Re Shields

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Yonathan Chanoch Shields

2021 IIROC 15

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario District)

Heard: September 14, 18, 24, 25, October 5, 14, 16, 29, November 2, 9, 17, 26, 2020 and January 18, 2021 in Toronto, Ontario via videoconference
Decision: July 20, 2021

Hearing Panel:
Philip Anisman, Chair, Deborah Leckman and Edward Jackson
Appearance:
Natalija Popovic and April Engelberg, Enforcement Counsel
Eric Brousseau, for Yonathan Chanoch Shields
Yonathan Chanoch Shields (present)

REASONS FOR DECISION ON THE MERITS

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I. INTRODUCTION

¶ 1 Knowledge of a client's financial circumstances, investment experience and objectives, and the client's capacity and willingness to accept risk are essential to a registered representative's ability to ensure that recommended transactions are appropriate for the client and are in the client's best interests. Accordingly, IIROC's rules require a registered representative to exercise "due diligence to learn … the essential facts relative to every customer and to every order or account accepted" (the "know your client" obligation) and to ensure the suitability of every recommendation and order for the client's account.[1]

¶ 2 This proceeding addresses these responsibilities in the context of futures accounts implementing a high-risk trading strategy in options on futures contracts ("futures options" or "options"). The Statement of Allegations alleges that Yonathan Chanoch Shields ("Shields" or the "Respondent"), a registered representative employed by R.J. O'Brien & Associates Canada Inc. ("RJO"), accepted ten clients referred to him by another client, Shane Dubin ("Dubin"), adopted Dubin's trading strategy for them, and recommended and executed trades for their accounts without complying with his know your client and suitability obligations, contrary to IIROC Rules 1300.1(a) and 1300.1(q). This trading resulted in losses for the clients totalling approximately $1,360,484 USD as a result of an unpredictable spike in volatility on February 5, 2018.

II. HEARING PROCESS: EVIDENTIARY AND PROCEDURAL ISSUES

A. Hearing Process

[1] IIROC Dealer Member Rules, Rules 1300.1(a) and 1300.1(p) and (q) (hereinafter "IIROC Rules").

¶ 3 This hearing was conducted virtually on thirteen days over five months. IIROC enforcement staff ("IIROC Staff") called three witnesses: an IIROC investigator, Alexander Oustinov ("Oustinov"), Dubin, and AM, who was one of the clients referred to Shields. Oustinov's evidence was based on IIROC's investigation of Shields' conduct; it included documents relating to the clients' accounts and transcripts of interviews of Shields and seven clients, VP, ED, JM, MW, BT, SF and RF, who did not agree to testify.[2] Oustinov read parts of these interviews into the record in direct and cross-examination. Shields testified on his own behalf.

B. Disclosure

¶ 4 In his cross-examination, Oustinov disclosed that he had interviewed LM, RJO's chief compliance officer. In response to queries by Shields' counsel, IIROC Staff explained that this interview was part of a separate investigation into RJO's supervision of Shields that was still open, and for this reason a transcript of LM's interview had not been disclosed to the Respondent. The failure to disclose this document presented an issue concerning IIROC's obligations under IIROC Consolidated Rule 8417, which requires IIROC enforcement staff to disclose and provide copies of all documents in IIROC's possession or control that are relevant to a proceeding.[3] After an adjournment, counsel informed the Panel that IIROC agreed to produce all documents obtained in its investigation into RJO's supervision, and the Panel adjourned the hearing and ordered that the disclosure would be subject to IIROC's deemed undertaking rule.[4] With the parties' consent, the Panel ordered that during the adjournment, Oustinov, who remained subject to cross-examination, would be permitted to speak to IIROC Staff solely to assist in production of these materials. IIROC Staff undertook to limit their discussions with Oustinov to matters pertaining to this assistance and that there would be no discussion relating to his evidence concerning Shields.[5] Audio recordings and transcripts of two interviews, one of LM and the other of JA, who was RJO's retail trading supervisor, were subsequently adduced in evidence.[6]

C. Transcript from Another Proceeding

¶ 5 Prior to the hearing, AM and six other clients brought civil actions against Shields and RJO in Manitoba (where RJO's head office is located) concerning their losses, which actions were settled. At a prehearing conference, Shields' counsel advised that he might wish to use the transcript of AM's examination for discovery or productions from this action in his cross-examination of her. With counsels' consent, a procedure to govern their use was adopted:[7] following AM's examination-in-chief, Shields' counsel provided copies of the transcript of AM's examination for discovery to the Panel and IIROC Staff and commenced his cross-examination; the hearing was then adjourned to allow IIROC Staff to review the transcript, when IIROC Staff could not discuss AM's evidence with her. At counsels' request, the Panel ruled that the transcript could be used only for purposes of impeachment, as if the examination for discovery had occurred in this proceeding.[8]

D. Hearsay Evidence: IIROC Interviews

¶ 6 Although evidence from IIROC's interviews is hearsay, it is admissible under IIROC Consolidated Rule 8203(3), and the evidence of seven of Shields' clients was introduced through Oustinov's reading parts of their interviews in his direct and cross-examination. Although it was given under oath or affirmation, this evidence was not subject to cross-examination. Accordingly, it must be weighed carefully with emphasis on whether it is

[2] The other two clients, PA and SS, did not agree to be interviewed. In accordance with IIROC's practice, the clients are identified by initials.

[3] IIROC Consolidated Rules of Practice and Procedure, Rule 8417 ("Consolidated Rules"). This Rule is based on *R. v. Stinchcombe*, [1991] 3 SCR 326; see also *IIROC v. Crandall*, 2020 NBCA 76, para. 67.

[4] Consolidated Rule 8420.

[5] Order, September 29, 2020.

[6] Exhibits 16 and 18 (audio) and 17 and 19, respectively; see para. 6, below.

[7] Order, July 6, 2020.

[8] See Queen's Bench Rules, Man. Reg. 553/88, Rule 30.1(6) (deemed undertaking not applicable); see also Consolidated Rule 8420(5).

corroborated. The Panel has considered the weight to be given to each of the interviews in light of the totality of the evidence presented in the hearing.

E. Standard of Proof

¶ 7 IIROC has the burden of proving its allegations on a balance of probabilities. Shields' counsel submitted that satisfaction of this standard requires clear, cogent and convincing evidence in view of the seriousness of the allegations and the potential consequences for Shields of an adverse finding, which suggested the more onerous standard of proof previously applied in disciplinary proceedings in Ontario[9] that the Supreme Court of Canada rejected in *F.H. v. McDougall*.[10] "Clear, cogent and convincing evidence" means only that the evidence must demonstrate that it is more likely than not that a fact occurred. This is not dependent on the seriousness of the allegations or the consequences of a finding that they occurred.

III. REGULATORY CONTEXT

A. IIROC Rules 1300.1(a) and 1300.1(q)

¶ 8 Although they are conceptually distinct, IIROC's know your client and suitability obligations are inextricably interrelated.[11] IIROC Rule 1300.1(a), the know your client rule, requires a registered representative to "use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted." It imposes an ongoing obligation applicable to the customer, a new account for the customer and every transaction subsequently made in the account, but does not expressly specify the facts that are essential.

¶ 9 The nature of these facts is prescribed in IIROC Rules 1300.1(p) and (q), which apply, respectively, to the acceptance of orders and recommendations respecting trades. Under both rules, a registered representative must "use due diligence to ensure that the [order or] recommendation is suitable for such client based on" a non-exhaustive list of factors that includes "the client's current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts' current investment portfolio composition and risk level." As one purpose of the know your client obligation is to enable the fulfilment of these suitability obligations, the factors specified in Rules 1300.1(p) and (q) also determine facts that are essential to satisfy the know your client requirement when opening an account and subsequently recommending and executing transactions for it.[12] New client application forms ("NCAF") used by dealer members usually reflect the information relative to the customer for all of these factors, including risk levels for the account.

¶ 10 While they are necessary for its fulfilment, the suitability requirement is not limited to factors relative to the client. It requires consideration of the essential facts relative to the client and their application in light of factors relating to available investment vehicles, the markets in which they trade, general market trends, and other relevant factors. These factors are essential facts relative to acceptance of an order under Rule 1300.1(a). Although Rule 1300.1(a) does not expressly refer to "recommendations", it applies to recommendations in the same manner as to orders in light of the parallel obligations under Rules 1300.1(p) and (q) and the fact that a recommendation approved by the client results in an order. The due diligence required by IIROC Rules 1300.1(p) and (q) thus overlaps and is dependent on compliance with the know your client rule.

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[9] E.g., *Re Boulieris*, 2004 ONSEC 1 (CanLII), paras. 33-34; *Re ATI Technologies Inc.*, 2005 ONSEC 14 (CanLII), paras. 13-15.
[10] *F.H. v. McDougall*, 2008 SCC 53, paras. 31, 39-40, 44-46 and 49. Shields' counsel cited *Re Gareau*, 2011 IIROC 53, para. 4, which followed the Ontario Securities Commission's *Re Boulieris* decision; see now, e.g., *Re Cheng*, 2019 ONSEC 8 (CanLII), para. 30.
[11] See *Re Daubney*, 2008 LNONOSC 338, para. 16, quoting *Re Lamoureux*, 2001 ABSECCOM 813127 at 10.
[12] The other original purpose is to ensure the integrity and credit worthiness of a customer in order to protect the firm; see, e.g., Connelly, "The Licensing of Securities Market Actors," in 3 *Proposals for a Securities Market Law for Canada: Background Papers* (1979), p. 1265 at p. 1332.

B. Futures Trading

¶ 11 Unlike trading in equity and debt securities, which covers a low to high risk spectrum, trading in futures and options on futures is high risk. RJO's NCAFs, for example, do not identify investment objectives with levels of risk; instead they reflect the purpose of an account with respect to types of transactions as either hedging or "speculative". As described by LM in her IIROC interview, hedging is used for price protection; hedged trades "are really zero sum" and unlike speculative accounts, do not expose a client to "real" losses; speculative accounts are more like gambling.[13]

¶ 12 Because margin requirements in futures markets are low, substantial leverage is available. Shields testified that leverage in futures trading ranged from 50 to 75 times the amount of margin deposited by clients in their accounts. In view of the small margin required for futures options, movements in market prices and volatility may result in margin calls and substantial losses if the market moves against a client. RJO's account agreements and risk disclosure statements, which form a part of the NCAFs for speculative accounts, state that low margin requirements can result in losses that exceed a client's investment and that it may not be possible to limit a client's potential losses.

