

13.1.2 MFDA Proposed Amendments to Section 11 of MFDA By-law No. 1 (Member Approval Process)

MUTUAL FUND DEALERS ASSOCIATION OF CANADA

**PROPOSED AMENDMENTS TO SECTION 11 OF MFDA BY-LAW NO. 1
(MEMBER APPROVAL PROCESS)**

I. OVERVIEW

A. Current Rules

The current MFDA membership application process involves several steps. As a first step, an application is considered by staff for general compliance. The application is then submitted to the Executive Committee of the MFDA Board of Directors for consideration. If the Executive Committee proposes to refuse the application or provide conditional approval, the applicant has a right to demand a hearing before the Board (the hearing to be conducted by Board members other than the individuals on the Executive Committee that considered the application). The applicant then has the further right to have this decision reviewed by the Board, in addition to the right to appeal to the relevant securities commission. This process reflects the processes of the Investment Dealers Association ("IDA") in place at the time of the MFDA's application for recognition.

B. The Issues

The Board and staff of the MFDA have become aware of a number of substantive and procedural issues with respect to the appeal process to be followed where membership in the MFDA has been or is proposed to be denied to an applicant or granted conditionally. Amendments to the current provisions have been proposed to streamline the approval process and make it consistent with the process used by the IDA.

C. Objectives

The objective of the revised process is to ensure that the following issues will be addressed in the membership application process to be followed by prospective MFDA Members:

- to be fair and appropriately address issues related to due process (i.e. an opportunity for an applicant to be heard);
- to clarify who the appropriate decision-makers are; and
- to be practical and efficient in terms of procedural and administrative matters.

D. Effect of Proposed Amendments

The effect of the proposed amendments will be to streamline and clarify the MFDA Member approval process and the appeal process where membership has been or is proposed to be denied or granted conditionally. By-law No. 1 currently provides an applicant with a right to be heard as part of the initial application process where the Board through the Executive Committee proposes to refuse an application or approve an application subject to terms and conditions. This provision would be eliminated and replaced with the ability of the Executive Committee to make an administrative decision based on the application as submitted and reviewed by MFDA staff. This decision may be reviewed by the Board or one of its committees and the right of appeal to the relevant securities commission would be retained.

It is not expected that the proposed amendments will have other significant effects on Members, other market participants, market structure or competition or that the proposed amendments will result in significant additional costs for Members to comply with the proposed amendments.

II. DETAILED ANALYSIS

A. Relevant History

In the course of processing membership applications, the Board and staff of the MFDA identified certain issues with respect to the procedures to be followed where an application for membership has been or is proposed to be denied or granted conditionally. To address such issues in future, it is proposed that the current provisions be amended.

B. Proposed Amendments

In addition to other consequential amendments, the proposed amendments would eliminate section 11.5 of By-law No. 1, which provides an applicant with a right to be heard as part of the initial decision making process where the Board of Directors proposes to refuse an application or approve an application subject to terms and conditions. Under the new proposed process, the Board would render its initial decisions on an administrative basis without a hearing after receiving the application and supporting materials from staff. Where the decision is made to refuse the application, or approve the application with conditions, the applicant would retain the right to apply within 21 days for a review of the decision by the Board. The process would also maintain the applicant's right of appeal to the relevant securities commission.

The terms and conditions of recognition of the MFDA and the basic principles of administrative law require the membership approval process of the MFDA to include appropriate due process including a right to a hearing. However, under the current process, a hearing is required as part of the initial decision in addition to the provision for a subsequent review and appeal. This process is duplicative and time consuming. The MFDA therefore proposes to adopt a process that provides for a single internal hearing. The Rules would continue to provide for and acknowledge a review or appeal to any CSA member having jurisdiction.

The amendments also provide some clarification as to the individuals to be appointed to hear matters that are subject to review under the approval process.

C. Issues and Alternatives Considered

In addition to the process to be followed under the proposed amendments, MFDA staff also considered an alternative whereby the Executive Committee would maintain the role of initially considering staff's review of the application. If the Executive Committee proposed to refuse the application or impose conditions on an approval, a hearing would be available by a separate committee or panel under the authority of the Board, but which may include individuals who are not members of the Board. The further appeal to or review by the Board would be deleted. This would avoid the difficulties of the Executive Committee holding a hearing. However, the Executive Committee would not actually make a negative decision (i.e. a refusal to approve or imposition of terms and conditions). The applicant would be entitled to a hearing as to its application, but any appeal would be to a CSA member having jurisdiction rather than an "internal" MFDA review or appeal.

