



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: May 26, 2021 by electronic hearing in Toronto, Ontario
Decision (Penalty) and Reasons: June 28, 2021

DECISION (PENALTY) AND REASONS

Hearing Panel of the Central Regional Council:

W. A. Derry Millar
Kenneth P. Mann
Joseph Yassi

Chair
Industry Representative
Industry Representative

Appearances:

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

I. INTRODUCTION

1. On January 29, 2021, we issued our Reasons for Decision (Misconduct) dated January 29, 2021 (“Misconduct Decision”). We found the Respondent had contravened the Rules of the MFDA as follows for the reasons set out in our Misconduct Decision:

- a) Contravention #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;
- b) Contravention #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 2.8.2; and
- c) Contravention #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 Rule 2.7.3.

2. On May 26, 2021, a penalty hearing was held to determine the appropriate penalty. The penalty hearing was conducted virtually. The Respondent appeared by video and made submissions.

3. The facts are set out in our Misconduct Decision. We found that the Respondent as part of his suitability obligations failed to disclose to his clients BD and DD the material risk of over-concentration of their investments in precious metal bullion funds. At the time of their 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 their joint account was 67.1%. We also found out that certain emails sent by the Respondent to clients BD and DD were misleading. While the Respondent as noted in our Misconduct Decision because of his commitment to precious metal bullion and, in particular, gold bullion as an investment, believed what he wrote in his emails to BD and DD, 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.” Lastly, we found that the Respondent had placed an ad without obtaining prior approval from his Member, Sterling Mutuals, as required by MFDA Rule 2.7.3 and Sterling Mutuals’ policies and procedures. The ad 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. The Respondent discontinued the ad at the end of October 2017.

II. STAFF SUBMISSIONS

4. MFDA Staff ("Staff") submit that the appropriate penalty for the Respondent's misconduct is:

- a) an 18 month to 2 year prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member;
- b) a fine in the amount of \$30,000; and
- c) costs in the amount of at least \$15,000.¹

5. Staff provided their written Submissions of Staff of the MFDA on Penalty for the hearing on May 26, 2021. Staff also provided a draft bill of costs in support of the request for costs fixed at \$15,000. Staff provided additional submissions by email through the Hearings Office on May 28, 2021, which were responded to by the Respondent by email through the Hearings Office on May 31, 2021.

6. Staff outlines in its written submissions the factors to be taken into account by Staff in recommending the penalty and which the Hearing Panel should consider in determining the appropriate penalty.

7. Staff submit that:

- a) The nature/seriousness of the misconduct in failing to disclose concentration risk is an aggravating factor in this case.
 - i. The Respondent's misconduct is serious. The Respondent contravened MFDA Rule 2.2.1 and his suitability obligations when he failed to inform clients DD and BD about the risks of holding investments concentrated in precious metal bullion mutual funds.

¹ Staff has attached a Bill of Costs with these submissions. The Bill of Costs reflects total costs incurred of \$38,650.00.

- ii. Even if the Respondent truly believed that his recommendations to clients DD and BD were suitable, he knew or ought to have known of his obligation to disclose and explain the risk of holding a concentrated portfolio comprised substantially of precious metal bullion mutual funds, which this Hearing Panel found to be “foreseeable and indeed inherent in the Respondent’s recommendations.”
 - iii. The Respondent had been a registrant since 1991, and as the Hearing Panel stated in its Misconduct Decision, “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 and the Respondent was aware of concentration risk and that a client should not be exposed to concentration risk in equity mutual funds.” Moreover, the simplified prospectus of the very mutual funds that the Respondent recommended identified concentration as a risk of the funds.
 - iv. The Respondent’s misconduct is further aggravated by the facts that from the very beginning of his relationship with clients DD and BD, he led them to believe that he would recommend a well-diversified portfolio as set out in the 2007 Retirement Report and subsequently, when they themselves took the initiative to express concern about the concentration levels of their investment portfolios, the Respondent discouraged them from diversifying their portfolio and recommended that they further increase the concentration of their portfolios in precious metals.
 - v. By failing to disclose all the relevant risks, the Respondent deprived his clients of the ability to make an informed decision about the suitability of his investment recommendations contrary to his suitability obligations, which led clients DD and BD to suffer a loss.
- b) The Respondent’s misleading client communications is also an aggravating factor:
- i. The Hearing Panel concluded that the Respondent made a number of misleading statements to clients DD and BD contrary to MFDA Rule 2.8, which were detrimental to his clients, the Member, and the mutual fund industry as a whole. Previously MFDA Hearing Panels have determined that such misconduct is serious in and of itself.

