

MUTUAL FUND DEALERS ASSOCIATION OF CANADA

PROPOSED AMENDMENTS TO MFDA BY-LAW NO. 1 – SECTIONS 1 & 22

(DEFINITIONS – “RECORDS” & EXAMINATIONS AND INVESTIGATORY POWERS)

I. OVERVIEW

A. Current Requirements

Currently, under MFDA By-law No. 1, section 22 (Investigatory Powers) the MFDA has powers with respect to examinations or investigations regarding MFDA By-laws, Rules, Policies and applicable securities legislation. Section 22.1 sets out various methods by which MFDA staff may request information from a Member or Approved Person. Section 22.2 contains provisions whereby MFDA staff is entitled to free access to, and to make and retain copies of records of every description from a Member or Approved Person. Section 22 also contains provisions placing corresponding obligations on Members and Approved Persons in relation to examinations and investigations.

B. Reasons for Amendments

The purpose of the proposed amendments is to modernize and clarify section 22 in light of current practices of MFDA staff.

The proposed amendments would also maintain investor protection by ensuring that the MFDA examination and investigation powers are harmonized with equivalent powers under the Rules of the Investment Industry Regulatory Organization of Canada (“IIROC”).

C. Objectives

The objectives of the proposed amendments are to update and clarify the provisions of section 22, and ensure that they reflect current MFDA practices and provides the MFDA with appropriate examination and enforcement powers.

D. Effect of Proposed Amendments

The effect of the proposed amendments will be that MFDA By-law No. 1 reflects current MFDA practices and provides the MFDA with appropriate examination and enforcement powers.

II. DETAILED ANALYSIS

A. Proposed Amendments

The following is a summary of the proposed amendments to section 1 and section 22 of MFDA By-law No. 1. Attached as Schedule “A” to this Notice, is a blacklined version of the proposed amendments indicating the changes from the current version of MFDA By-law No. 1.

- **Records – Definition (Section 1):** In response to the fact that many of the records currently maintained by Members are in electronic form, a definition of “records” has been proposed to clarify that records covered in section 22 means all recorded information of every description of a Member and Approved Person whether written, electronically stored or recorded by any other means. This expanded definition modernizes the types of records currently referenced in MFDA By-law No. 1, and is consistent with the scope of records that MFDA staff currently requests under section 22.

Revision of Section 22.1(b) and Section 22.1(c): These sections reflect the division of the current section 22.1(b) into two sections. Section 22.1(b) now requires a Member or Approved Person to produce for inspection any records in its possession or control that MFDA staff believes may be relevant to the examination or investigation. Section 22.1(c) now requires a Member or Approved Person to provide copies of any records in the manner and form that the MFDA requests, including electronically.

- **Addition of Section 22.1(d):** This section reflects the current practice of MFDA compliance and enforcement staff. Both departments routinely ask questions of Members and Approved Persons during examinations and investigations.
- **Addition of Section 22.1(e):** The section provides updated language that describes the current powers in section 22.1 regarding conducting and recording interviews during investigations.
- **Revision of Section 22.1:** This section provides updated language to describe the current duty of Members and Approved Persons to cooperate in the examination or investigation.
- **Addition of Section 22.2:** This is consistent with MFDA staff’s current practice to, where necessary, request and examine original records where available and potentially tender them in evidence at disciplinary hearings. This occurs for example in certain cases where the veracity of a client signature is in question.
- **Addition of Section 22.3(a):** This clarifies that free access to records includes the ability of MFDA compliance and enforcement staff to enter business premises, with or without notice, during business hours in order to access records and systems and other media in which records are stored. It is the current practice of MFDA staff during investigations to enter business premises during business hours without notice in situations described in relation to section 22.3(b) below.
- **Addition of Section 22.3(b):** The proposed amendment modernizes section 22 and clarifies that MFDA staff is entitled to free access to various types of records and to electronic systems and other media in which records are stored, including by taking an image of the computer hard drives of the Member or Approved Person. These additions are consistent with the approach of IIROC staff under IIROC Rules. A number of MFDA Members currently provide requested records by providing MFDA staff with direct access to electronic systems during compliance examinations.

The ability to access systems would be of assistance, for example, where there is a concern about preservation of evidence. In enforcement investigations, MFDA investigation staff access electronic systems and take images of computer hard drives in situations involving allegations of serious misconduct where there are concerns about being able to obtain full access to records by other means.

- **Addition of Section 22.3(c):** This section is similar to proposed section 22.2 regarding accessing original records, but applies in situations where MFDA staff attend at the business premises of a Member or Approved Person.
- **Addition of Section 22.4:** This section provides updated language describing the prohibition on concealing or destroying records during an examination or investigation contained in the current section 22.2.
- **Re-numbering of Section 22.5:** This section is currently section 22.3, and no changes have been made in substance.

B. Comparison with Similar Provisions

During the development of the proposed amendments, consideration was given to IIROC's Rules 8100 and 9100, which contain similar provisions regarding the powers of IIROC staff to initiate and conduct enforcement investigations and compliance examinations, and the rights and obligations of its Regulated Persons with respect to such investigations and examinations. The proposed amendments are consistent in substance with those IIROC provisions.

C. Issues and Alternatives Considered

No other alternatives were considered.

D. Systems Impact of Amendments

It is not anticipated that the proposed amendments will have a material impact upon Members' systems, impose any material burden or constraint on competition or innovation, impose any material costs or restrictions on the activities of market participants, or result in any material increased costs of compliance.

E. Best Interests of the Capital Markets

The proposed amendments to MFDA By-law No. 1, section 1 and 22 were approved by the MFDA Board of Directors at its February 27, 2019 meeting. The Board has determined that the proposed amendments are consistent with the best interests of the capital markets.

