

to November 2017 and that the compliance officer at Sterling Mutuals who joined Sterling Mutuals in March 2012 was aware of his concentration levels. We note that the reference to March 2012 in this submission is factually incorrect. The compliance officer referred to did not join Sterling Mutuals until December 2014.

72. The Respondent further submits on the issue of risk as set out in his written submissions:

a) All investments contain Systemic risk whether it is a GIC or a security. Securities also contain unsystematic risk and diversification is a strategy to reduce the unsystematic risk of individual securities or a group of securities within a given sector of the economy. Mr. Ford indicated he thought diversification could reduce unsystematic risk but not eliminate it. Leaving an investor with mostly Systemic risk when investing in a diversified portfolio of equities. Systemic risk cannot be reduced by diversification.

b) Bullion is not a security and the BMG Mutual Funds in question contain no unsystematic risk. They are Medium risk and contain only Systemic risk related to the world economy in general and more specifically to the value of Fiat currencies.

c) The MFDA Bulletin #0678-C dated February 4, 2016 referred to by Mr. Ford referenced "certain higher risk sector mutual funds."

d) Precious Metal Equity Sector Funds do contain unsystematic risk and carry a risk rating of High Risk.

e) The original MFDA Notice of Hearing alleges that he failed to inform clients about the risks of holding investments concentrated in precious metal sector funds. The wording in the written submission of staff arguments has changed to precious metal Bullion Funds.

f) Precious metal bullion funds are not precious metal sector funds.

g) The risk characteristics of an investment in bullion is not the same as an investment in precious metal equity sector funds. This was demonstrated in his evidence of Know Your Product and a comparison he did between Dynamic Precious Metals vs BMG BullionFund Class A, marked as Exhibit 23, since inception. He submits his "judgement was based on the attributes of the Mutual fund as opposed to optimism."

h) Even if the implied concentration disclosures for precious metals sector funds were allowed to be applied retroactively the BMG Bullion Mutual Funds don't qualify

as meeting the criteria as they are medium risk and have a similar risk profile to a well-diversified portfolio of Equities rather than a high risk Precious Metal Equity Sector Fund.

i) The MFDA Investor Questionnaire is evidence an investor with a growth mandate can maintain an 80% concentration in the equity asset class without the requirement of disclosing concentration.

j) The 2008 Client Powerpoint presentation demonstrated a realistic and objective assessment of the circumstances of the investment and included a balanced disclosure of both positive and negative material factors.

Position of Respondent re Standard of Conduct

73. The Respondent submits that:

a) He has demonstrated that at all times his reasoning was sound and his values are true and aligned with the best interests of his clients.

b) Positive and Negative Material disclosures were made. This includes disclosures of concentration risk in the 2007 Retirement Report.

c) It is not in the best interest of investors generally to have to turn to discount brokerages offering no advice in order to meet their investment needs because advisors are prohibited from the sale of approved products in the quantities clients require.

Allegation #1 – Decision

74. We agree with Staff and find that Respondent contravened MFDA Rule 2.2.1. The same facts are also a breach of MFDA Rule 2.1.1; although we are making a finding only with respect to MFDA Rule 2.2.1.

75. We agree with Staff that an Approved Person in the position of the Respondent has an obligation to disclose material risks to a client, here clients DD and BD. As noted above, we also agree with Staff that concentration of investments in a single asset class or sector of the economy has long been understood as material risk in the securities industry and the Respondent was aware of concentration risk and that a client should not be exposed to concentration risk in equity mutual funds.

76. We do not agree with the Respondent's submission that the risk of investing in bullion funds is the same as a "well diversified portfolio of equities." As noted in the 2011 and 2014 Simplified Prospectuses for the BMG BullionFund and BMG Gold BullionFund, which identified a number of risks of the Funds, detailed the risk associated with the lack of the diversification as follows:

> Specialization Risk
>
> The fund will invest only in gold, silver and platinum bullion, as applicable, an investor should only put a portion of their portfolios and the fund in order to achieve appropriate levels of diversification.

