Now New Self-Regulatory Organization of Canada, a consolidation of IIROC and the MFDA

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: Wealthsimple Advisor Services Inc.

Heard: November 23, 2022 by electronic hearing in Toronto, Ontario
Decision: November 23, 2022
Reasons for Decision: December 22, 2022

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., K.C.	Chair
Patrick Galarneau	Industry Representative
Brigitte J. Geisler	Industry Representative

Appearances:

Paul Blasiak	)	Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Kenneth A. Dekker	)	Counsel for the Respondent
Blair Wiley	)	Chief Legal Officer of the Respondent, Wealthsimple Advisor Services Inc.

Background

1. This is a Settlement Hearing under Section 24.4 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the "MFDA"). The hearing was held by videoconference on Thursday, November 23, 2022. The full Settlement Agreement, dated October 31, 2022, entered into between Staff of the MFDA and Wealthsimple Advisor Services Inc. (the "Respondent") is available on the MFDA website. The Respondent appeared at the Hearing with counsel.

2. The Panel accepted the proposed Settlement Agreement at the conclusion of the hearing, with reasons to follow. These are our reasons for our decision to accept the Agreement.

3. Wealthsimple is a company founded in 2014 which, amongst other activities, offers investors passive and automated investing through what is often called robo-advising.

4. One of Wealthsimple's companies is Wealthsimple Advisor Services Inc. (the "Respondent"), which has been a member of the MFDA since October 4, 2018, and is registered in all provinces and territories in Canada as a mutual fund dealer.

5. On May 15, 2020, the Respondent provided the MFDA with written notice of its intention to resign from the MFDA, and thereafter over the course of seven months it wound up its operations, notified its Approved Persons and clients that it had ceased operations, facilitated the transfer of its clients' investments to other entities, and closed all of its client accounts. On December 22, 2020, the Respondent voluntarily suspended its registration in all provinces and territories.

6. The Respondent's membership status in the MFDA is currently listed as "inactive-pending resignation." The Respondent's resignation will be completed upon the conclusion of this proceeding.

7. At all material times, the Respondent's head office was located in Toronto, Ontario.

8. A Notice of Settlement Hearing was issued by the MFDA on September 6, 2022, stating:

"The proposed Settlement Agreement concerns allegations that:

a) Between February 2019 and August 2019, the Respondent implemented a process for onboarding Approved Persons of other MFDA Members and Investment Dealers which failed to ensure that potential clients had consented to the disclosure

of their confidential information to a company affiliated with the Respondent, thereby failing to implement an adequate system of controls and supervision over its onboarding process, contrary to MFDA Rules 2.1.3, 2.5.1, and 2.1.1.

b) Between April 1, 2019 and May 27, 2019, the Respondent failed to implement an adequate system of controls and supervision over its process for onboarding Approved Person of other MFDA Members and Investment Dealers by failing to prevent staff of an affiliated company from viewing and accessing the system of another MFDA Member in order to assist an incoming Approved Person to transfer confidential client information without the other MFDA Member's knowledge or consent, contrary to MFDA Rules 2.1.3, 2.5.1 and 2.1.1."

"Onboarding" refers to processes in which new individuals are integrated into an organization. In 2019, the Respondent was soliciting Approved Persons registered with other MFDA Members and Investment Dealers to transfer their registrations and books of business to the Respondent.

9. Rule 2.1.3 relates to confidential information and provides:

a) All information received by a Member relating to a client or the business and affairs of a client shall be maintained in confidence by the Member and its Approved Persons and other employees and agents. No such information shall be disclosed to any other person or used for the advantage of the Member or its Approved Persons or other employees or agents without the prior written consent of the client or as required or authorized by legal process or statutory authority or where such information is reasonably necessary to provide a product or service that the client has requested.

b) Each Member shall develop and maintain written policies and procedures relating to confidentiality and the protection of information held by it in respect of clients.

10. Rule 2.5.1 provides: "Each member is responsible for establishing, implementing and maintaining policies and procedures to ensure the handling of its business is in accordance with the By-laws, Rules and Policies and with applicable securities legislation."

