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December 2, 2009

Brenda Leong, Chair and Chief Executive Officer  
British Columbia Securities Commission  
701 West Georgia Street  
P.O. Box 10142, Pacific Centre  
Vancouver, B.C. V7Y 1L2

Sent by Email: [bleong@bcsc.bc.ca](mailto:bleong@bcsc.bc.ca)

Dear Ms Leong:

**Subject: Request for review of MFDA Public Consultation Process**

Independent Financial Brokers of Canada (IFB) is writing to you, as the lead Recognizing Regulator (RR) of the Mutual Fund Dealers Association (MFDA) to ask that the BCSC, along with other CSA members, review the current process for soliciting comments from the public when amendments to MFDA regulations are published.

IFB is a voluntary, not for profit association representing approximately 4,000 licensed, independent advisors who conduct business in the financial services sector. Many of our members are Approved Persons and subject to the governance of the MFDA under MFDA By-Law No. 1. Some members also operate MFDA dealerships. Therefore, the majority of our members are directly affected by the regulatory authority of the MFDA.

IFB supports the public interest mandate of regulators by encouraging a high standard of professionalism amongst its members. We sponsor large continuing education events several times per year at various locations across Canada, offer a comprehensive errors and omissions program and provide compliance support. Such initiatives serve to help protect consumers.

A key part of the work we do is advocacy on behalf of our members. IFB is a regular contributor to the public consultation process undertaken by the MFDA. It is an important part of our mandate to our members that we ensure regulators gain feedback from those conducting business in this field so that regulatory changes do not adversely affect the advisors' ability to serve their clients, in situations where there is no imminent issue to address public harm.

As you may be aware, we recently applied to a Hearing Panel of OSC Commissioners to have amendments made to MFDA By-Law No. 1, Section 24.3 “Suspensions in Certain Circumstances” quashed. OSC staff and the MFDA argued that IFB did not have standing to bring forward this challenge, as it was not a person “directly affected” by the By-Law, and the Hearing Panel agreed. The Hearing Panel also ruled that it was not in the public interest for a hearing panel to review a policy decision made by the “Commission as a whole”. Unfortunately, this meant that our concerns with the amendment were not heard on their merits.

We have subsequently taken the somewhat unusual step of writing to the OSC and the MFDA asking them to revisit this amendment, in light of the previously unseen correspondence between the MFDA and RRs that became available to all of us in the course of our challenge. These documents indicated a greater level of concern on the part of the RRs, and in particular the BCSC and ASC, than was publicly available. These concerns and the changes requested by these Commissions, seemed to have encountered some resistance from MFDA staff and, in our opinion, were not fully reflected in the subsequent amendments made to this section by the MFDA. In fact, it is unclear to us if the RRs had access to the other Commissions’ comments and email exchanges before they approved (or did not object to) the amendment.

Our reasons to have the amendment quashed were two fold. These were documented in writing to the MFDA at the time of the original 30 day public consultation period, which ended in November 2006, and subsequently reiterated in our Application to have the amendment quashed.

First, we objected to the enhanced ability of the MFDA to take action against an Approved Person without notice, or *ex parte*, which we found to be very troubling and seemingly beyond what the securities commissions themselves may have available to them through their respective provincial securities acts. The use of an *ex parte* provision is a very powerful tool and could easily be abused without proper constraints built in to limit its usage, by applying the strictest test of imminent public harm. Furthermore, such hearings are conducted outside of the public forum, unlike hearings held with notice. The examples provided by the MFDA of reasons as to why they needed these expanded powers (in response to the ASC comments) did not seem to adequately reflect this level of seriousness and do not reflect an appropriate balance between the need for the MFDA to make *ex parte* orders in order to protect the public, and the right of an individual affected by such an order to make a full defence.

Second, there are greatly expanded grounds under which an Approved Person can be subject to disciplinary action. The new section 24.3.1(a) contains 8 grounds upon which a Hearing Panel of the MFDA Regional Council (“Hearing Panel”) can grant an application by Staff of the MFDA to suspend, terminate or impose conditions on the registration of an Approved Person without notice, including:

1. a person fails to cooperate with an examination or investigation;
2. a person has failed to comply with the provisions of any By-law, Rule or Policy of the MFDA; and
3. the MFDA receives information regarding the incapacity of the person, by reason of mental or physical illness, other infirmity or addiction to or excessive use of alcohol or drugs.

