



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A SETTLEMENT HEARING
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Excel Financial Growth Inc.

Settlement Hearing: August 20, 2010, Toronto, Ontario
Panel Decision: December 20, 2010

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, Q.C.
Linda Anderson
Anne Traczuk

Chair
Industry Representative
Industry Representative

Appearances:

Lyla Simon)	For the Mutual Fund Dealers Association of
)	Canada
)	
Margaret Cheng, President)	For Excel Financial Growth Inc.
)	
)	

1. By Notice of Settlement Hearing, dated July 5, 2010, a Hearing Panel of the Central Regional Council of the Mutual Fund Dealers Association of Canada (“MFDA”) was convened on August 20, 2010, to consider whether, pursuant to Section 24.4 of MFDA By-law No. 1, the Hearing Panel should accept a settlement agreement (“Settlement Agreement”) entered into between Staff of the MFDA and Excel Financial Growth Inc. (“the Respondent”) on July 2, 2010:

2. The Settlement Agreement was prepared and publicized in accordance with Section 24.4.2 of By-law No. 1 and Rule 15.2(1) of the MFDA Rules of Procedure. These provide as follows:

“24.4.2 Contents of Settlement Agreement

A settlement agreement shall be in writing and be signed by or on behalf of the Member or person and shall contain:

- (a) a statement of facts sufficient to identify the matter to which the settlement agreement relates;
- (b) a reference to any statutes or regulations thereto, By-law, Rules or Policies of the Corporation with which the Member or person has not complied and a statement as to future compliance therewith;
- (c) the consent and agreement of the Member or person to the terms of the settlement agreement;
- (d) the acceptance of the penalty to which the Member or person could be subject pursuant to Section 24.1;
- (e) the waiver of the rights of the Member or person to a hearing pursuant to the By-laws and all rights of review thereunder; and
- (f) such other matters not inconsistent with Section 24.4.2(a) to (e), inclusive, which may be agreed upon including, without limitation, the agreement by the Member or person to pay the whole or part of the costs of the investigation and any proceedings limited to the matters which are the subject of the settlement agreement.”

“15.2 Notice and Public Access

(1) Except where a settlement is reached after the commencement of the hearing of a proceeding on its merits, a Hearing Panel shall not consider a Settlement Agreement unless at least 10 days notice of the settlement hearing has been given by the Corporation in the same manner as a notice of penalty pursuant

to section 24.5 (Publication of Notice and Penalties) of MFDA By-law No. 1 specifying:

- (a) the date, time and place of the settlement hearing; and
- (b) the purpose of the settlement hearing with sufficient information to identify the Member or person involved and the general nature of the allegations which are the subject matter of the settlement.”

3. At the outset of the proceedings, we considered and granted a joint Motion by Staff and the Respondent to move the proceedings “in camera”. This Motion was brought pursuant to Rule 15.2(2) of the Rules of Procedure, which provides as follows:

“15.2 Notice and Public Access

(2) A Hearing Panel may, on its own initiative or at the request of a party, order that all or part of the settlement hearing be held in the absence of the public, having regard to the principles set out in Rule 1.8.”

4. Rule 1.8(2) provides as follows:

“1.8 Hearings Open to the Public

(2) A Panel may order that all or part of a hearing be heard in the absence of the public where the Panel is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.”

5. The Hearing Panel then considered the provisions of the Settlement Agreement, the salient portions of which are as follows:

“II. JOINT SETTLEMENT RECOMMENDATION

2. Staff discovered during a regularly scheduled compliance examination of the Respondent’s activities that the Respondent had engaged in activity for which the Respondent could be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1.2 of By-law No. 1.

IV. AGREED FACTS

Registration History

6. The Respondent has been registered in Ontario as a mutual fund dealer

since November 18, 1999 and a limited market dealer since October 4, 2007.

7. The Respondent has been registered as a mutual fund dealer in British Columbia since May 16, 2007.

8. The Respondent became a Member of the MFDA on May 10, 2002.

9. The Respondent's head office is located in Markham, Ontario. The Respondent has one branch office located in Richmond, British Columbia ("B.C. Branch").

10. The Respondent also currently has one sub-branch office located in Richmond, British Columbia.

Compliance Examination (2008)

11. In July of 2008, Staff conducted a second round compliance examination of the Respondent's head office and B.C. branch covering the period August 1, 2005 to May 31, 2008 (the "2008 Examination"). The results of the 2008 Examination were summarized and delivered to the Respondent in a report dated November 7, 2008 (the "2008 Report").