- ii. In this case, the Respondent's misleading statements also aggravate the Respondent's failure to disclose the concentration risk of the portfolios of clients DD and BD, as the clients were not warned that the concentration of their portfolio gave rise to risk and they were expressly misled about the nature and seriousness of the risk.
 - iii. Clients DD and BD, on several occasions, asked the Respondent whether their investment portfolio should be diversified to include investments outside of precious metal bullion mutual funds. Not only did the Respondent not diversify the portfolios of clients DD and BD, he made misleading representations to clients DD and BD to influence them to remain concentrated in precious metal bullion mutual funds.
 - iv. The Respondent's misstatements had the intended effect of persuading clients DD and BD to stay concentrated in precious metal bullion mutual funds. It is a further aggravating factor that the misleading statements occurred on multiple occasions over a long period of time.
 - v. In its Misconduct Decision in this case, the Hearing Panel stated that:
 - vi. 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.
 - vii. Therefore, the Respondent's misstatements to clients DD and BD are serious.
- c) The Respondent's use of an unapproved advertisement is also an aggravating factor in this case.
- i. The Respondent placed an unapproved advertisement on an internet search database which directed the viewer to the Respondent's website and stated that the Respondent provided "seasoned financial advice."
 - ii. By failing to seek Member approval of the advertisement, the Respondent circumvented the process that the Member had implemented to facilitate the review and scrutiny of advertising by compliance staff to ensure, among other things, that proposed advertisements did not run afoul of regulatory

requirements. As the Respondent conceded at the Misconduct Hearing, the advertisement linked to his website that advertised Member business.

- iii. MFDA Rule 2.7.2 places a number of restrictions on advertisements that Members must adhere to. Members can only ensure compliance if they are able to review all advertisements prepared by their Approved Persons *prior* to publication as required by MFDA Rule 2.7.3. The Respondent's conduct placed the Member at risk of running afoul of MFDA Rule 2.7.2 as well as having financial services advertised by the Respondent confused with the services offered by the Member.
- iv. While the Respondent did disclose the advertisement to a branch reviewer of the Member who attended his office, he knew or ought to have known of his responsibility to obtain approval prior to publishing the advertisement. The Member's policies and procedures unequivocally stated that, "[a]ll advertisements and sales communications proposed to be disseminated to the public must be submitted to Compliance and must receive the written approval from Compliance prior to their release." Moreover, the Respondent was aware of his obligation to obtain approval of advertisements and the process by which approval could be obtained as he had previously obtained Member approval for advertising when he created a website in respect of his business.
- v. The Respondent was therefore aware of his obligation to obtain prior approval from the Member before publishing advertisements and the process by which such approval could be obtained, yet he proceeded to publish the advertisement, in this case, without prior approval of the Member.

d) Deterrence:

- i. In order to properly protect investors, penalties imposed by Hearing Panels should prevent or at least discourage the Respondent and other Approved Persons from engaging in similar conduct in the future. Deterrence is intended to capture both specific deterrence of the wrongdoer as well as general deterrence of other participants in the capital markets in order to protect investors.

- ii. As one MFDA Hearing Panel stated: a “penalty must re-affirm public confidence in the regulatory system, and to do this, it must be seen to act as a general deterrent.”²
 - iii. The Respondent’s actions with respect to clients DD and BD and statements during the Misconduct Hearing demonstrate that he is unwilling to accept that heavy concentration of client investments in the precious metals sector causes additional risk to clients. The Respondent’s failure to warn clients DD and BD about those risks and his assertions that he does not accept the fact that high concentration levels pose a substantial risk to other clients reflect the need for the imposition of meaningful specific deterrence as a consequence of his conduct if the Respondent is permitted to continue working as an Approved Person in the mutual fund industry.
 - iv. The significant penalties that Staff has proposed in this case will emphasize to the Respondent and to other Approved Persons that an advisor’s suitability obligations are among the most critical regulatory obligations that they are bound by; that such obligations cannot be properly fulfilled if a fulsome explanation of the risks of products and strategies proposed by an advisor are not conveyed to the client in a fair and balanced manner; and that Approved Persons must always refrain from sending misleading communications to clients about the products and strategies that have been recommended.
 - v. Furthermore, as a result of the Respondent’s inability or unwillingness to acknowledge his misconduct and accept responsibility for his wrongdoing, a substantial prohibition is warranted to protect the investing public and reinforce the seriousness of the misconduct in this case to the Respondent and other Approved Persons.
- e) The Respondent's Experience and Level of Activity in the Capital Markets:
- i. The Respondent had been licensed in the mutual fund industry from 1991 to 2018. He acknowledged that he completed the Canadian Securities Course in 2000 and learned about the risks of over-concentration in one asset class during that course. He was aware of his obligation to obtain

² *Raymond Brown-John*, MFDA File No. 200502, Hearing Panel of the Pacific Regional Council, Reasons for Decision dated June 27, 2005 at p. 5.