77. We disagree with the submission of the Respondent that there was no requirement to make disclosure to a client of concentration in relation to precious metals until at least 2016. The concept of concentration risk and diversification applies equally to precious metal bullion funds or precious metal sector funds as they do to equity mutual funds.

78. We agree with Staff that the Respondent's position that he met his obligation to disclose concentration risk generally by sending the 2007 Retirement Report[17] to clients DD and BD is unfounded for the following reasons:

a) The 2007 Retirement Report would have suggested to clients DD and BD that the Respondent would be recommending a well-diversified portfolio of fixed income and equity investments, not concentrating their investments in precious metal bullion.
b) The Report did not warn clients DD and BD about the concentration risk inherent in the Respondent's recommendations and, the 2007 Retirement Report post-dated the initial concentrated investments by client DD.
c) Sending the 2007 Retirement Report does not satisfy the requirement for meaningful disclosure as previously articulated by MFDA Hearing Panels.

79. The evidence does not support the position of the Respondent that the MFDA Cautionary Letter dated November 11, 2011, provides evidence that the MFDA "were aware of and scrutinized my Bullion positions in 2011, which were concentrated, and found no breach of MFDA rules." As stated by John Gallimore during his testimony, the 2011 investigation did not review any of the

[17] Exhibit 13.

issues that are the subject of the Notice of Hearing, including concentration. The 2011 Cautionary Letter dealt with an issue of an unauthorized trade.

80. We agree with Staff and disagree with the Respondent that Staff seek to retroactively apply concentration disclosure requirements. We agree with Staff that their position does not require the retroactive application of any requirements, only the application of the suitability requirement as articulated in MFDA Rule 2.2.1 and the third element of the suitability analysis in *Lamoureux*.[18] In addition, we agree with Staff that the *Lamoureux*[19] decision did not address the retroactive application of suitability requirements, but held that the disclosure requirement only applies to foreseeable, as opposed to unforeseeable, risks at the time an investment is contemplated. The concentration risk in the portfolios of clients DD and BD was foreseeable and indeed inherent in the Respondent's recommendations.

81. We do not accept the Respondent's position that as neither Sterling Mutuals nor FundEX had concentration guidelines prior to November 2017 and January 2017 respectively, "it is improper and unreasonable to enforce Concentration disclosures specific to only precious metals retroactively prior to November 2017." As noted in the preceding paragraph, Staff does not seek to enforce concentration guidelines retroactively and only to precious metals. We agree with Staff that the absence of concentration guidelines from either Member is not a defence to Allegation #1. The obligation to disclose concentration risk arises from MFDA Rules 2.2.1 and 2.1.1 and not from the existence of Member concentration guidelines. The lack of concentration guidelines from either Member does not excuse the Respondent's failure to adhere to MFDA Rules.

82. We also agree with Staff that nothing in the MFDA Investor Questionnaire supports the Respondent's interpretation that an Approved Person can recommend that clients maintain 80% of their investment in the equity asset class without advising of concentration risk.

83. The Respondent did not warn clients DD and BD of the risk of concentration of their investments in precious metal bullion funds. As set out in paragraph 17 of the Affidavit of Sheila Daneshvaziri sworn October 9, 2020,[20]

> During the interview of the Respondent on January 4, 2019, he was specifically questioned about whether he disclosed the risk of concentration in precious metal bullion to client DD and BD. The Respondent explicitly stated he gave no such

[18] *Lamoureux (Re), supra*, pp. 11-12 and 16-17.
[19] *Lamoureux (Re)*, *supra.*
[20] Exhibit 8.

warning. Specifically, at page 95 of the transcript at Exhibit "F", the following exchange occurred:

> **MR. HALASZ**: I'm talking about concentration risk. Maybe I'll just make it clear. So you've said that you don't believe there to be a --- that there can be a concentration risk for holding this specific bullion fund, so that you can in fact hold all this fund and not be --- and it doesn't apply to holding your eggs in one basket, you can hold all your eggs, all your bullion, in one basket and that will be your only basket, 100 percent. You think that that's okay?
>
> MR. WILKINSON: I do.
>
> **MR. HALASZ**: And you don't think that there's a risk inherent in holding all your investments in bullion?
>
> MR. WILKINSON: No.
>
> **MR. HALASZ**: So you don't think that now and you didn't think that in the past?
>
> MR. WILKINSON: Right.
>
> **MR. HALASZ**: So am I correct to say then, that's not something that you would ever have said to the [clients DD and BD]' or any of your clients, that you did hold that --- that you did think that there was such a risk? You wouldn't.
>
> **MR. WILKINSON**: No, I wouldn't.

At the time of this interview, the Respondent was represented by counsel who attended the interview.

84. We agree with the Reply submissions of Staff that the Respondent's belief that the BMG precious metal bullion mutual funds are only subject to systemic risk, which cannot be reduced through diversification, is untenable for the following reasons:

a) The Respondent did not qualify himself as an expert on systematic or unsystematic risk, and provided no authoritative evidence to support his view that BMG precious metal bullion mutual funds are only subject to systematic risk. Without expert interpretation, it cannot be inferred from the price charts relied on by the Respondent that BMG's mutual funds are not exposed to unsystematic risk.

b) The Respondent's opinions are directly contradicted by: (i) the BMG Simplified Prospectuses for the funds at issue,[21] which, among other risks, identified specialization risk (i.e., concentration) as a risk of the fund; and (ii) BMG's own

[21] Exhibits I1 to I4 to the Affidavit of Mike Ford.

submissions to the Ontario Securities Commission,[22] which stated that its funds were not intended to be standalone products.

c) The Respondent's opinions are inconsistent with the CIM Course Extract,[23] which was part of the Respondent's evidence, and which identified that negatively correlated assets allow for greater diversification and the reduction of risk. The Respondent admitted on cross-examination that bullion is negatively correlated to financial assets. Therefore, a diversified portfolio mix of equity mutual funds and precious metal bullion mutual funds would have reduced the risk of concentration in the portfolios of client DD and BD.

85. We disagree with the Respondent's submission that because Allegation #1 in the Notice of Hearing uses the term "precious metal sector funds" as opposed to "precious metal bullion mutual funds", that Staff is somehow limited in its argument. We agree with Staff's submissions that the Respondent misinterprets the Notice of Hearing:

a) The term "precious metal sector funds" may include different investments in the precious metal sector, including precious metal bullion mutual funds. In *Gordon (Re)*,[24] the Respondent admitted to failing to adequately explain the risks "of investments in precious metal sector funds", one of which included the BMG Bullion Mutual Fund.

b) The particulars set out in the Notice of Hearing in support of the allegations amply describe the mutual funds at issue as being precious metal bullion mutual funds. As held in *Abate (Re)*,[25] the allegations against a respondent "are to be determined on the basis of the totality of the notice of hearing: the charging paragraphs and the particulars, read together."

c) During the hearing it was evident that the Respondent was aware that Allegation #1 related to precious metal bullion mutual funds and the Respondent provided his defence to this allegation accordingly.

[22] Exhibit 47.
[23] Exhibit 22.
[24] *Gordon (Re)*, [2019] Hearing Panel of the Pacific Regional Council, MFDA Hearing No.201849, Reasons for Decision dated December 5, 2019.
[25] *Abate (Re)*, [2015] Hearing Panel of the Central Regional Council, MFDA Hearing No. 201412, Reasons for Decision dated March 12, 2015 at para 76.

