

13.1.4 Summary of Public Comments Respecting Proposed Amendments to MFDA Policy No. 3 *Handling Client Complaints* and Responses of the MFDA

On July 13, 2007, the British Columbia Securities Commission and Ontario Securities Commission published proposed amendments to MFDA Policy No. 3 *Handling Client Complaints* (the “**Proposed Amendments**”) for a 30-day public comment period.

The public comment period expired on August 12, 2007.

Four submissions were received during the public comment period:

1. Desjardins Financial Security Investments Inc. (“Desjardins”)
2. The Investment Funds Institute of Canada (“IFIC”)
3. Royal Mutual Funds Inc. (“Royal”)
4. Worldsource Financial Management (“Worldsource”)

Copies of comment submissions may be viewed at the offices of the MFDA, 121 King Street West, Suite 1000, Toronto, Ontario by contacting Ken Woodard, Director, Communications and Membership Services Manager, (416) 943-4602.

The following is a summary of the comments received, together with the MFDA's responses.

General

Persons acting “on behalf of a client”

Royal noted that the definition of “complaint” includes “*any written statement of a client...or any person acting on behalf of a client*”. Royal expressed the view that guidance would be required in response to complaints brought forward by third parties purporting to act on behalf of a client but who have not been given prior authorization in respect of that client's account (e.g. lawyers, accountants, financial planners or Investment Advisors from other financial institutions). Royal recommended that the definition of complaint be amended to read “*any written statement including electronic communications, of a client or any person legally acting on behalf of a client*”.

MFDA Response

“Any person acting on behalf of a client” was intended to mean and should be understood as meaning any person authorized to act on behalf of a client. We also note that any written authorization to act on behalf of a client will suffice. We will amend the text of the section to clarify the meaning.

Complaints from “Prospective” Clients

Desjardins expressed the view that it would be very difficult to handle complaints from prospective clients because the dealer will probably not have any documentation supporting the allegations that will be put forward. Desjardins suggested that grievances received by a dealer in respect of its Approved Person(s) from potential clients (whether the grievance is made verbally or in writing) should be excluded from the definition of “complaint”. Desjardins recommended that “complaint” include only a written statement received by a dealer from a client or the legal representative of a client. Desjardins noted that, at a minimum, the definition of complaint should exclude all verbal allegations that are not sustained or supported by written evidence.

MFDA Response

The general principle with respect to the obligation to address complaints from prospective clients is that the conduct of Approved Persons in the course of any Member business (we regard communications with prospective clients as part of Member business) should be examined, where this conduct leads to a complaint. A Member would be expected to investigate the matter appropriately by obtaining a verbal statement and any relevant written documentation that might be available.

Policy No. 3 is Too Proscriptive

Worldsource expressed the view that the Proposed Amendments render Policy No. 3 too proscriptive, noting that detailed guidance should be provided in Member Regulation Notices and that Members should have flexibility in developing reasonable processes and procedures to comply with Policy No. 3. Policy No. 3 should not stipulate how specific complaints “must” be

handled or stipulate examples of “unreasonable analysis”. Worldsource noted that a proscriptive approach is inconsistent with that of other regulators and not an appropriate use of policy.

MFDA Response

The need to amend the complaint handling process in the securities industry was raised as an issue by participants at the Ontario Securities Commission’s (“OSC”) May 2005, Town Hall meeting. Member Regulation Notice MR-0059 – Complaint Handling Obligations (“MR-0059”) and the Proposed Amendments to MFDA Policy No. 3, were both developed based on input that came out of that meeting and subsequent discussions with the OSC, the Investment Industry Regulatory Organization of Canada (“IIROC”) (then the the Investment Dealers Association of Canada (“IDA”)) and OBSI. The MFDA’s Policy Advisory Committee reviewed and approved MR-0059 and the Proposed Amendments to Policy No. 3 prior to its publication for comment in July 2007. The OSC, IDA and Ombudsman for Banking Services and Investment (“OBSI”) also reviewed the Proposed Amendments to Policy No. 3 prior to its publication for comment.

In May 2008, a working group comprised of staff of the Canadian Securities Administrators (“CSA”), MFDA and IIROC was established by the CSA for the purpose of developing a complaint handling framework to be used to ensure that the requirements to be adopted by the two self-regulatory organizations (“SROs”) and in National Instrument 31-103 Registration Requirements (“NI 31-103”) were harmonized. This working group met and had discussions over the summer and fall of 2008, during which the complaint handling proposals of the two SROs were reviewed to ensure that they were consistent with this framework document, met the same regulatory objectives and minimized differences. MFDA staff has proposed additional amendments as a result of these discussions.

