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

Citation: Re Liu, 2019 BCSECCOM 236 Date: 20190704

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

Panel	Nigel P. Cave	Vice Chair
	Don Rowlatt	Commissioner
	Suzanne K. Wiltshire	Commissioner
Hearing Date	April 3, 2019	
Date of Decision	July 4, 2019	

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.

Decision

I. Introduction

[1] This is the decision of a majority of the Commission panel on the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. Vice Chair Cave has given separate reasons on the issue of an order under section 161(1)(g), starting at paragraph 78.

[2] The Findings of this panel on liability made on November 23, 2018 (2018 BCSECCOM 372) are part of this decision.

[3] We found that:

a) Chien-Hua Liu (also known as William Liu) contravened section 34(a) of the Act with respect to 48 trades in securities for $1,713,070.80;

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

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

d) Liu authorized, permitted or acquiesced in NuWealth's and CPFS's contraventions of section 34(a) and therefore, Liu contravened the same provision under section 168.2 of the Act.

[4] The executive director and the respondents provided written and oral submissions on the appropriate sanctions in this case.

II. Position of the parties

[5] The executive director sought the following sanctions in this case:

a) orders setting out market prohibitions against each respondent, as follows:

- under sections 161(1)(b)(ii), 161(1)(c) and 161(1)(d)(i), (ii), (iii), (iv) and (v), for a duration of 3 years, with respect to Liu;

- under sections 161(1)(b)(ii), 161(1)(c) and 161(1)(d)(iii), (iv) and (v), for a duration of 2 years, with respect to NuWealth; and

- under sections 161(1)(b)(ii), 161(1)(c) and 161(1)(d)(iii), (iv) and (v), for a duration of 1 year, with respect to CPFS;

b) orders under section 162 against each respondent, as follows:

- $75,000 against Liu;

- $80,000 against NuWealth; and

- $30,000 against CPFS; and

c) orders under section 161(1)(g) against Liu and NuWealth, as follows:

- $129,802.37 against Liu; and

- $315,063.49 against NuWealth.

[6] During oral submissions, there was some confusion over whether certain commissions that were ultimately received by Liu were included in the amount of the disgorgement order requested by the executive director against NuWealth. The executive director conceded that, to the extent such amount was included in the amount of the order requested against NuWealth, the amount should be deducted from the amount of that order (the respondents took a different position on this issue – all of which is discussed in greater detail below).

[7] The respondents submitted that it was not in the public interest for us to make any orders against any of the respondents.

[8] In the alternative, in the event that we determined that we should make orders against some or all of the respondents, the respondents submitted that:

a) any prohibition on Liu from trading in securities should contain a carve-out to allow him to trade and purchase securities for his own account through a registrant;

b) any prohibition on Liu acting as a director or officer of a corporation should contain a carve-out to allow him to act in such capacity for any corporation of which he and his immediate family members are the only shareholders (or, in the alternative, for any corporation whose business is limited to the sale of insurance and of which he and his immediate family members are the only shareholders);

c) the quantum of any orders under section 161(1)(g) against Liu be reduced by:

- certain amounts that he submitted were actually commissions paid to third parties; and

- a percentage that he submitted represented the taxes he would have had to pay on commissions directly obtained by him and that NuWealth would have paid, initially, on commissions first paid to NuWealth and then subsequently paid by NuWealth to him; and

d) the quantum of any orders under section 161(1)(g) against NuWealth be reduced by:

- an amount that NuWealth submitted was ultimately reimbursed by it to one of the payors of the commissions; and

- a percentage that NuWealth submitted represented the taxes NuWealth would have paid on commissions paid to it.

[9] In addition, the respondents requested that we make certain further orders:

a) an order relieving the respondents of an undertaking they gave to the Commission dated February 1, 2017;

b) an order relieving Liu and NuWealth of an undertaking they gave to the Commission dated November 1, 2017; and

c) an order revoking a freeze order issued by the Commission on July 24, 2017 and varied by the Commission on November 7, 2017.

