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: Barbara Suk Yee Man

Heard: November 6, 2013, in Toronto, Ontario
Reasons for Decision: May 5, 2014

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Hon. John W. Morden	Chair
Linda J. Anderson	Industry Representative
Terrence Bourne	Industry Representative

Appearances:

Francis Roy	)	Enforcement Counsel, Mutual Fund Dealers
	)	Association of Canada
	)	
Barbara Suk Yee Man	)	In Person
	)	
	)	

The Allegations

1. The Notice of Hearing in this matter dated May 10, 2013 set forth, among other matters, the following allegations of violations of the By-Laws, Rules and Policies of the MFDA:

> **Allegation #1**: Between January 27, 2011 and May 25, 2011, the Respondent failed to observe high standards of ethics and engaged in business conduct or practice that was unbecoming by altering account transfer forms signed by clients JL and JaL to effect the transfer of their accounts from Member 1 to the Member "in cash" instead of "in kind" as the clients had instructed, contrary to MFDA Rule 2.1.1.
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> **Allegation #2**: Between January 27, 2011 and May 25, 2011, the Respondent failed to observe high standards of ethics and engaged in business conduct or practice that was unbecoming by obtaining a blank, pre-signed account transfer form from client JaL which the Respondent then used to effect the transfer of client JaL's account from Member 2 to the Member 'in cash" instead of "in kind" as client JaL had instructed, contrary to MFDA Rule 2.1.1.
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> **Allegation #3**: In or about February 2011**,** the Respondent engaged in discretionary trading by transferring the accounts of clients JL and JaL to the Member "in cash" instead of "in kind" as the clients had instructed, contrary to MFDA Rules 2.3.1(a) and 2.1.1.

The Hearing

2. The hearing in this matter was held on November 6, 2013. The Respondent represented herself. She agreed with all of MFDA Staff's factual allegations. She asked to have two of the penalties proposed, which were a fine of $5,000.00 and costs of $5,000.00, "eliminated" because of her current financial situation.

3. Following the submissions of both parties, we retired to deliberate on them following which we returned to the hearing room to give our decision. Our reasons would be given at a later date. We found that the three allegations set forth above had been proven and that the

penalties proposed by MFDA Staff were reasonable.

4. The penalties, stated in full, are:

a) a 3 month prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of, or in association with, any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
b) a global fine in the amount of $5,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
c) costs attributable to conducting the investigation and hearing of this matter in the amount of $5,000, pursuant to s. 24.2 of MFDA By-law No. 1.

The Facts

5. The Respondent was an experienced mutual fund salesperson / dealing representative registered in Ontario with Royal Mutual Funds Inc. ("RMFI") at the material times. Before her registration with RMFI, she had been registered with TD Investment Services Inc. from January 1987 to November 22, 2006. She registered with RMFI in December 2006, and on May 25, 2011 she resigned from RMFI. She is not currently registered in the securities industry in any capacity.

6. On January 27, 2011, the Respondent met with JL and JaL, a married and retired couple, to complete the forms necessary to open accounts with RMFI and transfer to the Member their 5 existing investments held with Member 1 and Member 2. During the January 27, 2011 meeting, clients JL and JaL instructed the Respondent to have their existing investments transferred to RMFI "in kind", meaning that they wished their investments to be transferred "as is", and not sold and transferred in cash form.

7. In accord with the instructions of clients JL and JaL, the Respondent asked the clients to sign, among other documents:

a) Transfer forms for submission to Member 1 (the "Member 1 Transfer Forms")

containing instructions that their existing investments be transferred to RMFI "in kind"; and

b) A blank transfer form for submission to Member 2 that did not contain any instructions regarding the transfer of JaL's investments from Member 2 (the "Member 2 Transfer Form").