The Proposed Amendments to Policy No. 3 are specifically intended to provide guidance as to the minimum standards Members must meet with respect to the fair and prompt handling of client complaints and incorporate much of the guidance provided in MR-0059. The MFDA believes that it is timely and necessary to move this information from guidance that interprets an MFDA Rule (MFDA Rule 2.11) to guidance that clarifies minimum standards of Member conduct with respect to complaint handling.

Harmonization of Complaint Process

Worldsource, Royal and IFIC commented that the MFDA should seek to harmonize its complaint handling regime with the requirements of the IDA, AMF and the *Bank Act* wherever possible.

IFIC suggested that where an SRO establishes a complaint handling process meeting the guiding principles of NI 31-103, Members of that SRO should be exempt from complying with the applicable sections of NI 31-103. IFIC encouraged the MFDA to consider how the spirit of this approach could be incorporated into Policy No. 3.

IFIC and Royal noted that the definition of a complaint reportable to the AMF excludes initial expressions of dissatisfaction by a client, whether in writing or not, where the issue is settled in the ordinary course of business. Only in the event that a client remains dissatisfied and such dissatisfaction is escalated, reviewed and dealt with at a higher level is a complaint subject to reporting requirements. IFIC and Royal encouraged the adoption of this approach so that service related matters are not considered complaints pursuant to Policy No. 3.

IFIC also noted that a complaint should be recognized only if it is submitted in writing; however, the professional judgment of the dealer should continue to be exercised in determining whether a verbal allegation should be escalated and treated as a written complaint.

MFDA Response

As noted, in May 2008, a working group comprised of CSA, MFDA and IIROC staff was established with a view to ensuring that the complaint handling proposals of both SROs meet the same regulatory objectives and minimize differences to the extent possible. CSA, MFDA and IIROC staff met on a number of occasions to engage in such review and MFDA staff has proposed additional amendments to Policy No. 3 as a result of these discussions.

In response to the comment suggesting an exemption from the requirements of NI 31-103 where SROs have developed a complaint handling process that meets the guiding principles of NI 31-103, we note, that the CSA have determined that they will include the complaint handling approach to be adopted in NI 31-103 after the two SROs have finalized their respective proposals and minimized differences to the extent possible. Our understanding is that this approach is intended to ensure that the requirements adopted under NI 31-103 in respect of complaint handling are consistent with those adopted by the SROs.

With respect to excluding initial expressions of dissatisfaction that are resolved in the ordinary course of business, we disagree and note that the CSA has not finalized its position on this matter. As noted, the CSA will adopt a complaint handling approach to be included in NI 31-103 after the two SRO proposals have been finalized so as to ensure that the SRO requirements and those in NI 31-103 are as harmonized as possible.

We believe that investigation of a complaint should not cease simply because the specific issue has been settled in the ordinary course of business. While it is important to address client dissatisfaction in as timely a manner as possible, this, in our view, is not the exclusive purpose of a definition of complaint or a complaint handling process. We believe that an additional and equally important regulatory objective is to discover and address any potential underlying regulatory issues. Indeed, we believe that it would be relatively easy, in most circumstances, to “make a client happy” so that a matter is not escalated. However, addressing the dissatisfaction of a client does not mean that any potential underlying regulatory issues that may have given rise to the complaint (and that may do so again in the future) have been identified and adequately addressed.

In addition, we note that the definition of “complaint” has been amended to separate it from the process by which complaints are to be handled, thereby allowing the Policy to more clearly recognize that not all complaints (e.g. service complaints) are subject to the formally prescribed complaint handling procedures, as certain complaints can be adequately and appropriately addressed informally. The Proposed Amendments to the definition of “complaint” are consistent with the CSA’s complaint handling framework and the IIROC proposal.

With respect to the suggestion that Policy No. 3 make provision for the dealer, in its professional judgment, to determine whether a verbal allegation should be escalated and treated as a written complaint, we note, as set out above, that the definition of “complaint” has been amended. Under Policy No. 3 as revised, all complaints, written or verbal, must be addressed in accordance with Part I of the Policy. Certain complaints, must be addressed under Parts I and II of the Policy. In determining whether a complaint should be subject to the Additional Complaint Handling Requirements prescribed by Part II, the Policy provides the supervisory staff of the Member with both discretion and guidance in respect of how to make such a determination.