III. Facts

[10] The respondents filed an affidavit of Liu in connection with our sanctions hearing. The material information contained in that affidavit is as follows:

- that the notice of hearing and our Findings have had a significant and negative impact on the respondents' insurance business as several insurance companies have ceased doing business with the respondents;

- copies of cheques issued by NuWealth payable to third parties, without any evidence that these cheques were deposited (this evidence was submitted to support Liu's submissions (discussed below) with respect to the amount of commissions that he says that he actually obtained);

- that not all of the investors that were referred by the respondents were clients of the respondents' insurance business; and

- Liu's current financial circumstances.

IV. Analysis

A. Factors

[11] Orders under sections 161(1) and 162 of the Act are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37.

[12] In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

B. Application of the Factors

Seriousness of the conduct

[13] The Commission has repeatedly found that the obligation to be registered under section 34 is one of the cornerstone provisions of the Act. Registrants are required to have specified proficiencies and provide important investor protections, including obligations to "know your product", "know your client" and provide suitability advice.

[14] The misconduct was significant in this case in terms of the quantum of the amounts invested by investors referred by the respondents to W and GB (the issuers of the securities). The total of those investments was approximately $6.5 million.

[15] Liu was a former registrant and would therefore have been aware of the requirement to be registered, in certain circumstances, under the Act. In addition, Liu was a participant in a highly regulated financial services business – the insurance industry. That he did not seek legal advice to determine his legal obligations with respect to his referral activities must be considered a significant failing in the circumstances.

[16] Finally, the seriousness of the respondents' misconduct is increased by the fact that a number of the investors that were referred by the respondents to W and GB were clients of the respondents' insurance business. These investors came to the respondents seeking advice and assistance with one aspect of their financial lives and were diverted to another, unrelated and separately regulated, financial product.

Harm to investors/enrichment of the respondents

[17] The investors referred by the respondents to the issuers have suffered significant financial losses in this case. Although we did not have detailed evidence about the status of all of the various issuers (and the various investments of the investors therein), we heard that many of those issuers are in bankruptcy and the prospects of recovery for the investors are limited.

[18] However, it is not possible to draw a direct connection between the quantum of investor losses and the respondents' misconduct in this case. As a result of their referral activities, the respondents should have been registered and their failure to be registered resulted in investors first being referred by a person who was not subject to the proficiency, suitability, "know your client" and "know your product" obligations (among other obligations) that would apply to a registrant. However, in the case of investors referred by the respondents to W, those investors were then dealt with by a registrant having all of the obligations described above. That was not the case for investors who were referred by the respondents to GB – as GB was simply the issuer of the securities and was not, itself, a registrant. While certain investors therefore acquired securities without having dealt with a registrant (and were therefore denied critical investor protections), investor losses directly occurred as a result of the failures of the business ventures in which the investors ultimately invested. As a consequence, it is clear that there was investor harm caused by the misconduct but it is not clear the extent to which investor losses in this case were caused by the conduct of the respondents.

[19] There was evidence of enrichment by the various respondents. The respondents received commissions from W and GB in respect of the amounts invested in W and GB, respectively, by investors referred to those issuers by the respondents.

[20] Liu testified during the hearing. During that testimony, he said that CPFS directed W and GB, as the case may be, to pay any commissions that CPFS earned directly to individuals employed by CPFS that were responsible for the particular referral of an investor to one of those issuers.

[21] Liu's testimony and other evidence also made clear that NuWealth received commissions from W and GB and that NuWealth paid commissions in varying amounts to individuals who were responsible for specific referrals that generated the commission payments to NuWealth. However, other than the commissions paid by NuWealth to Liu, the evidence at the liability hearing did not specifically establish how much NuWealth paid, when or to whom.

[22] In our findings we determined that NuWealth received a total of $315,063.49 in commission payments from W and GB. We also determined that Liu received a total of $129,802.37 in commission payments with respect to his own personal referrals of investors to W and GB.

[23] As noted above, there was some confusion during oral submissions as to whether a portion of the $129,802.37 received by Liu with respect to referrals of investors to W and GB had flowed through NuWealth (and hence would be included in the $315,063.49). A further review of the evidence from the liability portion of the hearing confirmed that Liu received a total of $108,802.37 from NuWealth in commissions and that this amount forms part of the $315,063.49 listed above.

