



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: FundEX Investments Inc.

SETTLEMENT AGREEMENT

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 MFDA Central Regional Council (the “Hearing Panel”) should accept the settlement agreement (the “Settlement Agreement”) entered into between Staff of the MFDA (“Staff”) and FundEX Investments Inc. (the “Respondent”).

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.

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 IX) or any civil or other proceedings which may be brought by any other person or agency, whether or not this Settlement Agreement is approved by the MFDA.

AGREED FACTS

Registration History

6. The Respondent is registered as a mutual fund dealer and exempt market dealer in all jurisdictions in Canada. The Respondent has been a Member of the MFDA since May 16, 2002.

Corporate Structure

7. The Respondent’s head office is located in Markham, Ontario (the “Head Office”). The Respondent’s operations include branch offices located in: Toronto, Ontario; Etobicoke, Ontario; Vancouver, British Columbia; and Winnipeg, Manitoba (collectively, the “Branches”).

Compliance Examinations

8. Commencing on September 29, 2009, MFDA Compliance Staff conducted a third round compliance examination of the Respondent's Head Office and the Branches in order to assess the Respondent's compliance with MFDA By-laws, Rules and Policies during the period March 1, 2006 to July 31, 2009 (the "2009 Examination"). The results of the 2009 Examination were summarized and delivered to the Respondent in a report dated March 8, 2010 (the "2010 Report").

9. Prior to the 2009 Examination, MFDA Compliance Staff conducted a second round compliance examination of the Respondent's Head Office and several of its branch locations in order to assess the Respondent's compliance with MFDA By-laws, Rules and Policies during the period October 1, 2003 to February 28, 2006 (the "2006 Examination"). The results of the 2006 Examination were summarized and delivered to the Respondent in a report dated June 23, 2006.

Inadequate Two-Tier Supervision of Trades

10. During the 2009 Examination, the Respondent advised MFDA Compliance Staff that its Head Office conducted a limited second-tier review of trades. Specifically, the Respondent advised that it reviewed only those trades listed in a trade blotter (the "Exception Report") which consisted only of trades which met the following criteria:

- a) the risk tolerance of the client was inconsistent with the risk rating of the fund being purchased;
- b) the time horizon of the client was inconsistent with the load type of the fund being purchased; or
- c) redemptions made after August 2009, involving deferred sales charge fees ("DSC Fees").

11. The Exception Report identified only a small number of the actual trades processed by the Respondent.

12. For those trades which did not appear on the Exception Report, the second-tier

supervision of trading activity was deficient in that the Respondent's Head Office did not consider other relevant "Know Your Client" ("KYC") information such as investment objectives, age or investment knowledge in determining whether a trade was suitable for a client.

13. In addition, the second-tier supervision of trading activity conducted by the Respondent's Head Office was generally deficient for the following reasons:

- a) the review of risk tolerance conducted by the Respondent's Head Office, as described in paragraph 10(a), did not adequately consider whether the risk rating of the fund being purchased would cause the risk rating of the client's account to become unsuitable;
- b) prior to August 2009, the Respondent's Head Office did not review client redemptions;
- c) after August 2009, the Respondent's Head Office only reviewed redemptions which involved DSC Fees;
- d) the Respondent's Head Office did not make inquiries of some trades listed in the Exception Report, notwithstanding that the purpose of the Exception Report was to identify trades which required review by the Respondent's Head Office; and
- e) where the Respondent's Head Office made inquiries with respect to trades listed in the Exception Report, it failed to maintain evidence of the responses received and resolutions achieved.

Failure to Conduct Adequate Supervision of Leveraging

14. The Respondent failed to conduct any second-tier supervision of leveraging. In particular, the Respondent failed to establish policies and procedures requiring its Head Office to supervise leveraging and to document evidence of any supervisory review of leveraging recommendations, including records of suitability queries made, responses received and resolutions achieved as a result of supervisory inquiries.

15. In July 2008, the Respondent implemented policies and procedures for the supervision of leveraging by its Regional Branch Managers, which included the use of a "Leverage Suitability Review Form" to determine whether leverage recommendations were suitable. The Leverage

Suitability Review Form, which was used to calculate the total debt service ratio and loan to net worth ratio, contained errors and improper assumptions resulting in inadequate assessments of leveraging suitability.

16. As a result of the foregoing deficiencies, leveraging recommendations which may have been unsuitable were processed by the Respondent without proper supervision. Those leveraging recommendations have not been subject to full supervisory review in accordance with MFDA Rules and Policies.

Additional Deficiencies

17. In addition to the deficiencies identified during the 2009 Examination, investigations conducted by the MFDA's Enforcement Department identified deficiencies regarding the supervision of the outside business activities of the Respondent's Approved Persons, as particularized below.

Gerard and Mavis Brake

18. Between March 2005 and August 2006, the Respondent failed to adequately supervise Gerard and Mavis Brake (collectively, the "Brakes"), former Approved Persons who were registered with the Respondent from about November 2003 to August 2006.

19. The Brakes sold more than \$1 million in shares of corporations that they owned and operated to 24 clients between November 2003 and August 2006. The corporations were shams, and the Brakes failed to return or otherwise account for the monies invested by the clients.¹

20. The sales of the shares were not carried on for the account of the Respondent or processed through its facilities, and none of the share purchases were subject to supervision by the Respondent to ensure they were suitable for the clients.

¹ In December 2008, an MFDA Hearing Panel found that the Brakes had engaged in misconduct regarding, among other things, the sale of shares of corporations that they owned and operated to 24 clients. The Hearing Panel imposed permanent prohibitions and fines greater than \$1 million on each of the Brakes.

21. The Respondent failed to employ adequate supervision, from March 2005 until the Brakes' registration was terminated by FundEX on August 21, 2006, to prevent the Brakes from engaging in securities related business outside of the Respondent. In particular, the Respondent:

- a) did not have policies and procedures regarding the approval of outside business activities until June 2005;
- b) after June 2005, failed to adhere to its own policies and procedures by:
 - i) conducting only a minimal review of the outside business activities disclosed to the Respondent by the Brakes²; and
 - ii) permitting the Brakes to engage in outside business activities which were not approved by the Respondent;
 - iii) failed to detect and query client mutual fund redemptions, which redemptions were subsequently invested in the corporations owned and operated by the Brakes.³

22. In addition, the Respondent failed to conduct a reasonable supervisory investigation in response to a client complaint made in December 2005 which alleged that the Brakes were engaged in securities related business with clients. As a result, the Brakes engaged in further securities related business until the MFDA was notified of the client complaint and the MFDA brought it to the attention of the Respondent in August 2006

DW and GS

23. The Respondent failed to adequately supervise DW and GS, former Approved Persons who were registered with the Respondent from about April 2004 to April 2007

24. Between December 2005 and April 2007, DW and GS sold more than \$2 million in

² In March 2005, Gerard Brake disclosed, or partially disclosed, some of his outside business activities to the Respondent and concealed other outside business activities. The subject matter of this Settlement Agreement pertains to those outside business activities that were disclosed, or partially disclosed, to the Respondent and which the Respondent failed to adequately supervise to ensure the Brakes complied with MFDA requirements or in respect of which the Brakes failed to conduct a reasonable supervisory investigation. This Settlement Agreement does not pertain to those outside business activities which the Brakes concealed from the Respondent.

³ In two instances, the Respondent queried the Brakes to determine the reason for client mutual fund redemptions. The Brakes deliberately misled the Respondent with respect to the reasons for the redemptions. It is not alleged that the Respondent failed to supervise the Brakes in these two instances.

shares of two non-arm's length corporations to at least 13 investors.⁴ Three of the investors were clients of the Respondent.

25. The Respondent approved the activities of DW and GS, notwithstanding that the activities constituted securities related business and the shares of the corporations were being sold outside the facilities of the Respondent.⁵

26. Further, the Respondent allowed DW and GS to sell the investments without the Respondent having conducted any product due diligence to enable the Respondent to understand the nature of the investments.

27. As a result of the foregoing, none of the share purchases by clients were the subject of supervision by the Respondent to ensure that they were suitable for the purchasers and in keeping with their KYC information and investment objectives.

28. The MFDA's investigation into these matters has not revealed any client losses.

SD

29. The Respondent failed to adequately supervise SD, a former Approved Person who was registered with the Respondent from June 2002 to December 2009.

30. Between about 2006 and 2009, SD sold approximately \$530,000 in shares of a corporation that he owned and operated to at least 11 investors. Five of the investors were clients of the Respondent.

31. The sales of the shares were not carried on for the account of the Respondent or processed through its facilities and the share purchases were not subject to supervision by the Respondent to ensure they were suitable for the clients.

⁴ At all relevant times, the corporations were owned and operated by the two Approved Persons and the spouses or former spouses of the Approved Persons.

⁵ No proceedings by the MFDA have been taken, or are contemplated, with respect to DW and GS because they appear to have complied with the Respondent's policies and procedures concerning the disclosure and approval of outside business activities.

32. In 2009, SD also solicited loans totaling approximately \$175,000 from clients and other individuals to fund the operations of SD's corporation.

33. The Respondent failed to employ adequate supervision to prevent SD from engaging in securities related business outside of the Respondent. In particular, the Respondent failed to adhere to its own policies and procedures which required the Respondent to conduct an independent review of SD's outside business activities prior to granting its approval.

34. The Respondent also failed to conduct a reasonable supervisory investigation and take appropriate supervisory action in response to information it received in October 2009 that SD was engaging in securities related business with clients and other individuals. In particular, the Respondent:

- a) failed to review an adequate sample of SD's client files, or other materials at the branch pertaining to SD's activities, to determine the extent of SD's conduct; and
- b) following the termination of SD, the Respondent assigned another Approved Person, MS, to service SD's accounts and determine whether other clients were involved with SD's corporation, notwithstanding that MS was also affiliated with SD's corporation.

Additional Factors

35. The Respondent has cooperated with the MFDA's investigation of the issues that form the subject matter of this Settlement Agreement.

Correcting Deficiencies in Policies and Procedures

36. The Respondent has revised, and represents that it will continue to revise, its policies and procedures with regard to supervision of trading and leveraging, and has provided a copy of those policies and procedures to MFDA Staff. The Respondent represents that it has implemented, and will continue to implement, those revised policies and procedures. The Respondent (hereby) undertakes to comply with those policies and procedures in the future.

Addressing Historical Leveraging

37. The Respondent has developed a plan, which has been reviewed by MFDA Staff, to address existing leveraged accounts (the “Leverage Review Action Plan”). The Respondent represents that it will fully carry out the terms of the Leverage Review Action Plan to the satisfaction of MFDA Staff. The Respondent may be subject to further disciplinary action should it fail to adequately implement the Leverage Review Action Plan.

CONTRAVENTIONS

38. By engaging in the conduct described above, the Respondent admits the following:

- a) prior to July 2009, the Respondent failed to adequately establish, implement and maintain policies and procedures for the supervision of trades, contrary to MFDA Rules 2.2.1, 2.5, 2.9, and 2.10, and MFDA Policy No. 2;
- b) prior to July 2009, the Respondent failed to adequately establish, implement and maintain policies and procedures for the supervision of leveraging, contrary to MFDA Rules 2.2.1, 2.5, 2.6 and 2.10, and MFDA Policy No. 2;
- c) between March 2005 and August 2006, the Respondent failed to ensure that adequate controls and supervision were in place to prevent former Approved Persons, Gerard and Mavis Brake, from engaging in securities related business with clients, contrary to MFDA Rules 1.1.1, 2.5.1 and 2.5.3;
- d) between November 2005 and April 2007, the Respondent failed to ensure that adequate controls and supervision were in place to prevent former Approved Persons, DW and GS, from engaging in securities related business with clients and other individuals, contrary to MFDA Rules 1.1.1, 2.5.1 and 2.5.3;
- e) between about 2006 and 2009, the Respondent failed to ensure that adequate controls and supervision were in place to prevent former Approved Person, SD, from engaging in securities related business and personal financial dealings with clients and other individuals, contrary to MFDA Rules 1.1.1, 2.1.4, 2.5.1 and 2.5.3; and
- f) between about 2006 and 2009, the Respondent failed to conduct a reasonable supervisory investigation and take appropriate supervisory action with respect to the activities of former Approved Person, SD, contrary to MFDA Rules 2.5.1 and

2.1.1(c).

TERMS OF SETTLEMENT

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

- (a) the Respondent shall pay a fine in the amount of \$100,000 upon the acceptance of this Settlement Agreement;
- (b) the Respondent shall implement the revised policies and procedures identified in this Settlement Agreement;
- (c) the Respondent shall implement the Leverage Review Action Plan identified in this Settlement Agreement;
- (d) the Respondent shall pay costs in the amount of \$15,000 pursuant to s. 24.2 of By-law No. 1;
- (e) the Respondent acknowledges that any issues pertaining to its obligation to handle client complaints pursuant to MFDA Rule 2.11 and MFDA Policy No. 3 is unaffected by this Settlement Agreement;
- (f) the Respondent shall in the future comply with all MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulations made thereunder, including MFDA Rules 1.1.1, 1.2.5, 2.1.4, 2.1.1, 2.2.1, 2.5, 2.6, 2.9, and 2.10, and MFDA Policy No. 2 and MFDA Policy No. 6; and
- (g) a senior officer of the Respondent will attend the settlement hearing in person.

STAFF COMMITMENT

40. 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 facts set out

in Part IV and 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 of any facts or contraventions that are not set out in Parts IV and 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, including, for greater certainty, any obligations regarding the handling of client complaints arising out of facts and contraventions set out in Parts IV and V.

PROCEDURE FOR APPROVAL OF SETTLEMENT

41. 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.

42. 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 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.

43. 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.

44. 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 it.

FAILURE TO HONOUR SETTLEMENT AGREEMENT

45. 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 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.

NON-ACCEPTANCE OF SETTLEMENT AGREEMENT

46. 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.

47. Whether or not this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees that it 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.

DISCLOSURE OF AGREEMENT

48. 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.

49. Any obligations of confidentiality shall terminate upon acceptance of this Settlement

Agreement by the Hearing Panel.

EXECUTION OF SETTLEMENT AGREEMENT

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

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

Dated: December 16, 2011

“R. Corbett”
Witness- Signature

R. Corbett
Witness – Print Name

“Michael Greer”
FundEX Investments Inc.
Per: Michael Greer, President

“Mark Gordon”
Staff of the MFDA
Per: Shaun Devlin
Vice-President, Enforcement



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: FundEX Investments Inc.

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 FundEX Investments Inc. (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 has failed to comply with or carry out the provisions of MFDA Rules 1.1.1, 1.2.5, 2.1.4, 2.1.1, 2.2.1, 2.5, 2.6, 2.9, and 2.10, and MFDA Policy No. 2 and MFDA Policy No. 6;

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

1. The Respondent shall pay a fine in the amount of \$100,000 upon the acceptance of this Settlement Agreement;
2. The Respondent shall implement the revised policies and procedures identified in the Settlement Agreement.
3. The Respondent shall implement the Leverage Review Action Plan identified in the Settlement Agreement.
4. The Respondent shall pay the costs of this proceeding in the amount of \$15,000 upon the acceptance of this Settlement Agreement.
5. The Respondent shall in the future comply with all MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulations made thereunder, including MFDA Rules 1.1.1, 1.2.5, 2.1.4, 2.1.1, 2.2.1, 2.5, 2.6, 2.9, and 2.10, and MFDA Policy No. 2 and MFDA Policy No. 6.

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

Per: _____
[Name of Public Representative], Chair

Per: _____
[Name of Industry Representative]

Per: _____
[Name of Industry Representative]