

Summary of Public Comments Respecting Proposed Amendments to MFDA By-law No.1 – Sections 1 (Definitions) and 22 (Examinations and Investigatory Powers)

On March 21, 2019, the MFDA published for public comment proposed amendments to MFDA By-law No.1 – Sections 1 (Definitions) and 22 (Examinations and Investigatory Powers) for a 90-day comment period that expired on June 19, 2019.

Four submissions were received during the comment period:

1. The Investment Funds Institute of Canada (IFIC)
2. Kenmar Associates
3. Portfolio Strategies Corporation
4. Sun Life Financial Investment Services (Canada) Inc.

Copies of comment submissions may be viewed on the MFDA's website at: www.mfda.ca.

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

Comment Summary

1. Definition of "Records"

The industry association and the investor advocate indicated their support for the proposed definition. Comments in this regard assumed that the definition is "technologically neutral" and that the cloud, e-signatures and proprietary software and algorithms are captured. Commenters support the addition of a definition of records that is consistent with current practices and inclusive of a broad range of records.

MFDA Response

MFDA staff acknowledges the comment and advises that the definition is inclusive of all recorded information of every description of a Member and Approved Person, whether written, electronically stored or recorded by any other means.

2. Examinations and Investigatory Powers

General

The industry association expressed its support for the proposed amendments to the extent that they are intended to clarify that Section 22 is in line with current practices and intended to harmonize with IIROC rules. However, the industry association sought clarification that the changes are not intended to expand upon current practices for investigations and examinations.

The investor advocate expressed the view that the proposed revisions would improve the depth and quality of investigations, fortify the MFDA's enforcement capabilities and provide confidence building and trust among retail investors.

One MFDA Member was of the view that unlike IIROC, the amendments appear to grant the MFDA powers beyond what would be required to access Member records relevant to investigations or examinations.

MFDA Response

The changes reflect MFDA staff's current practices for investigations and examinations, and are consistent with IIROC's powers.

Section 22.1(e) Recording Interviews

One MFDA Member suggested that this Section should also permit Members and Approved Persons or their legal representation to record interviews that they are required to attend, to ensure that their comments are not taken out of context.

MFDA Response

There is a need to ensure the confidentiality and integrity of investigations. MFDA staff preserves both an audio recording and a transcript of the interview, and these are made available to persons under investigation at an appropriate point in the process to ensure that statements are taken in the appropriate context.

Section 22.3(a) MFDA Access to Business Premise

The industry association advised that the MFDA's power to access business premises without notice should be used sparingly and to address urgent issues. The commenter encouraged the MFDA to provide the Member reasonable notice wherever possible since investigations and examinations demand considerable time and resources and notice would help Members manage their day-to-day operations.

One MFDA Member expressed concern with the MFDA's power to access business premises without notice, in particular with respect to sub-branch home offices of Approved Persons. The commenter suggested that this type of entry raises privacy concerns and could cause undue stress on the families of the Approved Person, specifically in the case where the Approved Person is not present. This commenter also suggested that this type of entry should be subject to another level of oversight (e.g. by MFDA Directors), and that further clarification is warranted to explain when the MFDA would consider such action to be justified (e.g. the Approved Persons has performed a severe breach or misconduct).

MFDA Response

In most cases, MFDA staff provides notice to the Member. The power to access business premises without notice is used sparingly, to address urgent issues in situations where providing notice would impair the integrity of MFDA staff's investigation. In the case of branches and sub-branches, MFDA staff provides notice to the Member at the time of attendance at the premises and works with the Member to address potential issues as appropriate. In addition, the power to access

business premises would only be used for the purpose of inspecting and accessing records that relate to the MFDA examination or investigation.

Section 22.3(b) MFDA Access to Records

One MFDA Member commenter suggested that for privacy protection, there should be restrictions on the MFDA's power to access non-Member business or outside business. This commenter further noted that by taking an image of a Member's or Approved Person's hard drive, the MFDA could gain access to information that is potentially confidential and irrelevant to the investigation, such as privileged communications between the Member or Approved Persons and their legal counsel or accountant. This commenter referenced MFDA Bulletin #0780 which suggests that taking an image of a hard drive in situations involving allegations of serious misconduct is appropriate and stated that further clarification of what is considered "serious" is required.

MFDA Response

MFDA staff has procedures to ensure that hard drives are imaged and handled by an independent third party who retains the imaged copy. Members are provided with the opportunity to address any concerns regarding potential confidential and privileged communications before any of the information is accessed by MFDA staff.

Section 22.3(c) Accessing Original Records

One MFDA Member commenter expressed concern with the proposed amendment that would allow the MFDA to remove original records from the premises. This commenter suggested that if there are concerns about the preservation of evidence, making copies of the records or images of computer hard drives should suffice.

MFDA Response

As noted in the comment, MFDA staff usually proceeds by making copies of the records or taking images of the computer hard drives. In some cases, such as those where the veracity of a document or a client signature may be in question, original records would be required where available.

Systems Impact of Amendments

One MFDA Member commenter suggested that the proposed amendments could, in effect, lead the MFDA to shut down a Member or cause serious repercussions to their day-to-day practices, even if it is for one day only.

MFDA Response

MFDA staff makes all reasonable efforts to ensure that gathering evidence from business premises when conducting investigations or examinations does not result in serious repercussions to the day-to-day practices of a Member.