[24] In his affidavit filed in connection with the sanctions portion of this hearing, Liu provided evidence that $10,000.63 of the commissions paid by W to NuWealth had to be repaid to W due to an overpayment of commissions. Although that evidence did not actually include documentation of the payment of that amount by NuWealth, Liu's affidavit confirmed that it was paid and this was supported by the documentation from W which suggested that the overpayment would be deducted from future payments; therefore, we find that the total enrichment of NuWealth was $305,062.86.

[25] Liu's affidavit also included a table of payments of commissions by W totaling $20,310.83 that Liu submitted were incorrectly attributed to him during the liability portion of the hearing and were, instead, ultimately paid to other individuals. In support of his table in his affidavit he attached cheques from NuWealth, which appear to be commission payments (due to the notations on the cheques) payable to these other individuals. The amounts of the cheques do not match the commission amounts in the table and in one case exceed the commission attributed to Liu.

[26] We reject Liu's submission that the entire $20,310.83 in commissions attributed to him in respect of the investors listed in his table should be deducted from the commissions he was

found to have received. Liu is documented as the referring sub-agent in the case of each of these investors. However, we do accept the cheques as evidence of actual commissions paid by NuWealth to other individuals rather than to Liu in respect of some of the investments listed in the table. These payments result in a reduction in the amount of commissions paid to Liu of $10,421.58 and therefore reduce the amount Liu received in commissions from NuWealth to $98,380.79 and also reduce Liu's total enrichment to $119,380.79.

Aggravating or mitigating circumstances

[27] None of the respondents has a history of securities regulatory misconduct.

[28] The respondents say that a significant mitigating factor in this case is that they had an honest but mistaken belief in the legality of their conduct. In support of this proposition they referred to the decision in *R. v. Suter*, 2018 SCC 34, which sets out that, while not a defence to a criminal charge, a mistake of law can nevertheless be used as a significant mitigating factor in sentencing.

[29] The respondents submit that they had an honest but mistaken belief that they did not need to be registered in order to engage in referral arrangements. They submit that the evidence in support of this submission was that:

- Liu testified that he was told by representatives of W that referral agents of W did not need to be registered under the Act;

- Liu was sent an e-mail by a representative of W to the same effect;

- a former representative of W testified at the hearing that referral agents were given a list of "Dos and Don'ts" by W; Liu testified that he strictly adhered to those "Dos and Don'ts" in making referrals; and from all of that we should infer that W was providing that information, in part, to ensure the compliance by referral agents' with securities laws;

- the respondents' strict compliance with the "Dos and Don'ts" supports an inference that the respondents honestly and mistakenly believed that in following those strictures they would be in compliance with laws.

[30] The executive director submitted that the mistake of law doctrine should not apply to the respondents in this case because in order for it to apply it must have been reasonable for them to have an honest but mistaken belief in the state of the law. He submitted that it was not reasonable for the respondents to have had this state of mind about the law in this case. He further submitted that it was not reasonable for Liu to rely on the advice that he received from W, as W was only looking after its own legal compliance and not that of the respondents.

[31] We agree in part with the executive director's submissions on this issue. The difficulty with the respondents' submissions on this issue is that Liu was a former registrant, was engaged

in another highly regulated financial industry and yet he made no efforts to obtain his own legal advice in order to ascertain his legal compliance with securities laws. We do not think that it was reasonable for the respondents to simply rely upon what W told them they could or could not do in the circumstances.

[32] Although we do not view the respondents as having established a basis for a finding of a "mistake of law", we have taken some of the factors in the submissions of the respondents on this point into account in distinguishing the seriousness of this conduct from other cases involving contraventions of section 34 (all as described in paragraph 45 below).

Participation in our capital markets and fitness to be a registrant, director or officer

[33] That the respondents' very misconduct was failing to be registered must be a factor in considering their fitness to be a registrant.

[34] Liu was the controlling director of CPFS and of NuWealth (for most of the relevant period). That he was then responsible for those entities' non-compliance with laws must be a factor that we account for in our orders with respect to his fitness to be an officer and director of a corporation.

Specific and general deterrence

[35] The sanctions that we impose must be sufficient to establish that both the respondents and others will be deterred from engaging in conduct similar to that carried out by the respondents.

[36] Our orders must also be proportionate to the misconduct (and the circumstances surrounding it) of the respondents.

