

# INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

IN THE MATTER OF:

**THE DEALER MEMBER RULES OF THE  
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA**

AND

**THE BY-LAWS OF THE  
INVESTMENT DEALERS ASSOCIATION OF CANADA**

AND

**SYVERT FRANCIS MYTTING**

## NOTICE OF HEARING

**TAKE NOTICE** that pursuant to Part 10 of Dealer Member Rule 20 and Section 1.9 of Schedule C.1 to Transition Rule No.1 of the Investment Industry Regulatory Organization of Canada (“IIROC”), a hearing will be held before a hearing panel of the IIROC (“Hearing Panel”) on Wednesday February 8, 2012, at Reportex Agencies Ltd., 925 West Georgia Street, Suite 1010, Vancouver, British Columbia at 10:00 a.m.

**TAKE FURTHER NOTICE** that pursuant to Rule 6.2 of IIROC’s Dealer Member Rules of Practice, that the hearing shall be designated on the:

- The Standard Track
- The Complex Track

**TAKE FURTHER NOTICE** that on June 1, 2008, IIROC consolidated the regulatory and enforcement functions of the Investment Dealers Association of Canada (“IDA”) and Market Regulation Services Inc. Pursuant to the *Administrative and Regulatory Services Agreement* between the IDA and IIROC, effective June 1, 2008, the IDA has retained IIROC to provide services for the IDA to carry out its regulatory functions.

**THE PURPOSE OF THE HEARING** is to determine whether Syvert Francis Mytting (“Mytting” or “the Respondent”) committed the following contraventions that are alleged by IIROC:

**Count 1**

In or about February 2007 the Respondent, in relation to a client, KFL:

- (a) acted contrary to IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1) by failing to properly record the client’s investment objectives on the New Account Application Form for a new client account; and
- (b) acted contrary to IDA Rule 1300.1 (q) (now IIROC Rule 1300.1 (q)) by recommending the purchase of securities which were not suitable for the client.

**Count 2**

In or about August 2007 the Respondent, in relation to a client, KFL acted contrary to IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1) by:

- (a) personally guaranteeing the future value of the client’s account without the authorization of his firm; and
- (b) entering into personal financial dealings with the client and obtaining a potential interest in the client’s account by claiming for himself any funds, in excess of the original account value, in the account on a future date.

**Count 3**

In 2006 and 2007 the Respondent, in relation to as many as 5 clients, acted contrary to IDA Rule 1300.1 (q) (now IIROC Rule 1300.1 (q)) by recommending that the clients fund part of their investment portfolio using leveraged investment loans to extents which were not suitable for the clients.

**PARTICULARS**

**TAKE FURTHER NOTICE** that the following is a summary of the facts alleged and to be relied upon by Staff at the hearing:

## **Overview**

1. These Particulars relate to the Respondent's actions and recommendations he made to clients when he was the Registered Representative ("RR") responsible for the clients' accounts at a Berkshire Securities Inc. ("Berkshire") branch in Abbotsford, British Columbia.
2. Counts 1 and 2 relate to the suitability of recommendations made in the account of one client, and a promise to guarantee the future value of that account. That promise was made after the recommended securities purchased in the account had declined in value. The general time period related to these counts is February 1 – December 18, 2007.
3. Count 3 relates to the suitability of recommendations made to five clients to use leveraged investment loans to fund their investment accounts. The Respondent made some of these recommendations before 2007 but the recommendations were made primarily in May and June 2007.
4. The Respondent had been previously registered in the securities industry since 1994 and worked at Berkshire from October 2002 until he was dismissed by Berkshire on December 18, 2007. He has not since worked for any Dealer Member or in any registered capacity related to the securities industry.

## **Counts 1 and 2 - KFL**

5. AK & his wife SK (collectively, the "Ks") were long time clients of the Respondent. In or about December 2006 the Ks sold their business and, after considering different financial proposals, invested money from that sale in Berkshire accounts it opened on or about February 1, 2007, with the Respondent as the RR responsible for the accounts.
6. Part of the K's total investment was in a separate account, (the "KFL Account") because the Ks instructed the Respondent that they needed \$1,000,000 available in December 2007 to pay taxes due on the sale of the business.