The Board favoured the process to be followed under the proposed amendments over this alternative approach.

D. Comparison with Similar Provisions

The IDA currently has a process that restricts applicants to one hearing/appeal. An application is first considered by the staff and, if it is in general compliance and there is a recommendation from a District Council. Second, the application is referred to the Executive Committee of the IDA Board of Directors. The Executive Committee makes, in effect, an administrative decision on the application. Last, if requested by either IDA staff or the applicant, the decision of the Executive Committee can be reviewed by the Board or a committee of the Board. Any decision can be the subject of a review or appeal by a member of the CSA having jurisdiction. The IDA has recently filed a proposal to amend the IDA By-laws so that the initial administrative decision on membership applications will be made by the IDA Board instead of the Executive Committee. The decision of the Board would then be subject to review by the relevant securities commission.

E. Systems Impact of Amendments

It is not anticipated that there will be a significant systems impact on Members as a result of the proposed amendments.

F. Best Interests of the Capital Markets

The Board has determined that the proposed amendments are in the best interests of the capital markets.

G. Public Interest Objective

The proposed amendments will establish an application process for MFDA membership that is fair and reasonable and is efficient to administer. The proposed amendments will assist in the protection of the investing public by providing for a fair and balanced application process.

III. COMMENTARY

A. Filing in Other Jurisdictions

The proposed By-law amendments will be filed for approval with the Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, and Ontario Securities Commissions and the Saskatchewan Financial Services Commission.

B. Effectiveness

The proposed amendments are simple and effective.

C. Process

The proposed Policy has been prepared in consultation with relevant departments within the MFDA and has been reviewed by the Governance Committee of the Board. The MFDA Board of Directors approved the proposed amendments on June 15, 2007.

D. Effective Date

The proposed amendments will be effective on a date to be subsequently determined by the MFDA.

IV. SOURCES

MFDA By-law No. 1

IDA By-law 20

V. REQUIREMENT TO PUBLISH FOR COMMENT

The MFDA is required to publish for comment the proposed amendments so that the issues referred to above may be considered by the Recognizing Regulators.

The MFDA has determined that the entry into force of the proposed amendments would be in the public interest and is not detrimental to the capital markets. Comments are sought on the proposed amendments. Comments should be made in writing. One copy of each comment letter should be delivered within 30 days of the publication of this notice, addressed to the attention of the Corporate Secretary, Mutual Fund Dealers Association of Canada, 121 King St. West, Suite 1000, Toronto, Ontario, M5H 3T9 and one copy addressed to the attention of Anne Hamilton, Senior Legal Counsel, British Columbia Securities Commission, 701 West Georgia Street, P.O. Box 10142, Pacific Centre, Vancouver, British Columbia, V7Y 1L2.

On request, the MFDA will make available all comments received during the comment period.

Questions may be referred to:

Greg Ljubic
Corporate Secretary
Mutual Fund Dealers Association of Canada
(416) 943-5836

MUTUAL FUND DEALERS ASSOCIATION OF CANADA

APPROVAL PROCESS (Section 11 of MFDA By-law No. 1)

The Board of Directors of the Mutual Fund Dealers Association of Canada has made and enacted the following amendments to s. 11 of MFDA By-law No. 1:

11. APPROVAL PROCESS

11.1 Preliminary Review by the Corporation

An application for Membership with any accompanying documents shall be submitted to the Corporation, which shall make a preliminary review of the same and either:

- 11.1.1 if such review discloses substantial compliance with the requirements of the By-laws and Rules, transmit a copy to the Chair of the Board or a director or committee of directors authorized for that purpose; or
- 11.1.2 if such review discloses any substantial non-compliance with the requirements of the By-laws and Rules, notify the applicant as to the nature of such non-compliance and request that the application for Membership be amended in accordance with the notification of the Corporation and refiled or be withdrawn. If the applicant declines to amend or withdraw the application for Membership, the Corporation shall forward the same to the Chair of the Board or a director or committee of directors authorized for that purpose, together with any accompanying material and a copy of the notification to the applicant.

11.2 Submission of Financial Information

The application shall be accompanied by:

- 11.2.1 financial statements of the applicant as of a date not more than 90 days prior to the date of application for Membership (or as of such other date as the Corporation may require), prepared in accordance with Form 1 and audited by an auditor acceptable to the Corporation;
- 11.2.2 interim unaudited monthly financial statements, prepared in accordance with Form 1, for the period following the date of the audited financial statement submitted under Section 11.2.1 up to the most recent month prior to the date of the Membership application;
- 11.2.3 a report by the applicant's auditor to the effect that, based on his examination of the affairs of the applicant, the applicant keeps a proper system of books and records; and
- 11.2.4 such additional financial information, if any, relating to the applicant as the Corporation may in its discretion request.