Member approval of advertising but disregarded the obligation to comply with the procedure.

- ii. Given his considerable experience in the industry and his knowledge and awareness of the risks of concentration, his obligation to refrain from sending misleading communications and his obligation to obtain Member approval of advertising, the Respondent appears to have known of, but consciously disregarded, his obligations to comply with MFDA Rules and the Member's policies and procedures which the Hearing Panel determined that he contravened in this case.
- iii. Accordingly, the Respondent's experience is an aggravating factor.

f) The Harm Suffered by Investors as a Result of the Respondent's Activities:

- i. In its Misconduct Decision, the Hearing Panel referenced the fact that clients DD and BD suffered a net loss of \$8,340.82 during the period that their money was invested in concentrated holdings of precious metal bullion mutual funds at FundEX and Sterling Mutuals. Sterling Mutuals paid clients DD and BD \$38,626.62 to compensate them for a substantial portion of the \$41,622.78 in losses sustained in their investment accounts while they were clients of Sterling Mutuals whose investment accounts were serviced by the Respondent. Accordingly, Sterling Mutuals paid substantial compensation to clients DD and BD as a consequence of the Respondent's misconduct. The Respondent did not contribute to that compensation payment.
- ii. The payment of compensation from Sterling Mutuals to clients DD and BD does not mitigate the seriousness of the Respondent's misconduct. Prior MFDA Hearing Panels have imposed substantial sanctions on Approved Persons even though the Member concerned paid compensation to address the client harm caused by the Respondent's contravention.³
- iii. The repayment by Sterling Mutuals does not in any way absolve the Respondent of responsibility for his misconduct or mitigate the harm caused by his misconduct.

³ *Fike (Re)*, [2017] Hearing Panel of the Central Regional Council, MFDA Hearing No. 2017102, Hearing Panel Decision dated December 18, 2017.

g) Benefits Received by the Respondent:

- i. There is no evidence that the Respondent received any financial benefit from his misconduct beyond any commissions and fees that he would have been entitled to receive if he had not engaged in the contraventions of his regulatory obligations that were established in this case.
- ii. However, Staff submits that this factor has limited applicability to the current matter. While the Respondent's misconduct may not have been motivated by a quest for personal financial gain, Staff submits that the Respondent's actions demonstrate a disregard for his obligations to comply with regulatory requirements which include the obligation to disclose the risks of an investment or strategy.

h) Risk to Investors if the Respondent Remains in the Capital Market:

- i. Throughout the Misconduct Hearing, the Respondent remained steadfast in his opinion that concentration risk does not exist for precious metal bullion mutual funds.
- ii. The Respondent's assertions about the infallibility of precious metal bullion mutual funds reflect a risk that he will continue to disregard his obligations to disclose risks, particularly concentration risk, as they relate to investments in precious metal bullion. Staff is concerned that the Respondent will not disclose the risk of concentration in precious metal bullion mutual funds in the future as he continues to deny that such a risk exists, in spite of the position taken by Staff during the current hearing process and the findings of the Hearing Panel that such risks need to be disclosed to clients.
- iii. If the Respondent becomes an Approved Person again in the future, his unwillingness to disclose concentration risk is inconsistent with his regulatory obligations to ensure the suitability of the investment recommendations that he makes to clients.

i) Damage Caused to the Integrity of Capital Markets by the Respondent's Actions:

- i. The Respondent's actions are an example of a type of conduct that can bring the reputation of the mutual fund industry into disrepute. The Respondent

- ought to have recognized the harm that his misconduct could cause to clients and the fact that such conduct contravened his regulatory obligations.
- ii. The Respondent's failure to comply with his suitability obligations, the cornerstone obligation of Approved Persons, are detrimental to the integrity of the capital markets. The Respondent's failure to meet this obligation strikes at the very nature of the advisor-client relationship and the failure to disclose material risks of investments to clients indicates that the Respondent did not properly serve his clients by providing them with an objective, fair and balanced explanation about their investments.
 - iii. The Respondent's failure to disclose the risk of concentration is further aggravated by the fact that the Respondent made no disclosures of concentration risk to *any* of his clients.
 - iv. The Respondent's failure to disclose concentration risk to his clients, including clients DD and BD, undermines the confidence that clients have in Approved Persons in the mutual fund industry.
 - v. The Respondent further made misleading statements to clients DD and BD in respect of the concentration of their investments in precious metal bullion mutual funds. Not only did the Respondent fail to disclose the material risks of these investments in his communications, but he failed to provide clients with a balanced, truthful explanation about these investments and the risks of holding them. The Respondent's statements in respect of these investments also bring the mutual fund industry into disrepute.
 - vi. Each of the Respondent's contraventions caused harm to the integrity of the capital markets and warrant a significant sanction.
- j) The Respondent's Past Conduct including Prior Sanctions: Staff acknowledges that the Respondent has not previously been the subject of MFDA disciplinary proceedings but submits that in light of the Respondent's longstanding practice of over-concentrating clients in precious metal bullion mutual funds, the fact that the Respondent has no disciplinary history should not carry significant weight.
- k) Previous Decisions Made in Similar Cases: Staff provided us with a chart of cases relating to the penalties imposed by Hearing Panels relating to suitability contraventions, misleading statements to clients, and unapproved advertisements.

8. In response to an issue raised by the Respondent regarding his ability to pay a fine, as noted above, Staff made further written submissions by email through the Hearings Office on May 28, 2021, which the Respondent responded to by email through the hearings office on May 31, 2021.

9. Staff submit that the ability to pay a fine is a factor that a Hearing Panel may take into account in determining the appropriate penalty to impose in an MFDA disciplinary proceeding; however, it is only one of the factors to be weighed in relation to all other applicable factors including general and specific deterrence, and the burden is on the Respondent to raise the issue and to provide evidence of a *bona fide* inability to pay, not merely evidence of a reduced income.

10. Staff further submit that if a Hearing Panel is inclined to provide some accommodation to a respondent on the basis of their financial circumstances, the imposition of an installment plan is a legitimate alternative to a reduction of the fine to be imposed. Staff submits that in the case of a person in the position of the Respondent who continues to earn an income if any accommodation is granted, it would be more appropriate to grant the Respondent time to pay an appropriate fine rather than reducing the quantum of the fine that ought to be imposed.

11. Staff points out that the Respondent did not raise the issue of his inability to pay a fine prior to the penalty hearing and provided no evidence of his assets or liabilities beyond his income tax returns for 2018 and 2019. These income tax returns disclose that the Respondent earned income in both of those years, as did his spouse. Staff submits that these records do not demonstrate an inability to pay a fine.

12. Staff submits that if the Hearing Panel is inclined to accept the Respondent's assertions that he is unable to pay a fine, the length of the suspension to be imposed should be increased. If the Hearing Panel imposes only a small financial penalty in the short suspension, it runs the risk of undermining the important objective of deterring the Respondent and other Approved Persons from engaging in similar misconduct in the future and conveying the perception to the industry, to investors into the broader public that the misconduct in this case was not serious.

13. Staff further submits that its requests for costs of \$15,000 based on the draft bill of costs provided to the Hearing Panel is reasonable and should be awarded against the Respondent.

III. RESPONDENT'S SUBMISSIONS

14. The Respondent submits that:

- a) The references from the hearing transcript referred to by Staff in its submissions were quotes he had read from textbooks in the context of the breach of ethics. The excerpts were read as part of his defence relating to ethics. Those quotations should not be taken out of context and infer from them that he is not taking responsibility for putting clients in high concentrations and that he is defiant.
- b) The Hearing Panel should consider the lack of support he received from his dealers, FundEX and Sterling Mutuals. He was at FundEX when he crossed the 25% threshold of concentration, which did not exist at the time. No issue was raised by anyone at FundEX with his book of business and the degree of concentration in gold bullion funds. When he moved to Sterling Mutuals, the 25% concentration threshold did not exist there as well. Sterling Mutuals had no issue with his moving his book of business which was concentrated above 25% rate from day one into Sterling Mutuals. Two different compliance departments were aware of his positions and failed to raise any issue that he was offside in any shape or form.
- c) The MFDA, when it reviewed his accounts in 2011, was aware of the concentration and issued a cautionary letter that did not raise any issue with concentration in bullion.⁴
- d) If he is with a mutual fund dealer in the future, he would not defy the concentration guidelines of the dealer and exceed those guidelines.
- e) The investments he recommended to Clients BB and DD were suitable. They were medium-risk mutual funds investing in gold bars and storing them on a shelf. They were not complicated investments such as those in *Lamoureux*.⁵
- f) The ban proposed by Staff would be appropriate if he were still in the mutual fund business; however, he has been out of the securities business for three years now since Sterling Mutuals terminated his contract. The Hearing Panel should look at the appropriateness of a ban from the perspective of still being able to maintain a business as a going concern. The Respondent asked how long could someone possibly stay out of the mutual fund business, retain their client relationships, and return to the business.
- g) In the *Gascho*⁶ case, the respondent had been out of the mutual fund business for two years and agreed to a three month suspension as part of the settlement. The

⁴ We did not accept this submission at the Merits Hearing and we do not accept it here.

⁵ *Lamoureux (Re)*, [2001] ASCD No. 613 (ASC) at pp. 11-12 and pp. 16-17.