¶ 13 In the context of futures trading, therefore, a client's risk tolerance is of central importance and a registered representative's knowledge of a client's risk tolerance assumes heightened significance. In order to obtain this essential fact, due diligence mandates that a registered representative "make certain" that the client understands the nature of the risks involved in trading futures and futures options.[14] This is essential for both the acceptance of an account and trading in it.

IV. FACTS AND FINDINGS

A. The Respondent

¶ 14 At the time of the matters in this proceeding, Shields was employed as a registered representative at RJO, registered to trade in commodity futures and options on commodity futures. He began his employment in the investment industry in 1995, trading in securities, futures and options on futures. From 2004 to 2010, he was a futures specialist at Scotia Capital Inc., providing services trading futures and options to clients from other departments. At Scotia Capital, he met and worked with Dubin.

¶ 15 After the adoption of electronic trading in futures in 2005 or 2006, which included futures options trading, Shields wrote an article, "Getting Paid to Wait", describing a short options strategy. The strategy involved selling out of the money options and holding them until they expired unexercised to obtain the option premium, which would result in annual premiums of approximately ten per cent, provided that the market did not go down. Similar strategies were widely adopted in the years following, including by exchange traded funds.

¶ 16 In 2010, Shields left Scotia Capital to join another bank-owned member firm, where he remained until 2013, when he joined RJO, an independently-owned firm that traded only futures and futures options on behalf of clients. As senior market strategist, Shields handled client accounts with aggregate margin deposits of $20 to $25 million USD.

¶ 17 Shields' employment at RJO concluded in 2019, following the initiation of IIROC's investigation. Prior to this investigation, he had not been the subject of an investigation or a disciplinary proceeding.

B. Background: Dubin's Futures Strategy

¶ 18 Dubin was a registered representative at Scotia Capital from 2000 to 2018; he was registered to trade in securities and, from 2010 to 2016, in futures. He discussed futures markets and trading strategies with

[13] Exhibit 17, p. 15 (Interview).
[14] *Re Daubney*, note 11 above, para. 201.

Shields, when Shields was employed at Scotia Capital. Dubin traded in futures options for his own account following a strategy like the one described in Shields' article (the "Strategy").

¶ 19 The Strategy "consisted of writing uncovered US dollar options on futures on a number of futures products including the S&P 500 E-minis, crude oil, natural gas, and gold"; predominantly focused on S&P 500 E-minis, it sought "short-term option writing opportunities, both calls and puts within the futures markets".[15]

¶ 20 In 2015, Scotia Capital decided that it would not continue to provide retail futures trading services beyond June 2016. Dubin then contacted Shields and told him of his futures trading. In early 2016, after discussing the Strategy, Dubin opened two accounts with Shields at RJO.

¶ 21 As described by Shields in his testimony, the Strategy involved selling uncovered, or "naked", out of the money call and put options with a 30 to 40-day term in the expectation that they would not be exercised. If the market moved closer to an option's strike price, increasing the risk of exercise, the risk would be managed by "rolling" up or down, depending on whether the option was a call or a put. If a put, another put option with the same term would be purchased at the strike price and a put option sold with a lower strike price, exercisable for the next 30-day period; if a call, the option would be purchased and a higher strike-priced call would be sold. Assuming a one per cent premium, the Strategy would earn income of ten to 12 per cent annually.

¶ 22 Dubin also informed Shields that he had been trading futures as an adviser for a few clients whom he wished to refer to Shields. Between January 2016 and October 2017, Dubin referred colleagues, clients and friends, about whom he told Shields, including the individuals identified in this proceeding who opened accounts with Shields. For some of these accounts, Shields looked to Dubin for the know your client information to prepare the client's NCAF.[16]

¶ 23 It was understood that trading in these clients' accounts would mirror the trading in Dubin's accounts with Shields, subject to adjustments in quantity based on the size of the account. These trades were based on discussions between Dubin and Shields in which decisions concerning option pricing, timing and allocation were made.[17] Shields then sent emails to the clients recommending the trades.

¶ 24 Initially, Shields' emails said that the recommendations were made after discussion with Dubin, but LM, RJO's chief compliance officer, directed Shields not to say this in order to make clear that the recommendations came from Shields. Shields' subsequent recommendations identified the trades he recommended, without explanation.[18] Dubin informed the clients at the time of the referral that they were to respond affirmatively and promptly to these emails. On occasions when a response was delayed, he followed up to have the client send the required approval.

¶ 25 A number of clients looked to Dubin for ongoing assistance to explain the trading and performance in their accounts. To assist Dubin in providing this assistance, his email address was included on the NCAFs for the accounts so that he would receive account statements, and he was generally given access to their account information online.[19] In short, Shields and Dubin worked cooperatively in the opening and conduct of the clients' accounts.

¶ 26 Although Dubin obtained approval from Scotia Capital for his own accounts at RJO, he did not inform Scotia Capital of his involvement with Shields and the clients until after February 5, 2018 and the clients' losses. He was subsequently dismissed by Scotia Capital and entered a settlement with IIROC.[20]

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[15] Exhibit 22: Affidavit of Shane Dubin, sworn September 8, 2020, para. 13.
[16] E.g., Exhibit 3, Tab 69, p. 1550 (JM).
[17] In some cases, Dubin directed the quantity allocations; e.g., Exhibit 4, Tab 72 (transcript of conversation, June 9, 2017).
[18] See para. 121, below.
[19] Exhibit 4, Tab 75, p. 1559. Dubin's email address was noted on the NCAFs for PA, SS, JM (corporate account), MW, SF, RF and AM.
[20] Exhibit 22: *Re Dubin*, 2019 IIROC 17.

C. Account Opening Process

1. RJO's Process

¶ 27 RJO's Policies and Procedures Manual ("RJO's Manual") stated that before accepting an account, a registered representative "must determine that the new customer fully understands the risks inherent in trading futures and options on futures … [and] must be aware of the possibility that he may lose all monies invested and even significantly more, if the market should move against him."[21] It said that for this reason, it is imperative that the registered representative knows each customer.

¶ 28 The basic information obtained for this purpose was collected on the NCAF that each client was required to complete and sign. This information included the client's employment and financial information, including annual income, assets and liabilities, net worth and liquid net worth, the number of the client's dependants, the client's investment experience in trading futures or futures options and securities, and whether the purpose of the account was speculation or hedging.

¶ 29 The NCAF required the client to specify the approximate risk capital available for futures trading and stated that this is "the amount you are willing to risk trading". Although the NCAF did not say it, this was the amount to be used for margin on trades; it was described in RJO's Manual as what the client could reasonably afford to lose without affecting the client's standard of living. While the specification of risk capital was the client's responsibility, both the registered representative and supervisor were to ensure that the amount specified was consistent with the client's other information. Before an account was accepted, LM, RJO's chief compliance officer, reviewed this amount with emphasis on the client's liquid net worth.[22]

¶ 30 Based on this and other relevant factors, such as the client's age, employment, annual income, dependants, investment experience, and particularly experience in futures trading, LM determined whether the specified risk capital amount was appropriate for the client; if in her judgment it was not, she specified a lower figure on the NCAF, which she did for five of the accounts considered in this proceeding.[23] A client whose risk capital amount was reduced, however, was allowed to deposit a greater amount, all of which could be used for margin on trades in the account. This occurred with the clients holding the five accounts in this proceeding. Although copies of their final account opening documents were sent to the clients with other information concerning RJO accounts, none of them was advised of LM's change to their NCAF.

¶ 31 RJO treated the specified risk capital amount as a monitoring mechanism. If trading resulted in the loss of 90 per cent of the risk capital, RJO's retail trading supervisor would advise the registered representative to discuss the potential for a margin call and the risk involved with the client with a view to reconsidering the account and the risk capital amount. A discussion of this nature was not required for any of the client accounts referred by Dubin before February 5, 2018.

¶ 32 RJO's NCAF did not contain categories for time horizon or investment objectives because futures and futures options are not investments and trading in them is speculative and, as LM described it, akin to gambling. A client's ability and willingness to take risk, that is, the client's risk tolerance, was to be addressed by the registered representative as part of the know your client process and the determination of the suitability of the account for the client. RJO's Manual stated that as a starting point "when getting to know" a client, before an account is opened, the client should be asked three questions: (1) whether the client "fully understands" the use of leverage in the futures or futures options markets, (2) whether the client is financially

[21] Exhibit 7, Tab 8, p. 2. The record includes two editions of RJO's Manual, the first dated February 5, 2015 (Exhibit 7, Tab 7) and the second dated September 25, 2017. Although these versions straddle the period covered by this proceeding, the two manuals are substantially identical with respect to the matters addressed in these reasons. References are to the later RJO Manual.

[22] A client's liquid net worth was the client's cash and tradeable securities shown on the NCAF; it excluded the client's residence, other real property, automobiles and RRSPs, which were also included in the assets section on the NCAF.

[23] The accounts of VP, JM, BT and AM and the joint account of SF and RF. In her interview, LM characterized this determination as a "judgment call"; Exhibit 17, p. 30. Each account is addressed individually in Section D.1, below.

able to withstand a complete loss of the risk capital amount and is aware that losses could exceed this amount, and (3) whether a total loss would affect the client's lifestyle.