**MFDA By-Law No. 1, Section 24.3.1**

We are particularly aggrieved by Section 24.3.1(vii) (shown as #3 above) as it contains no threshold test as to what constitutes, for example, “excessive use of alcohol”, or what measure of “mental or physical illness” would result in “incapacity”. We question who at the MFDA will adjudicate when this level of “incapacity” has been reached and pass this “information” along to a Hearing Panel. This is surely well outside the reasonable standards of responsibility or knowledge for MFDA staff. The only reason provided by the MFDA for including such a provision was that similar wording is contained in Ontario’s *Law Society Act*, “the statute pursuant to which the Law Society of Upper Canada regulates lawyers in Ontario.”<sup>1</sup> Although we have not conducted an exhaustive search, we could find no provision containing such specific language in B.C.’s *Law Society Act* or in its “Professional Conduct Handbook”.

We note, with respect, that Approved Persons do not enjoy the same degree of scope in their financial services practice as do lawyers. They conduct business under very different circumstances. Approved Persons operate under the day-to-day oversight of their Dealer Member, which in turn is heavily regulated by the MFDA. The MFDA has statutory enforcement authority. In addition, there are clear requirements for Approved Persons to adhere to standards of conduct consistent with their responsibilities to advise clients on financial products. These standards permeate securities regulation and the MFDA regulations. For example, both Dealer Members and Approved Persons are subject to MFDA Rule 2.1.1 which states that:

- a. “Each Member and each Approved Person of a Member shall:
- deal fairly, honestly and in good faith with its clients;
  - observe high standards of ethics and conduct in the transaction of business;
  - not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
  - be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.”

Clearly, Approved Persons already have a duty of care obligation to clients and are subject to a requirement that they will conduct themselves in a professional and ethical manner to preserve the integrity of the capital markets. They are not, however, lawyers – specifically lawyers practising in Ontario; nor do they operate in a comparable marketplace with similar powers, for example, they do not have the ability to hold client funds in trust. Furthermore, any client funds received are paid directly to the dealer, not to Approved Persons.

We do not see why Approved Persons selling mutual funds should be held to a standard not reflected in many other professional standards of conduct – including securities representatives licensed under IIROC. It further mystifies us why the MFDA chose to extract only one condition in a statute which contains a considerable amount of further explanatory language regarding unacceptable professional conduct and how it will be dealt with under Ontario’s *Law Society Act*, or to rely on a statute which seems to have little direct relevance to those who

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<sup>1</sup> Application Record of the Respondent, Staff of the Mutual Fund Dealers Association of Canada, Volume 2 of 2, Tab 33, page 458

conduct business in the mutual fund industry. In fact, in the examples of actual enforcement cases provided by the MFDA supporting the need for these broader grounds, there was no instance that would have fallen under Section 24.3.1(vii). This indicates to us that the MFDA is “anticipating” the occurrence of such an instance. This is particularly noteworthy, given that one of Staff’s premise as to why the OSC Hearing Panel should not consider our Application was that it was “premature”, in that we were challenging the Amendment in advance of an actual case.

As is evident from the above discussion, IFB takes seriously the flaws we see in the Amendment and its potential to be prejudicial and unfair to Approved Persons. We sought to bring our Application forward because we felt it is neither practical nor fair to expect an individual who faces a charge under this section to be able to defend him or herself against the allegations, while at the same time challenging its legality based on its abridgement of principles of natural justice and procedural fairness. While it remains possible that this may happen in the future, it was our hope to engage in a fulsome discussion, without regard to the facts of a particular case, so that this section might be vetted in an objective way and therefore be better worded to address the MFDA’s regulatory concerns, while still respecting an individual’s statutory rights.

We have written to the OSC and the MFDA by separate letter requesting that this discussion take place. We would welcome the involvement of the BCSC and other CSA members in this discussion as well.

#### Public Consultation Process

The process involved in bringing our Application before the OSC exposed some flaws in the MFDA public consultation process which we would like to draw to the attention of the BCSC and other members of the CSA. It is our hope, that by doing so, the Commissions will look to improve this process.

The MFDA amendment was first published for public comment in October 2006. The comment period closed on November 27, 2006, 30 days later. Generally, a 30 day comment period is too short to give parties adequate time to review the proposed amendments and consider their response. This has been particularly troublesome when the 30 day comment period occurs in the summer months when staff of responding parties is often on vacation. We are pleased that the MFDA, in recent months, has responded to such complaints by issuing proposed amendments with a longer time frame; however, it is unclear if these changes are entrenched in MFDA procedures or a voluntary response that could be withdrawn at any time.

