Re Kazina

IN THE MATTER OF:

The Mutual Fund Dealers Association of Canada

and

Andrew Kazina

2023 CIRO 24

Canadian Investment Regulatory Organization
Hearing Panel (Manitoba District)

Heard: November 14-18, 21, 2022, January 13 and April 3, 2023
Decision and Reasons (Misconduct): November 15, 2023

Hearing Panel:
Sherri Walsh, Chair
Guenther Kleberg, Industry Representative
Greg Wiebe, Industry Representative

Appearances:
Justin Dunphy, Senior Enforcement Counsel for CIRO
Jennifer Galarneau, Senior Enforcement Counsel for CIRO
Andrew Kazina, Respondent

DECISION AND REASONS (MISCONDUCT)

INTRODUCTION

¶ 1 On June 4, 2020, the Mutual Fund Dealers Association of Canada (the "MFDA") commenced disciplinary proceedings against Andrew Kazina (the "Respondent") pursuant to sections 20 and 24 of MFDA By-law No. 1.

¶ 2 Effective January 1, 2023, the MFDA and the Investment Industry Regulatory Organization of Canada ("IIROC") were consolidated to form the New Self-Regulatory Organization of Canada which, on June 1, 2023, was officially named the Canadian Investment Regulatory Organization ("CIRO") (the "Corporation").[1]

¶ 3 The Notice of Hearing which the MFDA issued on June 4, 2020, contained the following Allegations:

> **Allegation #1**: Between February 8, 2002 and October 5, 2017, the Respondent engaged in outside business activities that were not disclosed to and approved by the Member by operating businesses that provided tax and financial planning services to individuals, and marketing,

[1] The Corporation adopted interim rules that incorporate the pre-amalgamation regulatory requirements contained in the rules and policies of IIROC and the by-laws, rules and policies of the MFDA (the "Interim Rules"). The Interim Rules include (i) the Investment Dealer and Partially Consolidated Rules, (ii) the UMIR and (iii) the Mutual Fund Dealer Rules. These rules are largely based on the rules of IIROC and certain by-laws, rules and policies of the MFDA that were in force immediately prior to amalgamation. Pursuant to Mutual Fund Dealer Rule 1A and s. 14.6 of By-law No. 1 of the Corporation, contraventions of former MFDA regulatory requirements may be enforced by the Corporation. Pursuant to Mutual Fund Dealer Rule 1A, MFDA By-law No. 1 continues to be applicable to this proceeding.

franchising and other consulting services to businesses, contrary to the policies and procedures of the Member and MFDA Rules 1.2.1(d)[2] [now 1.3.2], 2.1.1, 2.5.1, 2.10 and 1.1.2.

Allegation #2: Between January 2012 and October 5, 2017, the Respondent recommended and accepted approximately $257,500 for investment in a business that he operated from at least eight clients and at least two non-clients, thereby engaging in securities related business that was not carried on for the account of the Member or processed through the facilities of the Member, contrary to the policies and procedures of the Member and MFDA Rule**s** 1.1.1, 2.1.1, 2.5.1, 2.10 and 1.1.2.

Allegation #3: Between January 2012 and October 5, 2017, the Respondent solicited approximately $232,500 from at least eight clients that he used to finance and operate his business and commingled the money with his personal savings in bank accounts that he held in his own name or jointly with his wife, thereby engaging in personal financial dealings with clients that gave rise to a conflict of interest that he failed to disclose to the Member or address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rule**s** 2.1.4 and 2.1.1.

Allegation #4: Between no later than 2006 and October 5, 2017, the Respondent provided false or misleading information to the Member in responses to questions on annual compliance questionnaires from the Member, contrary to MFDA Rule 2.1.1.

¶ 4 On September 4, 2020, the Respondent filed a Reply to the Notice of Hearing in which he set out admissions, denials and "additional facts and conclusions".

¶ 5 The hearing of this matter which proceeded in a hybrid manner with participants attending by both video conference and in person, took place over the course of five days -- November 14 through 18 and November 21, 2022 (the "Hearing").

¶ 6 The Respondent attended the Hearing by remote participation and was not represented by legal counsel.

¶ 7 During the Hearing, the Panel heard evidence from 18 witnesses – 3 of whom were called by Staff and 15 of whom were called by the Respondent. We also received evidence in the form of an affidavit with attached exhibits affirmed by Patricia West on November 7, 2022 (the "West Affidavit") and a number of documents from both parties which were entered into the record as exhibits.

¶ 8 Several months after the completion of the evidence, Staff and the Respondent provided the Panel with written submissions setting out their respective positions on the facts and the law.

¶ 9 The parties presented final arguments by video conference on April 3, 2023, following which the Panel reserved its decision.

¶ 10 For the reasons set out below the Panel has determined that Staff has proven all four Allegations contained in the Notice of Hearing.

Jurisdiction

¶ 11 At all material times, as a mutual fund dealing representative and Approved Person of a Member of the MFDA until October 2017, the Respondent was bound by and agreed to observe and comply with the Rules of the MFDA.

¶ 12 The jurisdiction of these proceedings is set out in the Transitional Provisions under Rule 1A of the Mutual Fund Dealer Rules which provide, among other things that:

Transitional Provisions

[2] Effective December 3, 2010, former MFDA Rule 1.2.1(d) was renumbered as MFDA Rule 1.2.1(c). Effective March 17, 2016, former MFDA Rule 1.2.1(c) was amended and renumbered as MFDA Rule 1.3.

(1) The Corporation is the corporation continuing from the amalgamation effective January 1, 2023 of the Mutual Fund Dealers Association of Canada and the Investment Industry Regulatory Organization of Canada and as a result, for greater certainty:

(i) any reference in these Rules to the Corporation includes the Mutual Fund Dealers Association of Canada prior to January 1, 2023;

(ii) any person subject to the jurisdiction of the Mutual Fund Dealers Association of Canada prior to January 1, 2023 remains subject to the jurisdiction of the Corporation in respect of any action or matter that occurred while that person was subject to the jurisdiction of the Mutual Fund Dealers Association of Canada at the time of such action or matter;

...

(iv) the provisions of the articles, by-laws, rules, policies and any other instrument or requirement prescribed or adopted by the Mutual Fund Dealers Association of Canada pursuant to such articles, by-laws, rules or policies and any approval, ruling or order granted or issued by the Mutual Fund Dealers Association of Canada, in each case while a person was subject to the jurisdiction of the Mutual Fund Dealers Association of Canada, will continue to be applicable, whether presently effective or effective at a later date, to that person in accordance with their terms and may be enforced by the Corporation.

...

(3) The Corporation shall continue the regulation of persons subject to the jurisdiction of the Mutual Fund Dealers Association of Canada formerly conducted by the Mutual Fund Dealers Association of Canada, including any enforcement or review proceedings, in accordance with the by-laws, rules and policies of the Mutual Fund Dealers Association of Canada, and any other instrument or requirement prescribed or adopted by the Mutual Fund Dealers Association of Canada pursuant to such bylaws, rules or policies, in each case in effect at the time of any action or matter that occurred while that person was subject to the jurisdiction of the Mutual Fund Dealers Association of Canada.

...

and

(5) Any enforcement or review proceeding commenced by the Mutual Fund Dealers Association of Canada in accordance with its by-laws and rules prior to January 1, 2023:

(i) in respect of which a hearing panel has been appointed, shall proceed in accordance with the by-laws, decisions, directions, policies, regulations, rules, rulings and practice and procedure of the Mutual Fund Dealers Association of Canada in effect and applicable to such enforcement or review proceeding at the time it was commenced and shall continue to be heard by the same hearing panel; and Mutual Fund Dealer Rule 1A, Transitional Provisions

¶ 13 Finally, the Panel's authority with respect to disciplinary hearings, issuance of penalties and awarding of costs which was previously established under MFDA By-law No. 1 continues pursuant to CIRO Rules 7.3, 7.4 and 7.4.2.

Preliminary Evidentiary Matters (*Voir Dire)*

Voir Dire

¶ 14 At the beginning of the Hearing Staff indicated it intended to call as its first witness, Ms. Patricia West. A Senior Investigator with the MFDA, Ms. West was the individual who conducted the investigation which led to these proceedings. At the time of the Hearing, she had been employed in her role for 12 years.

¶ 15 As noted above, Ms. West affirmed an affidavit on November 7, 2022, in which she outlined her investigation findings and to which were attached as exhibits, a number of documents that Ms. West obtained

in the course of conducting her investigation.

¶ 16 At the outset of Ms. West's testimony when Staff asked the Panel to admit the West Affidavit into evidence, the Respondent raised an objection to the admissibility of one of the exhibits to the affidavit, namely, Exhibit #3. Exhibit #3 consisted of excerpts from the transcript of the interview Ms. West conducted of the Respondent on November 22, 2019 (the "Transcript"), as part of the MFDA's investigation of this matter.

¶ 17 The Respondent's objection required the Panel to hold a *voir dire* to determine the admissibility of Exhibit #3.

¶ 18 The Respondent's objections to the admissibility of Exhibit #3 were as follows:

(1) Staff had not complied with either the requirements of the Manitoba *Court of Queen's Bench Rules* (now the Court of King's Bench) (the "*Court Rules*") or the provisions of the Manitoba and Canada *Evidence Acts*, either in preparing or attempting to rely on the Transcript;

(2) the version of the Transcript he received as part of the disclosure Staff provided to him in the fall of 2020 was not a full or accurate reflection of everything that was said during the course of his 2019 interview; and

(3) the signed version of the Transcript was not provided to him within the time required by the MFDA *Rules of Procedure*, which require that disclosure of a document upon which a party intends to rely be made within 14 days of the commencement of the hearing.

¶ 19 The Respondent acknowledged to the Panel that he had received the Transcript as part of the original disclosure package Staff provided to him in the fall of 2020 but he noted that it was unsigned.

¶ 20 The Respondent provided the Panel with an e-mail thread of communications between himself and Enforcement Counsel from December 21, 2020, in which he told Enforcement Counsel that he felt that the Transcript did not contain a full reflection of everything that was said during his interview and Enforcement Counsel replied that they thought it was an accurate reflection of the interview.

¶ 21 The Respondent told the Panel that following this exchange of messages, he did not have any further communication with Staff regarding his concerns about the Transcript.

¶ 22 In their submission, Staff confirmed that they provided the Transcript of the Respondent's interview to him as part of the package of original disclosure they made to him in 2020 and that they provided it to him again on several subsequent occasions including on one occasion to his counsel in 2021.

¶ 23 Staff advised that they gave the Respondent a signed version of the Transcript on November 4, 2022, which was 10 days before the commencement of the Hearing. They conceded that it was an error not to send the signed version to the Respondent when disclosure was first made to him in 2020 but submitted that they did not believe that the error was material.

¶ 24 Staff also advised that the audio MP3 recording of the interview from which the Transcript was prepared was provided to the Respondent on three separate occasions: September 3, 2021; February 5, 2022; and November 4, 2022; either at the Respondent's request or the request of his counsel.

¶ 25 The Respondent did not dispute that he received the oral recording on those dates.

¶ 26 The Respondent told the Panel there were three things he told Staff in the 2019 interview which were not included in the Transcript being: i) a discussion about other Consultants in the Member's office whom he said were doing secondary businesses; ii) his information that the reason he did not complete the annual attestations correctly was because he thought he was grandfathered to MFDA Rules; and iii) information about a cheque for a certain client that related to a dispute he had with the Member.

¶ 27 In response to questions from the Panel, however, the Respondent confirmed that the portions of the Transcript which were contained in Exhibit #3, were an accurate reflection of what was discussed during the interview Staff conducted in November 2019.

¶ 28 Staff submitted that despite being provided with both the written Transcript and the oral recording of

the interview from which the Transcript was made, this was the first time that they were hearing from the Respondent about specific issues not being reflected in the Transcript.

¶ 29 In response to questions from the Panel the Respondent confirmed that despite the audio recording having been sent to his counsel in September of 2021, he had no record of any correspondence or communication between Staff and himself or his counsel, about the authenticity of the audio recording or the Transcript; nor did he believe any such communications were exchanged.

¶ 30 As part of the *voir dire*, Staff called Ms. West to testify about the interview process she followed in her role as an MFDA investigator in this matter.

¶ 31 Her evidence was that, consistent with her general practice, at the start of the interview she read into the record a statement that described what was going to be discussed and confirmed the Respondent's understanding of the process.

¶ 32 She testified that she recorded the interview by the use of a device called a Marantz Digital Audio Recorder, turning it on when the interview began and turning it off when the interview was completed.

¶ 33 She confirmed that she was the individual who stopped and started the recording. She said that typically, if someone asks for a break she pauses the recorder, noting that she has done so, on the record.

¶ 34 Ms. West referred the Panel to the portions of Exhibit #3 in which the Respondent acknowledged that he understood that the MFDA was recording the interview using a digital recording device.

¶ 35 She testified that during the Respondent's interview the recording device was placed on the table between herself, Enforcement Counsel and the Respondent and that her actions in pressing the "record" button were visible to all parties.

¶ 36 When the Respondent's interview was done, she took the recording device back to her desk, downloaded the digital audio file onto her desktop computer and asked to have the interview transcribed by the MFDA's transcription officer. She also took the file that she downloaded and transferred it onto her "H" drive.

¶ 37 Once a Transcript has been prepared, she testified, the transcription officer provides her with information as to where the Transcript is saved, giving her a document number so that she can review the Transcript.

¶ 38 Ms. West testified that her practice is to read the Transcript from start to finish and if she notices any anomalies, she goes back to the recording to listen to it.

¶ 39 With respect to the Respondent's assertions that certain information from his interview was not contained in the Transcript, Ms. West was clear that no such information was missing.

¶ 40 Further, in her affidavit, she affirmed that she had reviewed the excerpts of the interview contained in Exhibit #3 and confirmed that they were an accurate transcription of the audio recording, with one small exception being that the amount of $15,000 was mistakenly transcribed as $50,000.

¶ 41 In cross-examination by the Respondent, Ms. West confirmed that during his interview the recording device was on the table for all parties to see as to when the recording was stopped and started. She also said once the recording was downloaded no changes could be made to it.

¶ 42 As noted above, in making his submissions, the Respondent relied on the sections of the *Court Rules*, and the Manitoba and Canada *Evidence Acts* which deal with recording examinations and certification of transcripts. He also relied on several decisions: *Ryan v Canadian Farm Insurance Corp. et al* 2013 MBQB 271 and *Telecommunication Employees Association of Manitoba Inc. et al v Manitoba Telecom Services et al* 2005 MBQB 259.

¶ 43 The Respondent submitted that in his view the interview process that the MFDA conducts is an "examination for discovery" within the meaning of the *Court Rules* or equal to that and should be held to the same standards required under those rules.

¶ 44 Citing the *Court Rules*, he argued that Staff were required to seek approval of all parties before they could enter only a portion of the Transcript into the record.

¶ 45 He also argued, as noted above, that one of his objections to the admissibility of Exhibit #3 was that he did not receive the signed version of the Transcript within 14 days of the commencement of the Hearing as required by Rule 10 of the MFDA *Rules of Procedure*.

¶ 46 In response, Staff submitted that the authorities upon which the Respondent was relying were not applicable to these proceedings and that because the MFDA is a self-regulatory organization and not a creation of statute, its process is governed by its own by-laws and rules and not by legislation.

¶ 47 Staff also submitted that there is no requirement in the MFDA's *Rules of Procedure* for there to be a certified version of a transcript nor a requirement for an independent third party such as a court reporter, to be the one who performs the recording.

¶ 48 Relying on the *Botha* decision of the Alberta Securities Commission ("ASC") where the ASC was considering an appeal of a decision rendered by an MFDA Hearing Panel, Staff submitted that investigative interviews can be entered into evidence and can be relied on as long as procedural fairness is assured.

Botha (Re), 2021 LNABASC 11

¶ 49 In this case, Staff's view was that the only potential issue for the Panel to consider was the fact that the signed version of the Transcript was not provided to the Respondent until November 4, 2022, which was technically not within the requirements of the MFDA's *Rules of Procedure* because it was provided within 10 days prior to the commencement of the Hearing, rather than within the 14 days stipulated in the *Rules of Procedure*.

¶ 50 Staff submitted, however, that the Respondent was not denied procedural fairness on this basis.

¶ 51 In Staff's view, in light of the fact that the Respondent had received the unsigned version of the Transcript in the Fall of 2020 he did not experience any prejudice by receiving the signed version 10 rather than 14 days before the start of the Hearing. The two versions, they submitted, were identical save for the Transcription officer's signature. They also submitted there is no actual requirement under the *Rules of Procedure* for a signed version to be provided. Plus, they noted, the audio recording of the interview was provided to the Respondent or his counsel on three separate occasions prior to the Hearing, starting in September 2021.

¶ 52 Staff also pointed out that during the course of the Hearing, the Respondent would be free to cross-examine Ms. West on the accuracy of her affidavit including the exhibits attached thereto and could provide evidence himself with respect to the contents of the Transcript to clarify any evidence or information he gave during the course of his investigation interview.

¶ 53 After hearing the parties' submissions, the Panel took a recess to deliberate.

Decision on the *Voir Dire*

¶ 54 The Panel decided to admit Exhibit #3 to the West Affidavit into evidence. In so finding, we stated that we were making no comment as to the weight, if any, we would ultimately attribute to the evidence set out in that exhibit and we pointed out to the Respondent that he was free to lead evidence to contradict, explain or comment on the contents of that exhibit during the course of the Hearing.

¶ 55 Our reasons for admitting the exhibit into evidence were as follows.

¶ 56 First, regarding the Respondent's submission that he received disclosure of the signed version of the Transcript within 10 rather than 14 days before the start of the Hearing as stipulated in the *Rules of Procedure*, the Panel was of the view that it was appropriate to waive the 14 day requirement.

¶ 57 In making this decision, we relied on Rule 1.5(1)(b) of the *Rules of Procedure* which deals with the general powers of a Panel and which says that a Panel may waive or vary any of those *Rules* at any time on such terms as it considers appropriate.

¶ 58 We believed it was appropriate and fair to waive the *Rule* in this modest way because there was no suggestion that the signed version of the Transcript that the Respondent received was different than the version which he had received in the fall of 2020 which was 2 years before the start of the Hearing. We find, therefore, that he has not suffered any prejudice in having received the signed version of the Transcript 10 days instead of 14 days, before the commencement of the Hearing.

¶ 59 As to the authenticity and completeness of the Transcript, we find that the Transcript was an accurate reflection of the interview. In so finding, we rely on the evidence of Ms. West that she reviewed the Transcript and found it to be a complete recording of the entire interview she conducted.

¶ 60 We also noted that the Respondent acknowledged to us during the *voir dire* that he had no concerns about the accuracy of the portions of the Transcript that are contained in Exhibit #3 to the West Affidavit.

¶ 61 Finally, with respect to the application of the *Court Rules* or the Manitoba or Canada *Evidence Acts*, the Panel agrees with Staff that those authorities are of no relevance or application to this proceeding.

Hearsay Evidence and Evidence by Sworn Statement

¶ 62 Rule 1.6 of the MFDA *Rules of Procedure* specifically permits hearsay statements to be admitted as evidence:

1. Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.
2. A Panel may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.
3. Nothing is admissible in evidence which would be inadmissible by reason of a statute or a legal privilege.

¶ 63 Rule 13.4 permits evidence to be adduced by way of sworn statements.

13.4 Evidence by Sworn Statement

¶ 64 The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.

¶ 65 MFDA hearing panels and other regulatory bodies routinely consider and rely on hearsay and affidavit evidence in making findings of fact.

> *Tonnies*, MFDA File No. 200503, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated June 27, 2005 at pp.6-7

¶ 66 Pursuant to these authorities, and once the Respondent's objections which formed the basis for the *voir dire* were addressed, the Panel had no hesitation in admitting the West Affidavit into evidence in its entirety.

¶ 67 Ms. West also testified at the Hearing and was therefore available to be cross-examined by the Respondent.

¶ 68 The Panel granted Enforcement Counsel's request to mark the exhibits to the West Affidavit as confidential to the extent that they contain personal information, pursuant to the broad authority given to us under MFDA *Rules of Procedure* 1.5 and 1.8(2).

Evidence

¶ 69 As noted above, the Respondent chose not to testify at the Hearing. At various times through the Hearing, whether in response to objections by Staff or on our own initiative, the Panel reminded the Respondent that unless a witness affirmed a statement he put to them on cross-examination the statements he made during the proceedings were not evidence we could consider. We advised the Respondent that any statements he made about his conduct or the matters at issue during the course of the Hearing, on their own, did not

constitute evidence before us.

¶ 70 Although the Respondent chose not to testify, he did adduce evidence to support his defence including through: admissions set out in the Reply he filed dated September 4, 2020; documents he entered into evidence during the Hearing; cross-examinations he conducted of the witnesses called by Staff; and the direct evidence of the 15 witnesses he called to testify.

Witnesses called by Staff on behalf of the Corporation

Patricia West

¶ 71 The first of the three witnesses Staff called to testify was Ms. Patricia West.

¶ 72 Based on the evidence set out in the West Affidavit and Ms. West's testimony, Staff adduced the following evidence through this witness.

Registration history

¶ 73 The Respondent was registered as a mutual fund salesperson in Manitoba with Investors Group Financial Services Inc (the "Member") from approximately January 1992 to October 2017. During this time, he was also registered for varying periods in British Columbia, Alberta, Saskatchewan, Ontario and Nova Scotia.

¶ 74 Investors Group has been a Member of the MFDA since February 8, 2002.

¶ 75 The Respondent conducted business from the Member's offices located in Winnipeg, Manitoba. For a period of time prior to 2010, he acted as the branch manager of one of those offices.

MFDA Staff Investigation

¶ 76 Staff commenced an investigation into the Respondent's conduct in May 2018 as a result of receiving a report the Member filed on the Members' Events Tracking System ("METS").

¶ 77 The Member told Staff that in May 2018 it received a complaint made by individual CG on behalf of her parents, JG and MG, who were clients of the Member.

¶ 78 As part of Staff's investigation into this matter, Ms. West interviewed the Respondent on November 22nd, 2019.

¶ 79 Through the interview process Ms. West identified that the Respondent signed agreements with Investors Group on October 16, 1991 when he was first registered and again on August 12, 2002 when Investors Group became a Member of the MFDA.

¶ 80 The Sales Representative's Agreement which the Respondent signed with the Member on October 16, 1991, contained the following clauses:

> ...
>
> 2. SALES REPRESENTATIVE'S STATUS
>
> The Sales Representative shall carry out the responsibilities set out herein without interference from Investors, except that Investors may from time to time prescribe rules and regulations respecting the conduct of the Sales Representative's business which are necessary to protect the interests of Investors or its clients or to comply with any law, ordinance, or regulation, or with any resolution of the Investment Funds Institute of Canada which has been adopted by Investors, governing or relating to the conduct of Investors' business. With the exception of these rules and regulations, the Sales Representative is free to exercise his or her own judgement as to the conduct of his or her business, including the persons the Sales Representative will solicit and the time and place of solicitation.
>
> 3. SALES REPRESENTATIVE'S RESPONSIBILITIES
>
> The Sales Representative agrees to carry out the following responsibilities in connection with the canvassing for applications for products issued or distributed by Investors:
>
> (i) Licensing - to comply with all laws, ordinances and regulations relating to the performance of his

or her duties under this Agreement and to comply with all policy statements issued by the Securities Commission of the jurisdiction granting his or her license and issued by other regulatory authorities governing the conduct of his or her business. In particular, the Sales Representative agrees not to interview prospective clients nor to canvass for applications until he or she has secured all licenses required by law and has filed application for surety bond coverage on a form supplied by Investors;

...

¶ 81 In 2002, the agreement the Respondent signed with the Member, among other things, confirmed that the Member was engaging him as its agent to arrange for the distribution of the financial products and services offered or sponsored by the Member and or its affiliated corporations and to collect and pay over to the Member all payments received by him in connection with such activity. It also confirmed that the Respondent was not an employee of the Member and that the relationship between the two was one of principal and agent. In particular, the agreement stated:

...

1. **CONSULTANT'S APPOINTMENT AND STATUS**

IGFS hereby engages the Consultant as its agent to arrange for the distribution of the financial products and services offered or sponsored by IGFS and/or its affiliated corporations, from time to time, and to collect and pay over to IGFS all payments received by the Consultant in connection with such activity. For greater certainty, the Consultant and IGFS agree that the Consultant is not an employee of IGFS and the relationship is one of principal and agent. Subject to the protection of IGFS' goodwill and regulatory responsibilities, the Consultant is free to exercise his/her own judgment as to the conduct of his/her business and is free to carry out his/her responsibilities at such times, at such places and in such manner as he/she sees fit ...

The Consultant agrees that he/she will not distribute any products or services not offered or sponsored by IGFS and/or its affiliated corporations. The Consultant further acknowledges and agrees that all clients have a contractual relationship with IGFS and, that he/she owes a fiduciary duty to IGFS and he/she will not do anything to diminish IGFS' relationship with its clients. [emphasis added]

2. **CONSULTANT'S RESPONSIBILITIES**

The Consultant agrees to carry out certain responsibilities in connection with arranging for the distribution of financial products and services offered or sponsored by IGFS and/or its affiliated corporations, including but not limited to:

(i) Rules, Regulations and Laws - to comply with all rules, regulations and policies that IGFS may prescribe from time to time regarding the conduct of the Consultant when he/she is carrying on business as an agent of IGFS which are necessary to protect the interests of IGFS or its clients, or to comply with any applicable law, rule, policy, ordinance or regulation, and any amendments thereto, issued by any applicable regulatory authority, including, without limitation, the Mutual Fund Dealers Association of Canada, the Investment Funds Institute of Canada, any other self-regulatory authority and any securities commission or any successor thereto;

...

12. **MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

This Agreement incorporates all of the obligations required by Rule 1.15 (a) to (i) of the Mutual Fund Dealers Association of Canada or any other similar Rule that is imposed on its members from time to time.

...

14. **FORMER AGREEMENTS**

Effective as of the date of signing hereof, this Agreement shall be in lieu of and supersede any former Consultant's Agreement or Sales Representative Agreement.

¶ 82 On May 15, 2001, the Respondent also signed a document called "Schedule G - Agreement of Approved Person". This document required him, among other things to: notify the Member firm of which he was an Approved Person in writing of any change in information relating to him as an Approved Person as prescribed by any applicable law or any by-law, rule or policy of the MFDA; and be bound by, observe and comply with the MFDA Rules as they were from time to time amended or supplemented.

¶ 83 Schedule G also stipulated that the Respondent was conversant with the MFDA Rules and would keep himself fully informed about the MFDA Rules as they were amended or supplemented from time to time.

¶ 84 Ms. West testified that Schedule G was a document that Approved Persons were required to sign when the MFDA came into being.

¶ 85 During the investigation interview conducted on November 22, 2019, the Respondent told Ms. West the following information:

- Kazina Financial Services ("KFS") existed in 1973 and was an unregistered sole proprietorship that offered accounting and tax services;
- it may at one point have been called Kazina Accounting Services;
- KFS did not have its own bank account;
- KFS was the name that he used on tax returns to report the commissions he earned from the Member but the commissions were paid to him personally not to KFS;
- KFS's expenses included things such as advertising and normal business or operating expenses;
- KFS provided "fee for service" accounting and tax services to individuals;
- he started a business called Eagle Franchising and Business Services ("Eagle Franchising") around 2004 as an evolution of the accounting practice he conducted;
- KFS was providing tax services to people and companies on a fee for service basis; and when Eagle Franchising came about he switched to doing the taxes under Eagle;
- Eagle Franchising was a commission based company but no sales ever occurred;
- Eagle Franchising provided franchising support to companies that wanted to expand their operations using a franchising model and also engaged in tax preparation and miscellaneous business consulting;
- in 2014 Eagle Franchising was registered at the Manitoba Corporations Branch as a partnership between the Respondent and his cousin DK and subsequently became registered as a sole proprietorship to the Respondent in 2017;
- although Eagle Franchising was registered as a sole proprietorship there were co-owners such as, for example, clients JG and MG whom he also described as being kind of like an "informal partnership"; and
- eventually Eagle Franchising also had an affiliated business referred to as Bullseye Business Consulting that offered marketing assistance to business owners who wished to sell their business.
- According to the West Affidavit, a search of the corporate registry for Manitoba confirmed that Eagle Franchising was registered in June 2014 as a partnership between the Respondent and DK and subsequently became registered as a sole proprietorship in the Respondent's name only, in July 2017.

Disclosure of Outside Business Activity

¶ 86 In the investigation interview conducted in 2019, the Respondent gave the following information with respect to conducting and disclosing outside business activity for KFS and Eagle Franchising:

- when he first worked for Investors Group he had his own accounting/business consulting practice and he was informed that he could continue that activity as long as he did not work more than 8 to 10 hours a week;
- he was interviewed and hired by the Member's division manager;
- his business was a small accounting practice/business consulting kind of thing;
- he never formally disclosed his accounting business to the Member or completed any form;
- the last time he was a branch manager was, he guessed, 2010;
- while he was with the Member he considered that he was for the most part familiar with its policies and procedure;
- with respect to the Member's policies regarding outside business activity he said when he was first hired he had his own business and was told that that was not a problem and that he could continue it as long as he did not work more than 8 to 10 hours per week;
- he did not disclose his outside activities to the Member with respect to KFS when the MFDA came into existence;
- he never disclosed his activities in respect of Eagle Franchising;
- he did not disclose to the Member that clients JG and MG invested money with KFS and Eagle Franchising;
- he never disclosed to the Member that any of the clients who gave him money had become "co-owners" of KFS or Eagle Franchising;
- throughout his whole time with the Member he continued with his accounting practice which involved more small business accounting, tax preparation; and
- with respect to his understanding of the Member's policies regarding personal financial dealings with clients he said he thought it was not a problem as long as the client understood the relationship.
- When asked in his interview what his understanding of the Member's policies with respect to conflicts of interest was, he answered that he did not know that he really thought about that and when asked he could not give an example of what he might think would be a reportable conflict of interest to the Member.

Attestations

¶ 87 Between 2006 to 2017, the Respondent completed annual attestation forms which the Member required its Consultants to sign, confirming that he had disclosed and obtained written approval of all outside business activities, or in the alternative had no outside business activities in which case he was to select "not applicable" or "N/A" as his answer on the form. Copies of those annual attestations were attached to the West Affidavit as exhibits.

¶ 88 Relevant excerpts from those annual attestations are reproduced below:

Year	Submit Date	Consultant #	Consultant Name	Question #	Question	Response 1
2017	2017-Mar-13	3690	Andrew Kazina	2c	Have you disclosed and reported all Outside Activities, including volunteer positions, to Compliance for filing on the National Registration Database (NRD)? If you don't engage in any outside activity, select Not Applicable; If no, please describe the outside activity. (Note that previously undisclosed activities should be brought to the attention of Compliance immediately).	N/A
2016	2016-Mar-02	3690	Andrew Kazina	2c	Have you disclosed and reported all Outside Business Activities, including volunteer positions, to Compliance for filing on the National Registration Database (NRD)?	N/A
2015	2015-Mar-18	3690	Andrew Kazina	2c	Have you disclosed and reported all Outside Business Activities, including volunteer positions, to Compliance for filing on the National Registration Database (NRD)? If no outside business activity, select Not Applicable;	N/A
2014	2014-May-30	3690	Andrew Kazina	2b	If I have any outside business activity, I have disclosed and reported it to Compliance for filing on the National Registration Database (NRD). If no outside business activity, select Not Applicable;	N/A
2014	2014-May-30	3690	Andrew Kazina	2c	Other than corporately approved websites, including approved social media websites, I have not established a website, web-blog, or similar forum for the purpose of promoting my business or marketing mutual funds, other securities, insurance, banking, mortgages, other products and services, fee for planning or financial planning;	True
2013		3690	Andrew Kazina	2b	If I have any outside business activity, I have disclosed and reported it to Compliance for filing on the National Registration Database (NRD). If no outside business activity, select Not Applicable;	N/A
2012		3690	Andrew Kazina	2b	If I have any outside business activity, I have disclosed the outside business activity, and it has been approved by my Regional Director and Area Vice-President. In addition, it has been reported to Compliance for filing on the National Registration Database (NRD); If false, please describe the outside business activity. (Note that previously undisclosed activities should be brought to the attention of your Regional Director and Area Vice- President immediately).	N/A
2011		3690	Andrew Kazina	2b	If I have any outside business activity, I have disclosed the outside business activity, and it has been approved by my Regional Director and Area Vice-President. In addition, it has been reported to Compliance for filing on the National Registration Database (NRD).; If false, please describe the outside business activity. (Note that previously undisclosed activities should be brought to the attention of your Regional Director and Area Vice-President immediately).	True
2010		3690	Andrew Kazina	2c	Other than corporately approved websites, I have not established a website, web-blog, or similar forum for the purpose of promoting my business or marketing mutual funds, other securities, insurance, banking, mortgages, other products and services, fee for planning or financial planning:	True

Year	Submit Date	Consultant #	Consultant Name	Question #	Question	Response 1
2009		3690	Andrew Kazina	2b	I have not carried on any outside business activity or dual occupation. If I do have any outside business activity or dual occupation, I have disclosed the outside business activity or dual occupation, and it has been approved by my Regional Director and Area Vice-President. In addition, it has been reported to Compliance for filing on the National Registration Database (NRD):	True
2008		3690	Andrew Kazina	2b	I have not carried on any outside business activity or dual occupation:	True
2007		3690	Andrew Kazina	2b	I have not carried on any outside business activity or dual occupation:	True
2006		3690	Andrew Kazina	2b	I have not carried on any outside business activity or dual occupation without the written approval of my Regional Director and the IGFS Compliance Department, and in accordance with our Corporate policies and procedures	True

¶ 89 From 2006 to 2017 the Respondent also completed various semi-annual Consultant acknowledgement forms for disclosure on the National Registration Database ("NRD") in which he indicated that there was no change to his current employment and that he was not engaged in an outside business activity or dual occupation that was not previously disclosed. Copies of those forms were also attached as exhibits to the West Affidavit.

¶ 90 Ms. West testified that in the investigation report the Member prepared following its investigation of the complaint it received from CG, the Member concluded that it had no documents signed by the Respondent in which he had disclosed any outside activity.

¶ 91 The Member also confirmed that fact directly to the MFDA during the course of Staff's investigation of this matter.

¶ 92 The Member also provided the MFDA with the copy of e-mail correspondence it exchanged with Mr. Joe Funk. Mr. Funk was a former branch manager who at one time was responsible for the Respondent at the Member. In the e-mail Mr. Funk advised that the Respondent joined his division from another branch manager on May 16, 2016 and remained in his division until the Respondent retired. Mr. Funk said he was never made aware of any outside activity or securities related business that the Respondent may have been engaged in, when he joined his division nor did the Respondent or anyone else ever tell him while the Respondent was in Mr. Funk's division that the Respondent was engaged in any outside activity or securities related business.

¶ 93 Ms. West's evidence was that when she asked the Respondent in his interview whether he was aware that once the MFDA came into place the requirements to disclose outside activities changed he said: "yes and no". He said he knew there was a form completed but he also assumed that the Member had records or was aware that he had a secondary business because when he was hired he made it clear that he wanted to continue with his other business.

¶ 94 He told Ms. West that while that business was KFS, when he decided to register Eagle Franchising he did not disclose its existence to the Member because of the way it evolved. He said it was just kind of a continuation of a practice that changed its name although he acknowledged that KFS did not do franchising work.

Monies given to the Respondent by clients and non-clients

¶ 95 During the interview conducted on November 22, 2019, the Respondent told Ms. West that:

- clients JG and MG were clients of the Member whom he had serviced from approximately 1992;
- clients JG and MG gave him $10,000 for a percentage ownership of KFS and Eagle Franchising;

- he told clients JG and MG that they would not lose their money if they wanted to take it out of these businesses;
- clients JG and MG signed a second agreement with him dated August 24 2016 wherein they agreed to pay him an additional $5,000;
- clients JG and MG paid the Respondent with cheques and bank drafts which were made payable to him directly in the amounts of $10,000 and $4,900 respectively - the latter amount having been reduced to cover courier charges; and
- clients JG and MG were to be paid annually by a personal cheque from his personal bank account.

¶ 96 In this regard, Staff obtained copies of a written agreement made between clients JG and MG and the Respondent, dated March 21, 2012. Pursuant to that agreement, clients JG and MG were to provide $10,000 to the Respondent in return for receiving 0.6% of the gross revenue and 0.6% of the pre-tax income of KFS and Eagle Franchising, respectively.

¶ 97 According to this agreement, the purchaser, i.e. clients JG and MG, agreed to the following specific terms and conditions:

> AGREEMENT DATED THIS 21st DAY OF March 2012
>
> BETWEEN [JG and MG]
>
> OF THE CITY OF
>
> (HEREINAFTER REFERRED TO AS THE PURCHASER.
>
> AND
>
> ANDY KAZINA, OF THE CITY OF WINNIPEG, MANITOBA, IN THE PROVINCE OF MANITOBA (HEREINAFTER REFERRED TO AS THE VENDOR.)
>
> HAVE ENTERED INTO A CONTRACT WHERE THE PURCHASER AGREES TO PAY $10,000 TO THE VENDOR AND IN RETURN RECEIVES 0.6% OF GROSS REVENUE OF KAZINA FINANCIAL SERVICES AND 0.6% OF PRE-TAX INCOME OF EAGLE FRANCHISING AND CONSULTING.
>
> GROSS REVENUE IS DEFINED AS THE SUM OF THE REP COMMISSION LINE PLUS THE ARB PAYABLE LINE AS SHOWN ON THE ATTACHED STATEMENTS. PRE-TAX EARNINGS IS DEFINED A SALES LESS OPERATING EXPENSES. GROSS REVENUE AND PRE-TAX EARNINGS FOR THIS AGREEMENT BEGINS March 21, 2012 AND IS TO BE PAID JANUARY 31 OF EVERY YEAR, FOR THE PREVIOUS CALENDAR YEAR EARNINGS.
>
> THE VENDOR AGREES TO THE FOLLOWING TERMS AND CONDITIONS:
>
> 1) OPERATE THE BUSINESS IN A PROFESSIONAL MANNER
>
> 2) ANSWER ALL QUERIES BY THE PIRCHASER [sic] IN A TIMELY FASHION
>
> 3) SUBMIT SUPPORTING DOCUMENTATION TO THE PURCHASER SHOWING GROSS REVENUE AND PRE-TAX EARNINGS
>
> 4) SUBMIT DOCUMENTATION OF ALL CONTRACTS AND EXPENSES AT THE REQUEST OF THE PURCHASER
>
> THE PURCHASER AGREES TO THE FOLLOWING TERMS AND CONDITIONS:
>
> 1) THE VENDOR REMAINS IN COMPLETE CONTROL OF THE BUSINESS OPERATIONS
>
> 2) THE VENDOR HOLDS FIRST RIGHT OF BUYBACK OF EQUITY POSITIONS
>
> 3) THE VENDOR HOLDS THE RIGHT TO FACIILTATE ANY RE-SALE OF EQUITY POSITION AND HOLDS FINAL APPROVAL OF SAME

4) BUYBACK/OR RE-SALE OF EQUITY POSITIONS WILL BE AT MARKET VALUE

5) THE PURCHASER ACKNOWLEDGES THAT THEY ARE A SILENT PARTNER AND RESPECTS THE PRIVACY OF THIS AGREEMENT

SIGNATURES:

PURCHASER: "JG"

"MG"

VENDOR: ANDY KAZINA

"Andy Kazina"

¶ 98 A second agreement dated August 24, 2016 made between the same parties stated that it was agreed that JG and MG would purchase an additional 0.3% of KFS and Eagle Franchising and Business Services for the sum of $5,000 for total ownership of 0.9% of both companies effective September 1, 2016. All other conditions outlined in the original agreement dated March 21, 2012 remained intact. Both agreements were attached as exhibits to the West Affidavit (the "Agreements").

¶ 99 The agreement dated August 24 2016 was accompanied by an e-mail from the Respondent to MG with the subject "Agreement" in which the Respondent said that he had:

> "completed the redemption for $5,000. There are fees of approximately $75 which Eagle will cover. Also covered is the cost of the courier. ... The bank draft should be payable to Andy Kazina for $4,900 (the 5000 less $75 and $25 for courier fees) ..."

¶ 100 The e-mail went on to ask that JG and MG place both the agreement and the bank draft in an envelope to his attention marked confidential and courier it to his office at the Member.

¶ 101 On that same day he sent another e-mail to clients JG and MG stating:

> "This is to confirm that when you choose to sell your investment or should the businesses be sold your share will be at least the minimum of what your total investment was in the above stated companies."

¶ 102 Attached to the West Affidavit as exhibits were copies of cheque images showing payments from JG and MG of $10,000 and $4,900 respectively, made to Mr. Kazina personally, on March 26, 2012 and September 29, 2016, respectively.

¶ 103 In the course of her investigation Ms. West found net redemptions from the investment accounts JG and MG held at the Member, totaling $15,000 that were contemporaneous with the monies the clients provided to the Respondent. Copies of those redemptions were attached to her affidavit as exhibits.

¶ 104 In his interview with Staff the Respondent confirmed that KFS did not have its own bank account and that, for example, when he made a payment based on the .6% terms set out in the Agreements he did so by way of a personal cheque. He also confirmed that although the Agreements said that these monies were to be paid on January 31 of every year for the previous calendar year, that date was sometimes not met and that in fact he had not made all of the payments owing, pursuant to the terms of the Agreements.

¶ 105 The West Affidavit also attached as exhibits: emails from the Respondent to clients JG and MG which showed the gross commissions earned by KFS and whether there was any pre-tax profit for Eagle Franchising; and documentation which the Respondent provided to the clients including a handwritten accounting statement for Eagle Franchising, his statement of earnings from the Member and the total percentage of those earnings.

¶ 106 Other evidence Ms. West obtained and attached as exhibits to her affidavit included calculations of business income and loss from 2012 to 2017 which the Respondent provided to clients JG and MG, relating to what he described as their "share of earnings" in KFS and Eagle Franchising.

Additional investors in KFS and Eagle Franchising

¶ 107 As part of her investigation, Ms. West obtained information from the Manitoba Securities Commission relating to clients and other individuals who also provided monies to the Respondent. By reviewing the

Respondent's bank records she determined that in addition to the monies provided by clients JG and MG, the following clients and other individuals gave the Respondent monies which he deposited into his personal bank account:

Clients	Date of Payment to the Respondent	Investment Amount
CP and DP (only DP is a client)	July 15, 2012	$10,000
	March 22, 2013	$9,000
SK	August 9, 2012	$5,000
	September 6, 2012	$5,000
DK	March 6, 2013	$10,000
	December 9, 2013	$16,000
	December 11, 2013	$15,000
	February 24, 2014	$91,000
GT	June 1, 2013	$5,000
RW & JW	June 27, 2013	$5,500
GC	April 12, 2013	$5,000
	April 27, 2015	$20,000
	May 15, 2015	$19,000
GA	May 3, 2016	$2,000
TOTAL		**$217,500**

Non-Client Investor	Date of Payment to the Respondent	Investment Amount
HW	May 29, 2012	$10,000
# Manitoba Inc.	September 19, 2012	$15,000
TOTAL		**$25,000**

¶ 108 Copies of cheque images from the above clients and non-clients showing that the monies were made payable to the Respondent personally were attached as exhibits to the West Affidavit.

¶ 109 In reviewing their investment accounts held at the Member which were serviced by the Respondent, Ms. West found that clients DP, SK and GC redeemed mutual funds in their accounts contemporaneous with some of the above referenced monies they paid to the Respondent.

¶ 110 Also attached to the West Affidavit were excerpts from the history of the bank account the Respondent held jointly with his spouse, showing that the above referenced monies were deposited and co-mingled with his personal finances.

¶ 111 During the investigation interview Ms. West conducted of the Respondent in November 2019 the Respondent confirmed the following information regarding the various deposits from clients and other individuals into his personal bank account:

- CP signed an agreement with the Respondent similar to the Agreements signed by JG and MG and provided $19,000 to him which went to KFS and Eagle Franchising to cover operating expenses; CP became a “co-owner”; CP’s wife DP was a client of the Member, whose accounts he serviced;
- SK was a client of the Member who signed an agreement and provided $10,000 to him for the purpose of investing in KFS and Eagle Franchising on similar terms to those agreed to by clients JG and MG, which monies went to operating expenses;
- DK was a client of the Member and was the Respondent's cousin. DK signed an agreement and provided $132,000 to him to become a co-owner of KFS;
- DK has not received his monies back from the business;

- GT was a client of the Member who provided $5,000 to become “a co-owner” of KFS and Eagle Franchising and was still a co-owner; the Respondent told GT he could show the agreement to a lawyer, if he wished;
- RW was a client of the Member who provided $5,500 to the Respondent in order that his spouse JW could become a co-owner of KFS and Eagle Franchising; JW was not a Member client at the time;
- GC was a client of the Member who provided $34,000 to the Respondent to become a co-owner of KFS and Eagle Franchising;
- GA was a client of the Member who provided $2,000 to the Respondent to become a co-owner of KFS and Eagle Franchising;
- HW was a client of the Member who provided $10,000 to the Respondent to become a co-owner of KFS and Eagle Franchising;
- a numbered company which was not a client of the Member provided $15,000 to the Respondent to become a “co-owner of KFS and Eagle Franchising;
- the Respondent deposited all of these monies into the personal bank account he held jointly with his wife;
- the Respondent needed the co-owners’ money to use for operating expenses;
- in exchange for providing money to the Respondent, the co-owners would receive a portion of the revenues he generated as a mutual fund representative, through KFS;
- the co-owners would receive a percentage of KFS and Eagle Franchising in a similar manner to the Agreements the Respondent entered into with clients JG and MG; and
- the co-owners were allowed to give the Respondent “feedback” if he asked them for their ideas.

¶ 112 The West Affidavit also included emails sent between 2012 and 2017 from Eagle Franchising to Eagle Franchising@yahoo.ca. Ms. West testified that these messages gave the above-referenced clients and non-clients as a group, an overview of Eagle Franchising's activities.

¶ 113 With respect to the monies provided from DP and CP, Ms. West’s evidence was that cheques in the amount of $10,000 and $9,000 dated July 15, 2012 and March 22nd, 2013, respectively, made payable to the Respondent personally were signed by CP and were written on CP and DP’s joint bank account. She confirmed that only DP was a client of the Member.

¶ 114 Ms. West testified that based on her review of DP's investment statements with the Member, which she attached as exhibits to her affidavit, redemptions were made from DP 's account that corresponded in amounts and relative dates to the cheques which were made out to the Respondent, by CP, on CP and DP's joint bank account.

Current Status of Investor Monies

¶ 115 Ms. West testified that the Member informed MFDA Staff that clients JG and MG were offered and accepted $15,000 as a settlement of the monies they invested with the Respondent. This amount was later deducted from assured value payments the Member owed to the Respondent.

¶ 116 With respect to status of the other investors, during the investigation interview the Respondent told Staff that:

- client SK had been paid out and is no longer a “co-owner”;
- as of the date of the interview the rest of the co-owners in Eagle Franchising and KFS remained the same as when the Respondent was registered at the Member;

- CP has been paid back some of his monies;
- there is no guarantee of positive cash flow to pay out the investors and there are no real assets for investors to collect on but they may be eventually paid out of his estate if he passes away;
- that was not set out in his Will but he would give instructions to his wife;
- when it comes to return of individuals' ownership interests he and Eagle Franchising and KFS are all one and the same in terms of assets and that in fact there are no assets for those businesses in terms of brick and mortar; and
- he had no personal assets if something happened to him to cover these co-owners, while he was alive.

¶ 117 Ms. West's evidence was that she asked the Respondent to provide: banking records with respect to Eagle Franchising and KFS that were separate from his personal bank records; any agreements between the "co-owners" and Eagle Franchising and KFS; payment records; and evidence of repayment of the principal investments to the co-owners. She did not, however, receive those records. She also said she saw no evidence of how the investors' monies were used beyond being deposited into the joint bank account the Respondent held with his spouse.

Cross-examination

¶ 118 On cross-examination by the Respondent, Ms. West conceded that insofar as Allegation #1 alleged that the Respondent engaged in outside businesses that provided "financial planning services" to individuals, that she had no documents that would illustrate "financial planning" *per se* but she said that "financial planning" was a large category that could encompass giving advice to invest in a product that is not approved by the Member.

¶ 119 Ms. West confirmed that she did not interview any of the individuals, whether clients of the Member or otherwise, who are referenced in the Allegations in the Notice of Hearing; nor did any clients other than JG and MG file complaints.

¶ 120 She pointed out that the transaction statements from the Respondent's personal account showed that the deposits from individuals such as, for example, MG and JG were followed by various payments made out of the Respondent's account for such things as an RBC loan payment, a payment to Walmart and a payment to Red River Co-op.

¶ 121 Ms. West also told the Respondent that while those statements identified what he spent money on and how the majority of funds he received were dispersed, they did not identify what money if any went out to the "co-owners". She reminded the Respondent that that was why Staff had asked him for an undertaking to provide them with those documents but that he never did provide the information.

Catherine Kelly

¶ 122 The second witness Staff called to testify was Catherine Kelly. Ms. Kelly is a senior manager in the Member's compliance investigation unit. She has been employed with the Member since 1991 and has held compliance or investigative roles with the Member for the past 22 years.

¶ 123 Prior to her current role she was the Member's manager of compliance and communications. In that role she was responsible for: reviewing any regulatory updates and or policy adjustments or amendments that needed to be made; ensuring that the Member's manuals, communications and trainings were updated; and that the "field" was notified appropriately.

¶ 124 She explained that the supervisory structure for advisers up until the end of 2017 was as follows. There was a Regional Director to whom reported several Division Directors. Division Directors had a number of advisers or Consultants who reported to them directly. Division Directors were responsible to serve as branch managers. Either the Regional Director or the Division Director was responsible for the oversight of the

advisers.

¶ 125 The difference between a Regional Director and a Division Director is that a Regional Director has oversight over the entire region and all of its Division Directors and Consultants whereas a Division Director would typically have only a specific set of Consultants over whom they had oversight.

¶ 126 She explained that there was also an Area Vice President who had oversight of the Regional Directors from multiple offices usually within a geographic area.

Consultant Agreements

¶ 127 Ms. Kelly testified about the Consultant agreements that the Respondent signed. She explained that the reason the Respondent signed an agreement in 2002 was because that was when the Member joined the MFDA.

¶ 128 With respect to the Schedule G document that the Respondent signed, Ms. Kelly explained that that was the document an Approved Person was required to sign when they applied for Membership with the MFDA. She confirmed that in signing that document the Approved Person agreed to be bound by and observe the MFDA's Rules which include staying fully informed of those Rules whenever they were amended or changed.

Member's Police and Procedures

¶ 129 With respect to the Member's policies and procedures, Ms. Kelly testified that Consultants or advisers are and were expected to be fully aware of all of the Member's policies and procedures.

¶ 130 She said those policies and procedures are all available online through the Member's Intranet platform – "Advantage Plus". Prior to the early 2000s, she said she believed those policies were available in print through the regional office.

¶ 131 She testified that updates to policies and procedures are communicated to advisers by e-mail or a communication that would be posted through the Advantage Plus website.

¶ 132 Ms. Kelly testified about the content of the Member's policies and procedures manuals for the period 1997 to 2011. She said that from 1997 to 2005 the manual was called the "Business Standards Manual". In July 2005, its title changed to: "Compliance Manual".

Outside Business Activities

¶ 133 She testified that the Member had a policy regarding outside business activities that was set out in each version of the policies and procedures manual.

¶ 134 For example, in 1997, the manual stated:

> 8. A Representative's outside business activities must be disclosed to the Region Manager and the securities commission. Your mutual funds license stipulates that you will work full-time with Investors Group. If this is not the case, the Securities Commission may revoke your license or place restrictions on it.

¶ 135 In 2000, the manual stipulated:

> 7. A Consultant's outside business interests must be disclosed to the Regional Director and the Securities Commission. Your mutual funds registration stipulates that you will work full-time with Investors Group. If this is not the case, the Securities Commission may revoke your license or place restrictions on it.

¶ 136 Later in that document the policy stipulated, with respect to tax preparation:

> It is against corporate policy for you to prepare tax returns for clients. ***Leave tax preparation to the professionals.*** This policy is necessary to limit your personal liability, corporate liability and ensure that you have the time necessary to fully serve clients.

¶ 137 It then gave examples of reasons for this specific prohibition. Ms. Kelly testified that advisers were told that they were not allowed to have an outside activity relating to tax preparation because, as the manual said, among other things, there could be a potential conflict of interest with respect to the preparation of those

services.

¶ 138 She said that at a certain point in time a decision was made that with the proper disclosures and restrictions in place a tax preparation outside activity would be permitted as long as it was appropriately approved and disclosed to all parties similar to the approval of every outside business activity.

¶ 139 The 2002 version of the policies and procedures manual again stipulated:

> 7. A Consultants' outside business interests must be disclosed to the Regional Director and the Securities Commission. Your mutual funds registration stipulates that you will work full- time with Investors Group. If this is not the case, the Securities Commission may revoke your license or place restrictions on it.

¶ 140 The version of the manual dated November 10, 2011, discussed outside business activity at section 3.6. That section is identified as having been updated on May 28, 2010. It read as follows:

> 3.6 Outside business activity
>
> **Updated May 28, 2010**
>
> As an Investors Group Consultant, it is expected that your time and energy will be devoted to the ongoing servicing of clients and building your business. As a professional, you have responsibilities to maintain high standards of conduct as well as protect the confidentiality of client information and avoid potential conflicts of interest. It is therefore strongly recommended that Consultants focus their commitment to their primary career as an Investors Group Consultant versus seeking other employment activities.
>
> In the event, you wish to seek another business/employment activity, you must obtain prior approval from your Regional Director and Vice-President, Financial Services responsible for that region. From a regulatory and compliance perspective, outside business activities are potential risk areas for a number of reasons. The Regional Director will consider the following, among other factors when granting approval:
>
> - Potential conflict of interest (real or perceived) - a conflict exists when there is potential for a Consultant to place their own personal interest ahead of the client's interest
> - Client confusion – clients could potentially misunderstand who the Consultant represents in their outside business. Therefore, there is potential for liability to Investors Group for activities of the outside business
> - Time commitment and potential for client servicing impact
> - Consistency with standards of conduct expected of a Consultant
>
> In the event that approval is granted, you will be expected to meet certain requirements including disclosure to the securities commission through NRD (within 2 business days of commencing the activity/occupation) to your Region Coordinator, who will facilitate the updating of your NRD record. In addition, any changes (e.g. number of hours, position, cessation of the outside business activity, etc.), must be reported to your Region Coordinator within 2 business days.
>
> In certain cases (e.g. tax preparation services), a disclosure letter acknowledging that Investors Group is not involved in the operation or supervision of the Consultant's outside business activity and is not responsible for any losses or errors that may result, will be required.
>
> If it is determined that a disclosure letter is appropriate, Consultants are notified and are provided with an approved disclosure template which must be used in all cases. Consultants are to use these letters when a client of Investors Group is also involved with the Consultant in the outside activity. It is not necessary that the Consultant provide the letter to clients who are not involved with the activity.
>
> Consultants are to provide their Regional Director with a copy of each disclosure letter which is sent to clients and retain a copy in the Consultant's client file. The Regional Director copy of the disclosure letter is to be maintained."

¶ 141 Ms. Kelly testified that after November 2011 the Member continued to have a policy regarding outside business activities and that that policy and process has essentially remained the same from 2011 to the present.

¶ 142 With respect to the process as to how an adviser gets an outside business activity approved, for the period ending 2017, Ms. Kelly testified that the Consultant was required to complete an outside disclosure form and have it approved by the Regional Director. Once the Regional Director approved the form, approval would have to be obtained from either the Area Vice President or Senior Vice President depending on who had oversight at the time period.

¶ 143 The request would then be submitted to the Member's registrations team within the compliance area to be reviewed and approved. Following that it was submitted to the Securities Commission via the National Registration Database for approval. Once that approval was obtained it was communicated back to the Consultant together with any requirements relating to the activity such as disclosure letters or other restrictions.

¶ 144 Ms. Kelly testified that an outside business activity would not have been approved if there were concerns regarding conflicts of interest such as, for example, investing with clients, borrowing from or lending to clients, or being a power of attorney or an executor or a trustee for clients. She said approval would also not be given if there was a concern with respect to whether clients would be confused as to whom the Consultant was representing while undertaking that activity, namely whether it was being conducted by the firm or through their own personal outside activity.

¶ 145 Consideration would also be given to the time commitment involved and the Consultant's ability to undertake both the outside activity and maintain their primary relationship with the Member.

¶ 146 She confirmed that once approval for an outside business activity was obtained it did not need to be obtained again each year unless there were changes to the activity in which case approval needed to be sought for those changes.

Conflicts of Interest

¶ 147 Ms. Kelly then described the Member's policy with respect to conflicts of interest. Generally, she testified, advisers were to avoid them whenever possible. If it were not possible to avoid a conflict, then the policy required that the adviser disclose it to the Regional Director and or compliance so that a business decision could be made with regards to how to proceed going forward.

¶ 148 In 1997 the Member's policies and procedures manual required the following with respect to conflict of interest:

> 4. Avoid any perception of a conflict of interest.
>
> You must **act in the best interests of the client at all times**. Never allow your personal interests to conflict – or even appear to conflict – with the best interests of the client. (Please refer to the section on Investors Group's conflict of interest policy.) All recommendations must be objective and designed to suit the needs of the particular client. If you are recommending the services of other professionals such as a lawyer, their ability to provide proper service to the client should be the major consideration.
>
> CONFLICT OF INTEREST
>
> As a professional, there is a need for real and perceived integrity in all dealings with clients. The best interests of the client must always be the first consideration. A number of situations may arise, resulting in a potential conflict of interest for a Representative. **You must avoid allowing your relationship with a client to produce an actual or perceived conflict between your personal interests and those of the client**.
>
> The following are examples of situations that could give rise to a conflict of interest and are to be avoided:
>
> ...

Outside Activities With Clients.

You should avoid business relationships with clients other than those involving the products and services offered by Investors Group, for example, buying or selling property or other items from or to a client.

These actions can affect your dealings with the client causing a potential conflict of interest.

¶ 149 In 2000, the procedures manual stipulated:

4. Avoid any perception of a conflict of interest.

You must **act in the best interests of the client at all times**. Never allow your personal interests to conflict – or even appear to conflict – with the best interests of the client. (Please refer to the section on Investors Group's conflict of interest policy.) All recommendations must be objective and designed to suit the needs of the particular client. If you are recommending the services of other professionals such as a lawyer, their ability to provide proper service to the client should be the major consideration.

...

CONFLICT OF INTEREST

As a professional, there is a need for real and perceived integrity in all dealings with clients. The best interests of the client must always be the first consideration. A number of situations may arise, resulting in a potential conflict of interest for a Consultant. *You must avoid allowing your relationship with a client to produce an actual or perceived conflict between your personal interests and those of the client.*

The following are examples of situations that could give rise to a conflict of interest and are to be avoided:

...

Outside Activities With Clients

You should avoid business relationships with clients other than those involving the products and services offered by Investors Group, for example, buying or selling property or other items from or to a client. These actions can affect your dealings with the client causing a potential conflict of interest.

¶ 150 The 2011 version of the Policies and Procedures Manual which was updated as of May 28, 2010, started with defining conflict of interest as follows:

Any relationship that is, real or perceived to be, not in the best interest of the client or organization. A conflict of interest could prejudice a Consultant's ability to perform his or her duties and responsibilities, objectively and in good faith.

¶ 151 The manual then went on to cite MFDA Rule 2.1.4 which stipulates that Consultants must be aware of the possibility of conflicts of interest and how to deal with them.

¶ 152 In February 2011 the manual was updated to identify a number of specific situations that might result in a potential conflict of interest for a Consultant and which must be avoided. In particular, the manual identified the following prohibited activity:

...

Investing with clients

Investors Group Consultants are not permitted to become involved with clients in investment arrangements where the Consultant and the client invest together, except for members of your immediate family. Examples of inappropriate investment arrangements would be joint accounts with clients, investment clubs or investments involving client funds that are to be directly or indirectly managed by the Consultant. This prohibition also includes accounts held at other dealers.

¶ 153 In the section relating to conflicts of interest, the manual also identified that Consultants should avoid business relationships with clients, i.e. investing in a business, buying or selling property or other items from or

to a client. It stated that these actions could cause a potential conflict of interest and might constitute outside business activities.

¶ 154 Ms. Kelly testified that the requirements in the compliance manual with respect to conflicts of interest have substantially stayed the same from 2011 forward, namely that conflicts of interest should be avoided and investing with clients is prohibited.

¶ 155 She also testified that a Consultant must not conduct securities related business outside of the Member. She referred to the 2011 version of the Policies and Procedures Manual which stipulated that all of a Consultant's securities related business must be done through the Member and all compensation must flow through it. The manual specifically stated that Consultants cannot engage in any securities related activities outside the Member nor can they receive payments from any other firm, explaining that this provision is intended to make sure that the Member is able to supervise all of the securities related activities of its Consultants.

¶ 156 Ms. Kelly testified that this requirement has continued from 2011 to the present.

The Respondent's disclosure of outside business activities

¶ 157 Ms. Kelly testified that the Member has no record of any outside activities having been disclosed by the Respondent.

¶ 158 She described the steps the Member took to determine whether the Respondent had made such disclosure, noting that the Member reviewed: the Respondent's Consultant file at the Member's head office; the disclosures with respect to outside activities that the Respondent made on the Member's annual questionnaires; and the information he provided to be submitted to the National Registration Database. Based on this, she testified the Member was unable to locate any disclosures with regards to outside activity, made by the Respondent.

Annual Questionnaires

¶ 159 Ms. Kelly explained that a questionnaire or Consultant certificate must be completed by every Consultant annually to evidence the Consultant's understanding of the Member's Policies and Procedure Manual. The reason that the questionnaire is to be filled out annually is so that the Member has an up-to-date record of the Consultant's activity and to allow the Consultant an opportunity to bring forward any changes that have happened in the last year.

¶ 160 She testified she believed that the annual questionnaire was implemented starting around 2005.

¶ 161 Enforcement Counsel referred Ms. Kelly to the annual questionnaires which the Respondent completed for the years 2006 to 2017.

¶ 162 Ms. Kelly testified that the Respondent's answers in these questionnaires regarding outside activities, indicated to the Member that he had nothing to disclose.

¶ 163 Enforcement Counsel took Ms. Kelly to the following question in every annual questionnaire he filled out, for 2006 to 2017:

> 2c) Have you disclosed and reported all Outside Activities, including volunteer positions, to Compliance for filing on the National Registration Database (NRD)? If you don't engage in any outside activity, select Not Applicable. If no, please describe the outside activity. (Note that previously undisclosed activities should be brought to the attention of Compliance immediately.)

¶ 164 Ms. Kelly testified that the Respondent's answer to this question every year was: "not applicable".

¶ 165 She also testified about the excerpts from the National Registration Database acknowledgement forms for the years 2008-2015 that were attached as exhibits to the West Affidavit.

¶ 166 Ms. Kelly testified that the excerpts from the Respondent's NRD record indicated that: Mr. Kazina worked with the Member full time; his immediate supervisor was the Regional Director, Mr. Wayne Cadogan; and he was employed with Great West Life as an insurance provider. Beyond Great West Life and Investors

Group she said, there were no other activities disclosed.

¶ 167 She said that these documents were contained in the Respondent's Consultant file which was held at the Member's head office.

¶ 168 She explained that the NRD documents were sent out by the Member's registration team for Consultants to complete and review with their region, in order to provide updates to their NRD record. She explained that the questions posed in the NRD document asked advisers if there had been changes to their information, whether personal or business. She noted that, for example, on the document the Respondent signed in 2008, in response to the question: "*a change has been made to my current employment (e.g. I am currently engaged in an outside business activity or dual occupation that was not previously disclosed)*" the Respondent answered: "*no*" and that he provided the same answer on each subsequent acknowledgement for every year following until 2015.

¶ 169 Ms. Kelly testified that that answer meant that the Respondent was also advising the Member that he did not have any outside activities.

¶ 170 Finally, Ms. Kelly confirmed that the Member sent out client letters to all of the Respondent's client base with questions about any payments they may have made to the Respondent regarding Eagle Franchising. She said the Member received responses from 10 clients, none of whom made payments to Eagle Franchising.

¶ 171 She also confirmed that the only clients to whom the Member paid compensation regarding Eagle Franchising or KFS were clients MG and JG.

Cross-Examination

¶ 172 On cross-examination, Ms. Kelly testified that Consultants received annual training sessions regarding all of the updates and changes in the Policies and Procedures Manuals.

¶ 173 With respect to the Respondent's questions about training conducted by the Member, Ms. Kelly testified that it was her understanding that there was mandatory training that needed to be completed on an annual basis and that training material was primarily provided by the Compliance department and disseminated in various forms to Consultants.

¶ 174 In answer to the Respondent's question about whether the Member strictly adhered to its policies, she said that to the best of her knowledge the policies were expected to be maintained by the Consultants but she could not say for sure whether or not every Consultant followed them.

¶ 175 She confirmed that outside business activities could be allowed if they were appropriately approved and any restrictions maintained

¶ 176 The Respondent asked Ms. Kelly a number of questions about the annual questionnaires.

¶ 177 Ms. Kelly testified that by answering "N/A" on the annual questionnaire having regard, for example, to question 2c in the 2017 version of that document, a Consultant was indicating that they had no outside activities.

¶ 178 She testified that question 2c as it appeared in the later version of the questionnaire was clarified so that Consultants could provide an update, meaning that if they had previously disclosed an outside activity they did not need to disclose it again. She confirmed that "previously" could go back as far as a point in time when the Consultant first started with the Member and disclosed a secondary occupation. She said that the requirement to disclose an outside activity went back to at least 1995.

¶ 179 She was not able to say how much training or explanation the Member provided to Consultants in 2002 when it joined the MFDA.

¶ 180 She testified that the requirement to disclose an outside activity did not change once the firm became a Member of the MFDA. The requirement to disclose an outside activity, she testified, remained consistent.

¶ 181 She said that Consultants are advised every year to report and update their NRD records regarding disclosure of outside activities.

¶ 182 She confirmed that for the period 1991 to 2017 if a Division Director became aware of a Consultant with a secondary occupation they should advise the Regional Director and if they became aware of an undisclosed activity they should report that to Compliance.

¶ 183 Ms. Kelly testified that the information that the Member reviewed in looking for Mr. Kazina's disclosure of outside business activities came from the Regional office. She was not able to identify the names of any specific individual who supervised the Respondent and whose files would have been searched to look for information about him.

¶ 184 When asked about the hiring process, Ms. Kelly testified that she had no information about: what training Directors received regarding how to conduct an interview; when the Member's policies and compliance manuals were explained to prospective Consultants; or what notes or documentation of the interview were made or retained in the new hire's personnel file.

¶ 185 She testified that to the best of her knowledge the Member did not have a formal policy about what happens with a Consultant's personnel files when the Consultant moves from one Director to another.

¶ 186 She confirmed that Consultants are self-employed.

Re-examination

¶ 187 On re-examination Ms. Kelly testified that generally the Member's policies and procedures apply to all registrants regardless of whether their status is as an employee or an independent contractor.

¶ 188 She also testified that it would be important for a branch manager to have a working knowledge of the Member's policies and procedures, to be able to provide guidance to the Consultants who reported to them.

¶ 189 In response to questions from the Panel, Ms. Kelly further described the efforts the Member undertook to search for any evidence that the Respondent had reported outside business activities. She said that the Member reviewed all the information available to it through its systems. This included looking for evidence of an approval request made by the Respondent to his Regional Director and evidence of that request having been sent to Compliance for review and subsequently for submission to the NRD.

¶ 190 She said such information would have been found in the Consultant's file and in 2011 when the NRD came into effect the information would also have been in the NRD.

¶ 191 She reiterated that having reviewed its files relating to the Respondent from the time he was hired to the time he retired, the Member found no information regarding any outside business activities being carried on by him.

¶ 192 For clarification, the Panel asked Ms. Kelly whether, if an outside business activity had already been disclosed in a prior year a Consultant had to disclose it again. Ms. Kelly stated that the requirement changed over the years. Initially disclosure was expected to be made annually.

¶ 193 She testified that she believed there was a change that said a Consultant was only required to provide information about any outside activities that had not been previously disclosed and approved. That is, if they started something new that was not yet approved, they needed to disclose it. She believed that that change occurred around 2015, however, she said that the change only related to the annual certification process required by the Member but that the requirements of the NRD form did not change in the same manner.

Evidence of Wayne Cadogan

¶ 194 The last witness Staff called to testify was Mr. Wayne Cadogan.

¶ 195 Prior to his retirement in 2018, Mr. Cadogan was a Regional Director in the Member's Winnipeg downtown office -a position which he held for 20 years. Before becoming a Regional Director he was a Division Director for about 8 years and before that he worked for the Member as a Consultant. In total, he worked for the Member for 30 years and held branch manager registration for approximately 28 years.

¶ 196 As a Regional Director, he testified, his role was to "grow the office and keep it compliant", acting as a conduit from the Member's head office to ensure that the Winnipeg downtown office was run according to the

MFDA rules.

¶ 197 He said over the years he supervised anywhere from 60 to 100 people, annually.

¶ 198 He explained that the difference in the roles of a Division Director and a Regional Director was that the Regional Director is in charge of the entire office while the Division Director was in charge of a team within the office. The Division Director would have the first line of compliance responsibility for the team members and the Regional Director would oversee the Division Directors.

¶ 199 Mr. Cadogan confirmed that at some point the Respondent was a Division Director working under him and that Division Directors are responsible for servicing clients, hiring and training new advisers. They also have compliance responsibilities.

¶ 200 His understanding of the Member's requirement regarding outside business activities was that some outside business activities were allowed but an adviser had to declare and obtain approval or permission from head office in order to conduct the activity.

¶ 201 Every year there was an attestation whereby an adviser had to declare if they had any outside business activity. As Regional Director he would distribute the questionnaires and forward them back to head office for approval or disapproval

¶ 202 He said that he first became aware of the Respondent when the Respondent transferred to his office in approximately 2000. He was the Respondent's Regional Director from that time until the Respondent retired in 2017.

¶ 203 Although they worked together in the same office, Mr. Cadogan said he was not aware that the Respondent had any outside business activities.

¶ 204 He testified that he was not aware of an entity called Kazina Financial Services nor of one known as Eagle Franchising and Business services.

¶ 205 He said he first became aware of those activities when he received a client complaint around the time that he himself was retiring.

¶ 206 He confirmed that the complaint was from CG who was the daughter of MG and JG.

¶ 207 He testified that prior to receiving the complaint he had no knowledge that individuals were providing money to the Respondent in relation to KFS or Eagle Franchising.

Cross-examination

¶ 208 On cross examination, the Respondent asked Mr. Cadogan about the hiring processes that he followed when recruiting new Consultants and in particular whether during the hiring process he reviewed the Member's policies procedures and compliance manuals with the prospective hire.

¶ 209 Mr. Cadogan's evidence was that there was no need to do that prior to making a decision to hire but that that was done after a Consultant had been offered and accepted a position.

¶ 210 He confirmed that he believed that as Regional Director he had to sign off on Consultants' Annual Attestations and if there was an outside business activity declared he would review that with the Consultant.

¶ 211 The Respondent asked Mr. Cadogan whether there were any secondary occupations being conducted in the office where he was Regional Director to which Mr. Cadogan replied that there were not because he did not think secondary occupations would get approved.

¶ 212 He testified, however, that income tax returns were an outside business activity that could have been approved under a certain set of rules laid out by the Member.

¶ 213 He recalled there was one person who completed tax returns at the office where he was Regional Director and that he could say with certainty that that person had declared the activity and had received approval to conduct it.

¶ 214 Mr. Cadogan confirmed that if a Division Director became advised of a secondary occupation being

carried on by a Consultant that information would have to be declared immediately and approved by head office.

¶ 215 He denied being advised by a Division Director about a newly hired Consultant working at a secondary occupation in that Director's division.

¶ 216 Mr. Cadogan confirmed that everyone was asked to complete an attestation on an annual basis.

¶ 217 The Respondent put to Mr. Cadogan that he was baffled as to how, having carried on a secondary occupation since 1991, no Director had any knowledge of that occupation to which Mr. Cadogan responded by asking the Respondent whether he declared it.

¶ 218 The Respondent put to Mr. Cadogan that he had declared it in 1991 when he was hired, to which Mr. Cadogan replied that he did not hire the Respondent and that the information would have to be declared in the annual attestations in any event.

¶ 219 The Respondent also asked Mr. Cadogan whether as Regional Director he ever "bent" the Member's policies for certain Consultants to which the witness said he could not bend them because he had no authority to do so.

¶ 220 In response to the Respondent's questions about training, the witness said that whenever there were new directors appointed he did a lot of training for them.

¶ 221 In particular he recalled that when the Respondent first became a Division Director he attended a training session held in Banff.

¶ 222 He disagreed with the Respondent's suggestion that when the Respondent became a Division Director the training was rushed. His evidence was that he spent an enormous amount of time with everyone trying to train them and get them up to speed - that was his job.

¶ 223 The Respondent asked Mr. Cadogan a number of questions about a company Mr. Cadogan had incorporated and a timeshare that that company owned and which Mr. Cadogan offered to others in the office to use for themselves or for clients. Mr. Cadogan's evidence was that that activity was declared to and approved by head office.

Witnesses called by the Respondent

Danielle Tetrault

¶ 224 Ms. Tetrault was the first witness the Respondent called as part of his defence.

¶ 225 She has been employed with the Member since 1999.

¶ 226 She became an Assistant Vice President overseeing a Compliance team in or around 2015 and in November of 2017 she became the Chief Compliance Officer for the Member and continues to hold the role.

¶ 227 She testified she was familiar with the Member's written policies and procedures.

¶ 228 She was not employed at the Member in 1991 and was therefore not familiar with what procedures or compliance manual may have been in place at that time. She confirmed that in 1997 there was a compliance manual in place, called a Business Standards Manual.

¶ 229 With respect to the process for approving outside activities she said for certain that in 1997 outside activities were to be disclosed to the Regional Director for approval and disclosure to the Securities Commission.

¶ 230 She said there would have likely been some outside activities disclosed during the period from 1997 until 2002 when the MFDA became a self-regulatory organization.

¶ 231 She confirmed that there are a number of Consultants who have received approval to do tax preparation as an outside activity

¶ 232 She testified that from 2002 until 2018 Regional Directors and Division Directors were considered

registered supervisors of Consultants and as such would have had notes and files to evidence their supervision.

¶ 233 The Respondent put to her that because he had eight different directors at different levels there could be eight different files on him to which she replied that she could not say for sure. The only thing she could say for certain was that there would be a file regarding him at head office where a file was maintained on every Consultant.

Esther Bast

¶ 234 Ms. Bast started employment with the Member in April of 1990, working in the head office and Client Relations. She was promoted to the marketing department for a year following which she became a Consultant at one of the Member's Winnipeg offices. Within two years she was promoted to a Division Manager role and then in 1999 to Regional Manager at a Winnipeg office.

¶ 235 In 2001 she was moved and promoted to be a Regional Manager in southern Saskatchewan. She became a Senior Vice President in 2004 which position she continued to hold as of the date of her testimony.

¶ 236 She confirmed that as a Regional Manager she was a branch manager and would have definitely been aware of the Member's compliance procedures.

¶ 237 In response to the Respondent's question as to whether any of the Member's policies and procedures were "bent" for any high performing Consultants she said: not to her knowledge.

¶ 238 She also denied ever coming into the Respondent's office and seeing tax returns on his desk.

Danielle Ayers

¶ 239 Ms. Ayers joined the Member in 1991 starting in the mortgage division. She later switched into the Member's sales division where she became an Area Director of Sales. Eventually in the mid-2000s she worked in what is now called the "IG university" where she was responsible for leadership training and development.

¶ 240 From around 2006 until 2017, she moved back into the sales side to partner with Senior Vice Presidents and Regional Directors to help them manage production within their regional offices. From 2017 to the present she has acted as a business coach to the private wealth Consultants within the Member to help them run their practices as efficiently and effectively as possible.

¶ 241 She has never worked in the Compliance division nor been a branch manager.

¶ 242 When asked whether she recalls making a comment in a meeting with Division Directors about rules being bent or relaxed for high performers she said that did not sound like anything she would say. Her evidence was that she understood rules are there for a reason and that she knows her role in the firm is to be aware of the rules and follow them to the best of her ability.

Clint Mager

¶ 243 Mr. Mager began employment with the Member in 2012 working as a Consultant for a couple of years and then transitioning to become an associate.

¶ 244 The Respondent asked Mr. Mager questions about when he first began working for the Member and whether when he signed his agreement with the Member he was under the impression that he could continue to work for another company. Mr. Mager said categorically, that he was not under that impression.

¶ 245 In cross-examination Staff asked Mr. Mager to explain his understanding of the Member's policies regarding outside business activities and the process for getting approval for same. He answered that he understood a Consultant had to fill out paperwork and go to their Director to get approval for any outside activity.

¶ 246 He confirmed that once he became registered with the Member he stopped doing other work he had previously done. He was approved to be registered a couple of days after he confirmed that he was no longer working at any other activity.

Kathleen Baird

¶ 247 Ms. Baird started with the Member in 1994. She became a Division Director in 1999 and stayed in that role until 2014. She stepped back into the Division Manager role in 2016 and continued to hold that position as of the time of her testimony.

¶ 248 She testified that she has knowledge of the Member's written policies procedures and compliance matters and that to the best of her knowledge those policies and procedures have always been enforced.

¶ 249 She confirmed that the Respondent was in her division for a number of years. She testified that when he joined her division she did not recall receiving a personnel file relating to him from the previous Director.

¶ 250 With respect to the preparation of tax returns by advisers her evidence was that you had to have a designation and be approved by head office in order to prepare tax returns for clients. She recalled that in the St. Mary Avenue office there were two individuals who had received that approval; neither of whom was the Respondent.

¶ 251 With respect to outside business activities, she testified that she would have conversations with Consultants about their outside business activities but she could not recall having any such conversations with the Respondent.

Michael Buhr

¶ 252 Mr. Buhr started working with the Member in June of 1987. In 1989 he became what was then called a Division Manager and continued to act as a Division Director in various offices in Winnipeg until March of 2017. He confirmed that he had knowledge of the Member's policies, procedures and compliance requirements.

¶ 253 Mr. Buhr was the individual who hired the Respondent in 1991. He testified that he has known the Respondent since the late 1970s. The Respondent was once a client of his. When he hired the Respondent he knew that the Respondent was an accountant and that the Respondent had a small accounting practice.

¶ 254 Mr. Buhr recalled that during the interview process when he hired the Respondent, they discussed the Respondent's accounting practice. He recalled that the Respondent wanted to continue running his practice. He confirmed that he believed the corporate standard at the time was that if a Consultant spent less than 10 hours per week on an outside business that would be satisfactory.

¶ 255 His evidence was that in 1992 there was no formal process for having an outside business activity approved but Consultants did have to inform their Division Manager and the Regional Manager who was in charge of the branch. His recollection was that that process would have changed in the late 1990s or early 2000s as compliance within the company changed and in the late 1990s or early 2000s an outside business activity application form was created that had to be signed off by the Regional Director on an annual basis.

¶ 256 On cross examination Mr. Buhr testified that after 2001 he did not work in the same office as the Respondent and his subsequent contact with the Respondent was fairly limited. He said that he did not really give any thought as to whether the Respondent was still carrying on his accounting practice.

¶ 257 He also testified that if someone had been previously approved for an outside business activity, the Member's policies and procedures required that they still had to confirm on an annual basis that they were conducting their outside business activities and that Consultants had an annual obligation to disclose outside activities on their NRD application.

¶ 258 He testified that although he was aware that the Respondent had a small accounting practice at the time he was hired, he was not aware of any changes to that business or of any further business activities the Respondent conducted such as, for example, Eagle Franchising; nor was he aware that the Respondent was obtaining investments or ownership payments from clients or other individuals with respect to KFS or Eagle Franchising.

¶ 259 He testified that based on his understanding of the Member's policies and procedures, if the Respondent had taken on a new outside business activity after being hired he would have had an obligation to advise the Member accordingly.

¶ 260 On re-examination by the Respondent, Mr. Buhr confirmed that during the period that he was the

Respondent's Division Director, he did not believe there was a practice in place to complete an outside business activity application form.

Douglas Rea

¶ 261 Mr. Rea started working with the Member in 1990. He acted as a Division Manager hiring and training for a couple of years and then went back to being an adviser which role he continued to perform at the time of his testimony.

¶ 262 He and the Respondent worked together in the same Division under Mr. Buhr - for about five or six years.

¶ 263 He testified that he did not have any knowledge that during that time the Respondent was preparing tax returns.

¶ 264 On cross examination by Staff, he testified that certainly from 2001 onward there was a requirement to disclose to and seek approval from the Member with respect to conducting any outside business activities.

Treena Nault

¶ 265 Ms. Nault started working at the Member in 1992 in various roles at its head office. In 2005 she became a Consultant and started running her own practice. She was also a Division Director for a couple of years and currently works as a financial adviser.

¶ 266 She testified that she was not aware of any circumstances where the Member did not follow its written policies, procedures and compliance requirements.

¶ 267 She denied ever hearing Ms. Ayers or anyone else say anything to the effect that the Member's policies were sometimes relaxed for "hard performers".

¶ 268 She was not aware of any Consultants that had secondary occupations. She said she thought that at least one adviser's team completed tax returns for clients but on cross examination she confirmed she was not that adviser's supervisor.

Royle Derbitsky

¶ 269 Mr. Derbitsky joined the Member in January 1991 as a Consultant. At the time of his testimony he had recently transitioned into an associate role.

¶ 270 He confirmed that when he went through the interview process there was no discussion about the Member's policies and procedures.

¶ 271 He said that when he joined the Member he considered himself to be self-employed. He said that he never took on a secondary occupation although he was a volunteer umpire in table tennis and was aware that that was considered to be an outside business activity by the Member.

¶ 272 He said he was aware of a Consultant at the Member who sold tax software programs and that in fact he purchased such a program.

¶ 273 He testified that he used that program to prepare tax returns for clients and other people but that ultimately he stopped doing that work sometime around 2003 or 2004 because of the requirement to have the activity approved by the Member.

¶ 274 His evidence was that he never reported the activity to any of the Directors in the office but that was because the Member's policy clearly said that he should not be doing the work and since he did not want to be in conflict with the Member in any way, he stopped doing the work.

¶ 275 He testified that he thought that some of the Directors in the St. Mary Avenue office may have had some limited knowledge of Consultants preparing tax returns but no direct knowledge of that happening.

¶ 276 On cross examination by Staff he confirmed that he reported his volunteer activity as a table tennis umpire to the Member as an outside business activity and that the Member had certainly communicated the importance of reporting an outside business activity.

Rob Taylor

¶ 277 Mr. Taylor started with the Member in October of 1990 as a Consultant. In 1996 he became a Division Manager and in the last 12 or 15 years has gone back to being a Consultant. In reflecting on the hiring process he said he did not recall anything during the interview being explained about the Member's policies and procedures.

¶ 278 He testified that the Member did not offer a lot of training about Compliance in around 1990. He said training has become more detailed especially in the last 5 years.

¶ 279 He said that he was approved by the Member to complete tax returns and that he obtained that approval right from the beginning. To get that approval he had to file an outside business activity form every year which he said he has done ever since 1990. He said he probably did not fill out the first report until 1991 because he didn't start until late October of 1990.

¶ 280 His evidence was that he was one of six individuals in the office who chipped in to purchase a tax software package license and they each obtained activation codes. He believed that the Regional Director Wayne Cadogan was probably aware that he and others were doing taxes. He recalled that the Respondent was also doing taxes at that time in the same office.

¶ 281 On cross-examination, Mr. Taylor agreed with Staff that the Member had a process whereby a Consultant had to both provide disclosure to the clients and seek approval from the Member each year regarding conducting outside activities.

¶ 282 With respect to preparing tax returns for clients, he testified that for at least the last 20 years the Member has required Consultants to fill out a form indicating that they were assisting clients in preparing tax returns and they had to disclose to the client that they were not preparing tax returns through the Member.

Lindsay McLenehan

¶ 283 Ms. McLenehan testified that she worked with the Member from 2016 to 2018. She was interviewed for her job by Wayne Cadogan and hired by Joe Funk. She had knowledge of the Member's policies and procedures.

¶ 284 The Respondent asked the witness questions about an individual who, she confirmed, was a client of her husband. He showed her an email which Mr. Funk had sent him about this person and asked her whether she could say how Mr. Funk knew that the Respondent was familiar with the individual. Ms. McLenehan said she had no information about that.

Joe Funk

¶ 285 Mr. Funk worked with the Member from 2011 to 2019. He started out as a Consultant and then became a Division Director. He stepped back into the Consultant role around 2015 to 2018.

¶ 286 He recalled he was Mr. Kazina's Division Director at some point.

¶ 287 He did not recall whether he received the Respondent's personnel file from Jeff Schewe who was the Respondent's Division Director just before the Respondent was assigned to Mr. Funk but presumed Mr. Schewe passed on to him whatever he might have had.

¶ 288 Mr. Funk testified that he was not aware of anyone in his Division who was doing tax returns or had a secondary business in the St. Mary Avenue office.

¶ 289 The Respondent asked Mr. Funk about the email he had shown the previous witness, where Mr. Funk had asked the Respondent a question about a certain individual but Mr. Funk had no memory of who the person was or how he was given the individual's name.

Vincent Stycke

¶ 290 Mr. Stycke worked with the Member from 2000 to 2011. During that time he spent seven years as a Division Director.

¶ 291 He stated that he and the Respondent went through training together to become Division Directors.

¶ 292 His recollection was that they did not receive a lot of training from Mr. Cadogan in that regard. He said the only training he received was from taking the branch manager's course.

¶ 293 When asked by the Respondent whether rules were followed with respect to secondary occupations and tax preparation he said that while he could not speak for the whole office he could speak for himself. He testified that the people for whom he was responsible as a Manager filled out a form every year in which they were required to report any outside business activity.

¶ 294 He said that he believed Jeff Schewe was one of the people in his division who prepared tax returns and that he believed Mr. Schewe submitted annual attestations stating that he was doing that work.

¶ 295 He confirmed that he was aware that the Respondent had a secondary occupation and prepared tax returns, however, because he was not the Respondent's supervisor, he did not discuss that fact with any of the other directors.

¶ 296 He said he prepared tax returns but that he did not declare that on his annual attestation because he was only preparing them so that his clients could understand the benefits of RRSP loans and not for the purpose of submitting the returns to the government.

¶ 297 On cross examination he confirmed he was just using the tax software as an extension of the advice he was giving as an Approved Person of the Member and that he did not process tax returns for the purpose of filing them with the CRA.

¶ 298 He also confirmed that as a Division Director he reviewed the annual attestations of the people that he supervised and that one of the things he looked for was whether or not those people had outside business activities. If somebody had marked off that they had an outside business activity it would be his responsibility as a Division Director to find out what the roles and responsibilities of the individual were in that regard.

¶ 299 On re-examination by the Respondent, Mr. Stycke said he believed that the people in his Division who prepared tax returns completed annual attestations which disclosed that information.

Howard Kitchen

¶ 300 Mr. Kitchen began working with the Member in 1988. He was a Division Director from 1992 until 1998 and then went back into the Consultant role which he continues to perform.

¶ 301 He testified that when he was a Division Manager he kept a personnel file on each of his Consultants. When he left to go to a different position those files would have been forwarded to the next Division Manager.

¶ 302 Thinking as far back as 1988, his recollection was that secondary occupations such as preparing tax returns were allowed but had to be approved. He said he understood there were people in his office that had outside business interests but they always had to tell the Member about them.

¶ 303 He testified that he was not aware that the Respondent had an outside business activity and prepared tax returns. They were not in the same Division, however. His recollection was that there were approximately 3 Consultants in his division who prepared tax returns.

¶ 304 On cross-examination by Staff, Mr. Kitchen confirmed that he never had a supervisory role with respect to the Respondent and that they were managers at the same time working in different offices.

Jeff Schewe

¶ 305 Mr. Shewe started with the Member in 2003 as a Consultant. He was a Division Director from 2009 until approximately 2015. He went back to being a Consultant in 2016 and then worked as an associate until March of 2022.

¶ 306 He could not recall the exact time when he was the Respondent's supervisor. He testified that it was for two to three years, sometime in the period from 2009 to 2016.

¶ 307 He testified that with respect to the Member's rules regarding secondary occupations and completing

tax returns he did not believe the rules were always adhered to.

¶ 308 His reason for saying this was because of his own experience. He explained that around 2004 he prepared tax returns for clients for which he did not receive any payment. He therefore did not consider the activity to be an outside business activity. However, he testified that it was brought to his notification about 6 years ago that it was considered to be an outside business activity.

¶ 309 He said he then applied for outside business activity approval, retroactively. The process he had to follow included contacting and logging everything with every client for whom he had ever prepared a tax return going back to 2004. He was told that doing tax returns is considered to be an outside business activity and that when he did that activity without receiving the Member's approval he was acting contrary to the rules of both the MFDA and the Member.

¶ 310 His evidence was that he was aware that the Respondent was doing tax returns but he did not know the scope or particulars of what the Respondent was doing. He conceded that he did not ask questions that maybe should have been asked of the Respondent. He never asked the Respondent to complete an outside business activity report. He testified that he operated on the assumption that everyone knew what they were doing and there was no need to investigate especially someone like the Respondent, who was more senior.

¶ 311 On cross examination he confirmed that he did not investigate whether the Respondent had disclosed his outside business activity and had relied instead on the "honour system".

¶ 312 He said he assumed that someone at the Respondent's level of experience would have done what they were required to do and he did not "police" it.

¶ 313 He testified that while he was the Respondent's supervisor he was not aware of an entity known as Kazina Financial Services or of an entity known as Eagle Franchising and Business Services; nor was he aware of the possibility that monies from clients were going towards these two businesses.

ANALYSIS

The Parties' Positions and the Panel's Decision

The Panel's Analysis - Overview

Overview

¶ 314 In making all of the findings and conclusions that form the basis for our decision in these Reasons, the Panel has carefully considered all of the evidence which was adduced at the Hearing and all of the submissions made by the parties, both written and oral.

¶ 315 In making our findings of fact, we have applied the standard of proof known as the "balance of probabilities", taking into account the evidence which was put before us and deciding whether it was more likely than not that certain events took place. This standard, of course, is markedly different from the criminal standard of proof known as "beyond reasonable doubt".

¶ 316 To satisfy the balance of probabilities test, evidence must be sufficiently clear, convincing and cogent.

F.H. v. McDougall, 2008 SCC 3 at para. 46

¶ 317 A panel must be satisfied that the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the relevant time.

Faryna v Chorney, 1951 CanLII 252 (BCCA) at para. 8

¶ 318 It is also well accepted that the validity of evidence does not depend in the final analysis on whether it remains uncontradicted.

¶ 319 In *MacDougall, supra*, the Supreme Court held that a decision maker should not consider the evidence of one witness in isolation but must look at the totality of the evidence to assess the impact of any inconsistencies in a witness' evidence on questions of credibility and reliability pertaining to the core issues in the case.

¶ 320 Accordingly, we have considered the evidence of each witness in the context of the totality of the

evidence which was adduced in these proceedings.

¶ 321 Based on the totality of the evidence adduced in this matter, including the testimony of all of the witnesses, the documents entered into evidence, and the admissions made by the Respondent in his Reply, the Panel is satisfied that the facts alleged in the Notice of Hearing have been proven on a balance of probabilities, on the basis of clear and cogent evidence.

Staff's position – Overview

¶ 322 Staff confirmed that although the Respondent commenced his involvement with the Member in 1991 the time frame for the Allegations that form the basis of these proceedings starts in 2002 when the Member joined the MFDA.

¶ 323 Staff summarized the Allegations in the Notice of Hearing as alleging that the Respondent:

1. failed to disclose outside business activities;
2. conducted securities related business outside the Member;
3. engaged in personal financial dealings with clients that gave rise to a conflict of interest that he failed to address in compliance with his regulatory obligations; and
4. provided false or misleading information to the Member in response to its annual compliance questionnaires.

¶ 324 Staff pointed out that the evidence that the Respondent tendered related primarily to the issue raised in Allegation #1 regarding his obligation to disclose outside business activities to the Member.

¶ 325 In Staff's submission, the conduct which is the subject of Allegations #2 and #3 is by far the most serious of the allegations for the Panel to consider.

¶ 326 Staff submitted that the Respondent did not tender any evidence with respect to those two Allegations and that the evidence Staff led to substantiate those Allegations, was uncontested.

¶ 327 The parties' positions and the Panel's decision with respect to each of the four Allegations contained in the Notice of Hearing are as follows, below.

Allegation #1

> Between February 8, 2002 and October 5, 2017, the Respondent engaged in outside business activities that were not disclosed to and approved by the Member by operating businesses that provided tax and financial planning services to individuals, and marketing, franchising and other consulting services to businesses, contrary to the policies and procedures of the Member and MFDA Rules 1.2.1(d)[3] [now 1.3.2], 2.1.1, 2.5.1, 2.10 and 1.1.2.

¶ 328 Staff submitted that the Respondent contravened MFDA Rules 1.2.1(d) (renumbered 1.2.1(c), then 1.3.2) when he engaged in outside business activities by providing tax and financial planning services to individuals, as well as marketing, franchising and other consulting services to businesses, that were not disclosed to or approved by the Member.

¶ 329 In support of this Allegation Staff pointed to the admissions the Respondent made in his interview with Patricia West which were contained in Exhibit #3 to the West Affidavit, where he admitted that he operated both KFS, which provided tax and accounting services to individuals, and Eagle Franchising which offered franchising, marketing and business support to companies.

¶ 330 Staff submitted that the evidence, including Ms. Kelly's testimony and the information provided by the Member during the course of Staff's investigation, confirmed that the Member had no records of the Respondent's outside business activities with respect to either KFS or Eagle Franchising. Further, Mr. Cadogan

[3] Effective December 3, 2010, former MFDA Rule 1.2.1(d) was renumbered as MFDA Rule 1.2.1(c). Effective March 17, 2016, former MFDA Rule 1.2.1(c) was amended and renumbered as MFDA Rule 1.3.2.

and Mr. Funk both of whom had had supervisory authority over the Respondent testified that they were not aware of any such activities being conducted by the Respondent.

¶ 331 Staff conceded that Michael Buhr confirmed that the Respondent verbally disclosed to him the existence of an accounting practice at the time he hired the Respondent in 1991.

¶ 332 Staff noted, however, that on cross-examination Mr. Buhr said that he was not aware of the existence of Eagle Franchising, nor of any changes to the Respondent's activities including the fact that the Respondent was obtaining monies from clients relating to KFS and Eagle Franchising.

¶ 333 Staff submitted that to the extent that any of the witnesses called by the Respondent testified that they were aware of any of the Respondent's outside activities only one of them, Jeffrey Schewe, had supervisory authority over Mr. Kazina and on cross-examination, Mr. Schewe had agreed that he believed the Consultants under his supervision would have already taken the required steps to disclose existing outside business activities.

¶ 334 Staff submitted that in any event it is not a defence to the matters alleged in Allegation #1 to say that other individuals, whether or not they had supervisory authority over the Respondent, were aware of certain aspects of the Respondent's outside activities. In Staff's submission the obligation remained on the Respondent as an Approved Person, to ensure that he disclosed his outside business activities in compliance with the Member's policies and the MFDA's Rules.

¶ 335 Similarly, to the extent that the Respondent asked several witnesses whose evidence he called about their own outside business activities, Staff submitted that the outside business activities of other Approved Persons whether or not disclosed to the Member, were of no relevance to the allegations made against the Respondent.

¶ 336 Staff also noted that none of the witnesses whom the Respondent called to testify agreed with his assertion that the Member "bent the rules" for high performers.

¶ 337 In particular, Staff submitted that the Respondent tendered no evidence that he ever disclosed the existence of Eagle Franchising to the Member despite the fact that it was a separate entity as evidenced by the fact that it was registered in 2014 as a partnership and in 2017 as a sole proprietorship with the Manitoba Corporations Branch.

¶ 338 Staff submitted, therefore, that the Respondent breached MFDA Rule 1.2.1(c) which at the relevant time, required that any dual occupations be disclosed to and approved by the Member.

¶ 339 Staff submitted that by engaging in outside business activities the Respondent also failed to comply with the Member's policies and procedures which clearly required disclosure of outside business activities, contrary to Rules 2.5.1, 1.1.2 and 2.10.

¶ 340 Finally, Staff submitted that while Allegation #1 refers in part to the term "financial planning" that is a generic term which encompasses a wide variety of services including tax planning and accounting and that nothing in the Allegation turns on this language.

Respondent's position

¶ 341 The Respondent's arguments with respect to this allegation were summarized, in our view accurately, by Staff in its Reply submissions as follows:

- the Respondent disclosed his outside business activity in 1991 to Mr. Michael Buhr and had no further obligation to disclose after that initial disclosure;
- the Respondent's various regional and/or Division Directors between 2001 and 2017 ought to have been aware of the Respondent's outside business activity;
- other advisers at various times had access to tax preparation software and/or prepared tax returns for client;
- if the Respondent was engaging in an outside business activity and he had to disclose

same after the initial disclosure, the yearly attestations which the Member required to be signed were not clear as to when the outside activity was occurring and he therefore had no further obligation to disclose; and

- if the Respondent was engaging in outside business activities and he did not properly disclose same to the Member he should not be found to have engaged in misconduct because: i) the Member did not properly supervise or ensure compliance with its policies and procedures; and ii) other Approved Persons were engaging in outside business activities and were not penalized.

¶ 342 The Respondent also took the position that he did have written approval for his outside business activities because, he submitted, Mr. Buhr ought to have made a written note of that approval in the Respondent's personnel file when he first hired the Respondent and that note ought to have remained in his file throughout the time he was registered with the Member.

¶ 343 This information, he argued, should then have been forwarded to each subsequent Director who in turn should have forwarded it to Compliance and ultimately to the Securities Commission.

¶ 344 With respect to Eagle Franchising the Respondent's position was that it evolved out of KFS and because he had disclosed the activity associated with KFS when he was first hired in 1991 he had no obligation to make any disclosure about Eagle Franchising.

¶ 345 He made the same argument with respect to Bullseye Business Consulting. In any event, with respect to this business, the Respondent argued, its name was not used until October of 2017 once he was no longer registered with the Member.

¶ 346 In his oral submissions to the Panel, the Respondent said that he did not disclose Eagle Franchising to the Member because he did not think he had to. He was under the belief when he was hired that because he was self-employed, he was not subject to any restrictions with respect to how much time he could spend on outside business activities.

¶ 347 He submitted that as a self-employed individual he could provide whatever services he wanted and did not have to make any disclosure to the Member beyond what he told Mr. Buhr when he was first hired in 1991.

¶ 348 He also argued that because he was self-employed when he carried on the outside business activities, the MFDA Rules did not apply to those activities.

¶ 349 He further argued that as the Member's rules and policies changed he was never advised by anyone that any further disclosure had to be made.

¶ 350 Related to his failure to disclose outside business activities to the Member after 1991, the Respondent argued that with respect to Allegation #4, the reason he answered the Member's annual attestations the way he did was because he thought he was "grandfathered". He submitted he thought that when he was hired by the Member, Mr. Buhr was aware of his outside business activity and approved of it as evidenced by the fact that he hired the Respondent with knowledge of the Respondent's accounting business and he therefore felt he was under no further obligation to make disclosures to the Member.

Staff's Reply

¶ 351 In its Reply, Staff argued that while there was evidence that the Respondent initially disclosed his accounting practice to Mr. Buhr in 1991, there is no evidence that the Respondent ever disclosed any subsequent activities to the Member or ever obtained written approval for such activities.

¶ 352 Staff further submitted that soliciting money from clients and other individuals in exchange for offering them a percentage of the gross revenue of KFS and the pre-tax income of Eagle Franchising as set out in the Agreements signed between the Respondent and clients JG and MG, for example, was a completely different activity from the outside business activities the Respondent discussed with Mr. Buhr in 1991.

The Panel's Analysis

¶ 353 MFDA Rule 1.2.1(c) reads as follows:

> **1.2 INDIVIDUAL QUALIFICATIONS**
>
> **1.2.1 Salespersons**
>
> ...
>
> (c) **Dual Occupations.** An Approved Person may have, and continue in, another gainful occupation, provided that:
>
> **...**
>
> (iii) *Member approval*. The Member for which the Approved Person carried on business either as an employee or agent is aware and approves of the Approved Person engaging in such other gainful occupation.
>
> ...
>
> (vi) *Disclosure*. Clear disclosure is provided to clients that any activities related to such other gainful occupation are not business of the Member and are not the responsibility of the Member/

¶ 354 There is no dispute between the parties that while he was registered as an Approved Person with the Member, the Respondent operated KFS and Eagle Franchising and that those entities provided tax, accounting, franchising, marketing and business services. The Respondent acknowledged this during the interview Staff conducted with him in November 2019, as evidenced in the excerpts from the Transcript of that interview that comprised Exhibit #3 to the West Affidavit.

¶ 355 While the Respondent objected to the admissibility of Exhibit #3, the Panel decided to admit that exhibit into evidence. In particular, as discussed above, the Respondent told the Panel during the *voir dire* that he did not deny the accuracy of any of the portions of the Transcript that were contained in Exhibit #3 and during the Hearing, he did not lead any evidence to deny that he operated KFS and Eagle Franchising while he was registered with the Member.

¶ 356 Further, in the Reply he filed dated September 4, 2020, the Respondent admitted that he operated a business called Eagle Franchising and Business Services beginning in or about 1995/1996 and that he did not receive written authorization to operate that business.

¶ 357 We find that the Respondent clearly conducted business activities which were not businesses of the Member while he was registered as an Approved Person with the Member.

¶ 358 The Respondent has also acknowledged that he never disclosed information about or the existence of Eagle Franchising or any outside business activity to the Member after being hired in 1991.

¶ 359 Although the Respondent discussed his accounting practice with Mr. Buhr in 1991 upon initially becoming registered with the Member, we find there is no evidence that he ever disclosed any subsequent outside business activities to the Member or ever obtained written approval for such activities.

¶ 360 In particular we find there is no evidence that the Respondent ever disclosed Eagle Franchising to the Member. We also find that the activity carried out by Eagle Franchising which included providing marketing and franchising consulting services, was a completely separate activity from the outside business activity which the Respondent disclosed to Mr. Buhr when he was hired in 1991.

¶ 361 Even if we accept that Mr. Kazina disclosed the existence of an accounting practice when he was first hired by the Member in 1991, therefore, we find that he clearly failed to inform the Member of material changes to his outside business activities as required by the Member's policies and the MFDA's Rules.

¶ 362 The Hearing Panel in *Vitch (Re)* described the rationale for Rule 1.2.1 as follows:

> The need for a Member to know what other occupations and businesses its employee might be engaged in is obvious...The first is that a failure to know about an employee's other commercial activities

impinges upon the Member's ability to properly supervise its employee. The second reason is the Member could be exposed to litigation alleging that the Approved Person's activity was within the scope of his/her employment with the Member.

Vitch (Re), MFDA File No. 201103, Hearing Panel of the Central Regional Council, Decision and Reasons dated September 22, 2011 at para. 53

¶ 363 The Panel agrees with Staff's submission that by failing to disclose his outside business activities, the Respondent prevented the Member from being able to fulfill its regulatory obligation to supervise and protect clients.

¶ 364 As the Panel in *Giuliani (Re)* stated:

> ... an Approved Person's failure to disclose and obtain approval of his or her outside activities is serious misconduct, as it deprives the Member of a proper opportunity to supervise the Approved Person, prevent the Approved Person from contravening regulatory requirements and protect itself from the risk of litigation.

Giuliani (Re), MFDA File No. 2017103, Decision of the MFDA Central Regional Council dated June 13, 2018 at para. 8

¶ 365 Such conduct has also been found to be a breach of the standard of conduct under MFDA Rule 2.1.1 and we find that to be the case in these proceedings.

Giuliani (Re) supra

Harmer (Re), MFDA File No. 202051, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated March 22, 2002 (misconduct)

¶ 366 MFDA Rule 2.1.1 reads as follows:

> **2.1.1 Standard of Conduct.**
>
> 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.

The Member's Policies and Procedures

¶ 367 With respect to the requirements set out in the Member's policies, dating back to 1997 the Member clearly required Approved Persons to seek and obtain approval to carry on any outside business activities.

¶ 368 Both Ms. Kelly, as well as witnesses called by the Respondent, testified that as of 2002 when Investors Group became a Member of the MFDA, clear policies and procedures had been established which required disclosing outside business activities to the Member.

¶ 369 In this regard, the Member's policies reflected the evolution of the regulatory requirements for disclosure. By 2005, for example, its policy described a dual occupation requirement that required prior approval from both the Regional Director and Area Vice President, stipulating that the Regional Director would consider factors such as: potential conflict; time commitment; and consistency of standards of conduct expected of a Consultant. The manual also specifically stated that in the event approval was granted, the Approved Person would be expected to meet certain regulatory requirements including disclosure to the Securities Commission and ensuring that clients were aware of the dual occupations through a disclosure letter to be kept in the client's file.

¶ 370 This requirement was also reflected in the annual attestations that the Member required its Approved Persons to sign as of 2006.

¶ 371 The Panel agrees with Staff's submission that the evolution of the regulatory requirements which was reflected in the Member's policies made it clear that by 2005, a form of disclosure of outside business activity that may have been adequate in 1991 was no longer sufficient.

¶ 372 We find that the evidence was clear that the Member was not aware of the existence of Eagle Franchising because the Respondent did not disclose that business existed or its activities. In fact, the Respondent believed he did not have any obligation to disclose either the existence of that entity or the activities that he carried out in connection with it. In our view, this belief demonstrates a disturbing failure on the Respondent's part to understand the requirements which were imposed on him by both the MFDA and the Member.

¶ 373 With respect to the Respondent's position that he was "grandfathered" from having to comply with any outside business activity disclosure requirements, the Panel finds there was no evidence of such an accommodation having been made by the Member, nor does it make sense, having regard to the rationale for the regulatory rule and the Member's policy requirement, that any such grandfathering would have been allowed.

¶ 374 With respect to the Respondent's argument that it was somehow the obligation of his supervisors to inform him that he had failed to comply with his obligation to report his outside business activities to the regulator, the Panel notes that Panels of the MFDA and Securities Commission have held that "registrants are presumed to know their regulatory requirements and cannot rely on the position that others should have advised them of those requirements."

> *Botha (Re) supra* at para. 147

¶ 375 As the Alberta Securities Commission has made clear:

> 149 Specifically with respect to a registrant's obligation to keep informed of applicable regulatory requirements, an Investment Industry Regulatory Organization of Canada (IIROC) hearing panel arrived at a similar conclusion in *Re Pariak-Lukic* (*2014 IIROC 1* at para. 89):
>
> . . . as a registrant, [the respondent] had an obligation to know and understand the policies and procedures of [her employer] and the obligations and duties imposed on registered representatives by the by-laws and rules of applicable regulatory organizations. Her ignorance or misunderstanding of the rules in this matter was no excuse.
>
> 150 In the MFDA context, the hearing panel in *O'Connor* found (at para. 72): "Approved Persons are expected to be familiar with requirements of their regulator."
>
> *Botha (Re)* supra at paras. 149-150

¶ 376 With respect to the Respondent's argument that because he was self-employed he did not have an obligation to disclose his outside business activities, the Panel finds that an Approved Person's employment status has no relevance to and does not affect their obligation to comply with regulatory requirements to disclose outside business activities.

¶ 377 The Respondent's position that the only requirement that was ever imposed on him by the Member with respect to conducting an outside business activity was not to spend too many hours on it, is also inconsistent with the requirements set out in the Member's Policies and Procedures Manual which listed a number of factors that the Member will consider in deciding whether to approve of an outside business activity.

¶ 378 As the various versions of those manuals demonstrated and as Ms. Kelly testified, the amount of time spent on an outside business activity would be only one of a number of factors that the Member would consider in deciding whether to grant approval along with other factors such as, for example, the nature of the activity itself.

¶ 379 MFDA Rules 2.5.1, 2.10 and 1.1.2 read as follows:

2.5 MINIMUM STANDARDS OF SUPERVISION

2.5.1 Member Responsibilities

Each Member is responsible for establishing, implementing and maintaining policies and procedures to ensure the handling of its business is in accordance with the By-laws, Rules and Policies and with applicable securities legislation.

2.10 POLICIES AND PROCEDURES MANUAL

Every Member shall establish and maintain written policies and procedures (that have been approved by senior management of the Member) for dealing with clients and ensuring compliance with the Rules, By-laws and Policies of the Corporation and applicable securities legislation.

1.1.2 Compliance by Approved Persons

Each Approved Person who conducts or participates in any securities related business in respect of a Member in accordance with Rule 1.1.1.(c)(i) or (ii) shall comply with the By laws and Rules as they relate to the Member or such Approved Person.

¶ 380 MFDA Rule 2.5.1 required Members to establish policies and procedures to ensure the handling of their business is in compliance with the By-laws, Rules, and Policies of the MFDA and applicable securities legislation. Approved Persons have a corresponding obligation to comply with those policies and procedures pursuant to MFDA Rule 1.1.2. As stated by the Hearing Panel in *Franco (Re)*:

> The obligation of Approved Persons to comply with the policies and procedures of the Member that they are registered with is a cornerstone of the self-regulatory system. When Approved Persons disregard those obligations, the Member's ability to supervise the conduct of such Approved Persons and protect the interests of clients and the public is undermined.
>
> *Franco (Re)*, MFDA File No. 201016, Hearing Panel of Prairie Regional Council, Decision and Reasons dated May 6, 2011 at para. 38

¶ 381 The Hearing Panel in *Frank (Re)* stated:

> MFDA Rule 2.5.1 requires Members to establish, implement and maintain policies and procedures to ensure that the handling of its business is in accordance with MFDA By-laws, Rules and Policies and with applicable securities legislation.
>
> Such policies and procedures are meaningless and cannot achieve their intended objectives if Approved Persons are not required to comply with them. MFDA Rule 1.1.2 is clear that Approved Persons share the responsibility of ensuring that obligations set out in the MFDA Rules are followed and must do their part to support the Member's obligations to be compliant with its regulatory obligations.
>
> In the context of policies and procedures of a Member, and especially policies designed to facilitate regulatory supervision by the Member, the failure of an Approved Person to comply with the Member's policies constitutes a regulatory violation.
>
> *Frank (Re)*, MFDA File No. 201407, Hearing Panel of the Central Regional Council, Decision and Reasons (Misconduct) dated May 5, 2015 at paras. 56-58

¶ 382 In *Botha (Re)*, an Alberta Securities Commission panel upheld the MFDA's position that the interaction between Rules 2.5.1 and 1.1.2 establishes that an Approved Person must comply with the Member's policies and procedures.

> *Botha (Re)*, 2021 LNABASC 3 (QL), at paras. 113, 152–155

¶ 383 Hearing Panels have also found that the same conduct also engages Rule 2.10, dealing with the Member's requirement to have policies and procedures in place.

> *Luong Dao (Re),* MFDA File No. 201971, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 9, 2021 at para. 15

¶ 384 Finally, the Panel agrees with Staff's submission that nothing in Allegation #1 turns on the reference to the term "financial planning".

¶ 385 As the Panel in *Botha (Re)* commented, citing *Del Bianco v Alberta (Securities Commission)* 2204 ABCA 344 at para. 11, a Notice of Hearing should not be scrutinized for perfection. Its purpose is to give a Respondent adequate notice of the case to be met.

Botha (Re), supra para. 114

¶ 386 We find that the Notice of Hearing gave the Respondent adequate notice of the case he had to meet.

¶ 387 For the reasons set out above, we do not need to make a finding that the outside business activities the Respondent engaged in included "financial planning" in order to determine that Staff has established the matters set out in Allegation #1.

¶ 388 We note, however, that while we agree with Staff's submission that the Respondent's conduct in accepting money from clients and others in exchange for offering them a percentage of the revenue earned by KFS and Eagle Franchising was an outside business activity which he did not disclose to the Member, because that activity was not articulated in Allegation #1 we are not relying on that conduct to establish Allegation #1. To the extent that that activity is described in the Particulars contained in the Notice of Hearing, we have related our analysis of that conduct to the matters alleged in Allegations #2 and #3.

¶ 389 For all of the above reasons we find that Allegation #1 as set out in the Notice of Hearing has been established.

Allegation #2

Between January 2012 and October 5, 2017, the Respondent recommended and accepted approximately $257,500 for investment in a business that he operated from at least eight clients and at least two non-clients, thereby engaging in securities related business that was not carried on for the account of the Member or processed through the facilities of the Member, contrary to the policies and procedures of the Member and MFDA Rule**s** 1.1.1, 2.1.1, 2.5.1, 2.10 and 1.1.2.

Staff's Position

¶ 390 MFDA Rule 1.1.1 reads as follows:

RULE NO. 1 – BUSINESS STRUCTURES AND QUALIFICATIONS

BUSINESS STRUCTURES

Members

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, other than:

(i) such business as relates solely to trading in deposit instruments conducted by any Approved Person not on account of the Member; and

(ii) such business conducted by an Approved Person as an employee of a bank and in accordance with the Bank Act (Canada) and the regulations thereunder and applicable securities legislation.

¶ 391 Securities related business was defined in MFDA By-law No. 1 as follows:

"**securities related business**" means any business or activity (whether or not carried on for gain) engaged in, directly or indirectly, which constitutes trading or advising in securities for the purposes of

applicable securities legislation in any jurisdiction in Canada, including for greater certainty, securities sold pursuant to exemptions under applicable securities legislation;

MFDA By-Law No. 1, s. 1

¶ 392 Staff submitted that the evidence of Ms. West clearly establishes that clients and non-clients provided monies to the Respondent for the purpose of investing in KFS and Eagle Franchising.

¶ 393 Staff acknowledged that it has the burden of proving that the Respondent's activities constituted securities related business and that in that respect it must prove: the Respondent was "trading or advising"; and the activities in respect of KFS and Eagle Franchising fell within the definition of "security" within the meaning of the applicable securities legislation.

¶ 394 Staff submitted that the first part of establishing the language in Rule 1.1.1 is relatively easy.

¶ 395 In making this argument, Staff pointed to the admissions the Respondent made to Staff in the 2019 interview as evidenced in Exhibit #3 and the Agreements which were signed by clients JG and MG showing that those clients provided a total of $15,000 to the Respondent in order to receive a specified rate of return totaling 0.9% of the gross revenue of KFS and 0.9% of the pre-tax income of Eagle Franchising.

¶ 396 Since By-law No. 1 does not define "trading or advising" or "securities", Staff relied on the definitions of those terms which are set out in the Manitoba *Securities Act*.

¶ 397 By raising monies from clients and non-clients to invest in his personal business and promising a specified rate of return in exchange, Staff submitted the Respondent was clearly engaging in the "sale of a security", as per the definition of "trade" under the Manitoba *Securities Act* which provides that:

"trade" includes

(a) any sale or disposition of or other dealing in or any solicitation in respect of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, or any attempt to do one of the foregoing;

The Securities Act (Manitoba), CCSM c S50, s. 1(1) definition of "trade"

¶ 398 A "security" is defined in the Manitoba *Securities Act* as follows:

"security" includes:

...

(m) any investment contract including an investment contract as defined in Part XVI;

...

The Securities Act (Manitoba), CCSM c S50, s. 1(1) definition of "security"

¶ 399 Staff submitted that the Agreements the Respondent signed with clients JG and MG were "investment contracts" as defined by the Manitoba *Securities Act*.

¶ 400 In making this argument, Staff submitted that Hearing Panels have previously considered and adopted the *Howey* test which sets out the criteria for determining the existence of an investment contract. That test defines an investment contract as "an investment in a common enterprise with profits to come from the efforts of others". The three elements in the test that need to be satisfied are:

a. An investment of money and intention to earn a profit;

b. A common enterprise; and

c. An expectation of profits produced by the efforts of others.

Are (Re), MFDA File No. 201231, Hearing Panel of the Central Regional Council, Decision and Reasons dated October 20, 2014 (Misconduct)

Harmer (Re), supra, at paras. 357-364

Pacific Coast Coin Exchange v Ontario Securities Commission, [1978] 2 SCR 112, at pp. 8-9

¶ 401 Staff submitted that there is no evidence that the clients and non-clients provided anything other than money to KFS and Eagle Franchising in exchange for entitlement to a percentage of profits and there is no evidence that the profits were to be obtained through their own efforts. Rather, any profits were to be obtained solely through the efforts of the Respondent himself.

¶ 402 In support of this argument, Staff urged the Panel to look at the letter of complaint which was sent to the Member by JG and MG's daughter dated May 22, 2018 which was attached as an exhibit to the West Affidavit.

¶ 403 In that letter she said that the Respondent approached her parents for an initial investment of $10,000 into his company Eagle Franchising and Business services in exchange for which they were to receive a percentage of any profit the company made, as one of its shareholders.

¶ 404 Staff also pointed to the Agreement signed between JG and MG and the Respondent which said among other things, that the "vendor remains in complete control of the business operations" and "the purchaser acknowledges that they are a silent partner in respect of privacy of the agreement".

¶ 405 Staff submitted that the Agreement itself therefore, which identifies that the Respondent is the one who controls the business operations meets the part of the *Howey* test that requires that efforts be produced by another person. In terms of an expectation of profits produced by the efforts of another, essentially, it submitted, it was solely the Respondent whose efforts were generating income and revenue for these businesses.

¶ 406 Staff relied, as well, on the various statements that the Respondent sent to MG and JG between 2012 and 2017 which showed the calculation for what he described as the clients' "share of business income for Kazina Financial Services".

¶ 407 Staff submitted that these statements are further evidence that the money being generated at least with respect to income for KFS was solely generated by virtue of the Respondent's commission income and that as a whole, the evidence establishes that the relationship with people who gave him money was not one of co-ownership as the Respondent argued, but rather a relationship whereby the Respondent was giving those people part of commissions which were generated solely by him, in exchange for the money they provided.

¶ 408 Staff also relied on the letter the Respondent sent to JG and MG on August 24, 2016 in which the Respondent characterized the relationship as an "investment" and on the cheques signed by client SK dated August 9, 2012 and September 6, 2012 which said in the memo line, the phrases: "investment with Andy", "Investment/Eagle".

¶ 409 Staff submitted that while these references to "investment" were not necessarily determinative, they are part of the evidence which, taken as a whole, does not support a relationship of co-ownership but rather one where the income people received from the Respondent was generated solely from the Respondent's own mutual fund business activity.

¶ 410 Staff submitted that the totality of evidence, therefore, satisfies the elements in the *Howey* test which require an expectation of profits produced by the efforts of others and that the proper characterization of the relationship and transaction between the clients, non-clients and the Respondent was that they entered into an "investment contract" within the definition of a "security" set out in the Manitoba *Securities Act*.

¶ 411 In response to the Respondent's position that CP was not a client of the Member, Staff conceded that only DP was a Member client. Staff submitted, however, that the distinction between client and non-client has no relevance to establishing the allegation that the Respondent engaged in securities related business outside the Member because an Approved Person is restricted to acting only on the terms of their registration status. Accordingly, if, as in this case, an Approved Person is registered under mutual fund registration they can only deal with mutual funds.

¶ 412 For all of these reasons, Staff submitted that the Respondent engaged in securities related business outside the Member, contrary to MFDA rule 1.1.1(a).

¶ 413 Staff further submitted that the Respondent also breached the standard of conduct expected of him, under Rule 2.1.1.

Harmer (Re) supra at pp. 365-367 and the decisions cited therein

Respondent's Position

¶ 414 The Respondent maintained that the relationship and transaction he entered into with the people who paid him the money totaling approximately $257,000, whether they were clients or non-clients of the Member, should be characterized as an ownership transaction and not as one that involved trading in securities.

¶ 415 He argued the transaction involved selling a portion of a business which was comprised of his personal assets and for that reason was not a securities related transaction.

¶ 416 In making this submission, the Respondent argued, among other things that:

- his business was a sole proprietorship with no shares, units or securities;
- the monies he received from clients and other individuals was never intended to be used for a purchase of assets or working capital inside the business but was instead for partial sale of his business;
- there was no specified rate of return on any agreement; and
- there was no requirement to advise the Manitoba Securities Commission about the sale of an individual's sole proprietorship business.

¶ 417 With respect to the use by some clients of the phrase "investment" on the cheques that they made out to him, he argued that he did not control what a client decided to write on their cheques and to determine what a phrase meant to a client, would be pure speculation.

¶ 418 In response to questions from the Panel about the nature of the transactions, he said that he was selling portions of KFS and Eagle Franchising and that all of the individuals who paid him money became co-owners of those businesses.

¶ 419 He told the Panel that the contract he entered into with, for example, clients JG and MG was not governed by the MFDA Rules and that businesses are sold all the time without being reported to the Securities Commission.

¶ 420 He further submitted that Staff had not provided any evidence that a "co-owner" was not asked to or did not in fact provide any input into the operation of the business.

Panel's Analysis

¶ 421 MFDA Rule 1.1.1(a) requires that all securities related business be carried on for the account of the Member and through the facilities of the Member.

¶ 422 Consistent with this requirement, an Approved Person is restricted to trading or giving advice about securities which are products on the Member's shelf.

¶ 423 The Panel agrees with Staff's submission that the Rule is designed to ensure that Members can implement effective oversight of any products Approved Persons who are registered through them, provide advice about or sell.

¶ 424 Requiring that securities related business be directed through the Member ensures that clients are protected by the oversight, due diligence and risk appraisals undertaken by Members.

¶ 425 Conducting securities related business through the Member also means that clients receive the benefit of the Member's trade reviews which ensure that each recommendation made and order accepted, is suitable for the client.

¶ 426 MFDA Hearing Panels have consistently stressed that the importance of complying with Rule 1.1.1(a) is to ensure that Members can properly supervise the securities related business they conduct.

¶ 427 In *Caicco (Re)*, the Hearing Panel, citing an earlier 2010 MFDA decision, *Re Laverdiere* File No. 200936 at para. 5 commented on some of the principles underlying the Rule:

> 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 (*sic*) 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.
>
> *Caicco (Re),* MFDA File No. 201503, Hearing Panel of the Central Regional Council, Decision and Reasons dated Aug 4, 2015 at para. 23

¶ 428 The Panel agrees that Staff has the burden of proving that the Respondent's activities constituted securities related business and in our view Staff has met that burden.

¶ 429 In order to establish that the Respondent's activities constitute "securities related business" the Panel agrees that Staff must prove that: a) the Respondent was trading or advising; and b) the transaction activity entered into by the individuals who provided money to the Respondent was in respect of a "security" within the meaning of the Manitoba *Securities Act*.

¶ 430 Under that legislation the definition of "trade" includes

> a) any sale or disposition of or other dealing in or any solicitation in respect of a security for valuable consideration, whether the terms of payment be on margin, installment or otherwise, or any attempt to do one of the foregoing.
>
> *The Securities Act* (Manitoba), CCSM c. S50, s. 1(1) definition of "trade"

¶ 431 By his own admission, in accepting monies from the individuals identified in Ms. West's evidence the Respondent was engaging in a sale. He argued, however, that it was a sale of a business.

¶ 432 The question for the Panel to decide therefore is, did the transactions the Respondent entered into with both clients and non-clients involve the sale of a "security" within the meaning of the *Securities Act*. We find they do.

¶ 433 The Act defines "security" as including: ... m) any investment contract, including an investment contract as defined in Part XVI.

> *The Securities Act* (Manitoba) CCSM c. S50 s. 1(1) definition of "security"

¶ 434 In the Panel's view, the agreements entered into between the Respondent and the individuals identified in Ms. West's evidence meet the definition of "investment contract" within the definition of the *Securities Act.*

¶ 435 In so deciding we find that the agreements entered into between the Respondent and the people who gave him money, satisfy all three elements of the *Howey* test, namely: a) an investment of money and intention to earn a profit; b) a common enterprise; and c) an expectation of profits produced by the efforts of others.

¶ 436 In our view, there was no real dispute between the parties with respect to the evidence that supports the first two elements of that test. The only real dispute was with respect to the third element of the test - whether there was an expectation of profits produced by the efforts of others.

¶ 437 The Panel is satisfied, based on the evidence as a whole, that expected profits were to be produced solely by the efforts of the Respondent.

¶ 438 In making this finding the Panel has relied primarily on the terms and conditions of the agreements which the clients and non-clients entered into with the Respondent and which clearly set out that in exchange for paying the Respondent money these people expected to receive profits based on specified rates of return. The individuals further agreed to remain silent and to allow the Respondent to be in complete control of the

business operations from which profits were generated.

¶ 439 The Respondent did not dispute the terms of those agreements. He simply disagreed with Staff's characterization of the transaction underlying the agreements, saying that by virtue of paying him money the clients did not enter into investment contracts but rather became co-owners of KFS and Eagle Franchising.

¶ 440 We agree with Staff's submission that it defies logic that the clients and non-clients would purchase and become co-owners of KFS, a sole proprietorship whose revenues were based only on the Respondent's efforts and which had no value once the Respondent stopped working. In his interview with Staff, for example, the Respondent stated that neither KFS or Eagle Franchising had any physical assets.

¶ 441 We also find, on a balance of probabilities and based on the totality of the evidence, that all of the transactions pursuant to which both clients and non-clients provided monies to the Respondent, as alleged in Allegation #2, were based on similar terms and conditions as those reflected in the Agreements entered into between JG and MG and the Respondent.

¶ 442 In making this finding, we rely on the evidence the Respondent told Staff in his 2019 interview, where he specifically said that CP, SK, DK, GT and GA entered into similar agreements to the agreement signed by MG and JG. He also described all of the persons whom Staff identified as having given him monies in the same way, calling them all "co-owners".

¶ 443 When asked during that interview about the level of input or control the "co-owners" had, the only thing that the Respondent said was that they were allowed to give feedback – that he asked them what they thought.

¶ 444 We note that we considered whether the transaction entered into between DK and the Respondent should be characterized differently because the Respondent told Staff in his 2019 interview that DK became his partner in 2014.

¶ 445 In one of the emails that the Respondent sent to the people who gave him money, as a group, dated September 2, 2014, he said that Eagle Franchising had brought aboard another individual as of April 1, 2014 and that after a couple months of training he was seeing results.

¶ 446 Later, in an e-mail dated May 8, 2017 the Respondent sent to the group, he advised that as of January 1, 2017 the manager of Eagle Franchising had decided to take on another project.

¶ 447 The information contained in these two emails coincided with the dates when Eagle Franchising was registered at the Manitoba Corporations Branch as a partnership and then as a sole proprietorship in 2014 and 2017, respectively. We queried whether this was therefore evidence that unlike the other people who gave the Respondent money, DK provided more efforts than simply paying money towards the operation of Eagle Franchising.

¶ 448 However, in light of the fact that all of the monies DK paid to the Respondent were paid prior to April 1, 2014 when he became a partner, combined with the Respondent's own evidence from his investigation interview that DK had entered into a similar agreement as JG and MG, we concluded that the transaction entered into between DK and the Respondent also satisfied the *Howey* test and was an investment contract, noting that DK's monies were paid to the Respondent before he had the opportunity to contribute any other efforts towards Eagle Franchising earning profits.

¶ 449 The Respondent did not lead evidence to refute Staff's submissions that all of the monies given to him by clients and non-clients were provided on the same terms and conditions as the monies provided by JG and MG. The only issue he disputed was whether all the persons who gave him money were clients of the Member. We agree, however, that that issue was not relevant to a determination as to whether he was engaging in securities related business outside the Member.

¶ 450 Accordingly, the Panel finds that by raising monies from clients and non-clients to invest in his personal business, the Respondent was clearly engaging in the sale of a security within the meaning of the Manitoba *Securities Act*.

¶ 451 Finally, in order to find that the Respondent's conduct breached Rule 1.1.1(a), the Panel must determine whether the securities related business in which he engaged was carried on through the account of the Member.

¶ 452 In this regard, we find the evidence is clear that the agreements entered into between the clients, non-clients, and the Respondent, were not entered into through the Member's facilities; nor did they involve products which were "on the Member's shelf".

Rule 2.1.1

¶ 453 As other Hearing Panels have confirmed, the Respondent's conduct which engaged in securities related business conducted outside the Member clearly breaches the standard of conduct required under Rule 2.1.1.

Harmer (Re), supra at paras. 365-367

Rules 2.5.1, 1.1.2 and 2.10

¶ 454 Finally, the evidence clearly demonstrated that the Member had policies and procedures which required that all securities related business be conducted through it.

¶ 455 Relying on the analysis we set out with respect to the relationship between MFDA Rule 2.5.1 and Rule 1.1.2, in the section dealing with Allegation #1 above, the Panel finds that in conducting securities related business that was not carried on for the account of the Member or processed through its facilities, contrary to the Member's policies and procedures, the Respondent breached Rules 2.5.1, 1.1.2 and 2.10.

¶ 456 Accordingly, we find that Allegation #2 as set out in the Notice of Hearing has been established and substantiated in its entirety.

Allegation #3

> Between January 2012 and October 5, 2017, the Respondent solicited approximately $232,500 from at least eight clients that he used to finance and operate his business and commingled the money with his personal savings in bank accounts that he held in his own name or jointly with his wife, thereby engaging in personal financial dealings with clients that gave rise to a conflict of interest that he failed to disclose to the Member or address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rule**s** 2.1.4 and 2.1.1.

Staff's position

¶ 457 Staff submitted that this allegation was the most significant of the allegations contained in the Notice of Hearing.

¶ 458 Staff referred the Panel to the evidence from Ms. West which showed that in addition to the $15,000 invested by clients JG and MG, other clients and non-clients deposited monies into the Respondent's personal bank account as illustrated by the following chart which was contained in the West Affidavit:

Clients	Date of Payment to the Respondent	Investment Amount
CP and DP (only DP is a client)	July 15, 2012	$10,000
	March 22, 2013	$9,000
SK	August 9, 2012	$5,000
	September 6, 2012	$5,000
DK	March 6, 2013	$10,000
	December 9, 2013	$16,000
	December 11, 2013	$15,000
	February 24, 2014	$91,000
GT	June 1, 2013	$5,000
RW & JW	June 27, 2013	$5,500
GC	April 12, 2013	$5,000
	April 27, 2015	$20,000
	May 15, 2015	$19,000

Clients	Date of Payment to the Respondent	Investment Amount
GA	May 3, 2016	$2,000
TOTAL		**$217,500**

Non-Client Investor	Date of Payment to the Respondent	Investment Amount
HW	May 29, 2012	$10,000
# Manitoba Inc.	September 19, 2012	$15,000
TOTAL		**$25,000**

¶ 459 Staff reminded the Panel that Ms. West attached as exhibits to her affidavit copies of cheque images from the above clients and non-clients showing that the monies were made payable to the Respondent personally. She also attached excerpts from the history of the joint bank account the Respondent held with his spouse, showing that those monies were deposited and co-mingled with the Respondent's personal expenses.

¶ 460 Staff submitted that by accepting monies from clients to finance and operate the Respondent's businesses and mingling those monies with his own personal savings, the Respondent engaged in acts of personal financial dealings with clients which gave rise to a conflict of interest that he failed to address in accordance with the requirements of the MFDA's Rules relating to conflicts of interest.

¶ 461 In making this argument, Staff submitted there is no dispute that the Respondent accepted monies from clients which were deposited into the personal bank account he held jointly with his spouse.

¶ 462 In contrast to Allegation #2, dealing with securities related business, Staff acknowledged that Allegation #3 only applies in respect of Member clients.

¶ 463 The only dispute, they said, therefore, is the extent to which the people who gave him those monies were clients, namely: whether his conduct involved eight clients and two non-clients; or six clients and four non-clients, as the Respondent argued.

¶ 464 Staff submitted that if the Panel determines that the matters set out in Allegation #3 have been established as alleged with the exception of the number of clients and specified amounts it is still open to the Panel to make a finding that the Allegation has been substantiated albeit not precisely as it was written insofar as the identification of the number of clients and monies solicited.

¶ 465 In support of this position Staff again referred the Panel to the *Botha* decision where the Alberta Securities Commission said that the Notice of Hearing should not be scrutinized for perfection; its purpose is to give the Respondent adequate notice of the case to be met.

> *Botha (Re), supra*, at para. 114

¶ 466 In Staff's submission, therefore, if the evidence supports that there are fewer clients than identified in the Allegation that does not defeat the Allegation in its entirety.

Respondent's position

¶ 467 As Staff identified, one of the main points the Respondent made with respect to this Allegation is that Staff's information was not accurate with respect to whether the individuals who gave him money were clients of the Member.

¶ 468 His position was that there were six "co-owners" who were clients: MJ, JG, SK, DK, GT, GC and GA. This left a total of four "co-owners" who were not clients: HW, #Manitoba Inc, CP and JW.

¶ 469 In making this argument, the Respondent submitted that with respect to the two spousal pairs: JW and RW; and CP and DP, only one member of each pair was an actual client, namely: RW and DP respectively. The monies which were paid to him, however, he submitted came from cheques that were signed by the member of each pair who was not a client, namely: JW and CP.

¶ 470 His submission, therefore, was that JW and CP should be identified as non-client "co-owners" for a total of monies received from: four non-client co-owners and six client co-owners.

¶ 471 We note that on this point, although Staff had conceded that only DP was a Member client they argued that DP's monies were also tied up in the Respondent's businesses because:

a) the July 15, 2012 cheque for $10,000 and the March 22, 2013 cheque for $9,000, while signed by CP were payable out of a joint account held in both CP and DP 's names; and

b) client DP's Member account shows redemptions on July 16, 2012 and March 23, 2013 for the amounts of $10,000 and $7,500 respectively which closely corresponded to the dates and amounts of the cheques made payable to the Respondent and signed by CP.

¶ 472 Staff submitted that the fact that the payments made to the Respondent were contemporaneous with withdrawals made from the account DP held at the Member in similar amounts together with the fact that they came from a joint account held in in DP and CP 's names supports a finding on a balance of probabilities that those monies came from DP who was a client of the Member.

¶ 473 With respect to RW and JW, the Respondent said he told Staff in his investigation interview that JW was the individual who provided monies for KFS and Eagle Franchising, despite the fact that it was RW, the Member client, who signed the cheque.

¶ 474 The Respondent also argued that the act of accepting monies from clients was for the sale of a personal asset and therefore there would be no reason why those monies should not go into his personal bank account.

¶ 475 He argued as well that Staff had not provided evidence that he did not take reasonable business judgment with respect to the people who paid him money towards co-ownership of KFS and Eagle Franchising and that each and every co-owner had the opportunity to seek legal advice on the agreements they entered into.

¶ 476 Plus, he submitted, there was no evidence that the co-owners felt there was a conflict of interest.

¶ 477 He also referred back to the arguments he made to the Panel relating to whether he had disclosed his outside business activities when he joined the Member saying that when he was hired, his outside business activity was disclosed and approved by IG with no restrictions other than that he not work more than 8 to 10 hours per week on that business.

¶ 478 He submitted that that agreement was put in place 11 years before the Member joined the MFDA and that he always believed that he could operate his outside business activities any way he chose, that there was no requirement to report any potential conflict of interest and that none could arise.

¶ 479 Finally, he pointed out that other than JG and MG no clients have complained.

Panel's Analysis

¶ 480 The Panel finds that the Respondent clearly accepted monies from clients and non-clients which he then commingled with his own personal savings. Ms. West's evidence on this point was clear and unchallenged.

¶ 481 Further, in the Reply he filed to the Notice of Hearing, in response to the Particulars set out at para. 23 c) of the Notice, which stated that he did not disclose to the Member that he "*accepted at least $232,500 from at least eight clients and an additional $25,000 from at least two other investors which he deposited into bank accounts that he held in his own name or jointly with his wife*", the Respondent stated: "*I did deposit the funds in my bank account. It was the sale of my asset*."

¶ 482 The Panel does not construe this admission as an admission with respect to the number of clients from whom the Respondent received and deposited monies into his personal bank account but rather an admission that he did deposit the funds he received from various individuals, into his personal bank account.

¶ 483 In his Reply, the Respondent also admitted that: "*money from the sale of my business did go into my bank account and I did pay personal expenses and debts from the same account*".

¶ 484 The main dispute, therefore, for the Panel to determine is whether, by accepting and depositing those

monies into his personal account the Respondent was in breach of his regulatory obligations. Although the Respondent does not deny that he deposited monies received from people into his personal bank account, he denies that all of the monies which are the subject of these proceedings came from people who were clients of the Member.

¶ 485 Dealing first with the number of clients from whom the Respondent received money, the Panel finds that the monies which the Respondent deposited into his personal bank account and which formed the subject of this Allegation, came from 8 clients of the Member and 2 non-clients, as alleged in the Notice of Hearing.

¶ 486 Dealing first with RW and JW, although the Respondent submitted that the monies he received were paid in support of an agreement he made only with JW, it is clear that RW wrote the cheque in the amount of $5,500 dated June 27, 2013, made payable to the Respondent. The excerpts from the transaction history for the Respondent's personal bank account show a deposit of $5,500 into that account on that same day. Those monies were clearly paid by RW to the Respondent. RW was a client of the Member.

¶ 487 With respect to DP and CP, although the cheque in the amount of $10,000 dated July 15, 2012, made payable to the Respondent was signed by CP, it was drawn on a bank account which was jointly owned by CP and DP. Those monies were clearly paid by DP to the Respondent. There is no dispute that DP was a client of the Member.

¶ 488 If we are wrong in finding that clients RW and DP paid money into the Respondent's personal bank account, that does not detract from our finding that the Respondent engaged in personal financial dealings with 6 other clients whose status the Respondent does not dispute, that gave rise to a conflict of interest, that he failed to disclose to the Member or address according to MFDA Rules 2.1.4 and 2.1.1.

¶ 489 Dealing with the substantive aspect of the allegation, MFDA Rule 2.1.4, which governs conflicts of interest reads as follows:

2.1.4 Conflicts of Interest

(a) Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.

(b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d).

(c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.

(d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4(a), (b) and (c).

¶ 490 Staff also referred the Panel to MFDA Staff Notice MSN-0047 entitled "Personal Financial Dealings with Clients".

¶ 491 Staff Notices are intended to assist Members and their Approved Persons in the interpretation, application of and compliance with the requirements under MFDA By-laws and Rules. This Notice reminded Members and Approved Persons that they must be aware of the possibility of conflicts of interest arising in connection with business conducted by them for clients.

¶ 492 It stated:

> Responsible business judgment requires the use of reasonable care and diligence as necessary in the circumstances to address the conflict or potential conflict in the best interests of the client. The appropriate course of action will depend on the nature of the conflict of interest and the clients'

circumstances. In situations involving a potentially significant conflict of interest, the exercise of responsible business judgment may require a prohibition on the type of transaction giving rise to the conflict.

MSN-0047, p. 1

¶ 493 The guidance set out in this Notice is consistent with the findings of the MFDA Hearing Panel in *Tonnies (Re)* which stated:

> The phrase "responsible business judgment", which is contained in the Rule, is not defined by the Rules. However, a reasonable interpretation would suggest that it requires the exercise of care and diligence in the circumstances to address the conflict or potential conflict of interest always subject to being in the best interest of the client. . . . In cases involving a significant and actual conflict of interest, the exercise of responsible business judgment may require a blanket prohibition on, or refusal to proceed with, the type of transaction giving rise to the conflict.
>
> *Tonnies (Re)*, *supra* at pp. 13-14

¶ 494 MSN-0047 specifically identifies certain types of private investment schemes with clients that are prohibited not only because they tend to give rise to significant and direct conflicts but also because such arrangements may also be contrary to MFDA Rule 1.1.1. An example of one such prohibited arrangement is:

> **Private Investment Schemes with clients**
>
> ...
>
> arrangements where client funds are put into investments that are to be directly or indirectly managed by the Approved Person"
>
> ...
>
> MSN-0047, p. 2

¶ 495 The Panel agrees with Staff's submission that the solicitation of client money by an Approved Person into his own private business which money he subsequently commingled with his personal finances, as was the case here, constituted a prohibited conflict of interest for which the exercise of reasonable judgment required a blanket prohibition.

¶ 496 As the Panel in *Nunweiler (Re)* stated:

> Where an Approved Person borrows money from a client, or arranges investments by clients in companies in which the Approved Person has a personal interest, such conduct immediately raises a significant actual conflict of interest, a conflict that in most if not all cases will be impossible to resolve in favour of the client. It is patently obvious that facilitating investments by a client in your company, or borrowing money from a client is not the exercise of responsible business judgment in the best interests of the client.
>
> *Nunweiler (Re)*, MFDA File No. 201030, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated May 28, 2012 at para. 17

¶ 497 Hearing Panels have consistently found that where Approved Persons solicit and accept monies from clients for investment in businesses that they control or ventures that they have an interest in, such conduct gives rise to conflicts of interest that cannot be addressed by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rule 2.1.4 and the standard of conduct under MFDA Rule 2.1.1.

Harmer (Re), *supra* at paras. 284-309

Visneskie (Re), MFDA File No. 201553, Hearing Panel of the Central Regional Council, Decision and Reasons dated December 7, 2017 (Misconduct) at paras. 15-20

Nunweiler (Re), *supra* at paras. 15-23

Tonnies (Re), *supra* at pp. 13-16

¶ 498 MFDA Hearing Panels have also held that when an Approved Person holds client monies in a personal bank account, such circumstances give rise to a conflict of interest within the meaning of Rule 2.1.4.

Wang (Re), MFDA File No. 201762, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated October 2, 2017 at para. 16

Harmer (Re), supra at paras. 299-300

Rule 2.1.1

¶ 499 The Panel has no hesitation in finding that this conduct also breaches the standard of conduct rule.

¶ 500 For all of the above reasons, therefore, the Panel finds that Allegation #3 as set out in the Notice of Hearing has been established.

Allegation #4

Between no later than 2006 and October 5, 2017, the Respondent provided false or misleading information to the Member in responses to questions on annual compliance questionnaires from the Member, contrary to MFDA Rule 2.1.1.

Staff's position

¶ 501 Staff submitted that pursuant to the annual attestations the Respondent submitted to the Member between 2006 and 2017, depending on the framing of the particular question, the Respondent attested that he:

a) had no outside business activities at all;

b) had obtained written approval of any outside business activities; or

c) such outside activities had been submitted for reporting on the NRD.

¶ 502 In their written submission Staff set out the following chart which contained the relevant answers with respect to the questionnaires with emphasis added to highlight its position.

Year	Question #	Question	Respondent's Answer	Reference
2006	Q2b	I have not carried on any outside business activity or dual occupation without *the written approval* of my Regional Director and the IGFS Compliance Department, and in accordance with our Corporate policies and procedures (Emphasis added)	True	West Affidavit, Exhibit 17 (MFDA.AFF.212)
2007	Q2b	I have not carried on any outside business activity or dual occupation	True	West Affidavit, Exhibit 17 (MFDA.AFF.211)
2008	Q2b	I have not carried on any outside business activity or dual occupation	True	West Affidavit, Exhibit 17 (MFDA.AFF.209)
2009	Q2b	I have not carried on any outside business activity or dual occupation. If I do have any outside business activity or dual occupation, I have disclosed the outside business activity or dual occupation, and it has been approved by my Regional Director and Area Vice-President. *In addition, it has been reported to Compliance for filing on the National Registration Database (NRD)* (Emphasis added)	True	West Affidavit, Exhibit 17 (MFDA.AFF.206)
2010	Q2b	If I have any outside business activity or dual occupation, I have disclosed the outside business activity or dual occupation, and it has been approved by my Regional Director and Area Vice-President*. In addition, it has been reported to Compliance for filing on the National Registration Database (NRD)* (Emphasis Added)	True	West Affidavit, Exhibit 17 (MFDA.AFF.204)
2011	Q2b	If I have any outside business activity, I have disclosed the outside business activity, and it has been approved by my Regional Director and Area Vice-President. *In addition, it has been reported to Compliance for filing on the National Registration Database (NRD).* If false, please describe the outside business activity. (Note that previously undisclosed activities should be brought to the attention of your Regional Director and Area Vice-President immediately).	True	West Affidavit, Exhibit 17 (MFDA.AFF.202)

Year	Question #	Question	Respondent's Answer	Reference
2012	Q2b	If I have any outside business activity, I have disclosed the outside business activity, and it has been approved by my Regional Director and Area Vice-President. *In addition, it has been reported to Compliance for filing on the National Registration Database (NRD);* If false, please describe the outside business activity. (Note that previously undisclosed activities should be brought to the attention of your Regional Director and Area Vice-President immediately). (Emphasis added)	N/A	West Affidavit, Exhibit 17 (MFDA.AFF.199)
2013	Q2b	If I have any outside business activity, I have disclosed and reported it to Compliance for filing on the National Registration Database (NRD). *If no outside business activity, select Not Applicable;* (Emphasis Added)	N/A	West Affidavit, Exhibit 17 (MFDA.AFF.196)
2014	Q2b	If I have any outside business activity, I have disclosed and reported it to Compliance for filing on the National Registration Database (NRD). *If no outside business activity, select Not Applicable;* (Emphasis Added)	N/A	West Affidavit, Exhibit 17 (MFDA.AFF.193)
2015	2c	Have you disclosed and reported all Outside Business Activities, including volunteer positions, to Compliance for filing on the National Registration Database (NRD)? *If no outside business activity, select Not Applicable;* (Emphasis Added)	N/A	West Affidavit, Exhibit 17 (MFDA.AFF.190)
2016	2c	Have you disclosed and reported all Outside Business Activities, including volunteer positions, to Compliance for filing on the National Registration Database (NRD)?	N/A	West Affidavit, Exhibit 17 (MFDA.AFF.187)
2017	2c	Have you disclosed and reported all Outside Activities, including volunteer positions, to Compliance for filing on the National Registration Database (NRD)? *If you don't engage in any outside activity, select Not Applicable; If no, please describe the outside activity. (Note that previously undisclosed activities should be brought to the attention of Compliance immediately).*(Emphasis added)	N/A	West Affidavit, Exhibit 17 (MFDA.AFF.183)

¶ 503 In their oral submission Staff submitted that the wording of each of the above questions was unambiguous and that the Respondent was an experienced person who, having held supervisory authority as a branch manager at a certain point, should have been aware of what the questions meant and of the requirement to disclose the existence of outside business activities.

¶ 504 In particular, Staff submitted there is no question that the Respondent never disclosed Eagle Franchising to the Member. In Staff's submission, therefore, the Respondent clearly provided false or misleading information to the Member in response to the questions on its annual compliance questionnaires, in breach of MFDA Rule 2.1.1.

Respondent's position

¶ 505 The Respondent argued that the initial disclosure of his accounting practice that he made to the Member in 1991 when he was first hired, constituted sufficient disclosure to the Member and that following that he did not have to make any further disclosure.

¶ 506 He also argued that he understood he was "grandfathered".

¶ 507 Plus, he argued, none of his supervisors told him that he was completing his attestations incorrectly despite the fact, he submitted, that they were aware of his outside business activities.

¶ 508 He submitted, as well, that the Member's written approval of his outside business activities should have been found in the personnel files that Division Managers ought to have maintained about him, from the time he was first hired.

¶ 509 Finally, he argued that in any event, the financial dealings he had with clients involved the sale of a personal asset and that under his original outside business activity agreement with the Member there were no restrictions on what he could do as a self-employed business person including being able to sell part or all of his business. None of that activity, therefore, he submitted, needed to be disclosed to the Member.

Panel's Analysis

¶ 510 The Respondent did not lead any evidence to clarify or explain his answers on the annual questionnaires.

¶ 511 Even in the opening statement he made at the outset of the Hearing, the Respondent acknowledged to

the Panel that: he did "other business with investments clients"; such individuals were his friends; and that he did not report that business on the Member's annual attestations because when he started with the Member in 1991, approximately 11 years before it became an MFDA Member, he joined on the basis that he could continue to operate his already established accounting business as a self-employed individual.

¶ 512 As we stated earlier in these Reasons, we find that the Respondent did not disclose the existence of Eagle Franchising or any activities he carried out in connection with that business to the Member. We also find that by 2004 when Eagle Franchising began, the activities the Respondent conducted relating to offering franchising services and business consulting, together with the personal financial dealings he engaged in with clients, were different business activities than the accounting and tax preparation business that he conducted when he was hired by the Member in 1991.

¶ 513 For that reason, when the Respondent provided answers to the questionnaires that signaled to the Member that he had disclosed all of his outside business activities, we find he was providing false or misleading answers.

¶ 514 Even if we accept the Respondent's arguments that as of 1991, he disclosed to the Member that he had an accounting and tax preparation practice that does not change our finding that the Respondent's outside business activities had sufficiently changed by 2006 when he was required to start filling out the Member's questionnaires, that he ought to have disclosed the activities in the answers he gave on the questionnaires.

¶ 515 We agree with Staff's submissions that the wording of the questions in the questionnaires was clear and unambiguous and that as an Approved Person with significant experience including having acted for a period of time as a branch manager, the Respondent ought to have known that his answers were not accurate.

¶ 516 As we discussed in the section above dealing with our analysis of Allegation #1, Approved Persons are expected to know and understand the requirements imposed on them by their regulator and to stay current with an understanding of those obligations as they evolve.

¶ 517 Although the Respondent gave a number of explanations which were not in evidence but which he submitted as argument as to why his answers should not be considered false or misleading, the Panel finds no evidence to support those explanations nor do we find them to be an appropriate answer to this allegation, in any event.

¶ 518 We note, for example, that it is not a defense for an Approved Person to rely on others to detect their failure to comply with their regulatory obligations. Such obligations are personal to each Approved Person.

¶ 519 Rule 2.1.1 is a broad rule that encompasses a variety of misconduct that may not necessarily be caught by other more specific rules.

¶ 520 By providing answers which were false or misleading to the Member, the Respondent prevented the Member from conducting any further inquiries into the nature of his outside business activities and therefore prevented it from being able to perform the supervisory role which is essential to protect the public interest.

¶ 521 Hearing Panels have found that when an Approved Person engages in personal financial dealings and fails to truthfully answer questionnaires they submitted to the Member, the Approved Person has misled the Member and breached the standard of conduct set out in Rule 2.1.1.

Visneskie (Re), *supra* at paras. 21-25

Nunweiler (Re), *supra* at paras. 27-30

¶ 522 The Panel finds, therefore, that the Respondent's conduct in providing false or misleading answers to the Member's annual questionnaires, was contrary to the expectations of MFDA Rule 2.1.1.

¶ 523 Based on the totality of the evidence, the Panel finds that between 2006 and October 5, 2017 the responses the Respondent provided to the Member in answer to questions set out in the Member's annual compliance questionnaires were false or misleading and Allegation #4 as set out in the Notice of Hearing has been established and substantiated.

¶ 524 We find, therefore, that Allegation #4 as set out in the Notice of Hearing has been established.

Conclusion

¶ 525 For all of the reasons set out herein, the Panel finds that the allegations set out in the Notice of Hearing issued on June 4, 2020, have been established.

DATED this 15 day of November 2023.

Sherri Walsh, Chair

Guenther Kleberg

Greg Wiebe