⁶ *Gascho (Re)*, [2018] Hearing Panel of the Central Regional Council, MFDA File No. 201786, Panel Decision dated August 21, 2018.

Respondent submits that he has been out of the mutual fund business for three years already and that a longer ban is inappropriate. The Respondent submits that unless the MFDA wishes to put him out of business instead of disciplining him, the appropriate ban is three months.

- h) With respect to the fine, he did not have a very large book of business. It was in the \$10 million range, which generated roughly \$100,000 per year in commissions. He has been out of work for three years, and his taxable income in the past two years has been \$30,000 per year. His business disintegrated with the termination of his contract by Sterling Mutuals, and he lost the value of 30 years of work. He has been living off his investments to get through. He said he could not come up with the fine requested and costs after not working for three years and depleting his investments.

15. In his May 31, 2021 response to the further submissions of Staff sent by email on May 26, 2021, the Respondent submitted that:

- a) The industry ban should be evaluated separately from any financial penalties, and both should be appropriate given his circumstances.
- b) His career should be viewed as a going concern, and consideration should be given to the fact that he has been unable to work for three years. The *Gascho* case is relevant. The Respondent has been out of the mutual fund business for nine months longer than the respondent in *Gascho* when the three month ban is added to the two years he was out of mutual fund business before the ban was imposed.
- c) The penalty should be proportionate to his business, and consideration must be given to the financial hardships he has already endured. Relatively speaking, his business was small, with assets under administration in the \$11 million range. A \$45,000 financial penalty as proposed by Staff is much easier to absorb for an advisor managing \$30, \$50, or \$100 million in assets.
- d) A lower fine offset by a longer prohibition would continue to prevent him from re-establishing his career, likely ending it.

IV. ANALYSIS AND DECISION

16. In exercising its discretion to impose a penalty, the Hearing Panel should take into account the following considerations:⁷

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

17. Hearing Panels when determining whether a penalty is appropriate often consider the following:⁸

- a) the seriousness of the allegations proved against the Respondent;
- b) the Respondent's past conduct, including prior sanctions;
- c) the Respondent's experience and level of activity in the capital markets;
- d) whether the Respondent recognizes the seriousness of the improper activity;
- e) the harm suffered by investors as a result of the Respondent's activities;
- f) the benefits received by the Respondent as a result of the improper activity;
- g) the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- h) the damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- i) 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;
- j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- k) previous decisions made in similar circumstances.

18. In arriving at our decision on the appropriate penalty, we have considered the matters set out in paragraphs 16 and 17 above.

⁷ *Tonnies (Re)*, [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, Panel Decision dated June 27, 2005, at para. 22.

⁸ *Tonnies (Re)*, *supra*, at para 23.

19. It is important to remember when considering the issue of penalty that we found the Respondent failed to meet only the third step of his suitability obligations to Clients BB and DD. He failed to inform them of the material risks of holding investments concentrated in precious metal sector funds.

20. In presenting this case at the Merit's Hearing, Staff made it very clear that this failure was the only failure Staff was alleging arising from the Respondent's suitability obligations. This fact distinguishes the case before us from many of the decisions cited to us by Staff where the respondents in those cases failed to meet the other steps in the Know Your Client and suitability analysis. These cases also involved other misconduct by the respondents, which was different than the misconduct alleged against the Respondent and found by us.

21. We found that the Respondent's conduct as alleged in Contraventions #1 and #2 was serious. While we also found that the Respondent contravened MFDA Rule 2.7.3 in failing to obtain prior approval of the advertisement in question, we do not consider this breach as severe as the other two breaches. The Respondent had received prior approval for other advertising conducted by him. After he posted the advertisement in question on the Internet, he was unsure whether he needed approval. On October 29, 2017, when a reviewer from Sterling Mutuals was reviewing his practice, the Respondent brought the advertisement to the reviewer's attention as he had questions about the need for approval. When the reviewer told him that he needed approval, he took the advertisement down from the Internet by the end of October 2017.

22. Client DD had contacted the Respondent in 2006 because he was interested in gold bullion funds and his brother was a client of the Respondent and he was invested in gold bullion mutual funds.

23. When the Respondent was associated with FundEX, he had 130 clients including clients BD and DD. The evidence disclosed that in 2011 just before the Respondent's move to Sterling Mutuals in early 2012, the concentration in clients BD and DD's three accounts in precious metal bullion funds was 100%, 75.1% and 70.5%. All of the Respondent's clients were concentrated in precious metal bullion funds, principally gold bullion mutual funds. All of these clients moved to Sterling Mutuals with the Respondent.