In advance of publishing the proposed amendment, the MFDA Board had already approved it and it was presented to the MFDA Members for approval at the December 1, 2006 AGM - a scant 4 days after the close of the consultation period.

This indicates to us that:

- The board of directors of the MFDA approved the By-law Amendment prior to the conclusion of the 30 day comment period and without any consideration of the responses to the request for comments.

- With respect to the approval at the Annual General and Special Meeting of MFDA Members (the “AGSM”), the following points are noteworthy:
  - (a) The summary of the amendments that was enclosed with the Notice of Meeting represented that the “*summary application process contemplated by the amendments is generally consistent with the process followed by other securities regulators and, in particular, the Investment Dealers Association.*”
  - (b) For the reasons outlined below, the above statement is not accurate and minimizes the significance of the amendments from the perspective of respecting principles of natural justice;
  - (c) It does not appear that the responses to the request for comments, or any summary of such, were included in materials sent to members before the AGSM;
  - (d) The minutes of the AGSM indicate a very summary discussion of the amendments, during which it was noted that three comment letters had been received, “*dealing with the necessity for the interim powers and the application of the test of imminent harm to clients*”. The minutes indicate that the meeting was advised that the, “*interim relief powers were a necessary part of the regulatory powers affording the MFDA the ability to respond quickly and that imminent harm to clients was not an appropriate threshold test in all instances set out in Section 24.3.*”; and
  - (e) The characterization of the powers under section 24.3 as “interim” is not correct. It does not appear that MFDA members were advised why the new powers were necessary.
  
- A review of the MFDA Affidavit reveals that serious concerns were raised by the British Columbia Securities Commission (“BCSC”) and the Alberta Securities Commission (“ASC”) regarding the By-law Amendment.
  
- On August 1, 2008, the approval of the amendments was published, along with a summary of the “public comments” and the response of the MFDA to these comments. IFB observes that only a summary of the “public comments” was published and that the comments of the members of the Canadian Securities Administrators (“CSA”) were not referred to following the approval of the amendments. IFB does not know whether each Commission had the comments of the BCSC and the ASC before them when deciding to approve the amendments.

The affidavit filed by the MFDA pursuant to the IFB Application outlines the steps that were taken between October 2006 and July 2008 which culminated in the approval of the By-law Amendment. Notably, there is no public record of the Memorandum of Understanding that the MFDA was required by section 11(a) of the MFDA Recognition Order to enter into with the recognizing securities commissions to set out the approval process for changes to MFDA rules.

The MFDA, as a result of our Application, provided a draft of the MOU “Regarding the Review and Approval of Rules of the MFDA”, which the MFDA advises was followed in this case. However, the draft MOU does not address the approval of proposed amendments to the rules of the MFDA by the MFDA Board of Directors or the membership. This process seems to be

governed by internal procedure. Again, there is no public record of the “Amendment Internal Procedure” document the MFDA referred to in its Affidavit.

IFB believes that the public consultation process would benefit from greater transparency. In our case, we remain unclear as to whether each Commission had full benefit of the other Commission’s comments prior to their approval of the Amendment. In addition, it appears MFDA Members were asked to approve the Amendment at the AGM with only summary information available to them. Members may not have been aware of the full implications of the changes inherent in the Amendment. In addition, although nearly 2 years passed between the original public consultation period and the notice of the approved Amendment being published, there was no further public communication from the MFDA regarding the status of the Amendment or the issues under consideration.

We are attaching a copy of our Factum, as filed in this Application, as it contains further details that you may wish to consider.

We trust our comments will be useful to you and will further an open and more transparent dialogue amongst regulators, those they regulate and the stakeholders who respond to public consultations.

Yours truly,



John Whaley  
Executive Director  
Email: [jaw@ifbc.ca](mailto:jaw@ifbc.ca)

**Attach:** Factum of the Applicant: INDEPENDENT FINANCIAL BROKERS OF CANADA

**CC:**

Alberta Securities Commission  
Saskatchewan Financial Services Commission  
Manitoba Securities Commission  
Ontario Securities Commission  
Autorité des marchés financiers  
New Brunswick Securities Commission  
Nova Scotia Securities Commission  
Office of the Attorney General, Prince Edward Island  
Financial Services Regulation Division, Department of Government Services, Newfoundland and Labrador  
Registrar of Securities, Government of Yukon  
Registrar of Securities, Department of Justice, Government of the Northwest Territories  
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut