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: Patrick Pasquale Caicco

Heard: July 8, 2015 in Toronto, Ontario
Reasons for Decision: August 4, 2015

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.	Chair
Guenther W.K. Kleberg	Industry Representative
Susan L. Schulze	Industry Representative

Appearances:

Paul Blasiak	)	Counsel for the Mutual Fund Dealers Association of Canada
Patrick Pasquale Caicco	)	In attendance by teleconference; not represented by counsel

Background

1. This is a hearing under Section 20 and 24 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the "MFDA"). The hearing was held on Wednesday, July 8, 2015. An Agreed Statement of Facts (the "ASF") entered into between Staff of the MFDA ("Staff") and Patrick Caicco ("Mr. Caicco" or the "Respondent") is available on the MFDA website and will not be set out in detail here. The Respondent appeared by teleconference and was not represented by counsel.

2. From May 12, 2009 to March 12, 2010 the Respondent, who resided and carried on business in Ottawa at the time, was registered in Ontario as a mutual fund salesperson with Professional Investments (Kingston) ("Professional Investments"), a Member of the MFDA.

3. Prior to the Respondent's registration with Professional Investments, he had been registered in the securities industry in various capacities since approximately 1992. He is not currently registered in the securities industry in any capacity.

4. Proceedings against the Respondent had been commenced by a Notice of Hearing dated March 6, 2015. Two violations of the By-laws, Rules or Policies of the MFDA were alleged.

5. Allegation #1 was that:

> "Between May 12, 2009 and March 12, 2010, the Respondent engaged in securities related business that was not carried on for the account and through the facilities of the Member by recommending, selling, facilitating the sale or making referrals in respect of the sale of approximately $3.35 million of investment products to at least 33 clients and other individuals outside the Member, contrary to MFDA Rules 1.1.1 and 2.1.1, and sections 13.7 and 13.8 of National Instrument 31-103."

6. Allegation #2 was that:

> "Between May 12, 2009 and March 12, 2010, the Respondent had and continued in another gainful occupation which was not disclosed to and approved by the Member by recommending, selling, facilitating the sale or making referrals in respect of the sale of

approximately $3.35 million of investment products to at least 33 clients and other individuals outside the Member, contrary to MFDA Rules 1.2.1(d) [now Rule 1.2.1(c)] and 2.1.1."

7. In the ASF (see paragraph 4), Mr Caicco admits that he engaged in the conduct described in the two allegations.

8. Counsel for the MFDA requested that we not deal with Allegation #2 if we find that Mr. Caicco had breached Allegation #1.

9. At the conclusion of the hearing, we found that Mr. Caicco had breached Allegation #1. We have therefore not dealt with Allegation #2. We reserved our decision on the appropriate penalty for Allegation #1. This is our decision on the penalty and our reasons for so deciding.

Securities Related Business Outside the Member

10. In February 2009 the Respondent incorporated Advantage Wealth Building Strategies Inc. ("Advantage") in the province of Ontario. This company carried on business providing wealth coaching and wealth planning services.

11. The Respondent never sought or obtained permission from Professional Investments to engage in any outside business activities through Advantage. Moreover, on three occasions the Respondent completed the Standard Associate Form without disclosing his involvement in outside securities activities. There were a number of such "off book" transactions.

12. From May 12, 2009 to March 12, 2010, the Respondent recommended, sold, or facilitated the sale to at least 21 investors of at least $1,343,449 of investments in the Skyline Apartment REIT, launched in 2006 by the Skyline Group of Companies ("Skyline"), a real estate acquisition, management and investment company.

13. The Respondent did not seek or obtain approval from his dealer, Professional Investments, with respect to his involvement in the sale or referral of the Skyline Apartment

REIT. None of the sales or referrals were processed through the facilities or for the account of Professional Investments. The Respondent received a 1% referral fee from Skyline relating to the sales or referrals of the Skyline Apartment REIT, which amounts were paid to Advantage.