24. The evidence before us was that during the period 2006 to 2017 covered by Contravention #1:

- a) Not only were clients BD and DD over concentrated in precious metal bullion funds, but all of the Respondent's clients were.
- b) No one at FundEx management raised any issue of over-concentration.
- c) FundEx had no concentration guidelines.
- d) While at FundEX, the value of clients BD and DD's investments increased by \$41,622.78.
- e) When the Respondent moved to Sterling Mutuals in 2012,
 - i. Sterling Mutuals did no review of the accounts for diversification or concentration.
 - ii. In 2012, Sterling Mutuals had no formal concentration guidelines.
 - iii. At the time of the Respondent's move to Sterling Mutuals the then CEO of Sterling Mutuals looked at his assets under management and investment strategy and had no issue with his concentrated book of business.
- f) 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.
- g) 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 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 BD and DD on October 30, 2017.
- h) 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 BD and DD were invested in precious metal bullion funds with the Respondent 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.
- i) Sterling Mutuals compensated clients BD and DD 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 BD and DD 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.

25. 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.

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

27. The Respondent is a well-educated financial services professional with general and higher level security courses and designations.

28. The Respondent has been in the mutual fund industry from 1991 until he was terminated by Sterling Mutuals on June 29, 2018. The Respondent has not been registered in the securities industry in any capacity since that time.

29. The Respondent believed in gold bullion mutual funds. He educated himself and attempted to educate his clients about gold bullion funds. While he was aware of the risks of over-concentration, he was of the view that concentration in gold bullion funds, as opposed to equity metal sector funds reduced the risk.

30. As noted in our Misconduct Decision, the Respondent's belief in precious metal bullion funds, particularly gold bullion funds, as an investment, led him to make the statements in his emails to clients BD and DD, which we found to be "untrue or misleading and contained unwarranted or exaggerated claims concerning the safety and future performances of precious metals and/or gold bullion."

31. In our view, the unapproved advertisement is a factor to be considered in determining penalty; however, in the facts of this case, it is a minor factor.

32. Prior to this complaint, the Respondent had no discipline history. Staff submit that his lack of a discipline history is an aggravating factor as he should have known better. We disagree with

Staff. In our view, the lack of a discipline history over approximately 26 years to October 2017 is a mitigating factor.

33. While the Respondent is responsible as an Approved Person to ensure that he explains the risks of over-concentration to clients and in this case, clients BD and DD, in our view mutual fund dealers have an obligation to their clients to ensure that their accounts are not over-concentrated in an asset class and to monitor their Approved Persons accounts. On the evidence before us, neither FundEX nor Sterling Mutuals did that. As noted above, on the evidence before us, the then CEO of Sterling Mutuals reviewed the accounts being brought by the Respondent to Sterling Mutuals and had no issue with his accounts. Sterling Mutuals reviewed his accounts in 2013 and 2017 and raised no issue with the concentration levels. Sterling Mutuals only implemented a concentration policy in November 2017.

34. The fundamental question we must address is whether the Respondent accepts that over-concentration in an asset class, whether gold bullion or some other form of security, is a risk that must be explained to clients in a fashion that they understand. Staff submit that the Respondent has not shown that he accepts that his clients should not be over-concentrated in an asset class. Staff also submit that a 12 to 18 month suspension is also necessary as a general and specific deterrent.

35. The Respondent submits that he has learned and accepts that his clients should not be over-concentrated in an asset class, including gold bullion, and that he would respect concentration guidelines if permitted to resume his career. The Respondent also submits that we should take into account that he has been out of the mutual fund industry for three years.

36. The Respondent acknowledges that the ban proposed by Staff would be appropriate if he was still in the mutual fund industry. However, the Respondent submits that we should take into account that he has been out of the mutual fund industry for three years. The Respondent submits as noted above that unless the MFDA wishes to keep him out of the mutual fund industry as opposed to disciplining him, the appropriate ban is three months.

37. The Respondent has been out of the mutual fund industry for three years. In our view, that fact must be taken into account in determining the appropriate length of the prohibition in this case.

38. Both Staff and the Respondent referred to *Gascho (Re)*⁹ on the issue of the appropriate penalty. The Respondent relied on it as an example of an Approved Person having been out of the mutual fund business for two years who was banned for an additional three months together with a fine of \$35,000.00 and costs of \$5,000.00.

39. The *Gascho* decision approved a settlement between Mr. Gascho and Staff. The allegations against Mr. Gascho were set out in the decision as follows:

Contraventions

5. The Respondent's contraventions involved recommendations by the Respondent and the subsequent purchase by his clients of investments in gold and/or precious metals sector funds. As of April 2, 2015, seventy-three of his clients held over 25% of their investment holding in such funds. Thirty-nine of the clients were age 60 and over.