Previous decisions

[37] The executive director directed us to three previous decisions of this Commission as helpful guidance in determining the appropriate sanctions in the circumstances: *Streamline Properties Inc. (Re)*, 2015 BCSECCOM 66, *Re HRG Healthcare*, 2016 BCSECCOM 5 and *Re SBC*, 2018 BCSECCOM 267.

[38] The respondents directed us to the decision of this Commission in *601949 B.C. Ltd. (Re)*, 2004 BCSECCOM 447 in support of their submissions that it was not in the public interest for us to make any orders against any of the respondents in the circumstances of this case.

[39] In *Streamline*, one of the individual respondents (W) was found liable for engaging in contraventions of section 61 and 34(a) of the Act with respect to issuances of securities having an aggregate value of approximately $3.6 million. The seriousness of W's contraventions was exacerbated by the fact that investors did not understand that in addition to losing the value of their investments in the securities that they purchased, they were also liable for certain cost-overruns associated with a real estate development project. There were no aggravating factors with respect to W and, although W expressed significant remorse during the hearing, there were no significant mitigating factors either. There was significant investor harm and W was not directly enriched by his misconduct. The panel

imposed broad market prohibitions of 10 years in duration on W, an administrative penalty of $100,000 on W and an order under section 161(1)(g) in the amount of approximately $3.6 million (the disgorgement order has since been stayed by the Commission following the decision in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 (described below)).

[40] In *HRG*, one of the individual respondents (M) was found liable for engaging in 34 direct contraventions of section 61 with respect to issuances of securities having an aggregate value of approximately $1.7 million. M was also found liable for 85 contraventions of section 61 of the Act, under section 168.2 of the Act, as a director of a corporate respondent that contravened section 61 of the Act with respect to issuances of securities having an aggregate value of approximately $3.5 million. M was also found liable for two contraventions of section 168.1(1)(b) of the Act, under section 168.2 of the Act, as a director of a corporate respondent that contravened section 168.1(1)(b) of the Act by filing two false exempt distribution reports with the Commission. There were no aggravating or mitigating circumstances with respect to M. There was significant investor harm and M was personally enriched by his misconduct through his receipt of commissions in the amount of approximately $103,530. The panel imposed broad market prohibitions of 7 years in duration on M, an administrative penalty of $75,000 on M and an order under section 161(1)(g) in the amount of the commissions that he received.

[41] In *SBC*, an individual respondent and his personal holding company were found liable for engaging in contraventions of section 34(a) of the Act with respect to issuances of securities having an aggregate value of approximately $2.7 million and in contraventions of section 61 of the Act with respect to issuances of securities having an aggregate value of approximately $1.5 million. The panel found that there were no mitigating circumstances and found that it was an aggravating factor that the respondents' misconduct was neither accidental nor merely negligent. The respondents were significantly enriched as the securities that were issued in contravention of sections 61 and 34(a) were securities of the corporate respondent and there was an intermingling of funds between the corporate respondent and the individual respondent. The panel imposed broad market prohibitions of 10 years in duration on both the individual and the corporate respondent, imposed an order on the individual respondent to pay an administrative penalty of $100,000 and ordered that the individual and corporate respondents pay approximately $380,000 under section 161(1)(g) (as the amount of the investors' funds that was transferred to the individual respondent and hence used in a manner that was not consistent with what investors were told would be the use of proceeds).

[42] In *601949 B.C*, one of the individual respondents (M) was found to have contravened section 34(a) by referring prospective investors to another of the respondents who was then responsible for selling the securities to investors. The panel declined to make orders against M on the basis that his role in the transactions was limited to that of a referral. They also found the M was not a referral agent but was an employee of the issuer and he was not compensated for the referrals.

[43] The respondents submitted that their misconduct was most similar to the respondent M in *601949 B.C.* The executive director acknowledged that the respondents' misconduct in this case was less serious than that described above in *Streamline, HRG,* and *SBC*.

[44] While we agree that there are aspects of all four of those decisions that are similar to this case, we do not agree that the respondents' misconduct is analogous to any of the respondents described above. We would generally note that the seriousness of the misconduct falls somewhere between that of the respondent M in *601949 B.C.* and the respondents in *Streamline, HRG,* and *SBC*.