Client Access

Worldsource commented on the need for flexibility with respect to the delivery of the Client Complaint Information Form (“CCIF”). Members should be able to choose to deliver the CCIF information as part of the account opening forms, in a welcome package sent after account opening or as a separate document. Members should also be able to deliver the CCIF in paper or electronic format.

MFDA Response

We interpret “At the time of account opening” to also include welcome packages that are sent (in a timely manner) after account opening. It is acceptable for the CCIF to be delivered in electronic format, provided that such delivery is made in accordance with Member Regulation Notice MR-0015 (Electronic Delivery of Documents) (“MR-0015”).

Fair/Prompt Handling of Client Complaints

Worldsource noted that in matters where there is litigation or anticipated litigation, Members should not be required to handle a complaint in accordance with strict timelines or provide a “substantive response” to the complainant. The Member will respond in a timely fashion in the normal course of litigation. Worldsource expressed the view that it is unfair to require Members to make admissions in the complaint process that may cause prejudice in litigation. Complainants who have chosen to pursue litigation are able to obtain a substantive response and discover the Member’s case through the litigation process. Worldsource commented that the complaint handling process should not interfere with the Member’s ability to fully and fairly defend itself in litigation.

IFIC, while agreeing with the requirement for a Member’s timely participation in the litigation process, sought comfort that the intention of the reference is not to impose a time limit on complaint resolution once it has proceeded to litigation. IFIC also noted that the premature or forced resolution of a complaint simply to comply with pre-determined timelines could prejudice a Member’s insurance coverage and ability to fully and fairly defend itself in litigation.

MFDA Response

As a general matter, we note that Members have an ongoing obligation to deal with clients fairly and must, where litigation has been initiated, balance this obligation with strict adherence to their legal rights.

Members and Approved Persons should, thus, in all circumstances, seek to meet their obligations in respect of complaint handling in accordance with the Rule and Policy as fully as possible. Where litigation has been initiated, there is no expectation that Members act in a way that might compromise their ability to make a full and fair defense. However, Members and Approved Persons will, in such circumstances, still be expected to act and respond to clients in a timely manner, fulfill their obligations with respect to complaint handling, to the fullest extent possible and refrain from acting in a way that is clearly unfair. For greater clarity and as set out in Policy No. 3, acting in a timely manner where litigation is commenced, means “in accordance with the rules of procedure of the applicable jurisdiction”. In our view, it is possible for Members to deal with clients fairly under this Policy without derogating from their legal rights (e.g. with the use of “without prejudice” offers). We have made amendments to the Policy to provide further clarification on this issue.

General Complaint Handling Requirements

Obligation to Cooperate with Another MFDA Member and to Share Information

Desjardins expressed the view that this requirement would result in privacy issues and infractions of privacy law. Desjardins raised the concern that dealers who are reluctant to share information out of concern for their clients privacy could have complaints made against them to the MFDA for lack of collaboration. Desjardins noted that the requirement to share information with another Member is different from the existing requirement to share information with regulators because regulators have the legal authority to compel dealers to divulge information. Dealers are thus protected in this latter circumstance against allegations of having divulged personal information without having obtained authorization first. Desjardins recommended that the requirement to share information with other Members be redrafted so that the obligation is confined to the limitations imposed by provincial and federal privacy legislation.

Royal echoed this concern, suggesting that it would be better for the MFDA to co-ordinate information sharing and make use of information already available on the Member Event Tracking System ("METS").

MFDA Response

The disclosure and information sharing requirements of this section are to be construed narrowly as they are intended only to facilitate complaint resolution and are, accordingly, limited to information or specific pieces of information that have or might reasonably have a material bearing on events relating to a complaint that took place in part at another Member or a member of another SRO.

Members have a pre-existing obligation to comply with the requirements of provincial and federal privacy legislation. The information sharing contemplated by this proposed section is not intended to derogate from or be in conflict with any limits on disclosure imposed by privacy law. Where Members are in doubt with respect to their obligations pursuant to privacy legislation, they should seek specific client consent prior to sharing client personal information with another Member. We believe that clients will generally be amenable to providing consent for the disclosure of their personal information to another Member when they understand that such disclosure is for the purpose of facilitating the resolution of a complaint that they have raised.