7. The Ks invested the balance of the sale proceeds in a separate account (the “Other Account”).
8. The New Account Application Form (“NAAF”) for the KFL Account dated February 1, 2007 indicated the following:
  - Investment Objectives: 100% Long Term
  - Risk Tolerance: 100% Medium
  - Time Horizon: 10 years or more
9. On February 1, 2007 \$1,000,000 was deposited into the KFL Account.
10. On February 2, 2007 the Respondent recommended and executed the purchase of equity based mutual funds in the KFL Account.
11. On or around the same day, the Respondent recommended and purchased the same securities in the same percentages in the Other Account.
12. The securities the Respondent recommended and purchased generally declined in value after they were purchased so that the value of the original \$1,000,000 investment in the KFL Account at the end of each of the first 6 months was approximately as follows:

• February 28	\$ 971,477
• March 31	\$ 976,664
• April 30	\$ 988,228
• May 31	\$ 983,451
• June 30	\$ 959,475
• July 31	\$ 929,171
13. From February to August, AK contacted the Respondent regularly to express his concern over the decline in value of the KFL Account.
14. On August 16, 2007, the Respondent informed his branch manager (“BM”) that the Ks were unhappy with the performance of the KFL Account and raised the issue of him (Mytting) personally guaranteeing against losses in the account.

15. On August 21, 2007, the BM emailed the Respondent, advising him that:
  - ... an advisor may not make any commitment to a client in respect of making up any market losses without having involved head office compliance and advising them of their intention and the circumstances leading up to this decision.
  
16. On an unspecified day in August, 2007, the Respondent met with AK and promised to make up any losses in the KFL Account from the original \$1,000,000 investment as measured against the balance in the KFL Account as at December 15, 2007. The Respondent and AK also agreed that the Respondent would receive any funds in excess of \$1,000,000 in the KFL Account as of December 15, 2007.
  
17. After he made the agreement, the Respondent filled out a Berkshire Client Information Change Form (“Client Change Form”) and under the heading “Notes” wrote:
  - SMCC Management Inc. and/or Sy Mytting guarantee this account against loss as at Dec. 15/07. Value over \$1,000,000 pd. to SMCC/Mytting .
  
18. SMCC Management Inc. is 100% owned by the Respondent.
  
19. The Client Change Form was not dated.
  
20. On August 31, 2007 (a Friday), the Respondent faxed the Client Change Form to Berkshire’s Head Office Marketing Department.
  
21. The next business day, September 4, 2007, the BM found a copy of the Client Change Form in his office.
  
22. By August 31, 2007 the original \$1,000,000 invested in the KFL Account had dropped to approximately \$ 903,047.
  
23. Over the next 3 months the value of the KFL Account continued to generally decline so that the value at the end of each month was as follows:
  - September 30        \$890,100
  - October 31         \$852,030
  - November 30        \$847,322

24. On December 18, 2007, Berkshire dismissed the Respondent.
25. On December 19, 2007, the Ks sent a complaint letter to Berkshire demanding to be made whole up to the value of their original \$1,000,000 investment in the KFL Account.
26. On December 24, 2007, Berkshire proposed to settle the Ks complaint by paying KFL \$171,068.
27. On December 28, 2007 the Ks accepted Berkshire's proposal and the payment was made.

### **Count 3 - Suitability of Leveraged Loans**

28. When he was an RR at Berkshire, the Respondent generally believed that because equities had historically increased in value over time that equities would continue, into the future, to increase in value. Based on this belief, the Respondent generally advised clients and prospective clients to invest as much money in equity mutual funds as they could access. This included borrowing as much money as a financial institution would loan them and investing that money in equity mutual funds.
29. The following people (the Clients) were clients of Mytting at Berkshire:
  - GM & AM
  - DF
  - IW & LW
  - MA & NS
  - CR & DM
30. The Respondent recommended the Clients apply for investment loans through AGF Trust Company and B2B Trust Company, which loaned money on the condition that it be invested in mutual funds which secured the loan.
31. Some of the Clients applied for more than one loan so that total amounts of loans increased over time as follows:

Client	Loan Amounts and Dates	Total Loans
GM & AM	\$300,000 from AGF in April 2006; \$100,000 from AGF in October 2006; \$200,000 from AGF in December 2006; \$150,000 from AGF in June 2007.	\$750,000
DF	\$102,000 from AGF in June 2007 which consolidated an existing investment loan of \$32,000.	\$102,000
IW & LW	\$100,000 from AGF in May 2007.	\$100,000
MA & NS	\$100,000 from AGF in November 2005; \$147,000 from AGF in May 2006 which consolidated an existing \$117,000 loan; \$316,000 from AGF in June 2006 which consolidated an existing investment loan; \$300,000 from B2B Trust in August 2006.	\$863,000
CR & DM	\$50,000 from B2B Trust in October 2006; \$30,000 from AGF in October 2006; \$20,000 from AGF in June 2007.	\$100,000

32. All of the monies borrowed from AGF Trust Company and B2B Trust Company were invested in equity based mutual funds which were purchased on a deferred sales charge (“DSC”) basis<sup>1</sup>.
33. Each client loan was charged a variable rate of interest which was either .5% or .75% greater than the company’s prime rate. If the company’s prime rate increased the rate of interest would increase. If the company’s prime rate decreased the rate of interest would decrease. At the time of their latest loan each client was paying interest at a rate of 6.5%.

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<sup>1</sup> If the client sold the mutual fund the fund company would charge a percentage fee to sell the fund unless the fund was held for more than seven years. The amount charged is based on the value of the funds when they were purchased and is deducted from the value of the funds sold. The percentage rate depends on how long the client held the funds. If the fund was sold: within two years of purchase (5.5 %); during the third year (5.0%); during the fourth year (4.5%); during the fifth year (4.0%); during the sixth year (3.0%); and during the seventh year (1.5%). After seven years no fee is charged to sell the funds.

34. In making the recommendation to borrow as much money as AGF Trust Company or B2B Trust would loan them, Mytting advised the Clients that:
- a) They would not have to make interest payments out of their own cash flow because interest payments could be made by selling portions of the underlying mutual funds and that increases in the value of the underlying mutual funds would be more than enough to cover the interest payments;
  - b) Leveraging was a long term strategy that could not fail over time unless you abandoned the strategy and sold the investments;
  - c) Borrowing money to invest was consistent with a low – medium risk tolerance; and
  - d) Leveraging money to invest was the only way to save enough money for retirement and that anybody who didn't leverage would never be successful investing.
35. In making the recommendation, the Respondent did not advise the Clients that:
- a) The funds had to generate an annual return which at least equaled the rate of interest they were being charged on the loan just to break even; or
  - b) There was a potential increase in risk if the company's prime rate increased.
36. In making the recommendation to borrow money to invest in mutual funds, the Respondent used charts and graphs which accentuated the growth of hypothetical amounts of money over previous years without ensuring that those charts and graphs were accurate, up to date, or understood by the Clients.
37. The amount of money the Respondent recommended each of the Clients borrow to invest was not suitable for the Clients because the loan was higher than it should have been based on their age, income, net worth, and risk tolerance as recorded on the NCAF for each client.

- a) In the case GM & AM:
  - (i) their \$750,000 investment loan was 114% of their \$660,000 net assets as indicated on their June 2007 NCAF;
  - (ii) their \$750,000 investment loan was 3,750% of their \$20,000 liquid net assets as indicated on their June 2007 NCAF; and
  - (iii) their combined annual income on their June 2007 NCAF was \$99,000.
  
- b) In the case of DF:
  - (i) her June 2007 NCAF indicated that she was 62 years old and not married;
  - (ii) her \$102,000 investment loan was 54% of her \$175,000 net assets as indicated on her June 2007 NCAF;
  - (iii) her \$102,000 investment loan was 227% of her \$45,000 liquid net assets as indicated on her June 2007 NCAF;
  
- c) In the case of IW & LW:
  - (i) their June 2007 NCAF indicated that IW was 57 years old and LW was 55 years old and that their combined annual income was \$82,000;
  - (ii) their \$100,000 investment loan was 29% of their \$340,000 net assets as indicated on their June 2007 NCAF;
  - (iii) their \$100,000 investment loan was 500% of their \$20,000 liquid net assets as indicated on her June 2007 NCAF;
  
- d) In the case of MA & NS:
  - (i) their 2005 NCAF indicated that NS was 72 years old and MA was 63 when the loans were advanced and that their combined annual income was \$62,000.
  - (ii) their \$863,000 investment loan was 63% of their \$1,358,000 net assets as indicated on their 2005 NCAF;
  - (iii) their \$863,000 investment loan was 81% of their \$1,060,000 liquid net assets as indicated on their 2005 NCAF;

- e) In the case of CR & DM:
- (i) their June 2007 NCAF indicated that their combined annual income was \$73,000;
  - (ii) their \$100,000 investment loan was 56% of their \$180,000 net assets as indicated on their October 2006 NCAF;
  - (iii) their \$100,000 investment loan was 152% of their \$66,000 liquid net assets as indicated on her October 2006 NCAF;

38. The Clients didn't understand and the Respondent did not explain the risks of using leveraged loans to create an investment portfolio.

### **GENERAL PROCEDURAL MATTERS**

**TAKE FURTHER NOTICE** that the hearing and related proceedings shall be subject to the Association's Rules of Practice and Procedure.

**TAKE FURTHER NOTICE** that pursuant to Rule 13.1, the Respondent(s) is entitled to attend and be heard, be represented by counsel or an agent, call, examine and cross-examine witnesses, and make submissions to the Hearing Panel at the hearing.

### **RESPONSE TO NOTICE OF HEARING**

**TAKE FURTHER NOTICE** that the Respondent(s) must serve upon the IIROC and Staff a Response to the Notice of Hearing in accordance with Rule 7 within twenty (20) days (for a Standard Track disciplinary proceeding) or within thirty (30) days (for a Complex Track disciplinary proceeding) from the effective date of service of the Notice of Hearing.

### **FAILURE TO RESPOND OR ATTEND HEARING**

**TAKE FURTHER NOTICE** that if the Respondent(s) fails to serve a Response or attend the hearing, the Hearing Panel may, pursuant to Rules 7.2 and 13.5:

- (a) proceed with the hearing as set out in the Notice of Hearing, without further notice to the Respondent(s);
- (b) accept as proven the facts and contraventions alleged by Staff in the Notice of Hearing; and
- (c) order penalties and costs against the Respondent(s) pursuant to By-law 20.33, 20.34 and 20.49.

### **PENALTIES & COSTS**

**TAKE FURTHER NOTICE** that if the Hearing Panel concludes that the Respondent(s) did commit any or all of the contraventions alleged by Staff in the Notice of Hearing, the Hearing Panel may, pursuant to By-law 20.33 and By-law 20.34, impose any one or more of the following penalties:

#### **Where the Respondent(s) is/was an Approved Person:**

- (a) a reprimand;
- (b) a fine not exceeding the greater of:
  - (i) \$1,000,000 per contravention; and
  - (ii) an amount equal to three times the profit made or loss avoided by such Approved Person by reason of the contravention.
- (c) suspension of approval for any period of time and upon any conditions or terms;
- (d) terms and conditions of continued approval;
- (e) prohibition of approval in any capacity for any period of time;
- (f) termination of the rights and privileges of approval;
- (g) revocation of approval;
- (h) a permanent bar from approval with the Association; or
- (i) any other fit remedy or penalty.

**Where the Respondent is/was a Member firm:**

- (a) a reprimand;
- (b) a fine not exceeding the greater of:
  - (i) \$5,000,000 per contravention; and
  - (ii) an amount equal to three times the profit made or loss avoided by the Member by reason of the contravention;
- (c) suspension of the rights and privileges of the Member (and such suspension may include a direction to the Member to cease dealing with the public) for any period of time and upon any conditions or terms;
- (d) terms and conditions of continued Membership;
- (e) termination of the rights and privileges of Membership;
- (f) expulsion of the Member from membership in the Association; or
- (g) any other fit remedy or penalty.

**TAKE FURTHER NOTICE** that if the Hearing Panel concludes that the Respondent(s) did commit any or all of the contraventions alleged by Staff in the Notice of Hearing, the Hearing Panel may pursuant to By-law 20.49 assess and order any investigation and prosecution costs determined to be appropriate and reasonable in the circumstances.

**DATED** at Vancouver, this “3” day of January, 2012.

“Warren Funt signature”  
Warren Funt  
Vice-President, Western Canada

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