14. The Respondent also facilitated investments in two properties developed by the Assaly Group of Companies (the "Assaly Group"), which carried on business as a diversified real estate organization engaged in the development and management of residential and commercial properties in Canada and the United States. The two properties were Nature's Walk, a proposed gated community of 20 condominiums and a golf course in North Grenville, Ontario, and Villa Montague, which was to involve the redevelopment of an existing retirement residence in Smiths Fall, Ontario. The Respondent was the sole promoter of the Nature's Walk investment.

15. During the time the Respondent was registered with Professional Investments, the Respondent facilitated investments in the Nature's Walk development by a total of 21 investors in the total amount of $1,838,000 and facilitated an investment in Villa Montague to one client of at least $171,000. The Respondent received a 3% referral fee from the Assaly Group relating to the sales or referrals of investments in Nature's Walk and Villa Montague, which amounts were paid to Advantage.

16. The Member, Professional Investments, did not have a referral arrangement under section 13.7 and 13.8 of National Instrument 31-103 with Skyline or with the Assaly Group.

17. MFDA Hearing Panels have consistently held that Approved Persons who facilitate investments by clients in products that have not been approved for sale by the Member are engaged in securities related business outside the Member. See *Re Breckenridge* (File No. 200718) and *Re Larson* (File No. 200826).

18. In summary, during the time the Respondent was registered at Professional Investments, he sold, recommended, referred or facilitated the sale of $3,352,449 of investments in the Skyline Apartment REIT, Nature's Walk and Villa Montague to 33 clients and other individuals,

for which he received sales commissions, referral fees or other compensation in the amount of $73,704, all of which was paid to the Respondent's company, Advantage.

19. The investors in the Assaly Group projects stopped receiving payments on their investments in February 2011 and eventually sued the Assaly group. A court appointed inspector in the legal proceedings determined that the Nature's Walk and Villa Montague projects "are hopelessly insolvent and in stages of abandonment." The ASF states in paragraph 34 that "there is no reasonable prospect that the investors will recover the full amount of their investments."

Seriousness of the Conduct

20. It is important that persons approved by the MFDA conduct their securities transactions through the Member and with the Member's consent. The policy rationale underlying the prohibition on off-book business is that when transactions are carried out off a Member's books, the Member loses its ability to supervise the transaction and to take responsibility for the suitability of the transaction for the investor. The Rule protects both investors and Members.

21. The Respondent prevented Professional Investments from conducting due diligence to determine whether the investments were sound, legitimate and prudent products which ought to be made available for sale to clients and potential clients. His actions also prevented Professional Investments from supervising his sales activities. The Respondent exposed clients and other individuals to risks of investment loss. These risks materialized when the investments in the Nature's Walk development and Villa Montague development collapsed. The Respondent's misconduct caused considerable harm to the 22 individuals who invested in the Assaly Group developments.

22. MFDA Rule 1.1.1(a) provides:

> "No Member or Approved Person (as defined in By-law 1.1) in respect of a Member shall, directly or indirectly, engage in any securities related business (as defined in By-law 1.1) except in accordance with the following:

(a) All such securities related business is carried on for the account of the Member, through the facilities of the Member (except as expressly provided in the Rules) and in accordance with the By-laws and Rules...[the exceptions in the Rule are not applicable to this case].

23. A Pacific Regional Council Panel put it well in a 2010 case, *Re Laverdière* (File No. 200936 at paragraph 5:

> "MFDA Rule 1.1.1(a) is fundamental to the regulatory mandate of the MFDA. An Approved Person must not trade in securities other than through the firm employing him/her, and the firm must have knowledge and consent to those business dealings. The Rule enhances investor protection and strengthens public confidence in the Canadian Mutual Fund Industry, as it creates a regime whereby an approved person is only permitted to sell investment products that have first been approved for sale by the Member, and which are sold through the facilities of the Member, thus ensuring the trading activity is subject to appropriate review and supervision."

24. By his conduct, the Respondent breached the standard of conduct required under Rule 2.1.1 which provides:

> "Each Member and each Approved Person of a Member shall:
>
> (a) deal fairly, honestly and in good faith with its clients;
> (b) observe high standards of ethics and conduct in the transaction of business;
> (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
> (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1., or as may be prescribed by the Corporation"

Joint Submission as to Penalty

25. Staff submitted, and the Respondent did not oppose (see paragraph 5 of the ASF), that the appropriate penalty to impose on the Respondent should be:

(a) a permanent prohibition on the Respondent's capacity to conduct securities related business while in the employ of, or sponsored by, any MFDA Member, pursuant to section 24.1.1(e) of MFDA By-law No. 1;
(b) the payment of a fine in the amount of $50,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1; and
(c) the payment of costs of the investigation in the amount of $5,000, pursuant to section 24.2 of MFDA By-law No. 1.

