



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: Mark Kricievski

NOTICE OF HEARING

NOTICE is hereby given that a first appearance will take place by teleconference before a hearing panel of the Central Regional Council (the “Hearing Panel”) of the Mutual Fund Dealers Association of Canada (the “MFDA”) in the hearing room located at 121 King Street West, Suite 1000, Toronto, Ontario on July 27, 2009 at 10:00 a.m. (Eastern), or as soon thereafter as the hearing can be held, concerning a disciplinary proceeding commenced by the MFDA against Mark Kricievski (the “Respondent”). The Hearing on the Merits will take place in Toronto, Ontario at a time and venue to be announced.

DATED June 17th, 2009.

“Jason D. Bennett”

Jason D. Bennett
Corporate Secretary

Mutual Fund Dealers Association of Canada
121 King St. West
Suite 1000
Toronto, Ontario
M5H 3T9
Telephone: 416-943-7431
Fax: 416-361-9781
E-mail: corporatesecretary@mfd.ca

NOTICE is further given that the MFDA alleges the following violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between June 3, 2004 and January 2005, the Respondent contravened the Member's written direction, dated June 3, 2004, and subsequent oral direction that he refrain from selling, referring or facilitating the sale of investment products offered by Portus Alternative Asset Management Inc. ("Portus") to clients, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

Allegation #2: Between April 2004 and January 2005, the Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by selling, referring or facilitating the sale of approximately \$1.8 million of Portus investment products to 44 clients, contrary to MFDA Rules 1.1.1(a) and 2.1.1.

Allegation #3: Between October 2004 and January 2005, the Respondent sent communications to clients which:

- (a) contained untrue and misleading statements about the Portus investment products, contrary to MFDA Rules 2.7.2(a) and 2.8.2(a);
- (b) included unjustified promises of specific results and made unwarranted claims in relation to the Portus investment products, contrary to MFDA Rules 2.7.2(b) and 2.8.2(b);
- (c) contained an opinion or forecast of the future performance of the stock market which was not clearly labeled as such, contrary to MFDA Rule 2.7.2(d);
- (d) failed to fairly present the potential risks to clients of investing in Portus investment products, contrary to MFDA Rules 2.7.2(e) and 2.8.2(b);
- (e) were detrimental to the interests of clients because they recommended the purchase of an investment, being the Portus investment products, that had not been approved for sale by the Member, contrary to MFDA Rules 2.7.2(f) and 2.8.2(c); and

- (f) had not been approved by an individual designated by the Member as being responsible for sales communications prior to the Respondent sending the communications to the clients, contrary to MFDA Rule 2.7.3.

PARTICULARS

NOTICE is further given that the following is a summary of the facts alleged and intended to be relied upon by the MFDA at the hearing:

Registration History

1. From March 14, 2007 until he resigned on June 4, 2007, the Respondent was registered in Ontario as a mutual fund salesperson with ASL Direct Inc.
2. From July 7, 1997 until March 9, 2007, the Respondent was registered in Ontario as a mutual fund salesperson with Sterling Mutuals Inc. (“Sterling”).
3. The Respondent is no longer registered in the securities industry in any capacity.
4. Sterling became a Member of the MFDA on March 8, 2002.

Allegation #1 – Failure to Comply with Member’s Direction

5. On June 3, 2004, Sterling sent an e-mail to all Approved Persons, including the Respondent, which stated:

Please note that you are not allowed to sell products which has (*sic*) not been approved by the dealer. Paradigm funds have changed their name to Portus Funds. They are not approved. The firm has been trying to by-pass dealer compliance by offering their product on a referral basis through MGA channels. This is not allowed under the MFDA. Any advisor attempting to do so will be suspended and reported to regulators.

6. Subsequently, during the summer of 2004, the Chief Compliance Officer of

Sterling informed the Respondent that Portus investment products were not approved for sale by Sterling and that Approved Persons of Sterling were not permitted to sell, refer or facilitate the sale of Portus investment products.

7. Between June 3, 2004 and January 2005, the Respondent disregarded the written and oral directions of Sterling by selling, referring or facilitating the sale of Portus investment products to clients. The Respondent did not disclose his involvement in the sale of Portus investment products to Sterling.

8. By engaging in the conduct described above, the Respondent contravened MFDA Rules 1.1.2 and 2.5.1 and MFDA Rule 2.1.1.

Allegation #2 – Securities Related Business Outside the Member

9. Between April 2004 and January 2005, the Respondent sold, referred or facilitated the sale of approximately \$1.8 million of Portus investment products to 44 clients. None of the transactions were carried on for the account of Sterling or processed through the facilities of Sterling.

10. Sterling had not approved Portus investment products for sale by its Approved Persons and further, as described above, had expressly directed its Approved Persons, including the Respondent in particular, that they were not permitted to sell or refer them.

11. The Respondent was paid a sales commission in the amount of approximately 4% in connection with his involvement in the sale of Portus investment products to clients. The Respondent claims that he rebated to clients approximately one-half (or 2%) of the sales commissions he was paid at the time he received the monies from Portus. The Respondent retained the balance of the sales commissions he did not rebate to clients, estimated by MFDA Staff to be in the amount of at least approximately \$36,000.

12. By engaging in the conduct described above, the Respondent engaged in securities related business that was not carried on for the account of Sterling and through the facilities of Sterling, contrary to MFDA Rules 1.1.1(a) and 2.1.1.