¶ 33 RJO's NCAF formed the first part of a 21-page document.[24] It was followed by the client agreement, a risk disclosure statement, and a summary disclosure statement on exchange traded futures and futures options. The client agreement and disclosure statements comprised 16 pages of single spaced, small, five or six point print. These documents described the use of margin and disclosed the high risk nature of futures trading, including that it may not be possible to limit the extent of potential liability and that there is no limit to the possible loss on the sale of a naked option.[25] A client had to initial each page of the complete document and sign the NCAF and an acknowledgement that he or she had read and understood these disclosure documents.[26] RJO's Manual suggested that to expedite the account opening process, the registered representative "walk through the … account agreements with the customer and review those sections that must be completed."[27]

¶ 34 If a client had no experience in trading futures or futures options or specified a risk capital amount that was more than ten per cent of the client's net worth less the value of his or her residence, RJO required the client to sign an additional risk disclosure form ("ARDF"). The ARDF said that the client did not meet RJO's guidelines for opening an account and that trading in futures and options might be too risky, as the high degree of leverage used for such trading could lead to large losses. It advised the client to carefully consider whether such trading was suitable for him or her and required the client to acknowledge that he or she wished to proceed. RJO's Manual said that "[p]articular attention should be given to those prospects with no investment history."[28]

2. Shields' Process

a. General

¶ 35 Shields testified about his account opening practice. He said every client is specific and described his role as being "to ensure that the client understood what it was that they were using the futures markets for and the products that they were trading … and, you know, understand the specifics and the nature of that trade".[29] Before sending account opening documents to a client, he would reach an understanding of what the client wanted to accomplish with the account. He would then instruct his assistant, RM, to send the appropriate account opening documentation to be filled out by the client and would respond to questions on its completion. A trading authority form would accompany the NCAF documents, if a person other than the client was to have authority to approve trades for the account. If a client had no investment experience, an ARDF would be included, but Shields did not discuss the ARDF with his clients because, he said, "the form is pretty self-explanatory".[30] The client would complete and return by email copies of the documents, which would be sent to Shields for his review, after which Shields would meet briefly with the client to collect the original signed copy and verify the client's identity; the documents would then be sent to LM for her approval.

b. Clients referred by Dubin

¶ 36 Shields knew what the clients referred by Dubin wanted to accomplish with their accounts. He understood that they wished to follow Dubin's Strategy and mirror his trading and he looked to Dubin for information concerning them, which included their relationship with Dubin and Dubin's belief concerning their

[24] The NCAF for individual accounts was the first four pages. For joint accounts, the NCAF was seven pages, resulting in a 24-page document.
[25] E.g., Exhibit 1, Tab 1, pp. 21 and 23.
[26] For a joint account, both clients had to initial and sign the account opening documents.
[27] Exhibit 7, Tab 8, p. 3.
[28] *Ibid*., p. 3.
[29] Transcript, November 2, 2020, p. 36.
[30] Transcript, November 17, 2020, p. 12.

sophistication. Shields' evidence was that he outlined the Strategy to the clients to whom he spoke;[31] as they asked no questions when he referred to uncovered options, margin and leverage and informed them of rolls to mitigate potentially adverse market movements, he concluded that they had sufficient understanding of leverage and the risks of futures trading in light of his belief that they were sophisticated.

¶ 37 A client's sophistication, however, requires definition. "Sophistication" is indicative of a person's level of knowledge and understanding of a subject matter, based on study, experience or both. Knowledge in banking, finance or business, and even experience in trading securities, for example, may indicate an ability to understand information that they are provided concerning futures trading, but it does not demonstrate that a person is aware of such information or has an understanding of trading in futures or naked futures options and its risks or that such trading is suitable for the person. This was recognized by RJO's ARDF, which served as a secondary caution for customers who had no prior experience with futures and as a result, for whom RJO was unsure that futures trading was suitable. Thus although Dubin's view was that all the clients he referred to Shields were sophisticated, this was not sufficient to fulfil the know your client obligation and the determination of the Strategy's suitability for them. That was Shields' responsibility.

¶ 38 As Shields said in his IIROC interview:

> This strategy would be appropriate for someone, who's looking for an outsized market return, understood the nature of futures and the liability that transacting in futures encompasses.[32]

RJO's Manual suggested some of the ways that might be used to address whether a client had this understanding and to learn the client's risk tolerance.

¶ 39 Shields did not follow these suggestions. He did not review their NCAFs with these clients or walk them through the accompanying documents. Nor did he discuss with them their determination of the risk capital amount or how RJO used the risk capital figure. He also did not inform the six clients whose risk capital was reduced by LM that this had been done.[33] Rather, he allowed the full amounts initially deposited by these clients to remain in their accounts to be used as margin for trading purposes, which resulted in greater exposure, and greater losses, than would otherwise have occurred.[34]

¶ 40 Shields did not ask these clients the questions suggested in RJO's Manual or inform them of the potential for unlimited liability. Although he testified that he told all his clients that they could lose more money than they invested, this was clearly not the case with JM, as shown in the transcript of his only conversation with Shields.[35] It was also not the case with the other clients.[36] Shields did not inform these clients of the possible scope or nature of their risks. He did not advise them of their inability to limit liability when selling uncovered options or of the risk of an unpredictable increase in volatility that could cause this result, as occurred on February 5, 2018.[37]

¶ 41 When asked in their IIROC interviews about their understanding of the risk capital figure on their

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[31] He did not speak to four clients, VP, ED, RF and SS, but only to their husbands.

[32] Exhibit 2, Tab 20, p. 590.

[33] The six clients were VP, JM, BT, SF, RF and AM.

[34] A few clients subsequently deposited additional funds into their accounts. A table showing each client's net worth, liquid net worth, specified risk capital, adjusted risk capital, the total amount deposited and the loss incurred is included in these reasons as an appendix.

[35] Exhibit 3, Tab 69, pp. 1549-1552; and see para. 77, below.

[36] The opening of each of the clients' accounts and Shields' conduct with respect to them is addressed in section D.1, below.

[37] The clients' losses resulted from the unpredictable spike in volatility on February 5, 2018. This was the highest in the history of the Chicago Board Options Exchange ("CBOE") volatility index, known as the "VIX". The VIX was initiated in 1990. The highest prior single-day spike occurred on February 27, 2007 and reflected an increase of 64.2 per cent. The increase on February 5, 2018 was 115.6 per cent, almost twice that percentage; Exhibit 7, Tab 4, p. 2 ("After the Volpocalypse"). Although such one-day events were unpredictable, the possibility of such spikes was known. The largest similar event, the flash crash on October 19, 1987 resulted in a 313 per cent spike on the VXO, which index has a high correlation to the VIX; Exhibit 7, Tab 5, p. 5 ("Anatomy of a Blowup").

NCAFs, the clients said that they thought it reflected the amount they were investing and the most they could lose. However, they did not believe this would occur. From their conversations with Dubin, they understood that the Strategy had been successful, was low risk and would provide them with annual income of ten to twenty per cent of their invested risk capital. This evidence was corroborated by Dubin. Although he testified that he never said the Strategy was low risk and did not give any guarantee of its performance, he told them how well it had performed. In his testimony, he said in a good year, the return was about twenty per cent, as it was in 2017.[38] Shields, himself, said that the objective of the Strategy and these clients was around a 20 per cent annual return.[39] Shields' description of the availability of rolls to avoid potential losses tended to confirm the clients' beliefs. As explained more fully below, the Panel accepts the consistent evidence of Shields' clients on their conversations with Shields concerning the risks associated with their accounts.

¶ 42 Shields assumed that these clients understood the Strategy and its associated risks as a result of his reliance on Dubin and the clients' not requesting explanations or asking questions. He addressed potential risks only in response to specific questions concerning trading strategies, for example, with ED's husband, DD.[40] In other cases, without probing his clients' actual understanding, he concluded that the Strategy was suitable for them because he believed they understood the risks of the Strategy and their risk capital represented an amount they could afford to lose, as it was less than ten per cent of their net worth, a small part of their assets.

¶ 43 The clients' total net worth, however, was not indicative of their ability to satisfy potential margin calls, as its largest component was invariably their residences. When asked why he did not adopt the calculation on the ARDF (ten per cent of net worth less residence), Shields had no explanation other than that RJO's practice was unique to it in his experience. He also did not consider the clients' liquid net worth. Because a margin call would require immediate payment, a client's liquid net worth is an important indication of the client's ability to absorb risk, as was reflected in LM's practice concerning the risk capital amount on the NCAF.

D. Clients

¶ 44 As Shields recognized, a client's knowledge and the suitability of an account, trading strategy and trades are specific to each client. The alleged contraventions of IIROC Rules 1300.1(a) and 1300.1(q), therefore, must be addressed with respect to each of the ten clients for whom Shields opened accounts.

1. Account Opening: Know Your Client

a. VP

¶ 45 Dubin's first referral to Shields was DP, a friend and colleague and Dubin's private banker at Scotiabank, who had traded in futures options for nine years, the preceding two years with Dubin. Dubin made the introduction by email on January 11, 2016, and DP signed an NCAF two weeks later.[41] As his trading was self-directed, DP regularly discussed futures options trading with Shields. He followed a short option strategy, often engaging in riskier trading than Dubin. Shields said he explained to DP the greater volatility risk associated with the longer term puts DP preferred, in which his positions could be subject to periods of quick decline.

¶ 46 In 2017, DP told Shields that he was unhappy with the tax liability on his significant returns and wanted to move his accounts into his wife's name to reduce the taxes. After discussions with Shields, DP's account was closed and two accounts were opened in VP's name, over which DP retained trading authority. DP continued to trade as before in one of these accounts.[42]

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[38] See paras. 60, 83 and 116, below.
[39] Exhibit 2, Tab 20, pp. 587-588 (Interview).
[40] See para. 54, below.
[41] Exhibit 1, Tab 12, p. 358.
[42] This account was not included in the Statement of Allegations.

¶ 47 The other account was to follow Dubin's Strategy. The NCAF and accompanying agreements for this account were signed by VP on May 3, 2017. It showed VP's annual income as $70,000, DP's annual income as $300,000, the family net worth as $2,000,000, liquid net worth of $385,000 and a risk capital amount of $300,000.[43] Although LM reduced this amount to $100,000, the full $300,000 was deposited into the account. As a result of the volatility spike on February 5, 2018, VP's account lost approximately $223,866 USD.

¶ 48 As VP had no trading experience, RM sent an ARDF to DP with the NCAF.[44] The ARDF was not in VP's account opening documents.[45] Instead, the NCAF reflected DP's experience in futures and securities trading. Shields was aware that the experience shown was DP's. When he sent the NCAF for LM's approval, in answer to a question on how long he had known the client, he said "new relationship". In fact, Shields had not met or spoken with VP, and he continued to treat DP as the client without ever talking to VP.