8. The Respondent also gave the blank, pre-signed Member 2 Transfer Form to her assistant, DP, and directed DP to complete it with instructions for client JaL's investments at Member 2 to be transferred to RMFI "in kind". Acting on the Respondent's directions, DP submitted the Member 1 Transfer Forms to RMFI for processing and also completed the Member 2 Transfer Form to provide that client JaL's investments were to be transferred from Member 2 "in kind" and submitted it for processing.

9. On February 7, 2011, and again February 9 and 17, 2011, following receipt of RMFI's notifications that some or all of the clients JL's and JaL's investments could not be transferred to RMFI "in kind", the Respondent sent emails to DP asking her to ascertain whether any deferred sales charges would be applied to clients JL's and JaL's investments if they were sold and the proceeds transferred to RMFI "in cash".

10. Between February 17 and 23, 2011, following receipt of confirmation that only a $75 transfer fee and no deferred sales charges would be applied to the redemption of the clients' investments, DP, acting on the Respondent's directions, altered the Member 1 Transfer Forms and the Member 2 Transfer Form to indicate that the clients' investments were to be transferred to RMFI "in cash" rather than "in kind". DP then submitted the altered Member 1 Transfer Forms and the altered Member 2 Transfer Form for processing.

11. There is no evidence that the Respondent contacted clients JL and JaL before February 23, 2011 to inform them that the Member 1 Transfer Forms and the Member 2 Transfer Form had been altered and used to authorize the transfer of their investments to RMFI in a manner inconsistent with the clients' instructions. Notwithstanding the Respondent's efforts in attempting to halt the transfer of the investments held by clients JL and JaL at Member 1, the

transfers did in fact take place.

12. At all material times, RMFI's policies and procedures expressly prohibited the use of fully or partially incomplete forms to complete details of transactions.

13. By email dated March 31, 2011, the Respondent generally admitted to her branch manager the facts set out in the preceding paragraphs above. Furthermore, on May 6, 2013, before the Notice of Hearing had been issued, the Respondent sent a letter to Mr. Roy admitting the findings of MFDA Staff.

The Applicable MFDA Rules

> 2.1.1 **Standard of Conduct**. Each Member and each Approved Person of a Member Shall:
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> (a) deal fairly, honestly and in good faith with its clients;
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> (b) observe high standards of ethics and conduct in the transaction of business;
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> (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
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> (d) be of such character and business repute and have such experience and training as is consistent with the standard described in this Rule 2.1.1, or as may be prescribed by the Corporation.
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> * * * *
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> 2.3.1 (a) **Prohibition**. No Member or Approved Person shall accept or act upon a general power of attorney or other similar authorization from a client in favour of the Member or Approved person or engage in any discretionary trading.

Standard of Conduct: Rule 2.1.1

14. MFDA Hearing Panels have consistently applied the principles enunciated in Rule 2.1.1

as the standard of conduct required of all Members and Approved Persons. This Rule has been applied to prohibit a large range of misconduct, including misappropriation, forgery, preferring their own interests when engaging in business dealings with clients, failing to invest money received from clients, failing to disclose referral arrangements and unauthorized access to a Member's client database.

15. In addition, MFDA Hearing Panels have held that the use of pre-signed forms is prohibited. We refer to:

> ***In the Matter of John A. Moro***, [2007] MFDA File No. 200714.
> ***In the Matter of Ronald Bestard***, [2011] MFDA File No. 201125.
> ***In the Matter of Gary Alan Price***, [2011] MFDA File No. 200814.

16. In the *Moro* case, an MFDA Hearing Panel approved a Settlement Agreement in which an Approved Person admitted that by obtaining and possessing pre-signed blank trading forms, he acted contrary to MFDA Rule 2.1.1 and by using pre-signed blank trading forms to execute trades, he acted contrary to MFDA Rule 2.1.1(b).

17. In the *Price* case, an MFDA Hearing Panel found that when a Respondent deliberately failed to comply with the Member's directives to destroy all pre-signed blank investment forms, he did not observe the "high standards of ethics and conduct in the transaction of business" mandated by Rule 2.1.1(b).

Discretionary Trading: Rule 2.3.1(a)

18. MFDA Rule 2.3.1(a) specifically prohibits approved persons from engaging in discretionary trading.

19. An MFDA Hearing Panel has, succinctly, described the legal inability of a mutual fund salesperson to engage in discretionary trading as follows:

> "Individuals registered as investment counsel or portfolio managers have discretionary trading authority, and investment advisors are permitted to conduct

> discretionary trades in managed or discretionary accounts, provided they have explicit written consent. However, mutual fund salespeople are not permitted to conduct discretionary trades and must always contact the client prior to making any transactions. Where an Approved Person fails to obtain client instructions prior to executing a trade, he engages in discretionary trading beyond the terms of his or her registration as a mutual funds salesperson."
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> ***In the Matter of Leo Alexander O'Brian and David Baxter Snow***, [2008] MFDA File No. 200809, Decision dated November 25, 2008 at para. 19.
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> See also ***Price***, *supra* at para. 139.

20. The Respondent's actions in the matter at hand constitute discretionary trading, contrary to MFDA Rule 2.3.1(a) and 2.1.1. First, she was not registered as an investment counsel or a portfolio manager and so could not obtain authority from clients JL and JaL to conduct discretionary trades. Second, she proceeded to effect the transfer of the clients' investments to RMFI "in cash", contrary to the clients' specific instructions to have their existing investments transferred to RMFI "in kind" and without the clients' knowledge or consent. With respect to the transfer of client JaL's investments from Member 2, she employed a pre-signed form to complete the transaction.

21. Further, by obtaining a blank, pre-signed account transfer form from client JaL which the Respondent then used to effect the transfer of client JaL's account from Member 2 to the Member 'in cash" instead of "in kind" as client JaL had instructed, the Respondent failed to observe high standards of ethics and engaged in business conduct or practice that was unbecoming, contrary to MFDA Rule 2.1.1.

22. As stated above, it is not in issue that allegations 1, 2 and 3 have been proven.

The Principles relating to Penalty

23. In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at paras. 59 and 68, the Supreme Court of Canada said that the primary goal of securities regulation is the protection of investors. This principle has been cited in several MFDA decisions.

24. In *Larson*, MFDA Prairie Regional Council, MFDA File No 200826 at para. 77 (2009), the panel said that in exercising its discretion to impose a penalty, a hearing panel should consider the following factors:

a) Protection of the investing public;
b) The integrity of the securities markets;
c) Specific and general deterrence;
d) Protection of the MFDA's membership; and
e) Protection of the integrity of the MFDA's enforcement processes.

MFDA Penalty Guidelines

25. The MFDA Penalty Guidelines, while not mandatory, are an additional source of guidance when determining appropriate penalties in disciplinary proceedings. The applicable penalties and specific factors are set out in the chart below.

MFDA Penalty Guidelines

BREACH	PENALTY TYPE & RANGE	SPECIFIC FACTORS TO CONSIDER
Discretionary / Unauthorized Trading	• Minimum of $5,000 fine. • Write or rewrite an appropriate industry course (e.g. Canadian Investment Funds Course). • Suspension. • Permanent prohibition in egregious cases (e.g. undisclosed activity resulting in client loss).	• Number of trades. • Whether client provided verbal authority to engage in discretionary trading. • Underlying reasons for engaging in trading. (e.g. For personal financial gain). • The number of clients affected. • Period of time over which the trading took place. • Magnitude of client losses.
Standard of Conduct	• Fine: Minimum of $5,000. • Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course or Canadian Investment Funds Course). • Suspension or permanent prohibition in egregious cases.	• Nature of the circumstances and conduct. • Number of individuals affected. • Whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute.

Factors to Consider in the Present Case

26. The allegations at issue in this proceeding concern the opening of new client accounts and the execution of client instructions. They also concern instances of discretionary trading. These matters are central to the securities regulatory regime in that they are matters that directly affect client trust and the reputation of the industry.

27. Approved Persons carry on a business that is founded upon the trust of clients; clients rely on Approved Persons to act in compliance with the policies and procedures of their dealers, as well MFDA Rules and regulations. Therefore, the penalties imposed for failing to do so should reflect the gravity of the breaches and the importance of the maintenance of the trust of clients and the public generally in Approved Persons of the MFDA, and the regulatory arena more widely.

***Hill & Crawford*,** MFDA File No. 200834, June 23, 2009, paras. 3-4.

28. The foregoing is given meaning by the reaction of the client J. L. to what the Respondent had done. In the course of her interview with a member of MFDA Staff on September 14, 2011 the Respondent candidly stated that J. L. had said to her that he had "lost the trust that we have built together."

29. The alteration of trade authorization forms and the use of pre-signed forms is prohibited in part because their existence undermines the integrity of the audit trail for clients' accounts. As was stated in *Price*, "the presence of the client's signature on a trade form can no longer be taken as confirmation that the client authorized a particular trade. It also compromises the ability of the Member to subsequently investigate and respond to a client complaint concerning the propriety of trading activity in his or her account." For these reasons, pre-signed forms are prohibited regardless of whether the Approved Person's intention is to enhance client convenience, and irrespective of whether a client ostensibly endorsed the practice.

Price, *supra* at para. 124, MFDA Book of Authorities, Tab 6.

30. The nature and the use of a blank pre-signed form, and the altering of trade authorization forms contrary to client instructions suggest that, at the time, the Respondent failed to recognize the seriousness of the misconduct. However, the Respondent's admissions of her actions by email to RMFI dated March 31, 2011 (Exhibit "L") and by letter to Staff dated May 6, 2013 (Exhibit "M-2") indicates that she may appreciate the seriousness of the misconduct.

31. The Respondent cooperated with Staff during the investigation conducted pursuant to section 22.1 of MFDA By-law No. 1 and generally admitted the nature of her actions regarding the attempted transfer of clients JL's and JaL's investments. The Respondent resigned from the Member in May 2011 as a result of her misconduct and she has been out of the industry ever since.

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

33. In her submissions to us at the hearing, the Respondent asked the panel to consider her clear record with the MFDA to date, and asked to have the monetary penalties eliminated because her resources were limited and her expenses were high.

34. We observe that, in contrast to many of the other forms cases that come before the MFDA, the Respondent's alteration of the signed forms and the use of the pre-signed forms was not to give effect to the clients' instructions but, in fact, was the exact opposite to their expressed requests.

35. There was no misappropriation or client losses or any financial benefit to the Respondent. This is because the clients complained and had they not done so and the transfers were allowed to stand as cash transfers, the Member, and presumably the Respondent, would have earned sales commissions from the re-invested cash proceeds and the Respondent would have received the benefit from both resulting commissions.

36. Given that this proceeding concerns what are clearly matters of central and primary

importance to the industry, that is, the opening of new client accounts and execution of client instructions, it is particularly important to emphasize the objective of general deterrence. Accordingly, we are satisfied that the penalties imposed must be sufficient to send a message to others involved in the capital markets that it is not acceptable to do what the Respondent did and that doing so will result in serious consequences.

37. Having said this, based on further reflection on the penalties set forth in the order and the respondent's submission respecting her financial condition, we do not think that it would depreciate the importance of general deference if one half of the costs were not to be enforced.

Conclusion

38. Our decision was given at the end of the hearing as stated in paragraph 3 and 4 of these reasons.

DATED this 5th day of May, 2014.

"John W. Morden"

The Hon. John W. Morden
Chair

"Linda J. Anderson"

Linda J. Anderson
Industry Representative

"Terrence Bourne"

Terrence Bourne
Industry Representative

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