12. The 2008 Report identified a number of compliance deficiencies, the most serious of which were:

(i) Failure to Conduct Suitability Reviews and Trade Supervision

13. During the 2008 Examination, Staff found that the Respondent did not maintain an adequate two-tier supervision structure, contrary to MFDA Rule 2.5 and MFDA Policy No. 2, in that the Respondent:

- (a) was not conducting head office trade supervision in respect of the Approved Persons at the B.C. Branch; and
- (b) was not conducting suitability reviews of the trading activity of producing branch managers and, in some instances, was not approving the new client accounts opened by producing branch managers.

(ii) Lack of Evidence of Trade Supervision

14. During the 2008 Examination, Staff found that the Respondent failed to maintain evidence of head office review of trades, contrary to MFDA Rule 2.5 and MFDA Policy No. 2, in that:

- (a) the Respondent's procedures required the head office review of trades be evidenced by head office signing and dating each trade ticket but these procedures were not being followed; and

- (b) the Respondent conducted trade inquiries verbally and did not maintain any written evidence of the trade inquiries or follow up.

- (iii) Lack of Review and Approval of New Accounts

15. During the 2008 Examination, Staff found that the Respondent failed to maintain evidence of branch manager review and approval of new client accounts, contrary to MFDA Rules 2.2.3, 2.5, 5 and MFDA Policy No. 2.

- (iv) Suitability of Exempt Securities

16. During the 2008 Examination, Staff found that the Respondent failed to establish, implement and maintain policies and procedures to adequately and effectively supervise the sale of securities sold to clients pursuant to exemptions under the applicable securities legislation (“exempt securities”), contrary to MFDA Rule 2.2.1 and National Instrument 45-106, in that the Respondent sold exempt securities to clients without ensuring that the exempt securities were suitable for the clients and in keeping with their investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1.

17. Staff also found that the Respondent had failed to establish, implement and maintain adequate policies and procedures to ensure that:

- (a) clients who purchased exempt securities qualified as accredited investors in accordance with National Instrument 45-106; and
- (b) the Respondent conducted reasonable due diligence as to the nature and appropriate risk ranking of the exempt securities prior to allowing the exempt securities to be sold to clients.

- (v) Failure to Monitor for Excessive Trading and Market Timing

18. During the 2008 Examination, Staff found that the Respondent did not have adequate controls in place to detect instances of excessive trading or market timing, contrary to MFDA Rule 2.5 and MFDA Policy No. 2, in that the Respondent failed to detect instances where clients incurred large DSC fees upon redeeming DSC mutual funds and then used the redemption proceeds to purchase hedge funds.

Current Practices

19. In 2010, Staff conducted a third round compliance examination of the Respondent (the “2010 Examination”). The 2010 Examination identified that the Respondent had implemented some changes to its policies and procedures in an effort to comply with MFDA By-laws, Rules, and Policies, but that the deficiencies identified in the 2008 Report had not been fully resolved.

V. CONTRAVENTIONS

20. The Respondent admits that, from August 1, 2005 to May 31, 2008, the

Respondent failed to:

- (i) establish, implement and maintain an adequate two-tier supervision structure to supervise the trading activity of Approved Persons at the B.C. Branch and, in some instances, to review the trading activity and new client account openings of producing branch managers;
- (ii) maintain evidence of head office review of trades, contrary to MFDA Rule 2.5 and MFDA Policy No. 2;
- (iii) maintain evidence of branch manager review and approval of new client accounts, contrary to MFDA Rules 2.2.3., 2.5., 5 and MFDA Policy No. 2;
- (iv) establish, implement and maintain adequate policies and procedures to conduct reasonable due diligence on exempt securities and to supervise the sale of exempt securities to clients, contrary to MFDA Rule 2.2.1 and National Instrument 45-106; and
- (v) establish, implement and maintain adequate policies and procedures at head office to detect excessive trading and market timing, contrary to MFDA Rule 2.5 and MFDA Policy No. 2.

VI. TERMS OF SETTLEMENT

21. The Respondent agrees to the following terms of settlement;
- (a) the Respondent shall pay a fine in the amount of \$10,000.00, pursuant to section 24.1.2(b) of By-law No. 1, upon the acceptance of this Settlement Agreement;
 - (b) the Respondent shall, within three months of the date that this settlement is accepted by the Hearing Panel, implement policies and procedures to fully resolve the compliance deficiencies that were identified in the 2008 Report;
 - (c) the Respondent shall pay the costs of this proceeding in the amount of \$2,500.00, pursuant to section 24.2 of By-law No. 1, upon the acceptance of this Settlement Agreement; and
 - (d) the Respondent shall in future comply with all MFDA By-laws, Rules, and Policies, and all applicable securities legislation and regulations.