26. The Respondent accepts the penalty of a permanent prohibition in relation to MFDA activities and the payment of costs. In his comments to the Panel, he described his present financial difficulties, including a bankruptcy in 2012, and, understandably, would prefer that the fine was less than $50,000. So, although it is, in a sense, a joint submission, it is with a wish for a lesser penalty.

27. If this hearing was a Settlement Hearing we could either accept or reject it. We could not vary it. Because it is not in the form of a Settlement Hearing, we can vary it. The question is: should we do so?

Should We Accept the Proposed Penalty?

28. The Panel accepts the proposed penalty. The penalty of a permanent prohibition is a severe penalty and a $50,000 fine is a considerable sum of money, particularly in the Respondent's present financial circumstances.

29. The financial penalty is consistent with the MFDA Penalty Guidelines, which suggests a minimum fine of $10,000 in the case of outside business activities.

30. A number of cases were cited by MFDA counsel, showing a wide variation in the amount of the fine ranging from $5,000 in a 2007 case (*Re Smylski* File No. 200707), which consisted of 69 sales of off-book products totalling over $2,500,000, to another 2007 case (*Re Breckenridge* File No. 200718) where there was a fine of $350,000 for the sale of products of over $1.8 million

to 59 clients. In both cases there was a permanent prohibition. Much depends, of course, on the details of each case. The former case, for example, was a settlement hearing, where penalties are normally less than in contested hearings.

31. The most recent case cited was the 2010 *Re Laverdière* case (File No. 200936) cited earlier in these reasons, where the fine was $20,000 for a $133,953 sale to 6 clients. Although the number of clients and the total amount was less than in the present case, it was similar in that it was based on an Agreed Statement of Facts and a joint submission on the penalty (permanent prohibition and a $20,000 fine).

32. This brief survey of the cases suggests that a fine of $50,000 is not out of line.

33. Harm to investors is an important consideration. Persons who invested in the Assaly Group projects suffered a considerable loss, although the exact extent of the loss has not yet been determined. It should be noted, however, that none of the investors in the Skyline Apartment REIT who were sold or referred to the investment by the Respondent have complained to the MFDA or to Professional Investments.

34. Past conduct is another consideration. The Respondent has been in the securities business for over 35 years and has not been the subject of previous MFDA disciplinary proceedings.

35. The amount of benefit received by the Respondent was approximately $75,000, not significantly different from the fine imposed.

36. The fact that the Respondent has cooperated with the MFDA and entered into an ASF and a joint submission on penalty is an important factor in the Respondent's favour in showing he has accepted responsibility for his misconduct and avoided the necessity of the MFDA incurring the additional time and expense of a full hearing. It is also an indication of remorse, which the Respondent expressed in his remarks to us and in his earlier Reply to the allegations.

37. In our view, the proposed penalties will achieve both specific and general deterrence.

38. We agree with counsel for the MFDA who submitted that the penalties proposed in this case are reasonable and proportionate and are in keeping with the purpose of the MFDA to enhance investor protection and ensure high standards of conduct in the industry.

39. Just as a Hearing Panel should not interfere lightly with a Settlement Agreement, it should be very reluctant to interfere with a joint submission on penalty. As an Ontario panel stated in *Re McAuley* (File No. 201018) at paragraph 5: "There is ample authority for the principle that a hearing panel should not interfere with a joint recommendation of MFDA Staff and the Respondent unless the recommendation is seen to be manifestly unfit.

40. The penalty we have accepted is certainly not "manifestly unfit".

41. For the above reasons, we approved the proposed penalty.

DATED this 4th day of August, 2015.

"Martin L. Friedland"

Martin L. Friedland, C.C., Q.C.
Chair

"Guenther W.K. Kleberg"

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