BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Liu, 2018 BCSECCOM 372 Date: 20181123

**Chien-Hua Liu, also known as William Liu,
NuWealth Financial Group Inc. and CPFS Professional Financial Services Inc.**

Panel	Nigel P. Cave Don Rowlatt Suzanne K. Wiltshire
Hearing Dates	June 11, 12 &14, 2018 and September 7, 2018
Submissions Completed	September 7, 2018
Date of Findings	November 23, 2018
Appearing	
Mila Pivnenko	For the Executive Director
Owais Ahmed	For Chien-Hua Liu, also known as William Liu, NuWealth Financial Group Inc. and CPFS Professional Financial Services Inc.

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

[2] On December 18, 2017, the executive director issued a notice of hearing against the respondents (2017 BCSECCOM 378) alleging that:

a) each of NuWealth Financial Group Inc., CPFS Professional Financial Services Inc. (NuWealth and CPFS, together, the Corporate Respondents) and Chien-Hua Liu (Liu) contravened section 34(a) of the Act by acting in furtherance of trades by referring investors to two issuers at a time when none of NuWealth, CPFS or Liu were registered under the Act;

b) British Columbia and Hong Kong investors purchased approximately $6,523,382 of the securities of the two issuers in conjunction with the respondents' contraventions of section 34(a) of the Act; and

c) while he was director of the Corporate Respondents, Liu authorized, permitted or acquiesced in the Corporate Respondents' contraventions of section 34(a) and therefore, by virtue of section 168.2 of the Act, he also contravened section 34(a).

[3] During the hearing, the executive director refined his allegations as follows:

a) that Liu, personally, contravened section 34(a) of the Act with respect to acts in furtherance of 48 trades of securities totaling $1,713,070.80;

b) that CPFS contravened section 34(a) of the Act with respect to acts in furtherance of 54 trades of securities totaling $1,696,878; and

c) that NuWealth contravened section 34(a) of the Act with respect to acts in furtherance of 160 trades of securities totaling $4,826,504.52[1].

[4] During the hearing, the executive director called one witness (a Commission investigator), tendered documentary evidence and provided written and oral submissions. The respondents called two witnesses (a former employee of an exempt market dealer (W) to whom some of the investors were referred and Liu), tendered documentary evidence and provided written and oral submissions.

[5] These are our findings with respect to the liability of the respondents with respect to the allegations in the notice of hearing.

II. Background

The respondents

[6] Liu is a resident of Vancouver, British Columbia. Liu was formerly registered under the Act to sell mutual fund securities. That registration lapsed in March of 2013. Liu is a registered insurance agent. Part of his insurance business included selling segregated funds (along with various other insurance products).

[7] NuWealth is a British Columbia corporation that was incorporated on November 12, 2009. Liu was a director of this company from its incorporation until January 2010 and then again from August 1, 2014 until present. NuWealth has never been registered in any capacity under the Act. Liu's ex-wife was originally the sole shareholder of NuWealth. Liu became the sole shareholder of NuWealth in August 2014 and has remained the sole shareholder to present.

[8] During his interview with Commission investigators, Liu said that he ceased to be a director of NuWealth in 2010 (leaving his then wife as the only director of the company), in order to separate that company from his insurance business and for tax planning

[1] The total dollar amounts of the allegations of contraventions of section 34(a) against each of the respondents set out in paragraph 3 exceed the total dollar amounts of the alleged contraventions of section 34(a) in the notice of hearing because the allegations of contraventions of section 34(a) against Liu, personally, represent a subset of the aggregate of the allegations against the Corporate Respondents.

purposes. He also stated that in 2013 or 2014 marital difficulties made him concerned about his ability to use NuWealth for his referral arrangements as his then wife was the only director of the company. As will be discussed below, during this period he says that he used CPFS as a proxy for NuWealth in his referral business. After ending his marriage Liu says that he regained control of NuWealth in August of 2014 and resumed using that company for his referral business

[9] CPFS is a British Columbia corporation that was incorporated on February 18, 2008. Liu has been a director of this company since the date of its incorporation. CPFS has never been registered in any capacity under the Act. CPFS is an insurance company. CPFS, during the relevant period, had approximately 20 insurance agents working for it (including Liu).

[10] All of Liu, NuWealth and CPFS have common office space provided within the offices of a third party insurance company (which entity is unrelated to the matters covered by the notice of hearing).

[11] Liu testified that, although he was registered to sell mutual fund securities, he obtained that registration for the sole purpose of providing services to the clients of another mutual fund salesperson who was temporarily unable to service her clients.

Referrals to registrant W

[12] During the relevant period, W was registered under the Act as an exempt market dealer. That category of registration allowed W to trade in securities which were distributed pursuant to exemptions from the prospectus requirements of the Act. W sold only proprietary products, meaning they sold securities issued by affiliates of W. W's affiliates, in aggregate were substantial entities with substantial assets; however, W's affiliates engaged in a limited range of business activities, namely - "land banking" and real estate development.

[13] Liu was introduced to W through the brother of a friend of his who worked for W. Liu made a small investment in securities through W.

[14] W's business model included entering into referral agreements with entities who would refer investors to W and, in return, W would pay the referring entity a commission based upon the amount the investor invested through W. During the relevant period, W had a substantial number of these referral arrangements.

[15] Liu testified that NuWealth was incorporated because W was only interested in entering into referral agreements with corporations. The only business that NuWealth conducted during the relevant period was the referral business described herein.

[16] NuWealth and W entered into a referral agreement dated September 1, 2010.[2] This agreement was then renewed or replaced by another referral agreement between NuWealth and W dated March 26, 2015.