The METS system was specifically established for the reporting of information set out in MFDA Policy No. 6 Information Reporting Requirements and is not intended to be a general resource for information about Members. As noted, irrespective of the existence of the METS system, Members have a pre-existing obligation to comply with the requirements of provincial and federal privacy legislation and resolve any issues that arise. In addition, we note that the information sharing requirements of the section go beyond the information available in METS. Also, the METS system cannot be reasonably reconfigured to allow Members to share the information that it does presently contain.

Initiation of a Complaint File

IFIC recommended that the MFDA adopt a consistent information sharing policy with respect to complaints received directly from investors. Dealers should be given the substance of a complaint filed with the MFDA immediately following the receipt of such a complaint. IFIC noted that the early sharing of the details of a complaint would eliminate lengthy discussions and exchange of documents irrelevant to the complaint that take place because the dealer is unclear as to the specific nature of the complaint and is therefore unable to assist the MFDA in identifying the documentation that might help to resolve a client's complaint more quickly. IFIC went on to recommend that all complaints received by the MFDA first be referred back to the dealer for resolution before a complaint file is opened at the MFDA. IFIC noted that this approach would be consistent with the OBSI and AMF policies.

MFDA Response

Where the MFDA receives a complaint directly from an investor, we seek the investor's consent to refer the matter back to the dealer for initial review and resolution. Members are advised; however, that this information cannot be forwarded to the concerned dealer where the investor has not consented to its disclosure. With respect to the comment that all complaints should first be referred back to the dealer before a complaint file is opened at the MFDA, we disagree and note that this is inconsistent with the practice of most regulators. In addition, we note that the MFDA has a duty to engage in an independent consideration of all complaints to investigate underlying regulatory issues that may have given rise to the complaint and that may continue to exist after the complaint has been resolved.

Obligation to Maintain in "a central place an orderly up-to-date record of complaints"

IFIC and Royal expressed concern with the requirement to maintain a central up-to-date record of complaints including follow-up documentation.

IFIC suggested, as long as the complaint file is readily accessible, that the location of the record of the complaint not be prescribed.

Royal noted that as branch records are subject to internal and external reviews and audits, the obligation to keep duplicate files at a central location would present a significant administrative burden, especially for large financial institutions. Royal suggested that Policy No. 3 allow for internal complaint tracking systems as central record keeping tools, so long as they track the information requested in section 7 (Complaint Procedures).

MFDA Response

We acknowledge the comments and have amended the Policy to provide that where a Member has various regional head offices, the Member may keep follow-up documentation at any one regional head office, so long as information about the handling of the complaint is in the Member head office log and the follow-up documentation can be produced in a timely manner.

Settlement Agreements

IFIC and Worldsource commented that the proposed wording of Policy No. 3 should make it clear that confidentiality restrictions are permitted, except with respect to the MFDA, securities commissions and law enforcement agencies (i.e. while confidentiality restrictions cannot apply to the regulatory bodies listed, dealers are able to include confidentiality restrictions generally). The wording of the draft suggests that the intention is to prohibit confidentiality restrictions generally. Confidentiality restrictions are in the public interest as they promote the resolution of disputes.

MFDA Response

We are of the view that the wording of this section is sufficiently clear. The section sets out a limitation on the imposition of confidentiality restrictions and proceeds to specifically set out the types of organizations subject to that limitation. Any parties not specifically mentioned in the section must be understood as not being subject to the limitation.

Supervisory Investigations

Desjardins commented that formalizing and standardizing the process could result in the loss of clear direction from MFDA Enforcement staff that (presently) is tailored and provided according to the specific circumstances and facts of each complaint. Desjardins noted that the introduction of standardized requirements might result in a loss of flexibility for both the MFDA and dealers in conducting investigations and the collection and analysis of data. Exchanges of information between MFDA Enforcement Staff, through which dealers receive valuable instructions, may become less frequent or almost non-existent. Desjardins raised the concern that, without the benefit of such exchanges for the purpose of determining how far to go in investigating a matter, dealers may feel obliged to achieve a specific result, rather than have an obligation to proceed with due diligence and in good faith (for example, if a dealer does not see fit to interview branch staff in investigating a complaint but the MFDA is of a different view, the dealer could be found not to have proceeded with due diligence in the handling of the complaint).

MFDA Response

The provision of guidance under this section does not preclude Members from having discussions with or seeking more specific guidance from the MFDA. The provision of this information will also not prevent MFDA staff from communicating their expectations or providing Members with specific guidance. Members should bear in mind, when exercising judgment with respect to how to proceed with an investigation (or how detailed to make their inquiries), that they have an obligation to act in good faith by conducting investigations reasonably and with due diligence.