¶ 49 Shields testified that he would open an account in a spouse's name, for tax purposes, if as here, the assets were her husband's and the husband had trading authority over the account. On cross-examination, he was reluctant to agree that his client was VP, although he ultimately did. The NCAF, account agreements and the trading authority agreements all make clear that this is the case.[46]

¶ 50 Shields' counsel submitted that IIROC's rules permitted Shields to look to a person with trading authority (a "TA") to fulfil his know your client obligation under IIROC Rule 1300.1(a). Rule 1300.1(a) refers to "every customer", while Rule 1300.1(q) refers to a "client". He argued that "customer" is a broader category and includes a TA in circumstances like these.

¶ 51 Although the two words differ, their meaning in Rule 1300.1 is identical. Both refer to the holder of an account, who is responsible for decisions concerning the account and trading in it. The customer is required to sign the account agreements, including the agreement granting trading authority, is entitled to withdraw trading authority and replace a TA, and is responsible for margin payments and other liabilities incurred in connection with the account. Rule 1300.1 reflects this single meaning; its provisions addressing discretionary accounts refer to a "customer";[47] those governing managed accounts refer to a "client" and a "customer" interchangeably,[48] as do Rules 1300.1(a), (p) and (q).[49] In each case, "customer" and "client" mean the account holder.

¶ 52 This interpretation reflects the function of the know your client and suitability requirements. As the purpose of the know your client obligation is to enable a registered representative to ensure that orders are suitable for the client, knowledge of the client's experience, understanding, objectives and risk tolerance is essential. This knowledge must be obtained from the client to ensure its accuracy, particularly the client's risk tolerance, for which the client's understanding of the risks being undertaken is a prerequisite. Shields could no more rely on DP than on Dubin to determine VP's understanding of the risks involved in futures trading and her risk tolerance. This information must be obtained directly from the client. In short, "customer", as used in IIROC Rule 1300.1(a), refers only to a client.

¶ 53 Without talking to VP, Shields could not have determined that the Strategy was suitable for her. In

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[43] The NCAFs said US dollars in the risk capital line. Except in one instance, funds in Canadian dollars were deposited by the clients referred by Dubin and were converted to US dollars by RJO for trading purposes.

[44] Exhibit 3, Tab 49, p. 1385 (RM email).

[45] Exhibit 1, Tab 12, pp. 331-368.

[46] VP and DP both signed two agreements, a trading authority form and an agreement for non-professional advisers providing services to RJO customers. The trading authority form signed by VP stated that she expressly agreed that all transactions in the account were at her risk. The non-professional advisers agreement provided that VP's relationship with RJO was governed by her account agreement.

[47] IIROC Rules 1300.3-1300.5.

[48] IIROC Rules 1300.7-1300.8.

[49] IIROC Rules 1300.1(a) (customer), 1300.1(p)-(t) (client), 1300.3 (customer), 1300.4 (customer), 1300.5 (customer), 1300.7 (client), 1300.8 (customer).

failing to do so, he failed to exercise due diligence to learn the essential facts relative to the customer and the account he accepted, contrary to IIROC Rule 1300.1(a).

b. ED

¶ 54 In January 2016, Dubin referred another colleague and client, DD, to Shields in anticipation of Scotia Capital's cessation of its futures trading services. Dubin described DD as the head of mortgages at Scotiabank, who had been trading futures options with him for two years, often following DP's lead. At his request, Shields met with DD to go over the account opening documents; in the course of a 20-minute meeting, Shields filled out an NCAF with him. In response to a question about put spreads, Shields explained why he preferred to sell naked puts in terms of the comparative risks of the two strategies and the availability of roll transactions. He testified that DD understood margin because of his past trading experience.

¶ 55 DD wished to open an account with Shields over which Dubin would have trading authority. When this arrangement fell through, he decided to open the account in his wife, ED's name for tax reasons and to retain trading authority over it. ED signed the NCAF documents and trading authority form for this account on February 1, 2016. The NCAF showed $3,600,000 net worth of which $500,000 was liquid and specified risk capital of $100,000. DD subsequently deposited additional funds for trading purposes. As a result of the volatility spike on February 5, 2018, ED's account lost approximately $262,198 USD, including an outstanding margin debt of approximately $20,378 USD.

¶ 56 ED's NCAF contained a number of errors. It said that she had been employed as a bookkeeper for 20 years with annual income of $70,000. In her interview, however, ED said she was unemployed, but went into her father's company to help out with the banking, and that she had no income. Although she also had "absolutely zero"[50] investment experience, the NCAF showed her husband's investment experience in futures and futures options trading at Scotia McLeod as four years experience. (Both Shields and Dubin testified that it was two years.)

¶ 57 Shields admitted that he had not met or talked with ED before her account was opened. He said he would not have opened an account for her without DD having spousal trading authority, as "I didn't know her and don't open accounts for people I don't know … [but] her account with a seasoned TA or her spouse as a TA was something that was acceptable."[51] As with VP's account, Shields treated DD as the client with respect to his wife's account.

¶ 58 Shields talked to ED thereafter, when her approval for a withdrawal of funds from the account was required because her TA was not allowed to withdraw funds; on cross-examination, he said the withdrawal "had to be requested by the actual account holder."[52]

¶ 59 This highlights the fact that a TA is not the client. In so treating DD, Shields failed to exercise due diligence to learn the essential facts relative to his client, ED, contrary to IIROC Rule 1300.1(a).[53]

c. PA and SS

¶ 60 In August 2016, Dubin referred a married couple, PA and SS, to Shields, both of whom were his clients. PA, and presumably SS, wanted more aggressive trading. PA was the CEO of a Canadian direct bank, who Dubin characterized as sophisticated and one of the smartest people he had met. The NCAF for PA's and SS's joint account said that PA's annual income was $1,000,000, their net worth was $6,200,000 and their liquid net worth was $4,200,000; no annual income was shown for SS. Their risk capital amount was $250,000.[54] The

[50] Exhibit 5, Tab 111, p. 1571 (ED Interview).
[51] Transcript, November 2, 2020, p. 125.
[52] Transcript, November 17, 2020, p. 70.
[53] See paras. 50-52, above.
[54] $100,000 USD was initially deposited into the account.

NCAF showed over six years' experience in trading in securities, including options and short sales, but no trading experience in futures or futures options. Both PA and SS signed the NCAF and an ARDF on October 21, 2016. The account increased by approximately 15 per cent by June 2017, and additional funds were then deposited into the account.[55] As a result of the volatility spike on February 5, 2018, the account lost approximately $276,966 USD, of which approximately $96,840 USD was owing as margin.

¶ 61 Shields testified that he spoke to PA a number of times, including a 45-minute meeting in his office in October or November 2016, in which he explained the difference between trading futures options and forwards, the different concepts of margin in equity and futures markets, and the Strategy and the risks involved in it. His testimony on the Strategy's risks follows:

> I explained how margin worked and that it was there as a good faith deposit and that it was – that the derivatives, the underlying, as well as the fact that it was an option, *that there was the potential for rather big moves to occur in the short period of time,* and that while – while leverage works in your favour on the way up, it works against you when things turn sour.[56] (italics added)

¶ 62 Shields concluded after this interactive conversation that PA's "position as a CEO of a bank and his understanding of risk and markets was, to me, apparent."[57] He said he asked PA about SS's involvement and was told that they discussed all their investments, had both discussed the Strategy with Dubin and wanted to proceed. Although Shields thought SS "was in communication with myself and RM with regard to the account documentation," he did not recall specific conversations with her.[58]

¶ 63 Although it is not clear whether Shields' meeting with PA occurred before or after the account was opened, there is no evidence to contradict his evidence concerning his conversation with PA, as PA and SS refused to be interviewed by IIROC.

¶ 64 IIROC Staff argued that as PA was required to sign an ARDF, he was not sophisticated. While the ARDF was required because of PA's lack of experience in futures trading, this fact alone does not demonstrate that the Strategy was not suitable for him or that Shields failed to exercise due diligence with respect to this question. The risk capital deposited into the account was not excessive in view of his position, income and assets. The essential fact for this purpose was whether PA understood and was willing to accept the risks involved in the Strategy. In view of the conversation described by Shields, IIROC has not proved on a balance of probabilities that Shields did not fulfill his know your client obligation with respect to PA.

¶ 65 Shields' own evidence indicates that he did not take the same steps with respect to SS. He testified that his practice with a joint account was to speak to at least one of the clients. Holders of a joint account, however, are both clients and both are responsible for liabilities incurred in connection with it. IIROC Rule 1300.1(a) required that he exercise due diligence to learn the essential facts "relative to every customer".

¶ 66 While Shields believed that there were communications relating to the account documentation with him and his assistant, he did not recall a specific conversation with SS. He could not, therefore, have reached an informed conclusion about her understanding of the risks she was taking on as a client or her risk tolerance, as her willingness to sign the NCAF and ARDF does not indicate either of these essential facts. Although his failure to do so may be understandable in the circumstances, it was nevertheless a failure to comply with Rule 1300.1(a).

d. JM

[55] Exhibit 6, Tab H.5, p. 1382 (Dubin emails); Exhibit 5, Tab 114, p. 1741 (account statement, June 2017).
[56] Transcript, November 9, 2020, p. 22. This was the only client to whom Shields testified he provided the specific information in italics.
[57] *Ibid*., p. 24.
[58] *Ibid*., p. 23.

¶ 67 Approximately five months later, Dubin referred another client, JM, to Shields. JM was a client of a private banker at Scotiabank, who had recently referred him to Dubin.[59] He owned a successful transportation company and had previously been employed as a financial adviser at a bank, where he had held a mutual fund licence for a short period. Dubin said he was introduced to him by SF, a friend who had worked as a commercial banker at Scotiabank, and who had told JM about Dubin's successful futures trading Strategy.[60] JM asked to be referred to Shields because he wanted a more aggressive strategy with greater returns. Dubin told him that he could earn $1,000 to $1,500 per month in the Strategy, an annual return of 12 to 18 per cent.[61]

¶ 68 Dubin made the referral on March 30, 2017. After a telephone conversation with Shields the following morning, JM was sent account opening documentation by RM, and he filled it out and signed it the same day, March 31, 2017. JM's NCAF showed an annual income of $320,000, net worth of $2,766,000, liquid net worth of $250,000 and a risk capital amount of $100,000, which was reduced to $50,000 by LM. As a result of the volatility spike on February 5, 2018, he lost approximately $76,853 USD in this account.[62]

¶ 69 Both Dubin and Shields said JM had prior experience with futures options.[63] In an email to LM and JA in April 2018, however, Shields said that in their March 31, 2017 telephone conversation, JM "mentioned that he had employed short option strategies in the equity markets before, but this would be the first time in futures."[64] JM's NCAF said he had no futures experience, as he subsequently attested in his sworn IIROC interview, and he was required to sign an ARDF. His NCAF also indicated that he had previously traded securities, but not short sales or options on securities. In his interview, he said his prior investments were primarily in mutual funds. The March 31 conversation was recorded and played in the hearing;[65] JM did not say otherwise during the conversation. The Panel accepts JM's evidence concerning his prior trading experience.