[17] Liu testified that he understood that prior to the date of the original referral agreement W carried out due diligence investigations of himself and NuWealth. A former employee of W testified at the hearing. Although he was not able to confirm that W carried out these investigations with respect to Liu and NuWealth, he did testify that this would have been W's standard practice prior to entering into new referral arrangements.

[18] Liu testified that W provided he (and presumably NuWealth) with a written brochure that set out W's referral practices and, in particular, set out W's view of the "Dos and Don'ts" (from the perspective of securities regulatory compliance) of referral arrangements. He also testified that prior to referring investors he (and all other individual brokers who referred investors to W) had to successfully complete an online exam, set by W, relating to these referral practices.

[19] A copy of these written materials were entered as an exhibit in the hearing. Those materials include a list of requirements to establish a referral arrangement including (among other things):

- that the referral arrangements must be subject to a written agreement;
- that investors must be advised by W of the referral fee being paid to the referral agent prior to the investor making an investment;
- that each investor must sign a consent form with W acknowledging having been provided the disclosure regarding the referral fees; and
- that each individual referrer had to successfully complete the online exam referenced above.

[20] The brochure then listed a number of "Dos" for these arrangements which included:

- inviting prospective investors to W's seminars;
- introducing prospective investors to a representative of W;
- directing prospective investors to W's website; and
- providing prospective investors with general brochures about W (but not about any specific product that W might offer).

[21] The brochure's list of "Don'ts" included:

- participate in any trades or be present when any representative of W was conducting a trade with an investor;

[2] Although the original referral agreement between W and NuWealth is dated September 1, 2010, the allegations in the notice of hearing with respect to NuWealth's transactions with W relate to the period commencing in April 2013 through January 2016.

- describe a specific product that W might offer or provide any promotional materials with respect to a specific product;
- explain any factors that might make a specific product of W desirable;
- determine or comment on the suitability of any product that W might offer;
- advertise or promote W or engage in any solicitation of investors through websites or cold calls;
- complete any subscription agreements or other investor forms;
- help a client to decide how much money to invest with W; and
- handle any client funds related to an investment through W.

[22] Liu testified during the hearing. Although a transcript of an interview of Liu by Commission investigators held during the investigation of this matter was entered as an exhibit, we have principally relied upon Liu's oral evidence. However, we have referred to the interview transcript where directed by the parties.

[23] Liu testified that he adhered to the Dos and Don'ts set out in W's brochure throughout the relevant period. In particular, Liu testified that:

- he provided general promotional brochures about W and GB (an issuer discussed below) to investors, without any discussion of specific investments;

- he referred the investors to representatives of W and GB and, on occasion, assisted in setting up those meetings;

- he and other representatives of the corporate respondents attended seminars put on by W and GB but that none of the investors were ever at these sessions;

- he, NuWealth and individual brokers of CPFS received commissions from W and GB, as the case may be, for these referrals; and

- he believed that NuWealth, CPFS and their representatives also did what he testified that he had done himself.

[24] Although the executive director, on cross examination, suggested that Liu had carried on other activities, he denied this.

[25] In his interview with Commission staff, Liu acknowledged discussing information with the investors that, in the securities industry, would generally be considered "know your client" information. However, he indicated that these discussions occurred in the context of his activities in selling insurance products to the investors. There is obviously some blurring of the purposes to which this information could be put in circumstances where a person is both selling insurance products and making referrals. We will discuss this issue in greater detail below.

[26] The factual evidence of what activities the respondents participated in with respect to sending investors to W and GB was generally limited to the evidence given by Liu (in his oral testimony and in his interview) because none of the investors gave oral testimony.

[27] The executive director did submit handwritten notes of calls that Commission investigators conducted with a small number of investors. The respondents submitted that we should place little or no weight on these notes as the investors did not provide their answers under oath and because the investors were not called as witnesses to allow for cross-examination. The executive director submitted that the notes of these calls should be accorded weight as they were corroborated by other evidence in the hearing.

[28] In our view, the notes do little to assist in our analysis of the issues in this case. We are sympathetic to the concerns raised by the respondents. More importantly, while the notes confirm that the investors were referred to GB, the notes differ as to what occurred as between the respondents (or representative of the respondents) and the investors. At most, they indicate that a small number of investors may have been informed by individual brokers that GB offered both equity and debt securities and the range of interest rates applicable to those debt securities.

[29] Given that Liu's testimony was not contradicted by any oral testimony from investors and, at most, the notes of some of the investor interviews suggest some of the individual brokers may have told some investors about interest rates and the types of securities sold by GB, we find that the respondents' activities with respect to the investors referred to W and GB were generally limited to that set out in paragraph 23 above.

[30] Liu testified that he was told on several occasions by senior representatives of W that referral agents of W did not need to be registered under the Act. The only evidence which corroborates this advice to Liu from a representative of W is an e-mail from 2016, written by a lawyer of W, in which the lawyer states that W was in compliance with securities regulations if it entered into referral arrangements with unregistered referral agents. This speaks to W's compliance with securities regulations, not Liu's compliance. The contents of that e-mail are not one and the same with Liu's assertion that he was told by representatives of W that he did not need to be registered under the Act.

[31] The respondents did not challenge the executive director's allegation that, during the period between April 2013 and January 2016, NuWealth referred investors to W which resulted in 46 trades in securities for $1,933,230.50.

[32] The respondents did not challenge the executive director's allegation that, during this same period, Liu, personally, was responsible for referrals of investors to W which resulted in 23 trades in securities for $918,520.50. Liu received a total of $70,597.34 in commissions relating to these referrals.

[33] The referral agreements between NuWealth and W provided that NuWealth would receive a commission equal to 10% of the total amount invested in equity securities and, with respect to certain loan securities, it would receive a commission equal to 1% of the

total amount invested in those securities plus certain trailer fees. The executive director submitted tables which showed that the total commissions paid by W to NuWealth in connection with the 45 trades in securities was $102,137.09.