Settlement Agreement

11. Staff and the Respondent agree and consent to the following terms of settlement, set out in paragraph 5 of the Settlement Agreement:

a) the Respondent shall pay a fine in the amount of $100,000, pursuant to s. 24.1.2(b) of MFDA By-law No. 1, which shall be payable in certified funds on the date that this Settlement Agreement is accepted by a Hearing Panel;

b) the Respondent shall pay costs in the amount of $20,000, pursuant to s. 24.2 of MFDA By-law No. 1, which shall be payable in certified funds on the date that this Settlement Agreement is accepted by a Hearing Panel.

12. Paragraph 6 of the Settlement Agreement states that "Staff and the Respondent agree to the settlement on the basis of the facts set out in this Settlement Agreement herein and consent to the making of an Order in the form attached…."

The Facts

13. The agreed facts are set out in paragraphs 7-37 of the Settlement Agreement and will not be repeated here in full.

14. The onboarding was facilitated by another company affiliated with the Respondent, Wealthsimple Technologies Inc. ("WSTI"). WSTI provided technology services, including cloud-based data storage and data management, to the Respondent and other companies affiliated with the Respondent.

15. The Respondent and WSTI were wholly owned by the same holding company. They were related companies and conducted business from the same office location. The Respondent was responsible for the conduct of WSTI as it relates to matters in this Hearing.

16. In brief, the relevant facts set out in the Settlement Agreement and agreed to by Staff and the Respondent, are as follows with respect to allegation (a) set out above in paragraph 8:

a) The Respondent designed and implemented a process for onboarding Approved Persons of other MFDA Members and Investment Dealers whereby the Approved Persons provided confidential information regarding the clients whose accounts they serviced at other dealers to WSTI, prior to the Approved Persons becoming registered with the Respondent.

b) The Respondent utilized WSTI as an intermediary to store the client information on a portal that WSTI maintained in anticipation of the Approved Persons transferring their registration to the Respondent.

c) The Respondent, however, failed to ensure that the clients had consented to provide their client information to WSTI. Neither WSTI nor the Respondent independently verified that the Approved Person had obtained the consent and authorization of the clients to transfer the client information to WSTI.

d) The clients were invited to access the WSTI Portal where they could provide their consent to release their personal information to the Respondent. This occurred after the client information had already been provided to WSTI.

e) Between February and August 2019, as part of the onboarding process, 20 Approved Persons provided WSTI with client information pertaining to a total of almost 3,000 clients.

17. The facts, in brief, with respect to allegation (b) in paragraph 8 above, are as follows:

a) On two occasions (April 1, 2019, and May 27, 2019) during the onboarding process for an Approved Person registered with another MFDA Member, WSTI Staff viewed, accessed, and obtained client information from the other Member's system in order to assist the Approved Person to transfer client information to WSTI.

b) The other Member was not aware of any of these activities and at no time did the other Member provide consent to WSTI or any other parties affiliated with the Respondent to access or view the contents of the system, generate and receive reports from the system, or obtain client information from the system.

The Misconduct

18. The misconduct at issue pertains to the Respondent's failure to implement an adequate system of controls and supervision over its onboarding process by:

a) failing to ensure that potential clients had consented to the disclosure of their confidential information to WSTI, a company affiliated with the Respondent; and

b) failing to prevent WSTI Staff from viewing and accessing the system of another MFDA Member in order to assist an incoming Approved Person to transfer confidential client information without the other MFDA Member's knowledge or consent.

19. Rule 2.1.3, set out above, requires prior client consent.

20. Previous MFDA Hearing Panels have held that it is not permissible to disclose client information to a third party without receiving prior authorization from the client. See *Re Roche* [2014] MFDA File No. 201420; *Re Scott* [2017] MFDA File No. 201647; and *Re Wighton* [2020] MFDA File No. 2018123. The Panel stated in *Wighton* at para. 19: "As the Panel stated in *Re Roche*…at paragraph 12: 'Where confidential client information is released without the client's consent, the client's privacy interests are irrevocably compromised in respect of that disclosure and the Member and the affected client cease to have control over where the client's confidential information resides, or may go next.'"

21. Clients provide extensive personal and financial information to their advisor and Member. This includes information that would rarely be disclosed by the client to a third party, such as investment and bank account numbers, the sources and amounts of income earned, and their liabilities and net worth.

22. The need for vigilance about disclosure of confidential information is particularly important in the digital age. As the Ontario Court of Appeal stated in *Jones v. Tsige* 2012 ONCA 32 at para. 67: "The Internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information. As the facts of this case indicate, routinely kept electronic databases render our most personal financial information vulnerable."

23. The Respondent's policies in the present case were inadequate to prevent disclosure of confidential information.

24. In paragraph 4 of the Settlement Agreement, the Respondent admits to "failing to implement an adequate system of controls and supervision over its onboarding process" and to "failing to prevent staff of an affiliated company from viewing and accessing the system of another MFDA Member in order to assist an incoming Approved Person to transfer confidential client information without the other MFDA Member's knowledge or consent."

Acceptance of the Settlement Agreement

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

26. The conduct in the present case is serious. Disclosure of client information without prior approval is always serious.

27. There are, however, a number of mitigating factors. The Respondent did set up a process to handle the new accounts (see paragraph 14 of the Settlement Agreement), but the process was inadequate.

28. There is no evidence of any client loss or client complaints and there is also no evidence that the Respondent received any benefit from the conduct that is the subject of this hearing.

29. The Respondent has not previously been the subject of MFDA disciplinary Procedures.

30. By entering into the Settlement Agreement, the Respondent has saved the MFDA the time, resources, and expenses associated with conducting a full hearing on the allegations.

31. The penalty of $100,000 is not out-of-line with the Sanctions Guidelines as well as the many cases cited to us by counsel. In three of these cases, where there was a Settlement Agreement, the Panel imposed a fine of $100,000: see *Re Portfolio Strategies Corp*oration [2020] MFDA File No.202032; *Re Investia Financial Services Inc.* & *Re FundEX Investments Inc*. [2012] MFDA File No. 201031 and 200932; and *Re IPC Investment Corporation* [2017] MFDA File No. 201659.

32. The monetary penalty of $100,000 and costs of $20,000 provide a significant measure of specific and general deterrence.

33. Settlements can be important and useful in achieving outcomes which further the goals of securities regulation. The British Columbia Court of Appeal stated with respect to a settlement by the B.C. Securities Commission (*B.C. Securities Commission v. Seifert* [2007] B.C.J. No. 2186, para. 49 (B.C.C.A.)):

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

34. Hearing Panels should respect settlements worked out by the parties. The present settlement was worked out over several weeks by experienced counsel. A Panel does not know what led to a settlement, what was given up by one party or the other in the course of the

negotiations, and what interest each party has in agreeing to resolve the matter. The Panel cannot go beyond the Settlement Agreement. There are almost always facts that play a role in the settlement which are not set out in the Settlement Agreement or brought to the attention of the Panel.

35. As a Panel stated in *Re Keshet* [[2014] MFDA File No. 201419 at paragraph 7, to take one of many such cases: "It is well established that hearing panels should not interfere lightly in negotiated settlements and should not reject a settlement agreement unless it views the proposed penalty clearly falling outside a reasonable range of appropriateness." There are many similar statements by MFDA Panels, stemming from the leading decision of *Re Milewski* [1999] I.D.A.C.D. No. 17, which stated:

> "A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness."

36. The penalty and the costs agreed to in this case fall within "a reasonable range of appropriateness."

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

DATED this 22nd day of December, 2022.

"Martin Friedland"
Martin L. Friedland, C.C., K.C.
Chair

"Patrick Galarneau"
Patrick Galarneau
Industry Representative

"Brigitte Geisler"
Brigitte J. Geisler
Industry Representative

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