



Client Focused Reform amendments to MFDA Staff Notice MSN-0025 come into effect on December 31, 2021.

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MFDA STAFF NOTICE

SUITABILITY OBLIGATIONS FOR UNSOLICITED ORDERS

MFDA Staff Notices are intended to assist Members and their Approved Persons in the interpretation, application of and compliance with requirements under MFDA By-laws and Rules. Notices make reference to these requirements and set out MFDA staff's interpretation of how to comply with these requirements. Notices may also include best practices or guidance.

This Notice is intended to clarify the obligations of Members and their Approved Persons in the event that they receive an unsolicited order that they determine is unsuitable for the client.

Obligation to Make a Suitability Determination

MFDA Rule 2.2.6(1) requires Members and their Approved Persons to engage in a suitability determination, pursuant to which any investment action taken for a client must: (i) be suitable, based on the factors set out under the Rule; and (ii) put the client's interests first.

Members and Approved Persons are reminded that the obligation to make a suitability determination applies to all proposed transactions, even in circumstances where it is the client, not the Member or Approved Person, who proposes that a transaction be made (an "unsolicited order").

Unsuitable Orders

Under Rule 2.2.6(2.1), where a Member or Approved Person receives an instruction from a client to take an action that, if taken, would not meet the requirements under Rule 2.2.6(1), the Member or Approved Person may carry out the client's instructions, provided that the Member or Approved Person has:

- (i) informed the client of the basis for the determination that the action will not satisfy requirements under Rule 2.2.6(1);
- (ii) recommended to the client an alternative action that satisfies requirements under Rule 2.2.6(1); and

- (iii) received recorded confirmation of the client's instruction to proceed with the action despite the determination referred to in (i).

Members must set out procedures for dealing with unsolicited orders in their Policy and Procedures Manual.

Compliance Procedures for Unsuitable Orders

MFDA Rule 5.1(b) requires Members to keep an adequate record of each order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. Where an unsolicited client order is determined to not meet requirements under Rule 2.2.6(1), the record of the order pursuant to Rule 5.1(b) must include, at a minimum, evidence that:

- (i) the transaction was unsolicited;
- (ii) a suitability determination was made;
- (iii) the client was advised that the proposed transaction does not meet requirements under Rule 2.2.6(1);
- (iv) an alternative action, which would meet requirements under Rule 2.2.6(1), was recommended to the client; and
- (v) the Member received recorded confirmation of the client's instruction to proceed with the action after being advised in accordance with (iii).

Where the Approved Person determines that an unsolicited order will not meet the requirements under Rule 2.2.6(1), it is consistent with the policy objective of the branch manager trade review requirement in Policy No. 2 for the Approved Person to clear the order with the branch manager/compliance officer before proceeding with the trade (rather than waiting for the transaction to be flagged or discovered in the next day's review).

A pattern of unsuitable trades that are reported as having been directed by a client may be an indication that the Member does not comply with the obligation to make a suitability determination. The Member is expected to establish, maintain and apply policies, procedures and controls to identify and respond to any pattern of unsuitable trades.

No Obligation to Accept Unsuitable Orders

A Member or Approved Person has no obligation to accept a client order or instruction that does not, in the Member or Approved Person's view, meet the criteria for a suitability determination. However, marking the order as unsolicited is not sufficient. The Member or Approved Person must take the measures set out in Rule 2.2.6 (2.1) and advise the client, in a timely manner, against proceeding.

Should the client choose to keep an investment that does not meet or no longer meets the criteria for a suitability determination, it may be appropriate to recommend changes to other investments held by the client at the firm in order to maintain the suitability of the overall account. Any advice

given should be documented if the client declines to follow the Member or Approved Person's recommendations.

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