[34] There was no evidence that any of the investors referred by Liu or NuWealth, who purchased securities of W pursuant to prospectus exemptions, did not qualify for an exemption. Therefore, there is no evidence that the trades in securities to these investors were, ultimately, illegal distributions.

[35] In August of 2016, W suspended the referral arrangements between it and NuWealth and the referral agreement was terminated effective December 1, 2016.

Referrals to GB

[36] GB is an issuer whose principal business was an early stage real estate development project in Fort McMurray.

[37] Liu was introduced to GB in 2014 by one of his brokers who had previously acquired securities of GB. Liu told Commission investigators that he purchased equity securities of GB in 2014.

[38] In April 2014, CPFS and GB entered into a referral agreement. There is evidentiary confusion with respect to this agreement. There is another (identical agreement), dated the same date between NuWealth and GB. During the investigation, Liu and a representative of GB suggested that the agreement with NuWealth was entered into at a later date but back dated to the April 2014 date. During his testimony at the hearing, Liu suggested that there had been three referral agreements. He testified that there was another agreement between NuWealth and GB that was entered into before either of the agreements noted above. There was no documentary evidence to support the existence of this third agreement.

[39] The two agreements provided that CPFS/NuWealth would receive 10% commissions for referrals that led to equity investments by investors and 5% commissions for referrals that led to debt investments by investors. The agreement also provided that GB would pay the commissions directly to individual brokers if directed by CPFS/NuWealth. Liu told Commission investigators that, in fact, this is what occurred from April 2014 until early in 2015. GB was directed by CPFS/NuWealth to (and did) pay the brokers directly. In early 2015, GB commenced making commission payments to NuWealth directly.

[40] These agreements are dated during the time that Liu testified that his marriage was dissolving and that he did not have certainty of control over NuWealth (as it was owned by his ex-wife and she was the only director). Therefore, we find that it is logically consistent that the original agreement was between CPFS and GB. We also find that, during some part of 2014, referrals occurred pursuant to this agreement. There was documentary evidence that corroborated this finding. During the investigation of this matter, Liu provided to Commission staff copies of records of statements prepared by GB outlining the commissions it paid to CPFS. Liu says that those were prepared in error

and should have referred to commissions paid to NuWealth. It is also logically consistent that when Liu regained control over NuWealth he entered into a new referral agreement with GB. The reason for backdating this new agreement to April of 2014, was not clear from the evidence (other than this back dating would support Liu's position that when CPFS entered into the referral agreement it was doing so as a placeholder for NuWealth).

[41] Liu told Commission investigators that he and the other brokers followed the same practices with their referrals to GB as they did with respect to their referrals to W.

[42] The executive director alleges that during 2014, CPFS referred investors to GB that resulted in 54 trades of securities totaling $1,696,878. The respondents did not challenge the quantum of these trades but take the position that these trades were carried out by CPFS "as a placeholder" for NuWealth. The executive director submitted tables which showed that the total commissions received by CPFS from GB relating to these referrals was $116,643.90.

[43] The respondents did not challenge the executive director's allegation that, during the period between April 2014 and January 2016, NuWealth referred investors to GB, which resulted in 114 trades in securities for $2,893,274. NuWealth received a total of $212,926.40 in commissions from GB relating to these referrals.

[44] The respondent did not challenge the executive director's allegation that, during the period between June 2013 and January 2016, Liu, personally, was responsible for referrals of investors to GB, which resulted in 25 trades in securities for $794,550.30. Liu received a total of $59,205.03 in commissions relating to these referrals.

[45] Liu told Commission investigators that in late 2016 he became aware that GB had defaulted on making some interest payments on certain of its outstanding debt securities. Liu also said that he became aware that GB had not made certain commission payments to referral agents. He said that he stopped referring potential investors to GB and told his brokers to do the same.

Commission investigation and undertaking

[46] As part of the Commission's investigations of this matter, Liu agreed to provide an undertaking to the Commission dated February 1, 2017 pursuant to which the respondents agreed to cease trading in any securities during the tenancy of that undertaking. That undertaking remains in place and there is no suggestion that any of the respondents have breached that undertaking in any manner since it was given.

III. Analysis and Findings

A. Applicable Law

Standard of Proof

[47] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall,* 2008 SCC 53, the Supreme Court of Canada held (at paragraph 49):

> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial

> judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[48] The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

[49] This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, paragraph 35.

Definition of "trade"

[50] Section 1(1) of the Act defines "trade" to include "(a) a disposition of a security for valuable consideration" and "(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e)".

Registration Requirements

[51] Section 34(a) states "A person must not… trade in a security …unless the person is registered in accordance with the regulations…"

[52] National Instrument 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) includes further detail on the circumstances under which persons are required to be registered to trade in securities. This National Instrument sets out the registration requirements and the Companion Policy to NI 31-103 (CP 31-103) contains interpretations of the National Instrument by the Canadian Securities Administrators. The Canadian Securities Administrators comprises the securities regulators of all of the provinces and territories of Canada.

[53] Section 8.4(1) of NI 31-103 sets out an exemption from the requirement in section 34(a) that a person must be registered to trade in securities:

> 8.4(1) In British Columbia…, a person…is exempt from the dealer registration requirement if the person…
> (a) is not engaged in the business of trading in securities…as principal or agent, and
> (b) does not hold himself, herself or itself out as engaging in the business of trading in securities…as a principal or agent.

[54] This means that although the requirement is often thought of as "persons are required to be registered under the Act when they are in the business of trading in securities", the technical structure of the regulatory provisions is that a person is always required to be registered if they are trading in securities *unless* they are not in the business of trading in securities.