[45] In particular, the respondents' contraventions in this case are significantly less serious than in *Streamline, HRG* and *SBC* in that:

a) the respondents' misconduct was limited to contraventions of section 34 (some of the respondents in the other cases were found liable for other contraventions of the Act);

b) the respondents' conduct in this case was limited to referring investors to the issuers of the securities (rather than also being involved with other more significant activities in connection with the trades or the ultimate investment decisions made by investors);

c) compared to *SBC*, the investors' expectations in this case about what the respondents were doing was more consistent with the reality. It was expressly disclosed to investors that the respondents were acting as referral agents and that they would earn commissions as a consequence, which was what occurred. There was no evidence that the respondents misled investors about these activities;

d) the respondents did make efforts to comply with a set of procedures that would limit their role in the trades; and

e) with respect to the respondents' referrals to W, the investors were referred to a registrant who was obligated to provide those investors with the investor protections offered by dealing with a registrant.

[46] We also note, although this is not a significant factor in our analysis about the appropriate sanction, that there could have been at least a modicum of confusion in the marketplace about what activities required registration. Companion Policy to National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (CP 31-103) states that the Commission would generally not consider some types of referrals by registrants to "constitute trading". However, as set out in our findings, this language was not directly applicable to the circumstances, nor did the respondents submit that they specifically relied upon this language with respect to their conduct.

C. Analysis of appropriate orders

Market prohibitions

[47] The executive director has asked for broad market prohibitions:

- against Liu having a duration of three years;
- against NuWealth having a duration of two years;
- against CPFS having a duration of one year.

[48] The respondents have said that it is not in the public interest to make any orders against them.

[49] We do not agree that it is not in the public interest to make any orders against the respondents. The circumstances of this case are very different than that of the individual respondent M in *601949 B.C.* The only thing that is similar between this case and that of *601949 B.C.* is that the role of the respondents in the actual sales process was similarly limited to that of just a referral. However, the circumstances of the referrals are otherwise completely different. The respondents in this case were highly compensated for those referrals. The respondents referred clients of their insurance business to W and GB. Finally, the sheer quantum of the referrals made by the respondents in this case makes the context of their behavior different from that of M in *601949 B.C.*

[50] This case is also significantly different than each of *Streamline*, *HRG*, and *SBC*. In fact, the only real similarity between this case and those three was in the quantum of the dollar amounts involved in the breaches of the Act. In each of those three cases, the applicable respondents were found to have significant contraventions of section 61 (in *Streamline* and *SBC*, in conjunction with some or all of the same trades that were carried out in contravention of section 34(a) of the Act). In *HRG* there was also misconduct relating to filing false documents with the Commission. In *SBC*, the findings were very different than those in this case in that the panel in that case found that the respondents' contraventions of section 61 and 34(a) were neither accidental or merely negligent. None of those cases involved factors similar to those described in paragraph 45 above. Therefore, we find that the respondents' misconduct in this case was significantly less than the respondents in all of those three cases.

[51] This is a case where the need for specific deterrence is relatively limited. Liu has demonstrated compliance with undertakings given to the Commission several years ago. There is also evidence of an attempt to comply (albeit misguidedly) with certain sales practices. However, this is also a case where there is a significant public interest in imposing orders for purposes of general deterrence. Those who carry out activities in our capital markets that trigger the obligation to become registered under our Act must understand that there will be consequences for failing to do so. Failing to impose any orders against the respondents would significantly undermine our regulatory regime as it relates to registration.

[52] In all of the circumstances of this case we would impose broad market prohibitions on Liu and NuWealth for a duration of two years and against CPFS for a duration of one year. The evidence was that CPFS's role in the misconduct was more limited than that of Liu and NuWealth and our orders should reflect that difference in misconduct.

[53] Liu submitted that any order prohibiting him from trading in securities should contain a carve-out to permit him to trade securities for his own account through a registrant. He also submitted that any order prohibiting him from acting as a director or officer of a corporation should contain a carve-out to allow him to act in such capacity for any corporation of which he and his immediate family members are the only shareholders. The executive director did not raise any objections to these two carve-outs and we do not see that there is any risk to the public interest in granting them.

