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Jason Bennett
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And –

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Sent by email: jbennett@mfdca.ca; scorrigall-brown@bcsc.bc.ca

Dear Sir and Madam:

Subject: Proposed Amendments to MFDA By-Law No.1, Section 35: No Actions Against the Corporation)

Independent Financial Brokers of Canada (IFB) is writing to you because of certain events which have taken place recently related to several enforcement cases pertaining to Approved Persons. We believe these cases are pertinent to the concerns we identified in our earlier response to the proposed changes to Section 35, “No Actions Against the Corporation”, which were drafted to extend specific protection to officers and directors of the IPC against legal action.

Since nothing further has been posted to the MFDA website regarding acceptance of the proposed changes, we assume that the discussion at the Commission level is ongoing and have prepared these additional comments for your consideration.

In our submission to the MFDA and BCSC, dated September 24th 2009, we stated that since Approved Persons are not Members of the MFDA, are not eligible to participate in the voting process and are not represented on the Board, they should not be prevented from seeking legal recourse in certain circumstances. While our letter opined that such cases would likely arise infrequently, that should not preclude them from having recourse available to them. In fact, the MFDA now has before it several cases which demonstrate not only this point but support our concerns related to procedural fairness that we have made with regard to the amendments to Section 24.3 “Suspensions in Certain Circumstances”.

In our first example, the Approved Person, Gary Alan Price, was brought before a Hearing Panel, had his case heard and the Panel dismissed 3 of the 4 charges. Subsequently, one member of the Panel recused himself due to a potential conflict of interest. MFDA enforcement counsel advised the Panel that it should dissolve and a new panel be struck, although it was a legitimate choice for the remaining two members to continue to serve.

However, the Panel decided to take the MFDA’s advice, thus placing Mr. Price in the position of having to repeat the entire process. In fairness, he asked for costs to compensate him for time spent appearing before the first Panel. It must be remembered that time spent in hearings not only detracts from the Approved Person’s ability to earn a living but leaves the individual operating under a veil of implied wrong-doing. The Panel found that no remedy for allocating costs to an Approved Person is available to it under MFDA By-Law No. 1:

38. The second matter concerns costs. The Respondent asks that costs be assessed against the MFDA. It is not an unreasonable request because, through no fault of his own, he found himself involved in proceedings which put in question the Decision made in the case against him. Regrettably, we are unable to do so. Section 24.2 of By-law No. 1 (as amended) permits a Hearing Panel to order that a Member or Approved Person “pay the whole or part of the costs of the proceedings.” But it is silent about costs against the MFDA, and this precludes us from considering the request.

A second example has arisen in British Columbia, where a Hearing Panel dismissed the case against an Approved Person, Tony Lin, citing that the MFDA had not adequately proven its case. Mr. Lin’s legal counsel has asked for costs. However, the MFDA has requested that a new Panel be struck and the case against Mr. Lin be brought forward again. We do not presume to comment on the facts of the case or its merits, but on the ability of the MFDA to appeal a decision of a Hearing Panel which subjects the advisor to the entire process again.

Clearly an organization such as the MFDA has considerable physical and monetary resources available to it – resources not available to the average advisor. The inability for the Approved Person to receive compensation where no wrong-doing is established leaves him/her at a serious disadvantage in the legal process. Indeed, the fear of legal costs may sway many advisors to simply admit defeat or settle in advance of a hearing, rather than engage in a lengthy and expensive process to prove the charges unfounded.

MFDA By-Law No. 1, Section 35, “No Actions Against the Corporation”, as it exists now prevents Approved Persons, along with other parties subject to MFDA jurisdiction, from taking any recourse against the MFDA staff or other related parties. This, in conjunction with their ability to take action against an Approved Person without notice and on greatly expanded grounds, creates an unfair and

unbalanced situation which can lead to prolonged enforcement actions with no ability for compensatory relief for the accused.

It is our hope that the Commission and MFDA will seek to remedy this situation so that all parties have the ability to participate fully and equally in the system. This could be achieved by appropriate amendments to Sections 24 and 35 of MFDA By-Law No. 1 and providing Hearing Panels with the capacity to award the defendant costs where it deems it appropriate.

Yours truly,

A handwritten signature in black ink, appearing to read 'John Whaley', written in a cursive style.

John Whaley
Executive Director
Email: jaw@ifbc.ca