[55] The following from CP 31-103 are factors that regulators consider relevant to the determination of whether a person is trading for a business purpose :

- engaging in activities similar to a registrant – including whether the person is acting as an intermediary between the buyer and seller of securities;

- directly or indirectly carrying on the activity with repetition, regularity or continuity – including the frequency of transactions (but the activity does not have to be the sole or even the primary endeavor of the person) and whether the activity is carried out with a view to making a profit, the person's various sources of income and amount of time allocated to the activity;

- being compensated for the activity – receiving or expecting to be compensated for carrying on the activity indicates a business purpose; and

- directly or indirectly soliciting – contacting potential investors to solicit securities transactions suggests a business purpose.

[56] Companion Policies do not have the force of law. Their function is to inform market participants of the regulators' interpretation of certain aspects of securities law. We find the statements of policy in CP 31-103, outlined above, to be appropriate to the interpretation of some of the factors to be considered in determining whether a person is required to be registered under the Act.

[57] There are other exemptions from the requirement to be registered under the Act, with respect to specific trades in securities, that are not set out in NI 31-103. One of these is found in BC Instrument 32-513 – *Registration Exemption for Trades in Connection with Certain Prospectus-Exempt Distributions*. This exemption is more commonly called the Northwest exemption (after the geographical region of Canada in which this exemption has been adopted).

[58] The Northwest exemption provides that a person is not required to be registered under section 34(a) of the Act in connection with trades in securities that are exempt from the prospectus requirements under the:

a) accredited investor exemption (section 2.3 of NI 45-106);
b) family, friends and close business associates exemption (section 2.5 of NI 45-106);
c) offering memorandum exemption (section 2.9 of NI 45-106); and
d) minimum investment amount exemption (section 2.10 of NI 45-106),

if:

a) the person is not registered under the provincial or territorial legislation and was not formerly registered;

b) the person is not registered under the securities legislation of a foreign jurisdiction and was not formerly registered;
c) prior to the trade, the person did not advise, recommend or otherwise provide suitability advice to the purchaser;
d) at or before the time of purchase, the person obtained a risk acknowledgment (in the prescribed form) from the purchaser;
e) the person does not hold or have access to the purchaser's assets;
f) the person does not provide financial services to the purchaser other than the prospectus exempt purchase of securities; and
g) the person has filed with the Commission a form notifying the Commission of the person's reliance upon the Northwest exemption in connection with a particular trade or trades.

Liability under section 168.2

[59] Section 168.2 of the Act states that if a corporate respondent contravenes a provision of the Act, an individual who is an employee, officer, director or agent of the company also contravenes the same provision of the Act, if the individual "authorizes, permits or acquiesces in the contravention".

[60] There have been many decisions which have considered the meaning of the terms "authorize, permits or acquiesces". In sum, those decisions require that the respondent have the requisite knowledge of the corporate contraventions and have the ability to influence the actions of the corporate entity (through action or inaction).

B. Position of the Parties

[61] The executive director submitted that each of the respondents engaged in acts in furtherance of trades in securities by each of W (or one of its affiliates) and GB and that each respondent was therefore required to be registered to trade pursuant to section 34(a) of the Act.

[62] The executive director further submitted that the respondents have the onus of establishing that they qualify for one of the exemptions from the requirement to be registered to trade.

[63] Finally, the executive director submitted that the evidence failed to establish that either the exemption of "not being in the business of trading" or the Northwest exemption applied to any of the respondents.

[64] The respondents submitted that none of them engaged in trading in securities, as they merely referred prospective investors to W and GB, as the case may be. They submitted that the mere act of referring a prospective investor to another entity, even if it ultimately resulted in a trade being consummated between the investor and that entity, does not constitute "an act in furtherance" of a trade within the definition of "trade". The respondents submitted that this was a complete defence to all of the allegations in the notice of hearing against all of the respondents. In this vein, all of the respondents'

remaining submissions are relevant only in the event that they are unsuccessful with respect to this first submission.

[65] CPFS submitted that it did not refer any investors to GB and that its role with respect to GB was merely to act as a placeholder until Liu was able to regain ownership and control of NuWealth.

[66] The respondents acknowledge that NuWealth does not qualify for the "not in the business of trading" exemption from the requirement to be registered under section 34(a) of the Act. However, they submitted that, if they were trading, both Liu and CPFS would qualify for this exemption and did not need to be registered pursuant to section 34(a) of the Act.

[67] Finally, the respondents submitted that even if we find that any of them were required to be registered to trade in securities pursuant to section 34(a) of the Act, we should not impose any orders against any of the respondents as such orders would be neither required to protect our capital markets nor in the public interest.

C. Analysis

[68] With respect to each respondent, the issues to be determined are:

a) did that respondent engage in "acts in furtherance" of trades in securities by W (or one of its affiliates) or GB, as the case may be? and

b) if yes, did that respondent have an exemption from the requirement to be registered to trade in securities under section 34(a) of the Act?

[69] Each of those issues (with respect to each respondent) is a question of mixed law and fact.

Acts in furtherance of trades

a) <u>Factual context</u>

[70] The executive director submitted that the respondents' role in the trades in securities to investors by W and GB, as the case may be, went beyond mere referrals. He submitted that Liu met with prospective investors, spoke about the investment opportunities offered by W and GB, described features of the securities offered by W and GB, took investors to seminars offered by W and GB and organized meetings between investors and representatives of W and GB.

[71] As set out in paragraph 29, we do not find that the evidence supports these submissions and we find that the respondents' activities were limited as set out in that paragraph.

[72] The other factual issue for us to resolve relates to CPFS' role in these transactions and the multiple referral agreements between the corporate respondents and GB.

[73] As noted above, we find that there was a referral agreement in place between CPFS and GB commencing in April 2014 and carrying on throughout some portion of the remainder of 2014. Pursuant to that agreement, representatives of CPFS (and, therefore, CPFS) were making referrals of investors to GB. We also find that GB was directed by CPFS to pay commissions directly to individual brokers and there is no evidence that CPFS received any payments from GB.

[74] Liu testified that the arrangements with CPFS were meant to be a "placeholder" for a referral arrangement between NuWealth and GB. While that may have been the intent of Liu, there is nothing in the referral agreement between CPFS and GB to support this intention. Nor was there any other evidence to corroborate this intention. In fact, other evidence in the hearing (e.g. GB commission payout statements) suggested that this was not the case. We find that CPFS was engaged in conduct similar to NuWealth with respect to referrals (through its individual brokers) to GB during the relevant period.

b) Law

[75] The general law as it relates to what constitutes a "trade" and "an act in furtherance" of a trade was not in dispute between the parties.

[76] There was agreement that the term "trade" has been defined broadly to capture a broad range of activities relating to the selling and intermediating of sales of securities. This breadth acts purposively to assist in one the Act's critical functions – investor protection.

[77] The definition of "trade" is substantially similar in securities legislation across Canada. We were referred to the Alberta Securities Commission decision in *Re Hampton Court Resources Inc.*, 2006 ABASC 1345, which sets out the following (at paragraphs 113-115):

> 113. For the reasons that follow we believe that each of Buzan and Sellars was both a "finder" of investors and a trader in securities. We do not believe that the two roles are mutually exclusive. It is important to remember that "trade" includes both the actual selling and acts in furtherance of selling. Although not specifically argued, we took note in our analysis of the breadth of the concept of "trade", notably the final component of the defined term (paragraph 1(x)(v) of the Act as it then read):
>
> > (v) any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance of [among other things, a sale of a security];
>
> 114. We found useful the remarks of the Ontario Securities Commission in *Re Costello* (2003), 26 O.S.C.B. 1617 at para. 47:
>
> > There is no bright line separating acts, solicitations, and conduct indirectly in furtherance of a trade from acts, solicitations and conduct not in furtherance of a trade. Whether a particular act is in furtherance of an actual trade is a question of fact that must be answered in the circumstances of each case. A useful guide is whether the activity in question had a sufficiently proximate connection to an actual trade.

> 115. In this case, no single factor was determinative of the trading allegations against Buzan and Sellars. Instead, we looked to whether the circumstances as a whole indicated that the conduct of Buzan or of Sellars had a proximate connection to an actual trade in securities of Hampton Court. We found that there was in the case of each of them a proximate and compelling connection.

[78] There have been a number of decisions of this Commission and from other securities regulatory authorities across the country with respect to what specific conduct might constitute "acts in furtherance" of a trade. The recent decision of the Ontario Securities Commission decision in *Re Rezwealth Financial Services Inc.*, 2013 ONSEC 28 set out the following:

> [213] The inclusion of the word "indirectly" in the definition of "acts in furtherance", cited above in subsection 1(1)(e) of the Act, reflects an express legislative intention to capture conduct which seeks to avoid the registration requirement by doing indirectly that which is prohibited directly. The Commission has established that trading is a broad concept which includes any sale or disposition of a security for valuable consideration, including any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of such a sale or disposition.
>
> [214] The Commission has found that a variety of activities constitute acts in furtherance of trades. For example, the Commission has found that accepting and depositing investor cheques in a bank account for the purchase of shares constitutes acts in furtherance of trades (*Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 1727 **("Limelight")** at para. 133). Other examples of activities that have been considered acts in furtherance of trades by the Commission include, but are not limited to:
>
> a. providing potential investors with subscription agreements to execute;
>
> b. distributing promotional materials concerning potential investments;
>
> c. issuing and signing share certificates;
>
> d. preparing and disseminating materials describing investment programs;
>
> e. preparing and disseminating forms of agreements for signature by investors;
>
> f. conducting information sessions with groups of investors; and
>
> g. meeting with individual investors.
>
> (*Re Momentas Corporation* (2006), 29 O.S.C.B. 7408 **("Momentas")** at para.80)

[79] The respondents submitted that an interpretation of the phrase "an act in furtherance" of a trade to include mere referrals would be overly broad and would be unnecessary to further the purposes of the Act as the investors did not make their investment decisions based upon the conduct of the respondents but, rather, invested based upon the conduct of W or GB, as the case may be.

[80] The respondents further submitted that there was no investor harm in this case as the investors were referred, in the case of W, to a registrant and, in the case of GB, to an issuer who complied with the prospectus requirements of the Act.

[81] Lastly, the respondents submitted that their position was supported by wording from the securities regulators themselves in NI 31-103 and CP 31-103. They pointed to section 8.5 of NI 31-103 which contains an exemption from the requirement to be registered for certain trades that occur through a registered dealer. They also highlighted a discussion in CP 31-103 of the wording in section 13.8 of NI 31-103 that permits registrants to engage is certain referral arrangements, which sets out the following:

> A party to a referral arrangement may need to be registered depending on the activities that the party carries out. Registrants cannot use a referral agreement to assign, contract out of or otherwise avoid their regulatory obligations.
>
> Registrants may wish to refer their clients to other registrants for services that they are not authorized to perform under their category of registration. In making referrals, registrants should ensure that the referral does not itself constitute an activity that the registrant is not authorized to engage in under its category of registration.
>
> We would generally not consider the referral by a registrant of a client to a registered dealer to constitute trading by the referring registrant if, in the referral:
>
> - the referring registrant does not make any statement to the client about the merits of a specific security or trade,
> - the referring registrant does not make any recommendation or otherwise represent to the client that a specific trade is suitable for that client or another person or company, and
> - the referring registrant does not accept any instructions from the client in respect of trades to be made by the registered dealer.

[82] The executive director submitted that the mere introduction or referral of investors is an act in furtherance of a trade and relied upon this Commission's decision in *601949 B.C. Ltd.*, 2004 BCSECCOM 447 in support of that proposition. In *601949*, one of the respondents was found to have only introduced investors to an issuer of securities. That respondent was found to have engaged in "trading" in securities contrary to section 34 of the Act. However, the decision does not set out an analysis of why the panel reached that conclusion. The panel then went on to determine that no sanctions were required to be ordered for that respondent's misconduct.

[83] From all of this, we take the following basic principles:

- that the definitions of a "trade" and "acts in furtherance" of a trade are purposively broad and include direct and indirect conduct;

- assessing whether conduct fits within these definitions must be assessed according to the specific facts and circumstances of each case;
- in evaluating whether an act is "in furtherance" of a trade, consideration should be given to whether the conduct was proximately connected to an actual trade in a security; and
- there is a considerable body of regulatory decisions in which specific conduct has been held to be an "act in furtherance" of a trade.

[84] In this case, the last of these principles is not relevant. We have found that the respondents' conduct with respect to each investor was limited to that set out in paragraph 29 above, and that conduct does not align with the specific acts which are set out in *Rezwealth* (referring to *Momentas).*

[85] The circumstances in *601949* are therefore very similar to those before us. However, that decision lacks any explanation or analysis as to the rationale for the panel's findings.

[86] The acts in question in this case were referrals. Our interpretation of "act in furtherance" is limited to this context. The respondents and the executive director have framed the issue of whether an introduction or a referral, in and of itself, is an "act in furtherance" as a binary choice (i.e. it either is or it is not). We do not agree with either perspective.

[87] The facts and circumstances of each referral arrangement are unique and may lead to very different conclusions about whether it is an "act in furtherance" of a trade. For example, looked at from the perspective of whether there is a proximate connection to an actual trade in a security, an uncompensated referral to a full service registrant (offering a wide range of securities) is very different from a highly compensated referral to an issuer (offering either a single or narrow range of securities). In other words, referrals occur on a spectrum where, on one end, those referrals are "acts in furtherance" of a trade and, on the other end, they likely are not.

[88] Without attempting to set out every factor that might dictate where on the spectrum a particular referral might fit, the following is a non-exhaustive list of factors that are material (both in general and in the case before us) to whether a referral will be an "act in furtherance" of a trade:

- was there material (relative to the amount invested in securities) compensation paid for the referral?
- was that compensation tied to specific trades in securities?
- what is the range of securities offered by the person to whom the investor is referred?
- was the investor receiving financial services from the referrer prior to the referral?

[89] We will discuss each of these factors below.

[90] First, the question of compensation (both the quantum and whether the entitlement is tied to a specific trade in securities) is material to the proximity of the referral to a specific trade in securities. A referral arrangement which provides that a referrer is to receive (for example) 10% of the funds invested in a specific security, represents a *de facto* acknowledgement by the payer of the materiality of the role played by the referrer in the specific trade in that security.

[91] Second, the range of securities that may be acquired by an investor through the person to whom they are referred must be a consideration. A referral to an issuer with only one security (or a narrow range of securities) on offer, is an indicator of proximity to a specific trade in a security. What other outcome is the referrer expecting to come from their referral other than a trade in that security?

[92] Lastly, the context of the existing relationship between the investor and the referrer, at the time of the referral, must be considered. One of the investor protection concerns that arises with referrals is the question of whether the referral, in and of itself, acts as some form of implicit recommendation, by the referrer, of the securities on offer by the person to whom the referral is made. If the investor has established a relationship involving some level of trust with respect to financial matters with the referrer, the risk of implicit recommendation is much greater. This is more likely to be the case when the investor has come to the referrer in the context of receiving financial services.

[93] A consideration of these factors leads us to conclude that each of the respondents was engaged in acts in furtherance of trades when they referred investors to W and GB, as the case may be, and were therefore trading for the purposes of section 34(a) of the Act.

[94] This finding is based upon the following:

- the referral arrangements entered into by NuWealth and CPFS (and pursuant to which Liu, personally, was making referrals) provided for sizeable commissions payable only upon the sale of specific securities to the investors;

- GB had an extremely limited range of securities for sale to the investors;

- W, while being a registrant and having a greater number of securities available for sale than GB, was still only able to offer investors proprietary products (i.e. securities offered by its affiliates) which were extremely narrow in their business and investment scope (land banking and real property development); and

- Liu and CPFS were in the business of providing insurance services (including the sale of segregated funds which are similar products to mutual funds) to the investors that were referred to W and GB. Those services included obtaining substantial financial information about the clients and assisting them in

purchasing sophisticated financial products. The risk of the investors taking the referral as a form of implied recommendation would be extremely high in the circumstances.

[95] Before turning to the question of whether any of the respondents had an exemption from the obligation to be registered under section 34 of the Act, we must address the two additional submissions made by the respondents.

[96] The respondents submitted that, in the circumstances of this case, there was no evidence of investor harm and that, therefore, there is no purposive need to interpret the definition of "trade" to include the referral activities of the respondents.

[97] We do not agree with these submissions. First, as noted above, one of the potential risks with referral arrangements (of this type) is the potential for the referral to act as a form of implicit recommendation of the securities without, in this case, the respondents having the requisite proficiency or being subject to the "know your product", "know your client" or suitability obligations that would apply to a registrant making a recommendation. The nature of the relationship and the trust established between the referrer and an investor may influence the investor to place more reliance on the implied recommendation of the referrer than on the advice of the registrant. In addition, we would also note that the investors who acquired the securities of GB did so without having received any of the investor protections afforded to those who acquire securities with the assistance of a registrant. Therefore, we reject the notion that the conduct of the respondents does not raise investor protection concerns.

[98] Secondly, the respondents relied upon the wording in CP 31-103 which discusses permitted referral arrangements. That wording includes this reference:

> We would generally not consider the referral by a registrant of a client to a registered dealer to constitute trading by the referring registrant if …

[99] On a purely technical basis, this wording does not apply to the respondents as this language is discussing an interpretation about permitted referrals by registrants. The purpose is to allow a registrant (that is permitted to trade a limited range of securities) to make a referral to another registrant who is qualified to sell the specific securities that an investor may wish to acquire.

[100] Also, we would emphasize that wording in a CP is only the interpretive guidance of staff and does not have the force of law, nor are we bound to follow those views.

[101] However, we have some sympathy for the respondents' submissions in this regard. The wording's reference to not considering certain types of referrals to be "trading" is confusing. We do not agree that that is always correct, as set out in our analysis above. Secondly, the broad policy rationale that underpins the interpretation in question – which is to permit, in specific circumstances, registrants with a limited ability to sell securities to refer clients to other registrants who are registered to sell the specific securities that the investor wishes to acquire – has some analogy to the respondents' referrals of

investors to W. The respondents were not registered to sell securities and they referred investors to W, who was properly registered to sell those securities.

[102] We note that the above language offers no policy support for the respondents' referrals to GB who was not a registrant. Further, in this case, there is a difference in allowing a registrant to carry out certain activity, on a policy basis, and allowing an unregulated entity to carry out the same conduct. The registrant has a host of regulatory requirements, relating to conflicts, disclosure and "know your client" obligations, among others, and is regularly subject to compliance exams with respect to those obligations.

[103] In summary, we do not think the wording in CP 31-103 should act as guidance that we should follow in interpreting whether the conduct of the respondents constitutes trading in securities.

Exemptions from the requirement to trade

[104] Having found that each of the respondents engaged in conduct that constitutes acts in furtherance of a trade, section 34(a) of the Act required that each of the respondents be registered under the Act, unless an exemption from that requirement was available.

[105] In *Solara Technologies Inc. and William Dorn Beattie*, 2010 BCSECCOM 163, the Commission confirmed that it is the responsibility of a person trading in securities to ensure that the trade complies with the Act. The Commission also said that a person relying on an exemption has the onus of proving that the exemption is available. The Commission said:

> 37 The determination of whether an exemption applies is a question of mixed law and fact. Many of the exemptions are not available unless certain facts exist, often known only to the investor. To rely on those facts to ensure the exemption is available, the issuer must have a reasonable belief the facts are true.
>
> 38 To form that reasonable belief, the issuer must have evidence. For example, if the issuer wishes to rely on the friends exemption, it will need representations from the investor about the nature of the relationship…

[106] Although the above comments in *Solara* were made with respect to the availability of exemptions from the prospectus requirements of section 61 of the Act, we find that the reasoning is generally also applicable to exemptions from section 34 of the Act. In the circumstances of this case, we find that the respondents bear the onus of establishing that they qualified for an exemption from their respective obligations to be registered.

[107] The respondents have acknowledged that the "not in the business of trading" exemption in NI 31-103 does not apply to NuWealth. In other words, they acknowledge that, having found that NuWealth engaged in trading, it was in the business of trading.

[108] The respondents submitted that neither CPFS nor Liu were in the business of trading and therefore qualified for that exemption.

[109] The respondents did not submit that any of the respondents qualified for the Northwest exemption and, in our view, they do not; our analysis for reaching that conclusion is set out below.

[110] In support of their submissions that neither CPFS nor Liu were in the business of trading, the respondents contend that:

- neither CPFS nor Liu engaged in activities similar to a registrant in that neither of them promoted the securities or that they could buy or sell securities on behalf of the investors;

- neither CPFS nor Liu intermediated any trades – they simply referred prospective investors to GB or W, as the case may be, and then had no further involvement in the investment;

- CPFS did not engage in any activity with repetition, regularity or continuity (this submission is related to the respondents' submissions that CPFS was really just a placeholder for NuWealth); and

- neither CPFS nor Liu directly or indirectly solicited investors.

[111] The respondents acknowledge that they expected to be, and were, compensated for their referral activities.

[112] The executive director submitted that the "not in the business of trading" exemption did not apply to either of CPFS or Liu on the basis that nearly all of the factors set out in the guidance in CP 31-103 as indicia of being "in the business" of trading were present with respect to all of the respondents.

[113] The respondents' submissions with respect to CPFS were dependent, in part, on their submission that CPFS was really just a "placeholder" for NuWealth. As noted above, we do not agree with that submission.

[114] The respondents' remaining submissions on this point are that CPFS directed that commissions be paid directly by GB to the individual brokers. They say that CPFS cannot have been "in the business of trading" if it did not receive compensation for its conduct. We do not agree with this submission. Pursuant to the referral agreement between CPFS and GB, CPFS was legally entitled to receive the commissions earned by its individual brokers. That CPFS chose to direct those funds to its brokers does not change that it was entitled to that compensation and received that compensation (albeit by choosing to direct its payment elsewhere).

[115] As noted above, these are the factors to consider when assessing whether a person is in the business of trading:

- engaging in activities similar to a registrant – including whether the person is acting as an intermediary between the buyer and seller of securities;

- directly or indirectly carrying on the activity with repetition, regularity or continuity – including the frequency of transactions (but the activity does not have to be the sole or even the primary endeavor of the person) and whether the activity is carried out with a view to making a profit, the person's various sources of income and amount of time allocated to the activity;

- being compensated for the activity – receiving or expecting to be compensated for carrying on the activity indicates a business purpose; and

- directly or indirectly soliciting – contacting potential investors to solicit securities transactions suggests a business purpose.

[116] Each of Liu and CPFS met each of these criteria:

- finding investors and connecting them with issuers, as both Liu and CPFS did, are activities that are carried on by registrants;

- each of Liu and CPFS referred large numbers of investors, over many months in the case of CPFS and over years in the case of Liu, who ultimately invested millions of dollars with W and GB – this certainly constitutes "repetition, regularity or continuity";

- each of Liu and CPFS was compensated for their activities; and

- each of Liu and CPFS solicited investors – in this case, the fact that Liu and CPFS sourced their referrals from their insurance business must be taken into account. Liu and CPFS solicited clients for that business and then referred certain of those clients on to W and GB. Whether viewed as direct or indirect solicitation, we have no difficulty viewing this conduct as a solicitation of investors.

[117] Therefore, we find that none of the respondents qualified for the "not in the business of trading" exemption from the requirement to be registered under section 34(a) the Act.

[118] Finally, for greater certainty, we note that none of the respondents qualify for the Northwest exemption from the requirement to be registered under section 34(a) of the Act:

- There is no evidence that any of the respondents filed the requisite filing with the Commission that they were relying upon that exemption or that any of the respondents obtained the risk acknowledgement forms from the investors in connection with the trades in securities that the exemption requires;

- Liu would not qualify for the exemption as he was formerly registered under the Act; and

- both Liu and CPFS would not be eligible for the exemption as they were providing other financial services.

[119] We find that there were no exemptions available to the respondents from the requirement for each of them to be registered to trade pursuant to section 34(a) of the Act.

Orders are unnecessary

[120] The respondents submitted that, in the event that we found that they had contravened section 34 of the Act (as we have), that we determine now (prior to the sanctions hearing) that orders against the respondents are not necessary and not in the public interest.

[121] In making these submissions, the respondents rely upon previous decisions of this Commission in *Aviawest Resorts Inc. (Re)*, 2013 BCSECCOM 319 and *601949* and upon the existence of the undertaking that the respondents have already executed and which they volunteered could be left in place.

[122] The Commission made findings of liability against the respective respondents in *Aviawest* and *601949* but declined to make any orders against some or all of those respondents. Liu and the Corporate Respondents in this case submit that their circumstances are similar to the applicable respondents in those earlier decisions in that:

- they treat regulatory compliance seriously, as evidenced by their entry into, and subsequent compliance with, the undertaking;

- their misconduct lacked any dishonesty, intention to deceive investors or intention to profit by avoidance of securities regulatory compliance;

- they relied upon W's list of "Dos and Don'ts" to carry out their referral activities and that that reliance was reasonable as W was a registrant;

- there is no evidence of any investor harm, nor any evidence of the investors being denied any of the protections afforded under the Act (as the investors referred to W dealt with a registrant and none of the referrals were alleged to contravene the prospectus requirements of the Act); and

- their conduct did not compromise the integrity of our capital markets.

[123] We do not view the circumstances of this case to be analogous to those of the respondents in *Aviawest*. Although not argued as a case in which the respondents in *Aviawest* had a common law defence of due diligence, it is clear that the panel in *Aviawest* viewed the conduct of those respondents in that vein. Although the respondents in the case before us made some submissions with respect to their reliance (and the reasonableness thereof) on advice that they purported to receive from W, we do not view the efforts of the

respondents in this case to comply with securities laws as akin to that of the respondents in *Aviawest*.

[124] The circumstances of one of the respondents in *601949* are somewhat analogous to the circumstances before us. However, unlike that decision we are not able to conclude, at this time, that orders are not necessary in the circumstances.

[125] We also do not agree that there has been no investor harm in this case.

[126] A number of the respondents' submissions going to sanction are worthy of further consideration, but we think it appropriate to address all such submissions in the context of a hearing on sanctions in which both parties will have the benefit of these Findings and may make submissions on what orders are appropriate in the circumstances.

Section 168.2 allegations

[127] The executive director alleges that Liu, as a director of NuWealth and the sole director and officer of CPFS, permitted or acquiesced in NuWealth and CPFS' contraventions of section 34(a) of the Act, respectively, and he therefore contravened that same provision under section 168.2 of the Act.

[128] Liu was the only person directing the activities of NuWealth and CPFS when they made the referrals to GB and W described above. NuWealth and CPFS were trading in securities without being registered as required under the Act, with no exemptions available from that requirement.

[129] We find that Liu authorized, permitted or acquiesced in NuWealth and CPFS' contraventions of section 34(a) and therefore Liu contravened the same provision.

IV. Conclusions

[130] We find that:

a) Liu contravened section 34(a) of the Act with respect to 48 trades in securities for $1,713,070.80;

b) CPFS contravened section 34(a) of the Act with respect to 54 trades in securities for $1,696,878; and

c) NuWealth contravened section 34(a) of the Act with respect to 160 trades in securities for $4,826,504.52.

V. Submissions on Sanctions

[131] We direct the executive director and the respondents to make their submissions on sanction as follows:

By January 11, 2019	The executive director delivers submissions to the respondents and to the secretary to the Commission.

By January 25, 2019	The respondents deliver their response submissions to the executive director and to the secretary to the Commission. Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By February 1, 2019	The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

November 23, 2018

For the Commission

Nigel P. Cave
Vice Chair

Don Rowlatt
Commissioner

Suzanne K. Wiltshire
Commissioner