Allegation #3 - Misleading Communications Sent To Clients

13. Between October 2004 and January 2005, the Respondent sent communications to clients in the form of letters which he prepared that included, among other things, recommendations to purchase Portus investment products.

14. The communications did not comply with the requirements of MFDA Rules 2.7.2 and 2.8.2 in so far as the communications:

- (a) contained untrue and misleading statements about the Portus investment products, contrary to MFDA Rules 2.7.2(a) and 2.8.2(a);
- (b) included unjustified promises of specific results and made unwarranted claims in relation to the Portus investment products, contrary to MFDA Rule 2.7.2(b) and 2.8.2(b);
- (c) contained an opinion or forecast of the future performance of the stock market which was not clearly labeled as such, contrary to MFDA Rule 2.7.2(d);
- (d) failed to fairly present the potential risks to clients of investing in Portus investment products, contrary to MFDA Rules 2.7.2(e) and 2.8.2(b);
- (e) were detrimental to the interests of clients because they recommended the purchase of an investment, being the Portus investment products, that had not been approved for sale by Sterling, contrary to MFDA Rules 2.7.2(f) and 2.8.2(c); and
- (f) had not been approved by an individual designated by Sterling as being responsible for sales communications prior to the Respondent sending the communications to the clients, contrary to MFDA Rule 2.7.3

NOTICE is further given that the Respondent shall be entitled to appear and be heard and be represented by counsel or agent at the hearing and to make submissions, present evidence and call, examine and cross-examine witnesses.

NOTICE is further given that MFDA By-laws provide that if, in the opinion of the Hearing Panel, the Respondent:

- has failed to carry out any agreement with the MFDA;
- has failed to comply with or carry out the provisions of any federal or provincial statute relating to the business of the Member or of any regulation or policy made pursuant thereto;
- has failed to comply with the provisions of any By-law, Rule or Policy of the MFDA;
- has engaged in any business conduct or practice which such Regional Council in its discretion considers unbecoming or not in the public interest; or
- is otherwise not qualified whether by integrity, solvency, training or experience,

the Hearing Panel has the power to impose any one or more of the following penalties:

- (a) a reprimand;
- (b) a fine not exceeding the greater of:
 - (i) \$5,000,000.00 per offence; and
 - (ii) an amount equal to three times the profit obtained or loss avoided by such person as a result of committing the violation;
- (c) suspension of the authority of the person to conduct securities related business for such specified period and upon such terms as the Hearing Panel may determine;
- (d) revocation of the authority of such person to conduct securities related business;
- (e) prohibition of the authority of the person to conduct securities related business in any capacity for any period of time;
- (f) such conditions of authority to conduct securities related business as may be considered appropriate by the Hearing Panel;

NOTICE is further given that the Hearing Panel may, in its discretion, require that the Respondent pay the whole or any portion of the costs of the proceedings before the Hearing Panel and any investigation relating thereto.

NOTICE is further given that the Respondent must **serve** a **Reply** on Enforcement Counsel and **file** a **Reply** with the Corporate Secretary within twenty (20) days from the date of service of this Notice of Hearing.

A **Reply** shall be **served** upon Enforcement Counsel at:

Mutual Fund Dealers Association of Canada
121 King Street West
Suite 1000
Toronto, ON M5H 3T9
Attention: Shelly Feld, Senior Enforcement Counsel
Fax: 416-361-9073
Email: sfeld@mfd.ca

A **Reply** shall be **filed** by:

- (a) providing 4 copies of the **Reply** to the Corporate Secretary by personal delivery, mail or courier to:

The Mutual Fund Dealers Association of Canada
121 King Street West
Suite 1000
Toronto, ON M5H 3T9
Attention: Office of the Corporate Secretary; or

- (b) transmitting 1 copy of the **Reply** to the Corporate Secretary by fax to fax number 416-361-9781, provided that the Reply does not exceed 16 pages, inclusive of the covering page, unless the Corporate Secretary permits otherwise; or
- (c) transmitting 1 electronic copy of the **Reply** to the Corporate Secretary by e-mail at CorporateSecretary@mfd.ca.

A **Reply** may either:

- (i) specifically deny (with a summary of the facts alleged and intended to be relied upon by the Respondent, and the conclusions drawn by the Respondent

based on the alleged facts) any or all of the facts alleged or the conclusions drawn by the MFDA in the Notice of Hearing; or

- (ii) admit the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing and plead circumstances in mitigation of any penalty to be assessed.

NOTICE is further given that the Hearing Panel may accept as having been proven any facts alleged or conclusions drawn by the MFDA in the Notice of Hearing that are not specifically denied in the **Reply**.

NOTICE is further given that if the Respondent fails:

- (a) to **serve** and **file** a **Reply**; or
- (b) attend at the hearing specified in the Notice of Hearing, notwithstanding that a **Reply** may have been served,

the Hearing Panel may proceed with the hearing of the matter on the date and the time and place set out in the Notice of Hearing (or on any subsequent date, at any time and place), without any further notice to and in the absence of the Respondent, and the Hearing Panel may accept the facts alleged or the conclusions drawn by the MFDA in the Notice of Hearing as having been proven and may impose any of the penalties described in the By-Laws.

End.