F. Public Interest Objective

The proposed amendments will maintain investor protection, and are consistent with the public interest.

G. Classification

The proposed amendments have been classified as Public Comment Rule proposals.

III. COMMENTARY

A. Filing in Other Jurisdictions

The proposed amendments will be filed for approval with the Alberta, British Columbia, Manitoba, Nova Scotia and Ontario Securities Commissions, the New Brunswick Financial and Consumer Services Commission, the Superintendent of Securities of Prince Edward Island, and the Saskatchewan Financial and Consumer Affairs Authority.

B. Effectiveness

The proposed amendments are simple and effective.

C. Process

The proposed amendments were reviewed by the MFDA Policy Advisory Committee at its January 31, 2019 meeting, the Regulatory Issues Committee of the MFDA Board of Directors at its February 13, 2019 meeting, and approved by the full MFDA Board of Directors at its February 27, 2019 meeting. In approving the proposed amendments, the MFDA has followed its established internal governance practices and has considered the need for consequential amendments.

D. Effective Date

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

E. Exemption from Requirements under Securities Legislation

The proposed amendments do not involve a Rule that the MFDA, its Members or Approved Persons must comply with in order to be exempted from a securities legislation requirement.

F. Conflict with Applicable Laws or Terms and Conditions of Recognition Order

The proposed amendments do not conflict with applicable laws or the Terms and Conditions of a Recognizing Regulator's Recognition Order.

IV. SOURCES

- MFDA By-law No. 1, Section 1 (Definitions)
- MFDA By-law No. 1, Section 22 (Investigatory Powers)
- IIROC Rule 1200 (Definitions)
- IIROC Rule 8100 (Enforcement Investigations)
- IIROC Rule 9100 (Compliance Examinations)

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 90 days of the publication of this notice, addressed to the attention of:

Paige Ward
General Counsel, Corporate Secretary and Vice-President, Policy
Mutual Fund Dealers Association of Canada
121 King St. West, Suite 1000
Toronto, Ontario M5H 3T9
pward@mfd.ca

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
ahamilton@bcsc.bc.ca

Those submitting comment letters should be aware that a copy of their comment letter will be made publicly available on the MFDA website at www.mfda.ca.

Questions may be referred to:

Paige Ward
General Counsel, Corporate Secretary and
Vice-President, Policy
Mutual Fund Dealers Association of Canada
(416) 943-5838

DM# 665973

**MFDA By-law No. 1 – Proposed Definition of “records” to Section 1
(DEFINITIONS)**

1. DEFINITIONS

“records” means, for the purposes of Section 22, recorded information of every description of a Member and Approved Person including all books of accounts, securities, cash, documents, banking and investment account records, trading and supervisory records, client files and records, accounting and financial statements, audio and video recording, data, minutes, notes and correspondence, whether written, electronically stored or recorded by any other means;

**MFDA By-law No. 1 – Proposed Amendments to Section 22 (EXAMINATIONS
AND INVESTIGATORY POWERS)**

22. EXAMINATIONS AND INVESTIGATORY POWERS

22.1 For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation to:

- (a) submit a report with respect to any matter involved in any such examination or investigation;
- (b) ~~to~~ produce for inspection any records in the Member or Approved Person’s possession or control that the Corporation believes may be relevant to the examination or investigation and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and;
- ~~(b)~~(c) provide copies of any such records in the manner and form, including electronically, that the Corporation requests;
- (d) ~~to attend and give information respecting any such matters~~answer questions with respect to any such matters;
- (e) in an investigation, attend and answer questions under oath or otherwise, and any such attendance may be transcribed, recorded electronically, audio-recorded or video-recorded as the Corporation determines;
- (f) ~~to~~make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the Corporation

and the Member or person shall be obliged to cooperate in the examination or investigation, submit such report, to permit such inspection, provide such copies and to attend, accordingly. Any Member or person subject to an investigation conducted pursuant to this By-law may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending before the persons conducting the investigation. The person conducting the investigation may, in his or her discretion, require that any statement given by any Member or person in the course of an investigation be recorded by means of an electronic recording device or otherwise and may require that any statement be given under oath.

22.2 In a request made under Section 22.1, the Corporation may require production of original records and must provide a receipt for any original records received.

22.3 For the purpose of any In connection with an examination or investigation, pursuant to this By-law, the Corporation:

(a) may, with or without prior notice, enter the business premises of any Member or Approved Person during business hours;

(b) shall be is entitled to free access to, and to make and retain copies of, all books of account, securities, cash, documents, bank accounts, vouchers, correspondence and records and electronic systems and other media in which records are stored, and to make and keep copies of all the records that the Corporation believes may be relevant to the examination or investigation, including by taking an image of the computer hard drives of the Member or Approved Person; and of every description of the Member or person concerned, and no such Member or person shall withhold, destroy or conceal any information, documents or thing reasonably required for the purpose of such examination or investigation.

(c) may remove the original of any record obtained under Section 22.3(b), and where an original record is removed from the premises, the Corporation must provide a receipt for the removed record.

22.4 The Member or Approved Person who is aware that the Corporation is conducting an examination or investigation must not conceal or destroy any record that contains information that may be relevant to the examination or investigation.

22.322.5 The Corporation, may, with respect to any information received:

- (a) refer a matter to the applicable Regional Council for consideration in accordance with the provisions of Section 24; or
- (b) refer a matter to the appropriate securities regulatory authority, self-regulatory organization or law enforcement agency; or
- (c) take such other action under the By-laws or Rules which it considers appropriate in the circumstances.