VII. STAFF COMMITMENT

22. If this Settlement Agreement is accepted by the Hearing Panel, Staff will

not initiate any proceeding under the By-laws of the MFDA against the Respondent or any of its officers or directors in respect of the contraventions described in Part V of this Settlement Agreement, subject to the provisions of PART IX below. Nothing in this Settlement Agreement precludes Staff from investigating or initiating proceedings in respect to any contraventions that are not set out in Part V of this Settlement Agreement or in respect of conduct that occurred outside the specified date ranges of the contraventions set out in Part V, whether known or unknown at the time of settlement. Furthermore, nothing in this Settlement Agreement shall relieve the Respondent from fulfilling any continuing regulatory obligations.

IX. FAILURE TO HONOUR SETTLEMENT AGREEMENT

27. If this Settlement Agreement is accepted by the Hearing Panel and, at any subsequent time, the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff reserves the right to bring proceedings under the By-laws of the MFDA against the Respondent and any of its officers or directors based on, but not limited to, the facts set out in Part IV of the Settlement Agreement, as well as the breach of the Settlement Agreement. If such additional enforcement action is taken, the Respondent agrees that the proceeding(s) may be heard and determined by a hearing panel comprised of all or some of the same members of the hearing panel that accepted the Settlement Agreement, if available.

Principles Regarding Acceptance or Rejection of Settlement Agreements

6. Previous MFDA Hearing Panels have determined the factors which should be considered in determining whether a Settlement Agreement should be accepted. These include:

- (i) Whether acceptance of the Settlement Agreement would be in the public interest and whether the penalty imposed will protect investors;
- (ii) Whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the Settlement Agreement;
- (iii) Whether the Settlement Agreement addresses the issues of both specific and general deterrence;
- (iv) Whether the proposed settlement will prevent the type of conduct described in the Settlement Agreement from occurring again in the future;
- (v) Whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets;
- (vi) Whether the Settlement Agreement will foster confidence in the integrity of the MFDA;

(vii) Whether the Settlement Agreement will foster confidence in the regulatory process itself.

Re: Investors Group Financial Services (Re), [2005] MFDA Ontario Regional Council, File No. 200401, Hearing Panel Decision dated December 16, 2004 at pages 2-3.

Re: Evangeline Securities Limited (Re), [2008] MFDA Atlantic Regional Council, File No. 200816, Hearing Panel Decision dated September 21, 2008.

Re: Professional Investments (Kingston) Inc. (Re), [2009] MFDA Ontario Regional Council, File No. 200836, Hearing Panel Decision dated March 24, 2009 at para. 14.

7. With respect to the issue of penalty, the role of the Hearing Panel in a Settlement Hearing is not the same as its role in making a penalty determination after a contested hearing. In a contested hearing, the Hearing Panel attempts to determine the correct penalty. In a Settlement Hearing, the Hearing Panel takes into account the settlement process itself and the fact that the parties have agreed to the penalties set out in the Settlement Agreement. In our view, a Hearing Panel should not interfere lightly in a negotiated settlement and should not reject a Settlement Agreement unless it views the agreed upon penalty as clearly falling outside a reasonable range of appropriateness.

8. Previous Hearing Panels have set out a number of factors which should be considered when determining whether a proposed penalty is appropriate. These include:

- (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.
- Re: Stephan Headley (Re), [2005] MFDA Ontario Regional Council, File No. 200509, Hearing Panel Decision dated February 21, 2006 at pages 25-26.

9. Enforcement Counsel also referred us to the MFDA Penalty Guidelines. These Guidelines are not mandatory or binding on a Hearing Panel but do set out factors and penalty ranges that should be taken into account generally and with respect to specific types of misconduct.

10. In cases involving the misconduct of the type alleged in the present case, the MFDA Penalty Guidelines recommend consideration of the following factors:

- (a) the nature and materiality of the inadequacies;
- (b) the extent of any client losses;
- (c) intentional disregard of the requirements versus carelessness or inadvertence; and
- (d) corrective measures taken since the discovery of the problem.