6. There are five specific contraventions set out in paragraphs 41 to 45 of the Settlement Agreement. Paragraph 41 involved all seventy three clients and states:

“The Respondent admits that between 2002 and March 18, 2016, 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 [“Know Your Client”) factors relevant to each individual client, including the client’s age, risk tolerance, ability to withstand investment losses, and investment knowledge and experience, contrary to MFDA Rules 2.2.1 and 2.1.1.”

7. The other contraventions involved specific clients, WA. and EJ. Paragraphs 42, 44, and 45 of the Settlement Agreement involve client WA, a senior, where it is admitted by the Respondent that he did not explain the risk of such investments, did not adequately record the KYC factors of WA and did not use due diligence to ensure that the recommendations were suitable for client WA. These admissions were as follows:

Paragraph 42: “The Respondent admits that between September 2007 and November 2014, 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, contrary to MFDA Rules 2.2.1 and 2.1.1.”

⁹ [2018] Hearing Panel of the Central Regional Council, MFDA File No. 201786, Hearing Panel Decision dated August 21, 2018.

Paragraph 44: “The Respondent admits that between September 2007 and November 2014, 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, contrary to MFDA Rules 2.2.1 and 2.1.1.”

Paragraph 45: “The Respondent admits that between September 2007 and November 2014, 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, contrary to MFDA Rules 2.2.1 and 2.1.1.”

8. A further contravention involved client EJ, also a senior: Paragraph 43 states:

“The Respondent admits that in July 2015, 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, contrary to MFDA Rules 2.2.1 and 2.1.1.”

9. Details with respect to the concentration in gold and precious metals sector funds for these clients can be found in paragraphs 11 to 40 of the Settlement Agreement.

40. In *Gascho*, the Hearing Panel stated:

12. The conduct in this case was serious. The Respondent knew or should have known that the concentration of investing in any high risk product requires great care to know the client, to ensure that the product is suitable for the client and that the risks are carefully explained to the client. See the cases cited in paragraph 18 below in proceedings brought for similar conduct by IIROC and the MFDA. The importance of diversification is well known in the industry.

13. Many of the clients were seniors. Some had few resources to draw on in their retirement and therefore had no business investing in a high risk fund. WA’s investment in gold and precious metals was particularly serious. She and her husband retired with a modest annual income of between \$30,000 and \$50,000. He then died. As of April 2015 she had about \$165,000 invested in gold and precious metals sector funds, which comprised 43% of her portfolio. She incurred a loss of a little over \$10,000 from her investments in gold and precious metals sector funds. As the Settlement Agreement states in paragraph 31: “Given her age and level of income, client WA did not want to lose money and wanted safe investments.” As of February 2016 she incurred a loss of a little over \$10,000 from her investments in gold and precious metals sector funds. She was then 78 years old and

complained to FundEX, which later in 2016 paid her just over \$20,000 for her investment losses, including her investments in gold and precious metals sector funds.

14. Mitigating factors include the fact that the Respondent has been in the securities industry since 1993 and had not previously been the subject of any disciplinary proceedings. Moreover, during his time at FundEX the Respondent serviced approximately 282 clients with assets under administration totaling approximately \$25,000,000 as of April, 2015. Out of these clients, 73 – about a quarter of his clients – were heavily invested in the gold and precious metal sector funds.

15. Again in mitigation, most gold and precious metal sector funds had not been considered high risk in earlier periods. So the wrongdoing was as much about, and perhaps more about, not taking the clients out of the product as it was about putting them into it in the first place. As the Settlement Agreement states (paragraphs 13, 17, and 19): “The majority of the gold and/or precious metals sector funds consisted of two BMG funds which were rated as moderate risk at the time of investing. In or around, November 2017 these BMG funds were re-rated from moderate to high risk...Despite the Clients holding over 25% of their investment holdings in gold and/or precious metals sector funds, the Respondent did not recommend that the Clients reduce their concentration in gold and/or precious metals sector funds...When the value of gold and precious metals sector funds started to decline, the Respondent failed to recommend to the Clients that they reduce their concentration in gold and/or precious metal sector funds.”

41. We accept that the Respondent has learned from this experience and will not repeat this conduct in the future.

42. A number the facts referred to by the Hearing Panel in *Gascho* are present here including the fact as set out in paragraph 15 of *Gascho* that the majority of the gold and/or bullion funds held by clients BD and DD were classified as moderate risk at the time of investing and not changed from moderate to high risk until late 2017.