86. There is no question in our mind that the Respondent truly believed that his recommendations to clients DD and BD were in their best interests because of his strong belief in precious metal bullion funds. However, notwithstanding his personal belief, he had an obligation to disclose the material risk of overconcentration in precious metal bullion funds, which he did not do.

Standard of Conduct

87. The Respondent's failure to disclose that the material risk of overconcentration in precious metal bullion funds is a breach of the standard of conduct required of Approved Persons under MFDA Rule 2.1.1. We agree with Staff that the Respondent's submission that "Staff's position would prohibit advisors 'from the sale of approved products in the quantities clients require' is without merit."

Allegation #1 – Finding of Misconduct

88. We find that the Respondent contravened MFDA Rule 2.2.1. The same facts are also a breach of MFDA Rule 2.1.1; however, we are only making a finding with respect to MFDA Rule 2.2.1.

Allegation #2 – False or Misleading Communications to Clients DD and BD

89. Staff allege that:

> Between September 2010 and April 2015, the Respondent sent written communications to clients which contained misleading or incomplete information, made unwarranted or exaggerated claims or conclusions or failed to identify material assumptions made in arriving at the conclusions, or were detrimental to the interests of the clients or the Member, contrary to MFDA Rules 2.8 or 2.1.1.

90. Staff submit that the following representations made to clients DD and BD were misleading:[26]

[26] The "emphasis added" was done by Staff in their submissions.

Date	Content of Communication
September 24, 2010	"We could move any of your Mackenzie funds that are currently in Bonds into the Gold Bullion fund. Other than that I don't have any new ideas for you. The prospects for another severe decline in stocks is very real so I'm not looking to enter that arena until we see a healthy correction. Likely by next spring we should have another buying opportunity. In the mean time the precious metals are not only a safe haven but also have been generating the most growth. This trend is due to continue." [Emphasis added.]
October 7, 2010	"…I think Gold will see persistent and relentless demand over the next few months."
January 10, 2011	"…I expect the Bullion to continue to outperform any other asset class."
January 11, 2011	"…Currently my Model Portfolio is at 100% Bullion so I don't have any problem increasing you to these levels. I still believe the Bullion will continue to outperform regardless of the market environment."
December 13, 2012	"…In the larger view Gold should be substantially higher than it is, what I hear from those that study these things is that the price is being manipulated. Someday they will run out of ammunition for limiting its price and at that point we could see some spectacular price movements." [Emphasis added.]
December 10, 2014	"You have bought Gold because it is a safe store of wealth, risk free because Gold has no counterparty risk. This will turn out for the better for you and me. And you won't have to wait an eternity for it to happen, it will happen sooner than you think." [Emphasis added.]
April 9, 2015	"…I read that article and have seen other predictions on lower Gold prices as well. No one knows for sure how this all plays out day to day, month to month. We know how it ends though and thats [sic] with significantly higher Gold prices." [Emphasis added.]

91. MFDA Rule 2.8.1 defines client communication as "any written communication by a Member or an Approved Person to a client of the Member, including trade confirmations and account statements, other than an advertisement or sales communication."

92. MFDA Rule 2.8.2 requires that:

No client communication shall:

a) be untrue or misleading or use an image such as a photograph, sketch, logo or graph which conveys a misleading impression;

b) make unwarranted or exaggerated claims or conclusions or fail to identify the material assumptions made in arriving at these conclusions;

c) be detrimental to the interests of clients, the public, the Corporation or its Members;

d) contravene any applicable legislation or any guideline, policy, rule or directive of any regulatory authority having jurisdiction over the Member; or

e) be inconsistent or confusing with any information provided by the Member or Approved Person in any notice, statement, confirmation, report, disclosure or other information either required or permitted to be given to the client by a Member or Approved Person under the By-laws, Rules, Policies or Forms.