¶ 70 In his IIROC interview, JM swore that he filled out the NCAF without any assistance and was not informed of the change made by LM to the risk capital amount. He said there was no discussion of the ARDF or of margin. While he understood that there was greater risk necessary for a greater return, he characterized the Strategy as not aggressive and said he thought his maximum risk exposure was his risk capital of $100,000, but did not think it likely that he would use that amount.

¶ 71 Shields had a five to six minute telephone conversation with JM on March 31, 2017, before the account opening documents were sent to him. In the course of this conversation, Shields told JM that he and Dubin would discuss markets and Dubin would put on some trades, after which Shields would send their recommendations for JM's approval. The conversation proceeded as follows:

> [Shields]: And that's, and then, you know, if other ideas come up from time to time, happy to bring them up.
>
> JM: Uh huh.
>
> [Shields]: You know if there's the right kind. But, you know, trying to, to, to remain focussed on earning some income by selling uh, selling some premium. And that's …

[59] JM became Dubin's client one or two months before the referral to Shields.
[60] Dubin subsequently referred SF to Shields; see Section e, below.
[61] Exhibit 6, Tab E.6, pp. 18009-18010 (emails, June 15, 2017); Transcript, October 14, 2020, pp. 67-68.
[62] JM opened a second account for his transportation company with a risk capital of $200,000; although the NCAF for this account is contained in Exhibit 1, it was not included in the Statement of Allegations. This NCAF had Dubin's email address for receipt of duplicate statements.
[63] Transcript, October 14, 2020, p. 64 (Dubin: "I believe he also had futures trading experience. I don't know why I'm remembering this now, but I just – I have a feeling that he did"); Transcript, November 2, 2020, pp. 102 and 112 (Shields).
[64] Exhibit 6, Tab E.10, p. 11502 (Email, April 9, 2018).
[65] A transcript of this call was adduced as Exhibit 3, Tab 69, pp. 1549-1552, and as Exhibit 6, Tab E.4, pp. 16816-16819.

JM: And you're doing 30 days or, or, or 90 days?

[Shields]: Uh, usually within 30 days.

JM: Yeah, so you're doing calls and puts on 30 days.

[Shields]: Yeah. There are the times, I, I, I think that there's, you know, from time to time when the market has a good size correction and there's the possibility of selling like really deep out of the money option that might go out a little bit further but the odds are like so in your favour that the market won't collapse.

JM: (laughs) And uh, are you just playing basic or are you doing any like, uh, uh, unique things with the options, like Condors and all that crap?

[Shields]: Not really.

JM: Just basic stuff.

[Shields]: Yeah, not really.

JM: Just basic (laughs).

[Shields]: Yeah, I do from time to time where I'll look at um, I'll look at some option strategies. It might be a market that I like where um, you know, I might sell a call to buy a put spread if, you know if I think there's an opportunity, uh …

JM: Yeah, you cover yourself.

[Shields]: Yeah, so …

JM: (laughs)

[Shields]: … you know, you try to keep, keep prices, you know, keep things as with the costs as low as possible and, and if you're right, you know, hopefully you can make some money. Yeah.

JM: (laughs) Yeah no, no, I'm, I'm familiar with. I'm familiar with it. I just don't have time for it. That's the problem.

[Shields]: Right.

JM: Um, but yeah, I mean uh, that sounds good. Um, you know and I have all the faith in Shane and I've at least got great referrals from uh, a lot of the friends and people that I know so uh, you're in good hands I guess. I mean, you know, I have faith in you too now.

¶ 72 This was Shields' only conversation with JM. On the basis of it and the information received from Dubin, Shields concluded that the Strategy was suitable for JM because he was sophisticated, had a good understanding of the terminology and had previously traded in options on futures.

¶ 73 There was no discussion of JM's experience, margin, or of the extent of the risk involved in the Strategy. In cross-examination, Shields agreed that he asked no questions of JM other than "how are you". In response to a question concerning a discussion of unlimited risk, he said:

> I believe that the question with regard to condors spoke specifically with regard to unlimited exposure. Condors are a strategy that both sells one option and buys another, and by telling him that we don't do condors, that expressly explained that – that it was an unlimited exposure.
>
> …
>
> Again, a condor would have limited risk. Not using a condors strategy and just using a short option strategy would be unlimited exposure and the client who understood to ask about a condors strategy,

to me, had shown that he understood that it was an unlimited risk.[66]

¶ 74 Shields reached this conclusion without probing to determine the actual level of JM's understanding. In his interview, JM said he had read to try to understand and had learned the terms, but did not know how the market worked. Shields did not ask any questions relating to JM's futures or other experience. Nor were the NCAF and the ARDF reviewed with him.

¶ 75 Shields testified that he did not discuss the ARDF with his clients because it was self-explanatory. As the ARDF said that futures and option trading might be too risky an investment strategy with potential substantial loss and required the client to acknowledge acceptance of the financial risks involved, it was only self-explanatory if the client understood the risks that were involved. A discussion of its contents could have served as a vehicle for learning the client's risk tolerance to ensure that the Strategy was suitable for him.

¶ 76 An explanation of the meaning and use of the risk capital specified in the NCAF could also have served this purpose. Shields testified that there was "no reason" for him to have input into the client's decision concerning this amount. Although the decision was the client's, an understanding of how the risk capital and other funds deposited into an account were used was necessary for the client to make a reasonable determination. A discussion would, as well, have assisted in learning the client's risk tolerance and ensuring the suitability of the Strategy for him.

¶ 77 Whether or not the NCAF or the ARDF was so used, the determination of risk tolerance and suitability remained Shields' responsibility.[67] In response to a question from the Panel, Shields testified that he told every client they could lose more than they invested and that although no one believed that a volatility event like the one on February 5, 2018 was possible, he "explained that the potential was there".[68] He did not tell this to JM in their conversation on March 31, 2017.

¶ 78 Shields did not discuss margin, leverage or the unlimited potential risk of selling uncovered options. While JM's comments indicated some understanding of futures, his question about thirty or ninety day options indicates that Dubin had not told him how the Strategy worked. Moreover, the tenor of JM's comments was braggadocious and suggested he was inflating the knowledge he had. That his understanding of futures trading was limited is also indicated by his subsequently asking Dubin for an update on the account because he could not understand the account statements.[69] JM's conversation with Shields did not show that he understood the risks he was accepting.

¶ 79 Shields' counsel relied on the transcript of a subsequent recorded telephone conversation between JM and Shields' assistant, RM, on April 25, 2017, in which JM's comments showed that he understood that the Strategy involved selling puts and calls that were expected to expire and was risky and said with respect to her explanation of rolls that he had "done it before".[70] This conversation, however, followed the opening of JM's account and was not with Shields. More importantly, it does not show that JM understood the potential extent of the risk involved.

¶ 80 Shields' counsel also argued that Shields' evidence should be preferred to JM's because JM's evidence was hearsay and because JM was a party to an action against RJO and Shields at the time of his interview and after the action was settled, resiled from his previously expressed willingness to testify in this proceeding.

¶ 81 The transcript of Shields' only conversation with him confirms JM's evidence on his examination. It was Shields' responsibility to exercise due diligence to learn the essential facts relative to JM, including his risk tolerance. The March 31, 2017 conversation, including the use of "condor" by JM, did not demonstrate his

[66] Transcript, November 17, 2020, p. 58.
[67] *Re Daubney*, note 11 above, para. 210.
[68] Transcript, November 26, 2020, pp. 44-46.
[69] Exhibit 6, Tab E.6, p. 18009 (email, June 15, 2017).
[70] Exhibit 6, Tab E.5, pp. 16820-16824.

understanding of the risks involved in the Strategy. In the Panel's view, Shields did not meet his obligation under IIROC Rule 1300.1(a) with respect to JM.

e. SF and RF

¶ 82 Dubin made his next referral a few days later, in early April 2017. SF was a close friend who had been employed as a commercial banker at Scotiabank for approximately seven years and had recently joined another bank. He had discussed Dubin's futures trading with him over several years and was made aware of Dubin's recent successful trading by his colleagues in private banking, DP and DD. He discussed the Strategy with Dubin and asked him for a referral to Shields, as he wanted the extra income.

¶ 83 In his IIROC interview, SF said Dubin told him that the Strategy was low risk and was achieving a 25 per cent return. While Dubin testified that he never said the Strategy was low risk, he did say that it was intended to obtain a ten to 12 per cent return and described its performance. In April 2017, the Strategy's performance significantly exceeded 12 per cent. Dubin informed PA and SS two months later that it had earned a return of 15 per cent in their account, which on an annualized basis amounted to over 25 per cent.[71] He also testified that in a good year, he made approximately a 20 per cent return in his own accounts at RJO;[72] as he opened his RJO accounts in January 2016, the only years to which he could have been referring were 2016 and 2017. Whether Dubin said "low risk" or not, his description of the Strategy indicated that it was low risk with a high return.

¶ 84 SF spoke with Shields on at least two occasions concerning opening an account to trade Dubin's Strategy. He decided to open an account in his wife, RF's name for tax reasons, and an NCAF was prepared, for which she signed an ARDF on April 18, 2017.[73] Although Shields had not spoken with RF, this account was submitted for compliance approval, along with a trading authority form for SF, as Shields testified. It was rejected by LM because RF had no futures experience and was unemployed.[74]

¶ 85 As a result, Shields suggested a joint account, and an NCAF was signed by SF and RF on June 1, 2017. The NCAF said that SF's annual income was $135,000 and RF's $13,500 in Canada child benefits, that they had a net worth of $1,765,000, a liquid net worth of $60,000 and four dependants and that they had never traded futures or futures options. It specified risk capital of $100,000, which LM reduced to $20,000.[75] SF signed an ARDF on June 1, 2017 to accompany RF's earlier ARDF. He deposited $100,000 into the account to be used for trading purposes. In his interview, he said he obtained these funds through his line of credit, but did not tell Shields of this. As a result of the volatility spike on February 5, 2018, the account lost approximately $75,608 USD.