Section 161(1)(g) orders

[54] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, recently adopted a two-step approach to considering applications for orders under section 161(1)(g) (para 144):

> I now turn to apply these principles to the three appeals before this Court. I agree with and adopt the two-step approach identified by Vice Chair Cave in *SPYru* at paras 131-32:
>
> > [131] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).
> >
> > [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.

[55] The Court of Appeal in *Poonian* further adopted several principles to apply in interpreting section 161(1)(g) (para 143):

> 1. The purpose of s. 161(1)(g) is to deter persons from contravening the *Act* by removing the incentive to contravene, i.e., by ensuring the person does not retain the "benefit" of their wrongdoing.
>
> 2. The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention. Those objectives may be achieved through other mechanisms in the *Act*, such as the claims process set up under Part 3 of the *Securities Regulation* or the s.157 compliance proceedings in the *Act*.
>
> 3. There is no "profit" notion, and the "amount obtained" does not require the Commission to allow for deductions of expenses, costs, or amounts other persons paid to the Commission. It does, however, permit deductions for amounts returned to the victim(s).
>
> 4. The "amount obtained" must be obtained *by that respondent, directly or indirectly*, as a result of the failure to comply with or contravention of the *Act*. This generally prohibits the making of a joint and several order because such an order would require someone to pay an amount that person did not obtain as a result of that person's contravention.

5. However, a joint and several order may be made where the parties being held jointly and severally liable are under the direction and control of the contravener such that, in fact, the contravener obtained those amounts *indirectly*. Non-exhaustive examples include use of a corporate *alter ego*, use of other persons' accounts, or use of other persons as nominee recipients.

[56] Finally, the Court of Appeal in *Poonian* approved an approach to determining the amounts obtained, directly or indirectly, by a respondent that requires the executive director to provide evidence of an "approximate" amount, following which the burden of proof switches to the respondent to disprove the reasonableness of this number.

Step 1 – Can a section 161(1)(g) order be made?

[57] As discussed above, the evidence was that NuWealth received an aggregate of $305,062.86. Liu received an aggregate of $119,380.79 in commissions for his referrals. Orders under section 161(1)(g) can be made against NuWealth and Liu, respectively, in those amounts.

[58] We reject NuWealth's argument that the executive director failed to provide an approximation of the amount it received as a result of its contravention because the executive director failed to take any steps to provide an approximation of the amounts actually retained by NuWealth after it paid commissions to individuals who made referrals that generated commissions NuWealth received. The obligation of the executive director is to make an estimate of the "amount obtained" not "retained". The commissions paid to such underlying individuals are in our view costs and expenses of NuWealth and as such not required to be deducted to determine the "amount obtained".

[59] NuWealth and Liu submit that the amounts of any disgorgement orders against them should be reduced by the amounts they would have had to pay in income taxes. We disagree. As stated in *Poonian*, the "amount obtained" does not require the Commission to allow for deductions of expenses and costs to arrive at a profit or net amount. Similarly, a reduction for income tax liability is neither required nor in our view appropriate.

[60] We have determined that $98,380.79 of the $305,062.86 obtained by NuWealth was paid by NuWealth to Liu. This amount is also included in the amount obtained by Liu. To avoid duplication in the orders it is necessary to either (i) deduct the amount of $98,380.79 from the amount ordered against NuWealth, or (ii) make the orders against NuWealth and Liu joint and several with respect to the amount of $98,380.79.

[61] The executive director seeks separate disgorgement orders for each of NuWealth and Liu and concedes that the amount of $98,380.79 should be deducted from the amount of the separate order it seeks against NuWealth to avoid duplication. This would result in the amount to be ordered against NuWealth being reduced to $206,682.07.

[62] NuWealth and Liu request that any disgorgement orders made, should to the extent necessary, be joint and several to reflect the commissions paid to Liu by NuWealth from the commissions it received.

[63] Since the evidence has enabled us to determine the amount to be ordered separately for each of these respondents, we consider it appropriate to reduce the amount of the order against NuWealth as indicated above and make separate orders against each of NuWealth and Liu. This makes it unnecessary to make a joint and several order.

Step 2 – Is it in the public interest to make a section 161(1)(g) order?

[64] We find it to be in the public interest to make orders under sections 161(1)(g) against NuWealth in the amount of $206,682.07 and against Liu in the amount of $119,380.79.

[65] The purpose of orders under section 161(1)(g) is to strip respondents of the benefit of their misconduct. In this sense, section 161(1)(g) orders serve the purpose of both specific and general deterrence. As noted in *Poonian* (paragraph 88), "One way to deter is to remove the incentive for non-compliance".

[66] In this case, the orders under section 161(1)(g) provide general deterrence to market participants by showing that contraventions of section 34, a cornerstone provision of the Act, have serious consequences.

[67] In the case of NuWealth and Liu, their misconduct was serious and harmful to investors. The section 161(1)(g) orders remove the commissions they received that were the incentive for their non-compliance. It would be contrary to the investor protection objectives of section 34 to permit Liu and NuWealth to retain the benefit of their misconduct.

[68] We have considered Liu's current personal financial circumstances as set out in his affidavit. However, the negative impact of the findings of liability against him on his insurance business and his resulting limited financial resources are, as the executive director points out, collateral consequences of his misconduct. We do not view these collateral impacts as a reason to reduce the disgorgement order against him or against NuWealth with respect to the commissions already obtained by them as a result of their misconduct.

[69] Nor do we see any other reason to reduce the amount of the orders from the full amounts obtained by each of NuWealth and Liu. To do so would make the orders in this case just another cost of doing business.

Section 162 orders

[70] The executive director has asked for orders under section 162 of the Act against the respondents as follows:

a) Liu - $75,000;
b) NuWealth - $80,000; and
c) CPFS - $30,000.

[71] As noted above, the respondents submitted that there was no need to make orders in the public interest against any of the respondents under section 162.

[72] As discussed under the market prohibitions sections above, we do not agree with the respondents' submissions that there is no need to make orders in the public interest against any of the respondents in the circumstances. However, as we also set out above, we do not view the misconduct in this case as being as serious as set out by the executive director in his submissions. As a consequence, we also do not agree that our orders under section 162 should be in the amounts requested by the executive director.

[73] We have considered the following factors in determining the quantum of the appropriate orders under section 162:

- the quantum of the referrals made by the respondents to W and GB;
- that Liu was previously a registrant;
- a number of the investors referred by Liu were clients from his insurance business;
- the need for general deterrence so that avoiding our registration requirements are not merely a cost of doing business in an unregistered capacity;
- the circumstances of this case, which suggest that Liu's misconduct was less serious than the decisions referenced by the executive director (as described in paragraph 45 above);
- Liu's personal financial circumstances; and
- that CPFS' misconduct was less significant than that of both NuWealth and Liu.

[74] Having considered all of those factors, we find that orders under section 162 against each of NuWealth and Liu in the amount of $40,000 and against CPFS in the amount of $20,000 are appropriate in the circumstances.

[75] Because we are making orders under both sections 161(1)(g) and 162 against the respondents we dismiss the respondents' request that we revoke a freeze order issued by the Commission on July 24, 2017 and varied by the Commission on November 7, 2017. Any variation or revocation of that order should be made with submissions on how the orders that we make in this decision impact that freeze order.

[76] We agree that the undertakings signed by the respondents to the Commission are now no longer necessary and should be withdrawn. As undertakings are not orders of the Commission, we have no power to effect this by revocation; however, we direct the executive director to take steps to effect the removal of these undertakings from the respondents.

V. Orders

[77] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

Chien-Hua Liu, also known as William Liu

(a) under section 161(1)(d)(i), Liu resign any position he holds as a director or officer of an issuer or registrant, except that he may continue to act as a director or officer of an issuer whose securities are solely owned by him or his immediate family members

(being: Liu's spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law, brother or sister-in-law);

(b) Liu is prohibited for 2 years:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase securities or exchange contracts for his own account (including one RRSP account, one TFSA account and one RESP account) through a registered dealer, if he gives the registered dealer a copy of this decision;

(ii) under section 161(1)(c), from relying on any of the exemptions set out in this Act, the regulations or a decision;

(iii) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant, except that he may act as a director or officer of an issuer whose securities are solely owned by him or his immediate family members (being: Liu's spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law, brother or sister-in-law);

(iv) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;

(v) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and

(vi) under section 161(1)(d)(v), from engaging in investor relations activities;

(c) Liu pay to the Commission $119,380.79 pursuant to section 161(1)(g) of the Act; and

(d) Liu pay to the Commission an administrative penalty of $40,000 under section 162 of the Act.