93. Staff submit that:

a) The statements identified above were untrue or misleading and contained unwarranted or exaggerated claims concerning the safety and future performances of precious metals and/or gold bullion.

b) As set out in the Ford Affidavit[27] and in his evidence, investment in precious metals bullion was not a safe haven nor was it risk free. For clients DD and BD, the investments in precious metals bullion as recommended by the Respondent resulted in a loss.

c) The Respondent's unwarranted claims concerning the price manipulation of gold were also unsupported by any evidence. The evidence cited by the Respondent in his Reply post-dated his statements and did not support the contention that the price manipulation of gold depressed the price.[28]

d) Nowhere in the emails that contain the misleading statements identified above did the Respondent identify any assumptions he was relying on to support his statements.

[27] Exhibit 3, paras. 10-16.
[28] Ford Affidavit, Exhibit 3, paras. 17-18.

94. Staff submit that as stated by the MFDA Hearing Panel in *Burke (Re)*:[29]

> It goes without saying that the investing public relies on the advice received from dealing representatives such as the Respondent when making investment decisions. It is important therefore that the information being communicated to clients be accurate and not misleading.

95. Staff further submit that:

a) The Respondent's misleading statements were also detrimental to the interests of his clients, his Member, and the mutual fund industry as a whole. Clients DD and BD remained invested in precious metals bullion funds on faith in the Respondent's statements resulting in losses. The Member suffered the reputational harm from the complaint of clients DD and BD and further lost the three accounts held by clients DD and BD.

b) Unbalanced statements from an Approved Person that mislead clients, such as the statements of the Respondent, bring the dealers and the mutual fund industry into disrepute. The mutual fund industry relies on the trust placed by clients in Approved Persons that they will receive complete, clear, and truthful advice.

c) Accordingly, by making the above misleading written communications to his clients, the Respondent contravened MFDA Rule 2.8.2. In addition, MFDA Hearing Panels have held that making such misleading statements is also a contravention of the standard of conduct codified by MFDA Rule 2.1.1.[30]

96. The Respondent submits that:

a) The communications in question were responses to requests from the client for an opinion or were reminders of the principal reasons why they owned Bullion as an investment for long term Growth.

b) The communications were extensions of presentations and newsletters where the identity of assumptions were disclosed.

c) It is a widely held belief that Gold Bullion is a safe haven investment.

---

[29] *Burke (Re)*, [2017] Hearing Panel of the Atlantic Regional Council, MFDA Hearing No. 201739, Decision on Penalty dated December 19, 2017 at para 33 ("*Burke*").

[30] *Burke*, *supra*; *Doiron (Re)*, [2019] Hearing Panel of the Central Regional Council, MFDA Hearing No. 201722, Reasons for Decision dated February 6, 2019 ("*Doiron*").

d) It was a widely held belief that the price of Bullion was being manipulated for years, a belief that has been confirmed by fines paid by The Bank of Nova Scotia among others.

e) The wording Risk Free cannot be taken in isolation from the contextual phrase it was embedded. Risk Free was in reference to the feature of the BMG Mutual funds having no Counterparty Risk and was not in reference to the Mutual Fund investment itself, which is Medium Risk. A fact that had been disclosed to the client on many occasions including an e-mail communication dated 10 months previous.

97. In Reply, Staff submit:

a) The Respondent states that his communications to the complainants were responses to requests for an opinion or reminders of the principal reasons why the Complainants owned bullion. Opinions or reminders to clients are caught by Rule 2.8, which captures "*any communication*...to a client...other than an advertisement or sales communication." MFDA Rule 2.8 would be rendered meaningless if it did not capture Approved Persons' written statements of their opinions.

b) The Respondent further argues that the statements are not misleading, as defined in MFDA Rule 2.8, when considered in the context of his presentations and newsletters. During the Hearing, however, the Respondent failed to identify how his presentations and newsletters qualified or explained his statements. The Respondent relied on two "Human Browser" Newsletters,[31] which post-dated many of the impugned statements and which were far removed in time from those statements. The Respondent further did not explain what content in those Newsletters clarified or provided the assumptions for the impugned statements. The Respondent also relied on his 2008 Client PowerPoint Presentation, which preceded the earliest impugned statement by two years.

c) The Respondent states that it is widely known that gold bullion is a safe haven and that the price of bullion has been manipulated for years. These are bald statements by the Respondent for which he provided no evidence. While the Respondent relied on various class actions and articles to support his belief in the manipulation of gold

[31] Exhibits 43 and 44.

prices, all of those items post-dated the impugned statements and none established that there was any depression of gold prices.

d) In defence of the December 10, 2014 misleading statement,[32] the Respondent states that "[r]isk free was in reference to the feature of the BMG Mutual funds having no Counterparty Risk and was not in references to the Mutual Fund investment itself, which is Medium Risk." The Respondent's own statement demonstrates that the December 10, 2014 email, without further clarification by the Respondent, was misleading.

Allegation #2 – Finding of Misconduct

98. We agree with the submissions of Staff in paragraphs 91, 92, 93 and 95. The statements in the subject emails were misleading and contravene Rule 2.8.2. Again, while the Respondent, because of his commitment to precious metal bullion and, in particular, gold bullion as an investment, believed what he wrote in his emails to clients DD and BD, the emails were "untrue or misleading and contained unwarranted or exaggerated claims concerning the safety and future performances of precious metals and/or gold bullion."

99. As a result, we find that the Respondent contravened MFDA Rule 2.8.2. Again, while the same facts are also a breach of MFDA Rule 2.1.1; we are making a finding only with respect to MFDA Rule 2.8.2.

Allegation #3 – Unapproved Advertisement

100. Staff allege that:

> Between March 2017 and July 2017, the Respondent issued an advertisement which had not been reviewed and approved by the Member, contrary to the Member's policies and procedures, and MFDA Rules 2.7.3, 2.1.1, 1.1.2, or 2.5.1.

101. Staff submit that:

a) MFDA Rule 2.7.3 provides that no advertisement or sales communication shall be issued unless it has been approved by the Member. MFDA Rule 2.7.1 defines an advertisement to include an internet website and "any public material promoting the business of a Member".

[32] Exhibit P5 to the Affidavit of Sheila Daneshvaziri, Exhibit 8.

b) Accordingly, the Respondent was required to obtain Member approval prior to issuing the above noted advertisement. The Respondent is an agent of the Member for the purposes of providing financial services and therefore advertisements concerning the provision of such services required Member approval.

c) MFDA Hearing Panels have held that MFDA Rule 2.7.3 encompasses not only advertisements which directly relate to Member activity, but also encompasses promotional material which relates "more generally to financial services or investments which might, by inference, include the Member's business."[33]

d) The Respondent's conduct therefore contravened MFDA Rule 2.7.3. MFDA Hearing Panels have also previously held that issuing advertisements without the approval of a Member is also a violation of MFDA Rule 2.1.1.[34]

102. Staff submit that:

a) the Respondent failed to comply with Sterling Mutuals' Policies and Procedures regarding the advertisement. Staff submit that Sterling Mutuals' policies and procedures required all advertisements placed by Approved Persons to be submitted to compliance for review and receive written approval from the compliance department prior to their release. The Respondent failed to adhere to this policy and procedure.

b) MFDA Rule 2.5.1 requires Members to establish policies and procedures to ensure the handling of their business is in compliance with MFDA by-laws, rules and policies and applicable securities legislation. It is well established that Approved Persons have a corresponding obligation to comply with those policies and procedures pursuant to MFDA Rule 1.1.2.[35]

c) As the Hearing Panel stated in *Franco (Re)*:[36]

> The obligation of Approved Persons to comply with the policies and procedures of the Member that they are registered with is a cornerstone of the self-regulatory system. When Approved Persons disregard those obligations, the Member's ability to supervise the

