

Superintendent of Financial Services

Regarding the *Insurance Act*, R.S.O. 1990, c.1.8, as amended (the “Act), particularly Part XIV, in particular sections 393(9) – 393(11)

AND REGARDING a hearing concerning the suspension or revocation of the life insurance agent licence of Michael Darrel Harvey

DECISION and ORDER

Introduction:

Pursuant to a Notice of Hearing dated June 11, 2013, an Advisory Board was duly appointed under section 393(9) of the Act. The hearing was conducted on January 3, 2014 and March 4, 2014.

The allegations were set out in Schedule “1” as attached.

The report of the Advisory Board is attached.

Findings of Fact:

The three allegations deal with the suitability of Mr Harvey to maintain his licence as an insurance agent. The Advisory Board has made findings about the facts supporting the first two allegations of unsuitability, but it did not conclude that Mr Harvey is unsuitable to be a life insurance agent. No findings were made with respect to the third allegation. Accordingly findings of lack of suitability as set out in the allegations were not made and the findings were restricted to specific actions by Mr. Harvey.

I hereby adopt the findings of fact of the Advisory Board.

Recommendation of the Advisory Board:

The Advisory Board recommended that Mr Harvey’s licence as an insurance agent be suspended for a period of one month and that:

- He select a course dealing with professional ethical responsibilities and compliance and seek approval by the Superintendent of Financial Services (Superintendent) of the course chosen by April 15, 2014
- He pay for the course and provide evidence of satisfactory completion of that course to the Superintendent by July 31, 2014
- Such course would be in addition to the continuing education required by Regulation 347/04

The Advisory Board made reference to six previous decisions of the Superintendent and noted the factors it considered in making its recommendation. In particular it noted that Mr Harvey had no previous contraventions, that he expressed remorse, and that he answered questions in a forthright manner. The Advisory Board also noted the allegations did not involve dishonesty or harm towards clients. The Advisory Board noted that Mr Harvey provided letters of support from two companies.

Decision:

The Advisory Board has found that Mr Harvey had failed to disclose in his licence application the sanction imposed by the Mutual Fund Dealers Association.

There are two issues in this case. The first is the degree to which findings of unsuitability before a regulator of financial services, other than insurance, should be considered as a basis for a finding of unsuitability for purposes of a licence as an insurance agent. The second is the misrepresentation to the Superintendent.

The principles from the Nerdahl case deal with disciplinary action by a non-insurance regulator that leads to a proceeding under the Insurance Act. They are as follows:

1. If the proceeding under the Insurance Act finds that the agent is not suitable, the agent does not meet the requirements under Section 393 of the Insurance Act to hold a licence.
2. If the proceeding under the Insurance Act finds that the agent is suitable to hold a licence under the Insurance Act, it is necessary to ensure that misbehaviour does not emerge for insurance business. To achieve this objective, licence conditions and a licence suspension can be considered.
3. If the proceeding under the Insurance Act finds that the agent is suitable to hold a licence under the Insurance Act, any penalties should reflect only the Superintendent's responsibilities under the

Insurance Act. This does not detract from the seriousness of discipline imposed by the other regulators.

The Advisory Board did not find that orders by the MFDA represented a sufficient basis to conclude that Mr Harvey was unsuitable as an insurance agent. That does not imply that there is a lesser standard of suitability under the Insurance Act.

Each case must be considered on its own merits. It is possible that a finding by a non-insurance regulator may relate to the honesty and integrity of an individual in such a way that an Advisory Board could find that the individual has the proclivity toward such behaviour and represents an unacceptable risk to the public or that a single action by the individual is so serious that the individual would not meet the suitability standard for an insurance agent. In such a case, the individual would be unsuitable to be licensed as an insurance agent. The Advisory Board did not find that either of these circumstances exists in this case.

It is also possible that an Advisory Board, taking into consideration both the agent's history in the insurance industry as well as the agent's history in other financial services, might find conclude that any risk to the public is more specifically related to the non-insurance financial services and that the risk that such behaviour will recur in the insurance business can be managed. Such a finding would not represent condoning the action by the individual or a diminution of the findings of the non-insurance regulator. This appears to be the conclusion of the Advisory Board in this case.

It is clear from the report of the Advisory Board that it concluded, correctly, that a finding of unsuitability would reasonably lead to an order for revocation of Mr Harvey's licence. Section 393 of the Insurance Act makes suitability a condition to be granted a licence as an insurance agent and places a duty on the Superintendent to assess suitability.

Section 407 of the Insurance Act provides that "a licence may be issued to an agent or adjuster subject to such limitations and conditions as the Superintendent or the organization recognized under subsection 393 (14), as the case may be, may prescribe." Limitations or conditions are designed to manage risk in those circumstances where risk can practically be managed. This can be used in situations where protection of the public may require greater oversight of the actions of an agent.

There is a reasonable concern for the public that arises as a result of Mr Harvey's actions in the mutual fund business notwithstanding that there was no evidence presented that clients in the insurance business have been harmed. This concern is described below.

It would be inappropriate to ignore the fact that an individual who did not comply with the regulations governing the sale of non-insurance financial products is also continuing to be licensed to sell insurance (another financial product) to the public. This is especially the case when mutual funds compete with certain insurance products. Regulated persons are expected to know and comply with the rules governing those financial services.

The Advisory Board recommended a course in ethics to respond to its first finding with respect to the proceedings before the Mutual Funds Dealers Association. Mr Harvey's failure to take the steps directed by his dealer to monitor the consequences of leveraged investments was the cause of regulatory action by the Mutual Fund Dealers Association. I am not satisfied that a course in ethics is sufficient to deal with the risk of leveraged investing in insurance products such as individual variable insurance contracts. In light of the findings of the Advisory Board, I believe that licence conditions providing for supervision and monitoring of errors and omissions insurance coverage, are necessary to ensure that Mr Harvey's contraventions are isolated to the mutual fund business and that he does not pose a risk to insurance clients. Accordingly I will be ordering a period of supervision and monitoring errors and omissions insurance to address the risks of leveraged investing or indiscriminate replacement of mutual funds with insurance contracts. Errors and omissions insurance is a source of restitution for clients who may be harmed by insurance sales supported by leverage strategies that may be inappropriate to their circumstances.

The Advisory Board also made findings that Mr Harvey made a misstatement to the Superintendent in his application for a licence. Providing false or misleading information to the Superintendent is a serious matter. The absence of this information precludes the Superintendent from requiring closer supervision of the agent to ensure that misconduct in the sale of mutual funds does not become misconduct in the sale of insurance. Regulation would not be possible if licensees did not bear serious consequences for providing false or misleading information to the regulator.

Each case is unique. The Advisory Board has recommended a penalty at the shorter end of the range of penalties that have been imposed for misrepresentation to the Superintendent. I agree that the penalty should be at the lower end of the range and am prepared to accept the recommendation of the Advisory Board. Unlike some other cases, there are no other contraventions of the Insurance Act to be considered in conjunction with the misrepresentation. Further mitigating factors are the

two letters of reference, forthright testimony by Mr Harvey as summarized by the Advisory Board in its report, and his acceptance of responsibility for his actions.

ORDER

I hereby order the following suspension and conditions on the life and accident and sickness insurance agent licence of Mr Michael Darrel Harvey:

1. Mr Harvey's licence as a life and accident and sickness insurance agent be suspended for a period of one month commencing April 15, 2014.
2. Mr Harvey's licence as an insurance agent shall remain suspended until the later of the completion of the period of suspension ordered in the first point and the date Mr Harvey obtains the written approval of the Superintendent of a written undertaking from another agent (the Supervising Agent) who is licensed in Ontario and acceptable to the Superintendent, and who undertakes for a period of 24 months commencing on the day following the conclusion of the period of suspension of Mr Harvey's licence to:
 - a. supervise Mr Harvey and co-sign all applications, as evidence of joint responsibility for the insurance business transacted by Mr Harvey.
 - b. confirm whether any insurance transactions directly or indirectly involved leverage strategies
 - c. confirm that errors and omissions insurance is continuously maintained
 - d. report to the Superintendent immediately any contraventions of the Insurance Act and its regulations by Mr Harvey.
 - e. prepare promptly a report regarding the insurance business, any leveraged insurance sales, and compliance with errors and omissions insurance requirements of Mr Harvey and his compliance for each six month period during the period of supervision (the Agent Report).
3. Mr Harvey shall file with the Superintendent the Agent Report within 30 days of the completion of each six month period to which it relates.
4. Mr Harvey shall notify the Superintendent forthwith if the Supervising Agent is no longer willing to accept these responsibilities. Mr Harvey shall not act as an insurance agent when he does not have a Supervising Agent.

5. Mr Harvey shall notify the Superintendent if he wishes to substitute the Supervising Agent and shall not act as an insurance agent until such time as he has received the written approval of the Superintendent of a substitute Supervising Agent.

Dated at Toronto, this thirteenth day of March 2014

Grant Swanson
Executive Director, Licensing and Market Conduct
by delegated Authority from
Superintendent of Financial Services

Schedule 1

Allegations

1. Harvey has demonstrated untrustworthiness to transact the business of insurance for which the licence has been granted pursuant to section 8(d) of Regulation 347/04, and is thereby unsuitable to maintain his licence, in that:
 - a. Commencing in May 2009, Harvey intentionally failed to comply with his employer's directions to take steps as the employer considered necessary and reasonable to supervise leveraged accounts serviced by Harvey, contrary to the rules of the Mutual Fund Dealers Association of Canada (MFDA), for which he was sanctioned by an MFDA hearing panel;
 - b. Commencing in July 2010, Harvey failed to attend for an interview during the course of an investigation by the MFDA, contrary to the rules of the MFDA, for which he was sanctioned by an MFDA hearing panel.
2. Harvey has made a material misstatement or omission in his application for licence renewal dated July 4, 2011, contrary to section 8(b) of Regulation 347/04 by failing to disclose that he was the subject of an MFDA investigation and is thereby unsuitable to maintain his licence;
3. Harvey has thereby demonstrated untrustworthiness to transact the business of insurance for which the licence has been granted pursuant to section 8(d) of Regulation 347/04 and is thereby not suitable to maintain in his licence;
4. Such other allegations that FSCO may advise.