NuWealth Financial Group Inc.

a) NuWealth is prohibited for 2 years:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts;

(ii) under section 161(1)(c), from relying on any of the exemptions set out in this Act, the regulations or a decision;

(iii) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;

(iv) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and

(v) under section 161(1)(d)(v), from engaging in investor relations activities;

b) NuWealth pay to the Commission $206,682.07 pursuant to section 161(1)(g) of the Act; and

c) NuWealth pay to the Commission an administrative penalty of $40,000 under section 162 of the Act.

CPFS Professional Financial Services Inc.

a) CPFS is prohibited for 1 year:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts;

(ii) under section 161(1)(c), from relying on any of the exemptions set out in this Act, the regulations or a decision;

(iii) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;

(iv) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and

(v) under section 161(1)(d)(v), from engaging in investor relations activities; and

b) CPFS pay to the Commission an administrative penalty of $20,000 under section 162 of the Act.

July 4, 2019

For the Commission

Don Rowlatt
Commissioner

Suzanne K. Wiltshire
Commissioner

Reasons for Decision of Nigel P. Cave, Vice Chair

I. Introduction

[78] I concur with the majority in all respects other than the reasoning and decision associated with the majority's orders against Liu and NuWealth pursuant to section 161(1)(g).

[79] For the reasons below, I would not make any disgorgement orders against any of the respondents pursuant to section 161(1)(g).

II. Analysis

[80] I agree with the majority in their step 1 of the analysis for making orders under section 161(1)(g), that orders under that section in the amount of $305,062.86 and $119,380.79 can be made against NuWealth and Liu, respectively.

[81] Where I disagree with the majority is in step 2 of their analysis, whether it is in the public interest to make such orders against either NuWealth or Liu.

[82] I agree that the general purpose of a disgorgement order is to strip a respondent of the financial benefits of their misconduct. That is a sensible guiding principle; one that in many cases is not difficult to apply. However, this is one case where that simple principle is difficult to apply in practice for three reasons.

[83] Firstly, there is obviously a connection between the commissions earned by the respondents in this case and their failure to be registered. It was their conduct in referring investors to W and GB that triggered the need to be registered under the Act. However, unlike other contraventions of the Act (for example fraud), where a respondent directly obtains funds from investors through their misconduct, here the respondents' did not earn those commissions simply because they were not registered. The respondents certainly avoided costs and obligations (i.e. through avoiding the costs of obtaining registration as well as the ongoing costs of operating in a manner consistent with obligations on a registrant) as a result of their failure to be registered, but the causal connection between earning commissions and the misconduct is not direct (albeit related).

[84] Second, the respondents' role (as a referral agent) in this case and the commissions that they earned from that role were known to investors. The evidence was that investors were told that the respondents were earning commissions arising from their referral to W and GB. As a consequence, this case is similar to the cases that involve a contravention of section 61 of the Act but where the issuer uses the money in a manner that is entirely consistent with investor expectations. As I set out in my dissent in *Streamline*, in such circumstances I would not find it to be in the public interest to order disgorgement of such funds. In my view, these circumstances are best sanctioned by market prohibitions and orders under section 162.

[85] Lastly, the public interest assessment determining whether to make an order under section 161(1)(g) must involve an equitable assessment of the individual circumstances of the respondents and their misconduct. I view the following factors as weighing against making such orders in this case:

- the significant mitigating factor in this case of the respondents' attempts to comply with sales practices set out by W, combined with the potential confusion created by wording in CP 31-103 on the issue of whether referral activity was viewed by the CSA as trading; and

- the respondents' role in the sale of securities to the investors in this case was limited to referrals and, in the case of W, referrals to a registrant (where the investors would have received the protections of suitability advice and other obligations on registrants like the obligations to "know your client" and "know your product").

[86] In sum, I would find that large disgorgement orders against the respondents would make the totality of the orders disproportionate to the respondents' misconduct. In the circumstances of this case, for all of the above reasons, I would not make a disgorgement order against either NuWealth or Liu.

July 4, 2019

Nigel P. Cave
Vice Chair