[33] *Wayne (Re)*, [2018] Hearing Panel of the Central Regional Council, MFDA Hearing No. 201507, Decision on Misconduct dated June 13, 2018, para. 62 ("*Wayne*").
[34] *Wayne (Re), supra*; *Doiron*, *supra*.
[35] *Frank (Re)*, [2015] Hearing Panel of the Central Regional Council, MFDA Hearing No. 201407, Decision on Misconduct dated May 5, 2015 at paras 56-58.
[36] *Franco (Re)*, [2011] Hearing Panel of the Prairie Regional Council, MFDA Hearing No. 201016, Reasons for Decision dated May 6, 2011 at para. 38.

conduct of such Approved Persons and protect the interests of clients and the public is undermined.

d) The failure to comply with the Member's policies and procedures is further a contravention of the standard of conduct, and its requirements that an Approved Person observe high standards of ethics and conduct in the transaction of business and not engage in any business conduct or practice which is unbecoming or detrimental to the public interest.[37]

e) Accordingly, the Respondent's conduct contravened MFDA Rules 2.1.1, 1.1.2, and 2.5.1.

103. The Respondent submits:

a) The intent was not to hide advertisements from Sterling or engage in inappropriate advertising.

b) There are several grey areas surrounding the timing, content and requirement for disclosure of these ads.

c) It was in good faith that he asked the auditor questions about these grey areas around placing google ads. It is still unclear whether approval was required as the ads don't pertain to Sterlings Mutuals' business of Mutual Funds.

104. Staff submit in Reply to the Respondent's arguments about his advertisement. Staff submits that there were no "grey areas". The Respondent has admitted he issued an advertisement without Member approval, which is contrary to the explicit wording of MFDA Rule 2.7.3. Further, the advertisement clearly implicated financial services and therefore Sterling Mutuals' business, and also linked to the Respondent's website, which he admitted would have contained information about his mutual fund business.

Allegation #3 – Finding of Misconduct

105. The Respondent admits that, in or about March 2017, he placed an advertisement on an internet search database which listed the following services:

> "Investment Management Seasoned Independent Advice – wilkinsonfinancial.ca" and "Portfolio Management Services Seasoned Independent Advice – wilkinsonfinancial.ca"

[37] *Franco (Re)*, supra at para. 43.

106. The Respondent did not obtain prior approval from Sterling Mutuals, the Member, to place the advertisement as required by MFDA Rule 2.7.3 and Sterling Mutuals' policies and procedures.

107. We note that this advertisement was brought to the attention of the Sterling Mutuals' reviewer on July 29, 2017, by the Respondent as he had questions about the need for approval. The reviewer in his report directed the Respondent to obtain approval as he had done with all of his other advertisements.

108. The evidence is that the advertisement linked to the Respondent's website, which the Respondent admitted would contain information about his mutual fund business.

109. We find that the Respondent did not obtain prior approval from Sterling Mutuals, the Member, as required by MFDA Rule 2.7.3 and Sterling Mutuals' policies and procedures. Accordingly, we find that the Respondent contravened MFDA Rule 2.7.3. While the same facts support a finding under MFDA Rules 2.1.1, 1.1.2, 2.5.1, we are only making a finding of misconduct with respect to MFDA Rule 2.7.3 in the circumstances of this case.

IV. CONCLUSION

110. We have made the following findings of misconduct:

a) Allegation #1 - the Respondent contravened MFDA Rule 2.2.1;
b) Allegation #2 - the Respondent contravened MFDA Rule 2.8.2; and
c) Allegation #3 - the Respondent contravened MFDA Rule 2.7.3.

111. We request that a penalty hearing now be scheduled.

DATED this 29th day of January, 2021.

"W. A. Derry Millar"
W. A. Derry Millar
Chair

"Kenneth P. Mann"
Kenneth P. Mann
Industry Representative

"Joseph Yassi"
Joseph Yassi
Industry Representative

DM 795343