Application of Factors and Principles to the Present Case

11. In support of the proposed penalties, Staff made, *inter alia*, the following submissions:

- (a) As part of the compliance examination process, MFDA Compliance Staff assesses the adequacy of a Member's policies, procedures, and practices, and provides feedback regarding deficiencies to the Member in the form of compliance examination reports. It is incumbent upon the Member to correct the deficiencies identified by Staff during compliance examinations.
- (b) In some cases, Staff will require as part of the settlement that the Respondent/Member retain a monitor at its own expense, in order to correct deficiencies.

- (c) In the present case, MFDA Compliance Staff conducted a third round compliance examination in May 2010, which identified that the Respondent had implemented changes to its policies and procedures in an effort to comply with MFDA By-laws, Rules, and Policies, but that the deficiencies identified in the 2008 Report had not been fully resolved.
- (d) In Staff's view, the appointment of a monitor as a term of settlement is not necessary in the present case due to the fact that the Respondent has already resolved many of the deficiencies and has committed, as a term of the Settlement Agreement, to implementing policies and procedures to fully resolve the compliance deficiencies that were identified in the 2008 Report, within three months of the Settlement Agreement being accepted.
- (e) In Staff's view, the three month period is reasonable, and is all that should be required to allow the Respondent to address the outstanding deficiencies in their entirety.
- (f) The quantum of the fine and costs proposed in the present Settlement Agreement are otherwise identical to the penalties imposed in past similar cases that also involved compliance deficiencies.

Professional Investments (Kingston) Inc. (Re), 2009 LNCMFDA 9, MFDA Ontario Regional Council Decision dated March 24, 2009.

De Thomas Financial Corp. (Re), 2009 LNCMFDA 17, MFDA Ontario Regional Council Decision dated September 3, 2009.

Bick Financial Security Corp. (Re), 2009 LNCMFDA 25, MFDA Ontario Regional Council Decision dated November 12, 2009.

- (g) Staff also requested the Hearing Panel to take into account the following mitigating factors:
 - (i) The Respondent has not been the subject of a previous MFDA disciplinary proceeding;
 - (ii) In Staff's view, the deficiencies at issue were not the result of intentional disregard;
 - (iii) Staff is not aware of any client losses, harm, or complaints due to the contraventions admitted to;
 - (iv) The Respondent has been undertaking a review of its compliance structure for the purpose of developing and implementing changes

to its systems and controls to address the deficiencies and will be continuing to do so;

- (v) The Respondent has cooperated with Staff throughout the investigation and settlement process;
- (vi) This is not a 'repeat deficiency' case;
- (vii) The Respondent's admissions to the misconduct reflect the acceptance of responsibility for the misconduct; and
- (viii) By entering into a Settlement Agreement, the Respondent has avoided the need for a potentially lengthy hearing that would have entailed additional effort, time, and expense to the MFDA."

12. We have also considered the nature of these proceedings, the fact that they are public and the effect that this has had, and will have, on the Respondent.

13. We have also considered that this was a Settlement Agreement that was reached by the parties after significant discussion and negotiation. It represents what they feel, with their knowledge and experience, is an appropriate resolution.

14. Taking all of these factors into consideration, we unanimously concluded that, with one addition, the Settlement Agreement was reasonable, was in the public interest and should be accepted.

15. The one addition we thought was appropriate related to providing a mechanism, which could be utilized by Staff, in the event the Respondent did not comply with the provisions of paragraph 2 of the proposed Order and failed to implement policies and procedures to fully resolve the compliance deficiencies within the three month period set out in the paragraph.

16. We discussed our concerns with the parties. As a result, a new provision was, on consent, added to the Settlement Agreement, and the resulting Order, as follows:

"If the Respondent does not comply with paragraph 2 of this Order, Staff shall have the right to, upon reasonable notice, bring the matter back before a Hearing Panel for further consideration, including the possible imposition of such further

and other terms and conditions on Membership of the Respondent or other penalties as allowed under section 24.1.2 of MFDA By-law No. 1 as the Hearing Panel may consider appropriate;”

17. While the expressed intention of Staff was to bring this matter, if necessary, back before this Hearing Panel, the word “a” was consciously employed, in the third line of this new paragraph, to cover the eventuality that this particular Hearing Panel could not be reconvened to consider the matter.

DATED this 20th day of December, 2010.

“Thomas J. Lockwood”

Thomas J. Lockwood, Q.C.,
Chair

“Linda Anderson”

Linda Anderson,
Industry Representative

“Anne Traczuk”

Anne Traczuk,
Industry Representative