43. On the issue of general and specific deterrence, we note the comments of the Hearing Panel in *Gascho* on the significance of the three-month prohibition agreed to by Staff and Mr. Gascho in that case. At paragraph 16 of the Hearing Panel’s reasons, they note as follows:

The three-month prohibition from conducting securities related business with any Member of the MFDA is a significant penalty and along with the substantial monetary

fine of \$35,000 will serve as a general deterrent to others in the industry and a specific deterrent, if one is needed, to the Respondent. Moreover, the Respondent will have been out of the industry for over two years, which is a form of penalty that should be taken into account in mitigation. (Emphasis added)

44. In this case, the Respondent's been out of the industry for three years, one more year than Mr. Gascho. Unlike Mr. Gascho, the Respondent did not increase the risk tolerance of his clients; although he did send misleading emails to clients BD and DD as we have found. His three years out of the mutual fund industry is a substantial penalty which should be taken into account by us in determining the appropriate penalty.

45. The Respondent recognized in his submissions that a further ban was appropriate; however, he submits that the further ban should be three months having regard to the fact that he has been out of the mutual fund industry for three years. We agree with the Respondent and find that an additional three-month prohibition is appropriate. The Respondent will have been out of the mutual fund industry for at least three years and three months at the conclusion of the prohibition. In our view, this serves the regulatory objectives of general and specific deterrence. We do not believe that the Respondent will engage in this type of behaviour in the future and is not a risk to investors if he is permitted back into the industry.

46. With respect to a fine, Staff submitted that if we decrease the prohibition requested, we should increase the fine from their proposed \$30,000 to something higher. We disagree. In our view, Staff does not take into account in making this submission, the significant penalty experienced by the Respondent in being out of the industry for three years prior to this decision.

47. However, what is the appropriate fine in circumstances such as this. In some other cases provided to us by Staff, the fines were lower as part of a settlement agreement but also were combined with a permanent prohibition. As noted by the Hearing Panel in *Fike (Re)*¹⁰ at paragraph 17 of the Reasons:

A more difficult question is whether the fine is reasonable. We think it is. It is in line with the cases cited to us by counsel and with the MFDA Penalty Guidelines. The Respondent has received a very significant sanction by being prohibited from conducting securities related business in any capacity. The combination of a prohibition and a not insignificant monetary fine provides deterrence to others in the industry.

48. In *Gascho*, the fine imposed in addition to the three-month prohibition was \$35,000. Here, the fine proposed is \$30,000. However, the Respondent's been out of the industry for one more

¹⁰ *Fike (Re)*, *Supra.*, Fn. 3.

year than the respondent in *Gascho*. In our view, an appropriate fine is \$25,000. It is a significant fine in relation to the length of time the Respondent has been out of the industry and the further three-month prohibition ordered by us. It also recognizes not only the seriousness of the failure of the Respondent to inform clients BD and DD about the risks of holding investments concentrated in precious metal sector funds but also the seriousness of the related misleading written communications sent by the Respondent to clients BD and DD. The fine also recognizes our finding in relation to the unapproved advertisement. However, as noted above, in the circumstances of this case, the failure to obtain approval was not a serious infraction.

49. On the issue of costs, we are of the view that the amount sought for costs of \$15,000 is reasonable in relation to the costs incurred by the MFDA as set out in its draft bill of costs. The Merits Hearing lasted four days and the Penalty Hearing a little less than one half-day.

50. We agree with Staff that the onus is on the Respondent to establish his inability to pay a fine and costs. The Respondent has an obligation to raise this issue prior to the Penalty Hearing and provide sufficient information and documents to Staff so that they may make an informed decision on the issue of ability to pay. As well, if Staff disagrees with a respondent's submission regarding ability to pay, it is the responsibility of a respondent to provide the necessary information and documents to the Hearing Panel so that it may make an informed decision. Here, the Respondent raised the issue of his ability to pay during his submissions at the Penalty Hearing. He provided to Staff and through Staff, the Hearing Panel his income tax returns for 2018 and 2019. He provided no information on other assets or liabilities. We agree with Staff that the Respondent has not met the onus to establish his inability to pay the fine and costs.

51. In our view, the penalties determined by us will serve as a deterrent not only to the Respondent but also to other approved persons in the mutual fund industry. As noted above, being out of the industry for three years plus an additional three-month prohibition and a substantial fine and costs meets the regulatory objectives of the MFDA, and provide general and specific deterrence to other Approved Persons.

52. For the reasons set out above, we find the appropriate penalty is:

- a) A three-month prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member;
- b) a fine in the amount of \$25,000; and

c) costs in the amount of \$15,000.

53. We wish to thank Staff and the Respondent for their assistance, and their courtesy and professionalism throughout this proceeding.

DATED this 28th day of June, 2021.

“W. A. Derry Millar”

W. A. Derry Millar
Chair

“Kenneth P. Mann”

Kenneth P. Mann
Industry Representative

“Joe Yassi”

Joe Yassi
Industry Representative

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