11.3 Notification to the Board of Directors

If and when the Corporation has received the financial statements and report referred to in Section 11.2, and is satisfied with respect to all relevant matters, then the Corporation shall so notify the Board of Directors.

11.4 Determination of the Board of Directors

Upon receipt of the application for Membership from the Corporation and the notification from the Corporation pursuant to Section 11.3, the Board of Directors may:

- 11.4.1 ~~at the expiration of a period of six months or such lesser period as the Board of Directors may in any particular case determine,~~ approve the application;
- 11.4.2 approve the application subject to such terms and conditions as may be considered appropriate by the Board of Directors if, in the opinion of the Board of Directors, such terms and conditions are necessary in order to ensure that the By-laws and Rules will be complied with by the applicant; or
- 11.4.3 refuse the application if, in the opinion of the Board of Directors, having regard to such factors as it may consider relevant including, without limitation, the past or present conduct, business or condition of the applicant;
 - (a) it is not satisfied that the By-laws and Rules will be complied with by the applicant;

- (b) the applicant is not qualified by reason of the ownership, integrity, solvency, training or experience of the applicant or any of its partners, directors, officers, employees or agents, or any person having an ownership interest in the capital or indebtedness of the applicant; or
- (c) such approval is not in the public interest.

11.4.4 If, pursuant to the provisions of this Section 11.4, the Board of Directors approves an application subject to terms and conditions or refuses an application, the Board of Directors may order that the applicant may not apply for removal or variation of terms and conditions or reapply for approval, for such period as the Board of Directors provides.

11.5 Right to be Heard~~Power to Vary or Remove Terms and Conditions~~

~~If the Board of Directors proposes to approve an application subject to terms and conditions pursuant to Section 11.4.2 or to refuse an application pursuant to Section 11.4.3:~~

~~11.5.1 the applicant shall be provided with a statement of the grounds upon which the Board of Directors proposes to approve the application subject to terms and conditions or to refuse the application, and the particulars of those grounds;~~

~~11.5.2 the applicant shall be provided with a summary of the facts and evidence which are to be considered by the Board of Directors;~~

~~11.5.3 the Board of Directors shall permit the applicant to appear before it on notice, as is provided for in the Corporation's rules of procedure and with counsel or other representative, to call evidence and cross-examine witnesses in order to show cause why the application should not be subject to terms and conditions or should not be refused.~~

The Board of Directors shall have the power to vary or remove any such terms and conditions as may have been imposed on an applicant that may be considered appropriate by the Board of Directors, if such terms and conditions are or are no longer, as the case may be, necessary to ensure that the By-laws and Rules will be complied with by the applicant.

11.6 Hearing~~Notice~~

~~11.6.1 A hearing held pursuant to Section 11.5 shall be open to the public except where the Board of Directors determines that all or any part of the hearing should be held in camera in accordance with the principles set out in Section 20. To the extent not otherwise specified in this Section 11, the procedures applicable to proceedings under Section 20 shall be applicable to a hearing under this Section 11, mutatis mutandis.~~

~~11.6.2 If within 14 days of being notified of a proposal to approve an application subject to terms and conditions or to refuse an application, the applicant fails to request a hearing, the Board of Directors may approve the application subject to the proposed terms and conditions or refuse the application. If the applicant requests a hearing, the Board of Directors may, after permitting the parties to be heard, exercise any of its powers in accordance with Section 11.4.~~

~~11.6.3 Any decision of the Board of Directors at a hearing held pursuant to Section Sections 11.4 or 11.5 shall be in writing and shall contain a concise statement of the reasons for the decision. Notice of a decision shall be delivered to the Corporation which shall then promptly give notice to the applicant. A copy of the decision shall accompany the notice.~~

11.7 Power to Vary or Remove Terms and Conditions

~~11.7.1 The Board of Directors shall have the power to vary or remove any such terms and conditions as may have been imposed on an applicant that may be considered appropriate by the Board of Directors, if such terms and conditions are or are no longer, as the case may be, necessary to ensure that the By-laws and Rules will be complied with by the applicant. In the event that the Board of Directors proposes to vary terms and conditions in a manner which would be more burdensome to the applicant, the provisions of Sections 11.5 and 11.6, inclusive, shall apply in the same manner as if the Board of Directors was exercising its powers thereunder in regard to the applicant.~~