¶ 86 Shields dealt only with SF; he never met or spoke to RF. He spoke to SF three or four times, twice before RF's account was rejected and once or twice thereafter. Shields testified that SF wanted the same trades as Dubin because of Dubin's success over the years and the recent performance of the Strategy, of which Shields informed him. He said he told SF how he and Dubin cooperated, described futures markets and how they differed from forwards because of electronic trading and said that the leverage available in futures options trading differed from trading equity securities and "that was why it was kind of opportunistic to employ leverage, but that the downside of leverage is when things don't work out." He also discussed how margin is used in futures "as a good faith deposit" for trades and talked about rolling potential trades to

[71] Exhibit 6, Tab H.5, p. 1382.
[72] Transcript, October 14, 2020, p. 174.
[73] Exhibit 1, Tab 4, p. 76.
[74] Neither RF's NCAF nor the trading authority form for SF was adduced in evidence. Shields testified that he would not have accepted an account for RF without SF having trading authority.
[75] It is reasonable to conclude that LM's decision to reduce the risk capital amount to $20,000 was based on SF's annual income, his liquid net worth of $60,000, the fact that RF was unemployed and their four dependants. In these circumstances, a significant loss would likely have affected SF's and RF's lifestyle.

protect against an option's being exercised.[76] He said he believed the Strategy was appropriate for SF because SF had been following the Strategy over a number of years and understood what the trading was about and the associated risks.

¶ 87 Shields did not discuss the risk capital amount with SF and did not inform him of the change made by LM. Nor did he explain the ARDF. In his IIROC interview, SF swore that he thought his $100,000 deposit was his maximum possible loss, and that he did not think he could lose that amount. He said he did not understand the Strategy, that he "only knew the fact that it was providing a certain return per year, and that was the only thing that I was privy to and understood."[77]

¶ 88 In light of Shields' practices with these clients, the consistency of their hearsay evidence concerning his failure to disclose the Strategy's risks and documents supporting it,[78] and Shields' admitted cooperation with and reliance on Dubin, and despite the adjuration of Shields' counsel, taking into account all the evidence, the Panel accepts SF's evidence. Shields' description of his discussions with SF did not mention the potential risk of unlimited loss described in RJO's client agreement and risk disclosure statement, nor the risk of loss greater than the $100,000 that SF deposited for trading (let alone its effect on SF's lifestyle that likely led LM to reduce the amount to $20,000).[79] Due diligence required that this possibility be disclosed to SF in order to learn his risk tolerance and to ensure the suitability of the Strategy for him. Shields' failure to discuss this potential liability, in light of his failure to explain the use of risk capital and the ARDF, constituted a contravention of IIROC Rule 1300.1(a) with respect to SF.

¶ 89 For the reasons discussed above, Shields' failure to talk to RF contravened his Rule 1300.1(a) obligation with respect to her.[80]

f. MW

¶ 90 SC was a vice-president and the national head of mortgages at Scotiabank. She had been informed of the Strategy's performance by DD and DP and had been seeking a referral for some time. She arranged a lunch for Dubin to meet her and her husband, MW, who was a civil engineer employed as a project manager in construction. Dubin described her as smart, aggressive and persistent. In mid-April 2017, following this lunch, he referred SC to Shields. Shields contacted her by email on April 20, 2017. An NCAF and an ARDF were sent to her and MW the following day and signed by MW on April 24, 2017.

¶ 91 MW's NCAF said that his annual income was $140,000, SC's $350,000, their net worth $4,750,000, and their liquid net worth $750,000. He had no experience in futures trading. (Nor did SC.) The specified risk capital amount was $100,000 USD, and account statements were to be sent to Dubin. As a result of the volatility spike on February 5, 2018, the account lost approximately $82,154 USD, of which approximately $2,706 USD was owing for margin.

¶ 92 Shields was reluctant to agree that SC, as the TA, was not his client. His primary dealings with respect to the opening of the account were with SC and he treated her as his client. Shields met with her concerning the account on May 9, 2017. His note of this meeting for identification purposes said he met "with the client in her office".[81] Shields testified that he met with SC for about half an hour in her office, where she had the account opening documents. He said that he told her how he and Dubin found options that:

> hopefully would expire worthless, but were worthwhile for us to sell in anticipation of earning the

[76] Transcript, November 2, 2020, pp. 78-80.
[77] Exhibit 2, Tab 23, p. 822.
[78] See paras. 71-73, above, and para. 93, below.
[79] See para. 32, above.
[80] See paras. 50-52 and 65-66, above.
[81] Exhibit 1, Tab 14, p. 469. The only notes taken by Shields in evidence were notes like this one to satisfy RJO's identification requirements.

premium.

> And I explained that these – this program was actually a derivative of a derivative that we were selling options on on [*sic*] futures contracts and we talked about how in 2008 when the markets suffered the – through the global financial crisis, how quickly derivatives turned poorly in particular mortgage securities, but in derivatives there was the potential for rather adverse moves to happen quickly, and that while we were selling derivatives on the derivatives, she should understand that there was the potential for rather sharp losses to occur in a short period of time.[82]

He said they also talked about margin:

> We talked about how the account, when funded, has to be – is used as a margin – is used – the margin deposit in her account was used as collateral, a good faith deposit to make sure that she had enough capital with regard to the trades that we were putting on, and she assured me that she understood.[83]

He said she decided that the account should be in her husband's name. A trading authority form was signed by SC on May 15 and by MW on May 16, 2017, and LM approved the account on May 18, 2017.

¶ 93 Shields did not meet MW. He spoke to him once for about four to five minutes on April 21, 2017, before RM sent the NCAF. MW's note of this call refers to "futures/options trading", Shields' prior employment, his consultation with Dubin to select trades, the recommendation and approval of such trades, the trading fee and the number of contracts per month. The note does not mention risk or potential liability.[84]

¶ 94 In his interview, MW swore that he had no help in filling out the account opening documents and received no explanation of the ARDF. He said there was no discussion of the nature of trading and no explanation of the Strategy, of margin or of his exposure and that he understood that the risk capital amount on his NCAF represented his investment. From his lunch with Dubin, he thought the investment was "safe" and would earn six to eight per cent.[85]

¶ 95 Shields' testimony concerning his phone call with MW corresponds with MW's note, with two additions. Shields said that MW told him he had used forwards to hedge copper or currency and "had previous experience with regard to understanding the mechanics of a hedge and – and he was, as well, familiar with derivatives and their function within the marketplace" and that MW asked that recommendations be sent to both SC and him with either being able to respond.[86] Shields concluded that the Strategy was suitable for MW because both he and SC "had shown they had experience in understanding derivatives" and financial capacity.[87] Nevertheless, he said that if MW had wanted an account on his own, without SC having trading authorization, he would likely not have opened the account "without a more fulsome discussion with him."[88]

¶ 96 For the reasons stated above, Shields could not look to a TA to determine the suitability of the Strategy for MW.[89] His obligation was to learn the essential facts relative to MW, including his risk tolerance. This required some discussion of the risks associated with the Strategy and the liability that might be incurred as a result of market movements, such as an unforeseen increase in volatility.

¶ 97 MW's interview evidence that he was not informed of these risks is corroborated by Shields' own

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[82] Transcript, November 9, 2020, pp. 8-9. The only client to whom Shields testified that he made a similar statement was PA; see para. 61, above.
[83] *Ibid*., p. 10.
[84] Exhibit 1, Tab 16, p. 505.
[85] Dubin explained this error as reflecting the level of earnings in accounts he managed. He testified that he said the Strategy's goal was one per cent each month and ten to 12 per cent annually and that he did not go over the details of the Strategy.
[86] Transcript, November 9, 2020, pp. 12-13.
[87] *Ibid*., p. 15.
[88] *Ibid.*, pp. 15-16.
[89] See paras. 50-52, above.

testimony. In his interview, MW swore that he had no experience with derivatives, as stated in his NCAF, and an ARDF accompanied the NCAF that was sent to him.[90] In addition, MW's note contained no reference to hedging. Taking into account Shields' counsel's submissions concerning weight, in light of all the evidence, the Panel accepts MW's evidence on this question.

¶ 98 Even if MW were familiar with hedging, as Shields testified, this would not demonstrate that he understood speculative trading in futures options and the liability it encompasses, as the risks associated with hedging differ significantly from those associated with trading uncovered futures options.[91] A reference to hedging would have presented an opportunity to discuss these comparative risks, rather than assuming that understanding. Shields' acknowledgement that he required a more fulsome discussion to open an account for MW indicates he recognized this.

¶ 99 The Panel finds that as Shields was looking to SC as the primary client, he did not discuss the Strategy or the risks involved in it with MW. He did not exercise the due diligence required by IIROC Rule 1300.1(a) with respect to MW.

g. BT

¶ 100 On March 23, 2017, Dubin sent Shields an email introducing his cousin and client, BT. BT was a chartered accountant whose practice was consulting, restructuring and insolvency. Dubin had managed his investments in securities for eight to ten years. He suggested the Strategy because BT was interested in a greater return. He told BT that the Strategy had been earning ten to 12 per cent annually. After some delay, on May 16, 2017, BT asked Dubin if he had to meet with Shields. Following receipt of an email from Dubin, RM sent an NCAF and an ARDF to BT later that day. BT filled out and signed them the following day, May 17, 2017.

¶ 101 The NCAF showed BT's annual income as $500,000, his net worth as $3,340,000, his liquid net worth as $310,000 and that he had never traded futures or options on futures. It specified a risk capital amount of $100,000, which LM reduced to $50,000. As a result of the volatility spike on February 5, 2018, the account had a net loss of approximately $79,494 USD, and a balance owing of approximately $5,059 USD.

¶ 102 Shields met with BT in BT's office, likely on May 17, 2017.[92] Shields testified that the meeting took forty-five minutes. He said BT was then completing the documentation and they had an extensive discussion of how futures and margin worked, in which he explained the use of futures to hedge commodity and currency exposure, speculative trading, the short options strategy, leverage, how they used calls and puts, the use of rolls to mitigate market changes, and Shields' consideration of implied volatility and the risks of options trading. He testified that BT said he was quite familiar with derivatives from his work, understood leverage and indicated an awareness of the information because he asked no questions about terminology during the discussion.

¶ 103 Shields said he also explained how he and Dubin identified opportunities, that he would send recommendations after executing the same order for Dubin and that BT could respond by email. The only questions BT asked related to his receiving the same trades as Dubin, as this was important to him. Shields said that upon completion of the documentation, he asked BT "if he had gone through it and understood it and he said yes."[93] On cross-examination, Shields said he relied on BT's relationship with Dubin as one of the reasons he thought the Strategy suitable for him and did not walk him through the NCAF. The only note in evidence concerning this meeting is Shields' handwritten note for identification purposes that he "met with

[90] Exhibit 3, Tab 64, p. 1531 (RM email).
[91] See para. 11, above.
[92] In his interview, BT said he returned the signed documents on May 17, 2017 and met with Shields on May 18, 2017, but the record does not contain an email returning the documents to RM. Shields' note of this meeting is dated May 17, 2017, and the account opening documents show that the NCAF was sent to LM on May 17, 2017 and state that Shields met with BT. It is therefore likelier than not that May 17, 2017 was the date they met. LM approved the account on May 18, 2017.
[93] Transcript, November 2, 2020, p. 95.

client in his office", dated May 17, 2017.[94]

¶ 104 BT's interview largely contradicts Shields' evidence. In his IIROC interview, he swore that the meeting with Shields was to pick up the original application, lasted only ten or 15 minutes and that nothing meaningful was discussed. He said there was no explanation of the Strategy and no mention of potential gains and losses, risks, or risk tolerance. He swore that he had no experience with derivatives, had never traded options or futures,[95] and did not understand the terminology concerning exchange traded futures options in the account opening documents. He said he filled out the NCAF and ARDF without assistance or explanation and understood that the $100,000 risk capital amount was the amount he was risking, although he thought the Strategy was safe, as Dubin and Shields had earned ten to 12 per cent for years. He was unable to explain why the risk capital amount on his NCAF was changed to $50,000. He understood that the trading decisions would be made by Shields and Dubin and he would approve their recommendations.

¶ 105 The Panel prefers BT's evidence concerning the contents of the meeting.[96] BT was relying on Dubin's success with the Strategy, rather than looking to Shields for advice. In his interview, he candidly described his reason for opening the account as "greed"; he "wanted to make between 10 and 12 percent, that's it."[97] His priority was to mirror Dubin's trades, as his only questions to Shields indicated and as was shown by his response to Shields' final recommendation, in which his approval was conditioned on the recommendation having come from Dubin.[98]

¶ 106 The meeting was more likely a brief meeting for Shields to meet BT and pick up the original completed documents. This accords with Shields' general practice of not discussing risk capital or reviewing clients' NCAFs with them.[99] A brief meeting, without a discussion of the risks associated with the Strategy, is also consistent with Shields' admitted reliance on BT's relationship with Dubin, the general success of his trading in uncovered futures options and of the Strategy, his brief discussions with other clients referred by Dubin[100] and his belief that an event like the one on February 5, 2018 was not possible.[101]

¶ 107 The Panel finds that Shields did not take the steps necessary to ensure that BT understood the Strategy and the accompanying risks and to learn his risk tolerance. On a balance of probabilities, Shields failed to fulfill his know your client obligation, contrary to IIROC Rule 1300.1(a).

h. AM

¶ 108 Dubin sent his last referral to Shields on October 12, 2017. AM was a senior private banker at Scotiabank who worked on DP's team, providing banking and credit services to wealthy clients. These services included financial planning and the sale of mutual funds, although she had not personally invested in securities. Her office was on the same floor as Dubin's and she had referred banking clients to him for investment advice. Some time between April and July 2017, Dubin informed her of how well his futures trading had been doing and the rate of return it had been getting, and he suggested she talk to DP about opening an account at RJO. After talking to DP and obtaining her husband's agreement, AM agreed to the referral.[102] RM sent her an NCAF the same day, which she filled out and returned a week later, on October 19,

[94] Exhibit 1, Tab 6, p. 139.
[95] Dubin testified that BT had traded naked options on securities with him at one time; this was not reflected on BT's NCAF.
[96] BT was not a party to an action against Shields and RJO.
[97] Exhibit 2, Tab 24, p. 872.
[98] BT's responding email stated, "Approved if recommended by Shane"; Exhibit 3, Tab 43, p. 1299.
[99] E.g., Exhibit 3, Tab 28, p. 1183 (email to AM).
[100] See paras. 71 and 93, above (JM and MW).
[101] Transcript, November 26, 2020, p. 45.
[102] Although AM's husband had a telephone call with Dubin to obtain information about his wife's decision, he played no part in the opening process or the account prior to February 5, 2018. After February 5, 2018, her husband was actively involved in requests to RJO for compensation, but his and AM's conduct in the period following this date is not relevant to the Panel's determination of the events that preceded it.

2017.

¶ 109 The NCAF said her annual income was $120,000, her net worth $1,673,300, her liquid net worth $400,000 and that she had lines of credit totalling $94,500. It stated that she had never traded in futures or securities and specified a risk capital amount of $150,000. AM initialled each page and as required, signed documents acknowledging that she had read all its parts. Following the return of the NCAF, RM sent her an ARDF and requested a short five to ten minute meeting with Shields for introductory purposes and to pick up the original copy of the application.[103] AM signed the ARDF in blank and returned it on October 20, 2017. Dubin's email address was added to the NCAF, and the boxes on the ARDF indicating that AM had no futures experience and that her risk capital exceeded ten per cent of her net worth less her residence were marked after they were returned.

¶ 110 LM reduced the risk capital amount to $75,000 and approved the account on October 26, 2017. The next day AM deposited $125,000 into her account, which she obtained from her line of credit. She deposited the remaining $25,000 the following month.[104] She did not inform Shields of this method of funding. As a result of the volatility spike on February 5, 2018, AM lost approximately $283,354 USD, including approximately $163,855 USD owed for margin.

¶ 111 On October 24, 2017, Shields met AM on the 15th floor at Scotia Plaza, where her office was located.[105] Although Shields and AM both testified that this meeting took fifteen to twenty minutes and that the discussion involved Shields' previous employment at Scotia Capital, their evidence on the discussion that ensued was contradictory.

¶ 112 Shields testified that they went to a conference room, where he talked about the Strategy, which mirrored Dubin's trades, explained margin, pointed out it was a two-edged sword and said he would watch and deal with market movements, looked through the documents she gave him and asked her whether she had gone through them and had any questions. He said she told him she had gone through the documents, had talked to DP about his trading and was familiar with the Strategy and was aware of the mirroring. Although he was aware that she had no experience in trading futures or futures options, he concluded that she wanted to pursue the Strategy and understood it and the associated risks.

¶ 113 AM testified that they met in the reception area on her floor,[106] that Shields did not open the package of documents, that there was no discussion of the Strategy, trading, margin or of the risks involved, and that she did not think there could be losses.

¶ 114 This evidence was not shaken, despite an extensive cross-examination. On cross-examination, Shields' counsel took AM through the references to margin and risk in the agreement, risk disclosure statement and other sections of the NCAF. She testified that although she initialled each page and signed the NCAF and accompanying documents, she did so on a computer programme, only glanced at and did not read these sections and did not understand that there was a risk of loss in view of what she had been told by Dubin about the Strategy's performance. She understood that the risk capital in the NCAF was the amount of her investment.

¶ 115 In the Panel's view, AM was an honest witness, who showed a willingness to qualify her statements and address suggestions put to her by counsel in her efforts to answer truthfully. She admitted, for example, that she understood that her account involved risk like any account, but said she did not think there was a risk

[103] Exhibit 3, Tab 28, p. 1183 (RM email).
[104] AM testified that the second amount was meant to be for her parents; Transcript, October 29, 2020, p. 88.
[105] The account opening documents were sent to LM the same day and approved by her on October 26, 2017.
[106] Counsel treated this difference as significant. AM said only that they met in the reception area; she did not mention a conference room, and was not asked about it on cross-examination. In the Panel's view, where the discussion occurred does not affect what was discussed and is not determinative of the issues presented.

of loss in this case because of the information received from Dubin, and possibly DP. She said that Dubin had not mentioned risk or loss. He had told her of the historical performance of his trading as a result of which she expected a steady return of two per cent or $1,000 to $2,000 each month. While she wanted to trade Dubin's Strategy, she said she did not realize that her trades would mirror his.

¶ 116 Her evidence was corroborated by Dubin's testimony that he did not describe the details of the Strategy, but told AM how well he was doing and the rate of return he had been getting. During the period preceding his referral of AM, he told PA and SS that the return in their RJO account in the seven months from November 2016 to June 2017 was 15 per cent, which is over 25 per cent when annualized;[107] and in September 2017, he told SC and MW that the rate they had been getting was 18 per cent annualized.[108]

¶ 117 This information led AM to believe that the Strategy was risk free and to disregard or minimize indications that it was not, as demonstrated by her testimony concerning her signing of the ARDF. She said she read the ARDF, and thought it was merely a second step required as part of the account opening process. Because of her prior discussions, she did not understand from it that there could be losses.

¶ 118 In the Panel's view, AM was a credible and reliable witness. She did not recall some details from October 2017, but these were not central to her decision to open an account at RJO. Although she should have read the NCAF and the description of futures trading and its associated risks and was surprisingly naïve, and perhaps negligent, in disregarding the statements in the ARDF, she was carried away by the prospect of the return she expected from an account with RJO. A client's negligence, however, is not relevant in a proceeding to determine whether a registered representative has complied with regulatory requirements. Nor is her failure to read the fine print in the NCAF documents. It was Shields' obligation to make sure that she understood not only the Strategy, but the nature of the market she was entering and the potential liability inherent in futures trading so that he could learn her risk tolerance.[109]

¶ 119 An explanation of these matters required more than a 15-minute meeting, a part of which was taken up with introductory talk about Shields' background at Scotia Capital. Shields did not say why he looked through the documents he was picking up; they had been completed to RM's satisfaction five days earlier and the meeting was not scheduled for know your client purposes. Shields did not take her through the NCAF and did not ask about the lines of credit mentioned on it, nor did he discuss risk capital. In his testimony recounting their conversation, he did not refer to potential unlimited liability or a loss exceeding the amount she deposited into the account.

¶ 120 On Shields' own evidence about this meeting, he did not expressly address with AM the scope of potential liability involved in the Strategy and described in the account opening documents. This was also not expressed in Shields' description of the meeting in his IIROC interview.[110] Instead, he relied on his relationship with Dubin and the referral, without himself exploring AM's understanding. In view of his knowledge about AM's lack of experience and her ARDF, he did not exercise the due diligence necessary to learn the essential facts relative to opening her account, contrary to IIROC Rule 1300.1(a).

2. Trading: Suitability

a. Trading

¶ 121 When Shields sold options for Dubin, he sent emails recommending transactions in the same options, with variations in the size of the orders, to each of the clients or their TAs. On October 30, 2017, for example, he recommended that all of the clients, except VP and ED, sell five December Canadian dollar 76 puts at 15 or

[107] See para. 60, above; Exhibit 6, Tab H.5, p. 1382 (email, June 6, 2017).
[108] Exhibit 23 (email, September 18, 2017).
[109] *Re Daubney*, note 11 above, paras. 201-202.
[110] Exhibit 2, Tab 20, pp. 604-606.

better and five January crude oil $60 calls at 17 or better.[111] The recommendation to DP, for VP, was to sell ten of each and to DD, for ED, to sell 20. The emails contained no further information; there was no explanation provided and none was expected. The clients understood that they were to send their approval by reply email, and each of them (or their TAs) did so. This pattern continued from the opening of their accounts until February 5, 2018, without a discussion of additional margin; until then, the 90 per cent of risk capital threshold was not triggered in any of these accounts.

¶ 122 On Monday morning, February 5, 2018, in response to a small decline in the S&P 500 Index and a slight increase in volatility the preceding Friday, which brought some accounts close to margin, and after a discussion with Dubin, Shields sent a recommendation intended to reduce exposure to a potential margin call by buying four offsetting positions at market. Shields testified that "at market" was the terminology used when exiting a position or reducing risk and meant that the transaction was intended to reduce exposure. The emails, however, did not explain this or the reason Shields considered it advisable. Like the earlier emails, they only identified the recommended transactions, and, as before, all the clients or their TAs approved in reply emails.

¶ 123 Early that afternoon, the S&P 500 Index fell further, as a result of which Shields recommended a roll by buying February E-mini S&P puts and selling March puts with a lower strike price and fewer option contracts, all at market to reduce exposure. The emails, sent at approximately 2 p.m., contained only the recommended transactions without explanation of the reason for them or their intended effect, and again all of the clients or their TAs approved by reply email.[112] Over the remainder of the afternoon, the implied volatility continued to rise, and it doubled in the 15 minutes before markets closed, resulting in "skyrocketing" prices of puts and substantial losses in the clients' and Dubin's accounts.

¶ 124 By the close of trading on February 5, 2018, the VIX had increased 20 points from the previous day's close, an increase of 115.6 per cent. This was the largest one-day increase since 1990, when the VIX was created, and almost twice the previous high of 64.2 per cent in 2007. In after-hours markets, volatility continued and the VIX increased at least another 12 points, to over 50.[113]

¶ 125 At approximately 7:30 p.m., Shields sent another set of emails; these emails said, "Due to market conditions, we are recommending liquidating all positions in your account this evening" and recommended four purchase transactions at market. The emails did not explain the market developments that prompted the recommendations or the reasons for them and did not mention a margin call. Eight of the clients approved by email.[114] Shields testified that he spoke to DP and DD, who approved the liquidation of their wives' accounts. In cross-examination, Shields admitted that these recommendations did not follow the Strategy and said liquidation was the only alternative. As a result of the volatility spike, the losses suffered by the clients totalled approximately $1,360,484 USD.

b. Suitability: Rule 1300.1(q)

¶ 126 The facts alleged in the Statement of Allegations relating to IIROC Rule 1300.1(q) focus on Shields' failure to explain his recommendations or discuss them with the clients. IIROC Staff argued that an explanation of the reasons for a recommendation must be provided to the client for each trade to comply with the suitability obligation, as well as to obtain the client's approval.

¶ 127 Shields' counsel submitted that Shields fulfilled his suitability obligations for each client when he determined that the Strategy was suitable. In his submission, each client chose to open an account specifically

[111] This was the first recommendation for AM's account; the email to her recommended two additional transactions.
[112] AM's approval was sent at 2:50 p.m.; because the market changed during the intervening period, the order placed for her was rejected.
[113] Exhibit 7, Tab 4 ("After the Volpocalypse"); see note 37, above.
[114] BT's approval said "if recommended by" Dubin.

to mirror Dubin's trades in pursuing the Strategy. As Shields fulfilled his know your client obligation when he opened their accounts, there was nothing further to say to them when he recommended trades.

¶ 128 Neither position fully addresses the role of Rule 1300.1(q) in IIROC's regulatory framework.[115] Suitability is an objective due diligence standard.[116] The suitability of a transaction involves an exercise of judgment, "based on factors including the client's current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts' current investment portfolio composition and risk level". These factors must be considered in light of the instrument being traded, the market in which it trades and other relevant market factors.[117]

¶ 129 Most of the personal factors must be obtained initially in fulfilment of the know your client obligation in Rule 1300.1(a) when an account is accepted. As Rule 1300.1(a) also applies to every order, the information so obtained must be kept current. In this respect, Rules 1300.1(a) and (q) contain overlapping obligations. Rule 1300.1(q) requires the application of this information in light of the client's current investment portfolio composition and the market to determine the appropriateness of a trade for the client. There are thus two elements to the obligation imposed by Rule 1300.1(q), the due diligence process and the judgment concerning the appropriateness of the recommended trade, that is, its suitability, for the client. One or the other may dominate when determining whether the due diligence obligation to ensure that a recommendation is suitable has been fulfilled.

¶ 130 Although an explanation of the reasons for a recommended trade may be necessary to obtain a client's approval, this may not always be required to determine its suitability. For example, if a proposed trade in an equity account will affect the risk levels in the account's investment objectives, a discussion with the client may be needed. If the account is speculative, however, recommendation of a trade within its objectives may not require additional client information and an explanation or discussion may not be necessary to determine its suitability.

¶ 131 As suitability is objective, a trade may not be suitable even if a discussion takes place and the client's approval is obtained.[118] Similarly, a trade may be suitable for a client without further discussion of risk, if an adequate discussion preceded the opening of the client's account and the trade fits within the parameters in the account's NCAF.[119]

¶ 132 Neither IIROC Staff nor Shields' counsel addressed suitability on a trade by trade basis.[120] The issue to be decided, therefore, is whether Shields exercised due diligence to ensure the suitability of the trades he recommended to the ten clients. He could not do so without having obtained knowledge of the factors mandated by Rule 1300.1(q) applicable to each client. In view of the nature of their accounts, a failure to learn these factors is necessarily a failure to exercise due diligence to ensure the suitability of the trades. Shields failed to learn his clients' risk tolerance when he accepted their accounts. He might have corrected this failure before executing trades for them, but he did not. As he failed to exercise due diligence to learn the clients' risk tolerance, he did not exercise due diligence to ensure the suitability of the trades he recommended to them either before or in connection with his recommendations. This finding applies to all of the trades made for all

[115] A number of questions were posed by the Panel concerning this issue for response by the parties in their written or oral submissions; Transcript, November 26, 2020, pp. 70-73.
[116] *Re Daubney*, note 11 above, paras. 13 and 202; *Re Locke* 2020 IIROC 14, paras. 22 and 147.
[117] It goes without saying that suitability is determined at the time of the recommendation. The ultimate profit or loss resulting from the trade, viewed with hindsight, is not relevant to this assessment.
[118] See, e.g,. *Re Lamoureux* note 11 above, p. 16, quoted in *Re Gareau* 2011 IIROC 53, para. 32.
[119] As RJO did not permit discretionary accounts, a discussion and explanation may have been necessary to obtain a client's approval of a recommended trade. A failure to obtain client approval, however, is not addressed by Rule 1300.1(q).
[120] While it might be argued that the use of funds as margin for trades beyond the adjusted risk capital amount specified by LM in a client's NCAF was not suitable for the client, this argument was not part of the parties' positions, see paras. 126 and 127, above, and is not considered in these Reasons.

of the clients, except PA.[121] Shields thus contravened IIROC Rule 1300.1(q) with respect to VP, ED, SS, JM, SF, RF, MW, BT and AM.

V. DECISION

¶ 133 For the preceding reasons, the Panel finds that Shields contravened IIROC Rules 1300.1(a) and 1300.1(q) with respect to VP, ED, SS, JM, SF, RF, MW, BT and AM.

¶ 134 A hearing to consider sanctions, including the relevance of the overlapping requirements of Rules 1300.1(a) and 1300.1(q), will be held on a date set by the National Hearing Officer. The Panel requests that the parties provide to the National Hearing Officer by August 6, 2021 an agreed timetable for service and filing of written submissions.

Dated at Toronto, this 20 day of July 2021.

Philip Anisman

Deborah Leckman

Edward Jackson

APPENDIX

Client Name	Net Worth $CAN	Liquid NW $CAN	Client Specified RISK CAP $US	RISK CAP RJO -LM Adjusted $US	Actual Deposited $CAN	Losses $US
VP	2,000,000	385,000	300,000	100,000	300,000	223,866
ED	3,600,000	500,000	100,000	100,000	400,000	262,198
PA & SS	6,200,000	4,200,000	250,000	250,000	230,000	276,966
JM	2,766,000	250,000	100,000	50,000	100,000	76,853
SF & RF	1,765,000	60,000	100,000	20,000	100,000	75,608

[121] See para. 64, above. As a result, it is not necessary to address the fact that the recommendation to liquidate all positions did not implement the Strategy.

Client Name	Net Worth $CAN	Liquid NW $CAN	Client Specified RISK CAP $US	RISK CAP RJO -LM Adjusted $US	Actual Deposited $CAN	Losses $US
MW	4,750,000	750,000	100,000	100,000	100,000	82,154
BT	3,340,000	310,000	100,000	50,000	100,000	79,494
AM	1,673,300	400,000	150,000	75,000	150,000	283,345
					Total:	1,360,484