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: David MacIver Potter

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. By Notice of Settlement Hearing, the Mutual Fund Dealers Association of Canada (the "MFDA") will announce that it proposes to hold a hearing to consider whether, pursuant to section 24.4 of By-law No. 1, a hearing panel of the Central Regional Council (the "Hearing Panel") of the MFDA should accept the settlement agreement (the "Settlement Agreement") entered into between Staff of the MFDA ("Staff") and the Respondent, David MacIver Potter (the "Respondent").

II. JOINT SETTLEMENT RECOMMENDATION

2. Staff conducted an investigation of the Respondent's activities. The investigation disclosed that the Respondent had engaged in activity for which the Respondent could be penalized on the exercise of the discretion of the Hearing Panel pursuant to s. 24.1 of By-law No. 1.

3. Staff and the Respondent recommend settlement of the matters disclosed by the investigation in accordance with the terms and conditions set out below. The Respondent agrees to the settlement on the basis of the facts set out in Part IV herein and consents to the making of an Order in the form attached as Schedule "A".

4. Staff and the Respondent agree that the terms of this Settlement Agreement, including the attached Schedule "A", will be released to the public only if and when the Settlement Agreement is accepted by the Hearing Panel.

III. ACKNOWLEDGEMENT

5. Staff and the Respondent agree with the facts set out in Part IV herein for the purposes of this Settlement Agreement only and further agree that this agreement of facts is without prejudice to the Respondent or Staff in any other proceeding of any kind including, but without limiting the generality of the foregoing, any proceedings brought by the MFDA (subject to Part X) or any civil or other proceedings which may be brought by any other person or agency, whether or not this Settlement Agreement is accepted by the Hearing Panel.

IV. AGREED FACTS

Registration History

6. The Respondent was registered as a mutual fund salesperson with FundEX Investments Inc. ("FundEX") from September 1, 2006 to May 7, 2009 when he was terminated as a result of the events described herein.

7. The Respondent was previously registered as an Approved Person with the following mutual fund dealers:

(a) FundTrade Financial Corp. ("FundTrade") from April 2004 to August 2006;
(b) Olympian Financial Inc from September 2001 to April 2004; and
(c) CIBC World Markets Inc. from February 2001 to August 2001.

8. The Respondent is not currently registered in the securities industry in any capacity.

9. FundTrade and FundEX amalgamated on September 1, 2006, at which time the amalgamated company continued under the name FundEX.

10. FundEX became a Member of the MFDA on April 12, 2002.

The Respondent's fee-for-service business

11. As a mutual fund salesperson at FundTrade, the Respondent was registered to trade in mutual funds on behalf of clients of FundTrade and to provide investment advice to those clients incidental to the trading activity.

12. In 2006, the Respondent began entering into fee-for-service agreements with some clients of FundTrade. Under the terms of these agreements, the Respondent charged these clients a fee based on the value of their accounts at FundTrade and at an investment dealer with which FundTrade had a referral arrangement in exchange for providing investment advice to the clients and managing their accounts. FundTrade did not permit its Approved Persons to enter into fee-for-service agreements of this nature and the Respondent did not disclose his use of the agreements to FundTrade.

13. The Respondent structured the fee-for-service agreement in the following manner: the Respondent had clients sign a FundTrade document entitled "Account Application Addendum to Establish a Fee for Service Arrangement", which the Respondent had altered by writing on the document that "Potter & Partners" (as opposed to the account administrator) would provide invoices directly to clients for the fees charged. "Potter & Partners" is an entity owned and operated by the Respondent and is not registered to advise or trade in securities.

14. Beginning in or about 2007, also unbeknownst to FundEX, the Respondent also had clients sign a document entitled "Financial Advisor Fee Agreement", pursuant to which the clients agreed that the Respondent would collect a fee from the clients for "managing" their mutual fund accounts with FundEX and/or investment portfolios with M.R.S. Securities Services Inc. ("MRSSSI"), a member of the Investment Industry Regulatory Organization of Canada or

"IIROC".

15. MRSSSI, a subsidiary of Mackenzie Financial Corporation, offered a direct-trading facility and investor services for clients of independent dealers and their financial advisors who were not registered to advise or trade in equities and other types of securities. MRSSSI had a referral arrangement with FundEX pursuant to which FundEX's Approved Persons were permitted to refer FundEX clients to MRSSSI.

16. To prevent its Approved Persons from providing, or attempting to provide, investment advice in respect of securities for which they were not registered to provide such advice, FundEX prohibited its Approved Persons, including the Respondent, from discussing MRSSSI offered securities with clients. FundEX's Statement of Conduct, applicable to all of its Approved Persons, provided, in part:

> *"Associates/Employees may not discuss securities offered through MRSSSI in either specific or general terms clients. All such questions are to be referred directly to an MRSSSI representative."*

17. The Financial Advisor Fee Agreement that the Respondent negotiated with some clients[1], and was agreed to by such clients, provided, in part:

> *"It is hereby agreed that David Potter is appointed as our Investment Advisor to help us manage our registered and non registered portfolios in accordance with our mutually agreed investment objectives to grow our capital with a growth oriented investment strategy mandate for monies invested in our open investment account with MRS Trust and MRSSSI and recommend changes to our portfolio from time to time as market conditions change."*
>
> * * *
>
> *"David Potter's investment advisory fees are agreed at 1.25% of total portfolio value including funds and stocks/bonds paid quarterly in arrears. This fee will be invoiced by Potter & Partners from account opening date and currently is a tax deductible expense for your investment account".*

18. Between May 2006 and May 7, 2009, the Respondent entered into fee-for-service arrangements with at least 36 clients.

[1] The MFDA investigation did not find evidence that every client who participated in the fee-for-service arrangement had signed one of these agreements.

19. The Respondent issued at least 100 invoices to these 36 clients (the "Invoices"), which described the services the Respondent purported to provide to these 36 clients, including the following:

(a) "Quarterly Funds & Stocks Portfolio Management";
(b) "Quarterly Stocks Portfolio Management";
(c) "Quarterly Portfolio Management";
(d) "Investment Management"; and
(e) "Financial Services Fee".

20. The Respondent charged fees to each client of these 36 clients based on a percentage of the value of the individual client's mutual fund accounts held with FundEX and/or the investment accounts held with MRSSSI or other trading facilities.

21. Between March 2007 and December 2008, the Respondent charged these 36 clients fees totalling $61,330 pursuant to the Invoices, which were rendered approximately every three months to these 36 clients.

Respondent's failure to seek member approval of fee-for-service arrangements

22. On April 19, 2007, FundEX conducted an annual compliance review of the Respondent and issued a report dated May 10, 2007 (the "Report"). FundEX noted in the Report that the Respondent advised FundEX that he offered "GICs and Fee-For Service (F-Class)" mutual funds to clients. These activities had not been previously approved by FundEX's compliance staff. FundEX advised the Respondent in the Report that FundEX must approve all of his outside business activity.

23. On May 28th, 2007, the Respondent sent a copy of his professional profile to FundEX for approval before he was to distribute it to potential clients. The document stated, in part, that: "*[The Respondent] works on either a negotiated fee for service or commission paid by the fund companies or a combination of these two most common methods of remuneration.*"

24. On June 13, 2007, FundEX staff advised the Respondent that it did not have a record of his fee-for-service activities and informed the Respondent that in order to provide such services, FundEX must provide its approval, and asked him to complete and submit FundEX's "Outside Business Activity Approval Form" ("OBA Approval Form").

25. On June 29, 2007, FundEX compliance staff reiterated its request that the Respondent complete the OBA Approval Form.

26. On August 8, 2007, the Respondent submitted an OBA Approval Form to FundEX, in which he disclosed that he received commissions for selling life and disability insurance, and rental income on property but did not disclose that he received fees in respect of investment advice provided to clients.

27. On August 20, 2007, FundEX staff wrote the Respondent and requested that he complete the OBA Approval Form for his GIC and fee-for-service business, which he had advised FundEX of during the compliance review conducted on April 19, 2007.

28. FundEX staff reiterated its request that the Respondent complete the OBA Approval Form for his GIC and fee-for-service business on October 12, 2007, and then again on October 29, 2007.

29. On November 19, 2007, the Respondent spoke with the FundEX Chief Compliance Officer ("CCO") about several of the issues raised in the Report. During that conversation, the Respondent advised FundEX's CCO that he did not perform fee-for-service services "as a general rule", and that the Respondent has one couple who have purchased "f-class" funds whom he bills separately.

30. On April 23, 2009, FundEX conducted a further review of the Respondent, and subsequently terminated the Respondent after determining that he was charging clients a fee for providing investment advice in respect of mutual funds and equities.

Advising outside the Respondent's registration

31. While registered as an Approved Person with both FundTrade and FundEX, the Respondent was registered solely as a mutual fund salesperson and was not registered to provide investment advice to clients or other individuals in respect of non mutual fund securities or individual equities.

32. As set out above, between May 2006 and May 7, 2009, the day the Respondent was terminated by FundEX, he engaged in a fee-for-service business by providing investment advice to at least 36 clients on their FundEX accounts and/or the portfolios these clients held in accounts at the direct-trading facility MRSSSI and other trading facilities.

33. The Respondent provided information and advice to certain of these 36 clients with respect to publicly traded equity securities, including recommendations for investing, and his views as to the likely future performance of both specific securities as well as their sector performance. By way of example, the Respondent provided advice to one client about shares of "X. Co."1 by way of an email communication dated March 29, 2007, as follows:

> *"[X Co.] - had a look at this company and my comment is that it is typical of junior mining companies trying to raise awareness of their heavily indebted pre production mining activities so they can get investors to finance their start ups. This company is presently out offering shares and it looks like they have filled their quota, although the investor relations person at the company I spoke to said there may still be some shares available at 60 cents. Currently the stock is at 54 cents so don't know why we would want them at 60 cents. They are planning to reopen a previously mined operation in Mexico as they believe there is still gold to be mined and with the price now so high they can do it profitably. As there are dozens of these type of junior mining stocks out there I just don't know why you would choose this one if you were interested in the sector as there are others I know about that are more interesting and potentially bigger discoveries. Recent market performance, the gold mining sector on the tsx is fairly flat for the past 6 months since [X Co.] listed compared to some others I follow which are up 15-20% and [X Co.] is up 60% so it has already had a huge run up which may mean you would be buying in a market high. In my opinion, the way we should really handle this is to have you set up an open investment account with [MRS], put $10-20k into the account, and we can use this account to speculate on these types of stocks …."*

[1] A publicly traded company on the Toronto Stock Exchange.

Failure to follow Member policies and procedures

Fee for Service

34. FundEX's Compliance Policy and Procedures Manual dated June 2005 ("PPM") provided as follows:

> *The MFDA requires full disclosure of a fee-for-service practice by an Associate, not only to the dealer and the client, but also to the applicable regulatory authorities.*
>
> *Associates may charge a fee-for-service for, but not limited to: Financial Planning; Estate Planning; or Income Tax Preparation. Associates are reminded that proper qualifications are required for preparation of Financial and Estate Planning. See Chapter 2 Section II.*
>
> *Head Office Compliance requires written notification of an Associate's desire to conduct fee-for-service business.*
>
> *MFDA Rule 2.4.3 states that no Associate shall impose on any client or deduct from the account of any client any service fee or service charge relating to services provided by the Associate in connection with the client's account unless written notice shall have been given to the client on the opening of the account or not less than 60 days prior to the imposition or revision of the fee or charge. For the purposes of the Rule, service fees or charges shall not include any commission charged for executing trades.*
>
> *Those Associates who choose to participate in a fee-for-service arrangement with their mutual fund clients are required to provide an invoice to each client. The client's cheque should be made payable to FundEX Investments Inc. for the full amount, including GST. Once payment is received from the client, forward the cheque to FundEX Head Office together with a copy of the invoice. Any such fees forwarded to HO will be remitted on your regular commission payout, less the GST.*
>
> *For those Associates who choose to participate in a fee-for-service arrangement with non-mutual fund clients (i.e. insurance clients) the Associate must provide the client with the "Statement of Disclosure Fee-For-Service" document which clearly states that although you are a mutual fund representative associated with FundEX, FundEX is not sponsoring or supervising the fee-for-service activities being preformed and does not supervise the fee-for-service activities being performed.*
>
> *If you intend to provide fee-for-service planning as a part of your business practices, please contact the Registration & Licensing Department at Head Office so that the required supplement to your current registration may be amended.*

Mitigating factors

35. The Respondent has not previously been the subject of MFDA disciplinary proceedings.

36. The Respondent has co-operated with MFDA Staff's investigation into his conduct.

V. RESPONDENT'S REPRESENTATIONS

37. The Respondent deeply regrets the contraventions of MFDA Rules that are described in this Settlement Agreement.

38. The Respondent represents that the fees he received under the fee for service arrangements with the 36 clients as described in this Settlement Agreement represented a small part of his overall compensation as a licensed mutual fund salesperson.

39. The Respondent is 65 years old and desires to retire from the mutual fund business and is therefore prepared to accept being permanently prohibited from conducting securities related business while in the employ of, or associated with, any MFDA Member.

VI. CONTRAVENTIONS

40. The Respondent admits that:

(a) between May 2006 and May 7, 2009, he accepted remuneration directly from 36 clients in the amount of approximately $61,330 in respect of a fee-for-service business he engaged in providing investment advice to these clients, contrary to MFDA Rules 2.4.1(a) and 2.1.1;

(b) between May 2006 and May 7, 2009, he engaged in securities related business beyond the terms of his registration as a mutual fund salesperson by providing investment advice to certain of these 36 clients in respect of publicly traded equity securities, contrary to MFDA Rules 1.1.2, 1.1.5(a) and 2.1.1;

(c) between May 2006 and May 7, 2009, he engaged in securities related business that was not carried on for the account and through the facilities of the Member by carrying on a fee-for-service business that provided investment advice to certain of these 36 clients in respect of publicly traded equity securities, contrary to MFDA Rules 1.1.1(a) and 2.1.1;

(d) in communications with the Member leading up to and including November 19, 2007, he misled the Member by representing to the Member, among other things, that he did not "generally" charge a fee-for-service to clients when he knew that to be a misleading or untrue statement at the time and in the circumstances he made it, in that he omitted material facts from his statement which were required to make his statements to the Member not true or misleading, thereby interfering with the ability of the Member to conduct a reasonable supervisory investigation of his activities and failing to observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1; and

(e) between September 1, 2006 and May 7, 2009, the Respondent failed to comply with the policies and procedures of the Member prohibiting fee-for-service arrangements, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

VII. TERMS OF SETTLEMENT

41. The Respondent agrees to the following terms of settlement:

(a) the Respondent shall be permanently prohibited from conducting securities related business while in the employ of, or associated with, any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;

(b) the Respondent shall pay a fine in the amount of $12,500, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;

(c) \ the Respondent shall pay costs in the amount of $5,000, pursuant to s. 24.2 of MFDA By-law No. 1; and

(d) the Respondent will attend in person on the date set for the Settlement Hearing.

VIII. STAFF COMMITMENT

42. 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 in respect of the contraventions described in Part VI of this Settlement Agreement, subject to the provisions of Part X below. Nothing in this Settlement Agreement precludes Staff from investigating or

initiating proceedings in respect of any contraventions that are not set out in Part VI of this Settlement Agreement or in respect of conduct that occurred outside the specified date ranges of the contraventions set out in Part VI, 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. PROCEDURE FOR APPROVAL OF SETTLEMENT

43. Acceptance of this Settlement Agreement shall be sought at a hearing of the Central Regional Council of the MFDA on a date agreed to by counsel for Staff and the Respondent.

44. Staff and the Respondent may refer to any part, or all, of the Settlement Agreement at the settlement hearing. Staff and the Respondent also agree that if this Settlement Agreement is accepted by the Hearing Panel, it will constitute the entirety of the evidence to be submitted respecting the Respondent in this matter, and the Respondent agrees to waive its his rights to a full hearing, a review hearing before the Board of Directors of the MFDA or any securities commission with jurisdiction in the matter under its enabling legislation, or a judicial review or appeal of the matter before any court of competent jurisdiction.

45. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel, then the Respondent shall be deemed to have been penalized by the Hearing Panel pursuant to s. 24.1.2 of By-law No. 1 for the purpose of giving notice to the public thereof in accordance with s. 24.5 of By-law No. 1.

46. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel, neither Staff nor the Respondent will make any public statement inconsistent with this Settlement Agreement. Nothing in this section is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

X. FAILURE TO HONOUR SETTLEMENT AGREEMENT

47. If this Settlement Agreement is accepted by the Hearing Panel and, at any subsequent time, the Respondent fails to honour any of the Terms of Settlement set out herein, Staff reserves

the right to bring proceedings under section 24.3 of the By-laws of the MFDA against the Respondent 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.

XI. NON-ACCEPTANCE OF SETTLEMENT AGREEMENT

48. If, for any reason whatsoever, this Settlement Agreement is not accepted by the Hearing Panel or an Order in the form attached as Schedule "A" is not made by the Hearing Panel, each of Staff and the Respondent will be entitled to any available proceedings, remedies and challenges, including proceeding to a disciplinary hearing pursuant to sections 20 and 24 of By-law No. 1, unaffected by this Settlement Agreement or the settlement negotiations.

49. Whether or not this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees that it he will not, in any proceeding, refer to or rely upon this Settlement Agreement or the negotiation or process of approval of this Settlement Agreement as the basis for any allegation against the MFDA of lack of jurisdiction, bias, appearance of bias, unfairness, or any other remedy or challenge that may otherwise be available.

XII. DISCLOSURE OF AGREEMENT

50. The terms of this Settlement Agreement will be treated as confidential by the parties hereto until accepted by the Hearing Panel, and forever if, for any reason whatsoever, this Settlement Agreement is not accepted by the Hearing Panel, except with the written consent of both the Respondent and Staff or as may be required by law.

51. Any obligations of confidentiality shall terminate upon acceptance of this Settlement Agreement by the Hearing Panel.

XIII. EXECUTION OF SETTLEMENT AGREEMENT

52. This Settlement Agreement may be signed in one or more counterparts which together shall constitute a binding agreement.

53. A facsimile copy of any signature shall be effective as an original signature.

Dated: July 4th, 2011.

"Deborah Goetz"	"David Potter"
Witness – Signature	David MacIver Potter
Deborah Goetz	
Witness - Print name	
	"Shaun Devlin"
	Staff of the MFDA Per: Shaun Devlin Vice-President, Enforcement

Schedule "A"

Order

File No. 201038

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: David MacIver Potter

ORDER

WHEREAS on [date], the Mutual Fund Dealers Association of Canada (the "MFDA") issued a Notice of Settlement Hearing pursuant to section 24.4 of By-law No. 1 in respect of [Respondent] (the "Respondent");

AND WHEREAS the Respondent entered into a settlement agreement with Staff of the MFDA, dated [date] (the "Settlement Agreement"), in which the Respondent agreed to a proposed settlement of matters for which the Respondent could be disciplined pursuant to ss. 20 and 24.1 of By-law No. 1;

AND WHEREAS the Hearing Panel is of the opinion that the Respondent:

(a) between May 2006 and May 7, 2009, accepted remuneration directly from 36 clients in the amount of approximately $61,330 in respect of a fee-for-service business he engaged in providing investment advice to clients, contrary to MFDA Rules 2.4.1(a) and 2.1.1;

(b) between May 2006 and May 7, 2009, engaged in securities related business beyond the terms of his registration as a mutual fund salesperson by providing investment advice to certain of these 36 clients in respect of publicly traded equity securities, contrary to MFDA Rules 1.1.2, 1.1.5(a) and 2.1.1;

(c) between May 2006 and May 7, 2009, engaged in securities related business that was not carried on for the account and through the facilities of the Member by carrying on a fee-for-service business that provided investment advice to certain of these 36 clients in respect of publicly traded equity securities, contrary to MFDA Rules 1.1.1(a) and 2.1.1

(d) in communications with the Member leading up to and including November 19, 2007, misled the Member by representing to the Member, among other things, that he did not "generally" charge a fee-for-service to clients when he knew that to be a misleading or untrue statement at the time and in the circumstances he made it, in that he omitted material facts from his statement which were required to make his statements to the Member not true or misleading, thereby interfering with the ability of the Member to conduct a reasonable supervisory investigation of his activities and failing to observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1; and

(e) Between September 1, 2006 and May 7, 2009, failed to comply with the policies and procedures of the Member prohibiting fee-for-service arrangements, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

IT IS HEREBY ORDERED THAT the Settlement Agreement is accepted, as a consequence of which:

1. the Respondent shall be permanently prohibited from conducting securities related business while in the employ of, or associated with, any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
2. the Respondent shall pay a fine in the amount of $12,500, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;
3. the Respondent shall pay costs in the amount of $5,000, pursuant to s. 24.2 of MFDA By-law No. 1; and

4. if at any time a non-party to this proceeding requests production of, or access to, any materials filed in, or the record of, this proceeding, including all exhibits and transcripts, then the MFDA Corporate Secretary shall not provide copies of, or access to, the requested documents to the non-party without first redacting from them any and all intimate financial or personal information, pursuant to Rules 1.8(2) and (5) of the MFDA Rules of Procedure.

DATED this [day] day of [month], 20[ ].

Per: ___________________________

[Name of Public Representative], Chair

Per: __________________________

[Name of Industry Representative]

Per: __________________________

[Name of Industry Representative]

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