~~11.7.2 If, pursuant to the provisions of Section 11.4, the Board of Directors approves an application subject to terms and conditions or refuses an application, the Board of Directors may order that the applicant may not apply for removal or variation of terms and conditions or reapply for approval, for such period as the Board of Directors provides.~~

11.7 11.8 Review

11.7.1 11.8.1 In the event of a decision of the Board of Directors

- (a) to approve an application subject to terms and conditions pursuant to Section 11.4.2;

- (b) to refuse an application pursuant to Section 11.4.3; or
- (c) to vary terms and conditions in a manner that would be more burdensome to an applicant pursuant to Section ~~11.7.1, 11.5,~~

the Board of Directors shall, upon application of either the Corporation or by the applicant, made within 21 days of receiving notice of the decision of the Board, review the decision and either (i) confirm the decision, or (ii) make such other decision as the Board of Directors considers proper.

~~11.7.2~~ ~~11.8.2~~ If the Board of Directors is required to review a decision pursuant to Section 11.8.1, the Board of Directors shall ~~11.7.1, the applicant or the Corporation shall be entitled to be heard at a hearing conducted in accordance with the rules of procedure adopted by the Corporation in respect of such hearings including the right to:~~

- ~~(a) consider the record of the proceeding in which the decision was made;~~
- ~~(a) receive a summary of the facts and evidence to be relied on by the applicant or the Corporation, as the case may be; and~~
- (b) permit the Corporation and the applicant to appear before it on notice as is provided for in the Corporation's rules of procedure appear on reasonable notice, with counsel or by agent, to make submissions; and other representative, to call evidence and cross-examine witnesses and make reply.
- ~~(c) provide written reasons for decision of the review to the Secretary who shall then promptly give the applicant notice and a copy of the decision.~~

~~11.7.3~~ A hearing held pursuant to Section 11.7.1 shall be open to the public except where the Board of Directors determines that all or any part of the hearing should be held in camera in accordance with the principles set out in Section 24. To the extent not otherwise specified in this Section 11, the procedures applicable to proceedings under Section 24 shall be applicable to a hearing under this Section 11, mutatis mutandis.

11.8 Board of Directors

~~11.8.1~~ ~~11.8.3~~ The authority of the Board under this Section ~~11.8.1~~ may be exercised by the Executive Committee or a committee of the Board appointed pursuant to Section 3.6.4-3.6.4 but consisting in whole or in part of persons who are not members of the Board including, without limitation, persons who are eligible to sit on a Hearing Panel and any reference in this By-law or any rules of procedure made in respect of membership applications shall be deemed to include a reference to the Executive Committee or such other appointed committee. No member of the Board of Directors who has participated in a decision in respect of an application or proceeding pursuant to Section 11.4.2, 11.4.3 or ~~11.7.1, 11.5~~ shall subsequently participate in a hearing pursuant to Section ~~11.8.1, 11.7.1~~ regarding that decision.

~~11.8.2~~ ~~11.8.4~~ Subject to ~~Sections 11.7 and Section~~ 26, decisions of the Board of Directors pursuant to this Section ~~11.8.1, 11.7~~ are final and there shall be no further review of such decisions within the Corporation.

11.9 Actions Upon Approval of Application

- 11.9.1 If and when the application is approved by the Board of Directors, the Corporation shall compute the amount of the Annual Fee to be paid by the applicant pursuant to Section 14.
- 11.9.2 Subject to the provisions of Section 10.3, the Corporation shall advise at the next meeting of the Board of Directors the amount of the Annual Fee to be paid by the applicant, less the amount of the deposit submitted by the applicant pursuant to Section 10.2
- 11.9.3 If and when the application has been approved by the Board of Directors, and the applicant has been duly licensed or registered to carry on business as a mutual fund dealer under the applicable law of the province or provinces or territories in which the applicant carries on or proposes to carry on business, and upon payment of the balance of the Annual Fee, the applicant shall become and be a Member.
- 11.9.4 Notwithstanding the foregoing, if an applicant qualifies for exemption from payment of the Annual Fee and if the Board of Directors approves of such exemption and gives its approval to the application for Membership, the applicant shall be admitted to Membership if all other conditions relating to an application for Membership have been duly complied with except such conditions, if any, as the Board of Directors may deem appropriate to be waived under the circumstances of any particular case.

SRO Notices and Disciplinary Proceedings

- 11.9.5 The Corporation shall keep a register of the names and business addresses of all Members and of their respective Annual Fees. The Annual Fees of Members shall not be made public by the Corporation.
- ~~11.10 The Corporation may prescribe rules of procedure (which may be Policies) in respect of all matters relevant to the conduct of proceedings under Section 11.~~