

Summary of Public Comments Respecting Proposed Amendments to MFDA By-law No.1 – Sections 3.3 (Election and Term), 3.6.1 (Governance Committee) and 4.7 (Quorum)

On March 14, 2019, the MFDA published for public comment proposed amendments to MFDA By-law No.1 – Sections 3.3 (Election and Term), 3.6.1 (Governance Committee) and 4.7 (Quorum) for a 90-day comment period that expired on June 12, 2019.

Eleven submissions were received during the comment period:

1. The Canadian Advocacy Council for Canadian CFA Institute Societies
2. Larry Elford
3. Ruth Elliott
4. The Investment Funds Institute of Canada (IFIC)
5. The Investor Advisory Panel
6. Millie Jagdeo
7. Kenmar Associates
8. MBC Law Professional Corporation
9. Portfolio Strategies Corporation
10. Arthur Ross
11. Peter Whitehouse

Copies of comment submissions may be viewed on the MFDA’s website at: www.mfda.ca.
<https://mfda.ca/policy-and-regulation/proposed-regulation-consultations/propamend-by-law-no-1/>

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

Comment Summary

General

The industry association applauded the MFDA’s initiative to undertake a review of its corporate governance structure.

One commenter expressed concern that the scope of the review was limited only to making the MFDA’s governance practices consistent with those of other SROs and did not take advantage of the opportunity for more meaningful reform. Another commenter recommended a complete industry-independent review of other aspects of MFDA governance (e.g. Rulemaking, cybersecurity) be undertaken in the context of the public interest mandate, investor protection, increasing investor expectations/needs and technological change.

One commenter also advised that it is unfortunate that the MFDA sought advice on its governance from Borden Ladner Gervais LLP (“BLG”), which while it is a reputable firm, its involvement as legal advisor to the MFDA results in a conflict of interest. In addition, another commenter questioned why the BLG’s governance report was not made public.

MFDA Response

The governance review undertaken by BLG considered the MFDA's governance structure in the context of what is considered best practices for SROs. We acknowledge that BLG is the MFDA's counsel on various matters. In order to ensure BLG's advice was objective, the review was undertaken under the oversight of the Governance Committee.

The Governance Committee reviewed with BLG the scope of its review. The review extended beyond the subject areas of the proposed amendments and considered the following elements of corporate governance: Board composition (size, representation of "non-industry" directors and quorum), Committee composition (size, representation of "non-industry" directors and quorum), Director nomination and election process, Chair appointment process, conflicts of interest policies, Board and Committee self-assessments, Board and Committee membership succession, Board diversity, Board and Committee mandates and Terms of Reference; and director term limits.

The MFDA determined that in light of BLG's knowledge of the MFDA's governance framework, the terms of the recognition orders and experience in governance matters generally, that it was well suited to efficiently undertake the review on a cost effective basis.

BLG did not believe at the time of its engagement (and does not now) that its engagement represented a conflict of interest as it reported its findings to the Governance Committee in accordance with the work plan developed under the oversight of the MFDA Governance Committee.

The BLG governance report, as are all communications to the MFDA's Board or one of its committees, was prepared on a confidential basis and the MFDA does not believe it is appropriate to make the entirety of the report public, having made the relevant recommendations public. The MFDA believes that its ability to seek and obtain legal advice, including the BLG governance report, on a confidential basis is important to support effective Board communications and deliberations.

Term Limits

The industry association expressed support for increasing term limits to address concerns related to the limited pool of candidates.

The investor associations and one MFDA Member, expressed disagreement with the proposed increase in term limits. These commenters suggested that eight-year term limits are at odds with prevailing governance trends, could cause Board stagnation and complacency and that new Directors should be brought in more frequently, especially with so many changes impacting the industry.

MFDA Response

We do not agree that an eight year term limit is at odds with prevailing governance trends. We do however acknowledge that best practices favour reasonable term limits.

The increase in the term limits from six years to eight years is intended to address concerns relating to the limited pool of candidates for election as directors, ensure greater continuity on the MFDA Board of Directors and Board Committees and allow the MFDA to benefit from directors who have had a chance to develop familiarity and expertise with MFDA affairs. In addition, a

maximum tenure of eight years is consistent with the governance practices of other Canadian self-regulatory organizations and protection funds.

We believe that, in the context of the MFDA, a shorter term hampers the ability of the MFDA to encourage qualified candidates to apply and may negatively impact on board engagement. Moreover, as the term of each director consists of 2 or 3 years (up to a maximum tenure of eight successive years), members have the ability to cast a vote for each director every two years (for Industry Directors) and three years (for Public Directors) within the maximum tenure of eight successive years.

Board Diversity

Several commenters suggested that the MFDA Board of Directors lacks diversity, specifically gender diversity.

One commenter noted that one of the Industry Directors on the MFDA Board of Directors is always from Investors Group and noted that it would be preferable to see a wider variety of individuals from various dealers participate, so that they can bring their diverse experience to the table.

MFDA Response

The Terms of Reference of the MFDA Governance Committee set out factors that must be considered by the Committee in determining the criteria, profile and qualifications of new director candidates. The Terms of Reference refer expressly to individual diversity among members of the Board as a factor that contributes to a well-functioning Board. The Governance Committee also reviews a Matrix of Directors' Skills and Attributes which sets out skills and qualifications sought in Director nominees and considers the diversity of the Board and of its nominees. The Governance Committee will continue to consider annually in the context of the nomination process how best to achieve diversity.

With respect to Industry Directors, the Terms of Reference of the Governance Committee set out diversity of Membership as a primary criteria in reviewing new director candidates, which includes consideration of regional/geographical considerations, size of Members, type of business and ownership structure, including without limitation, small and medium-sized Members according to assets under administration and number of Approved Persons. MFDA Members are invited to participate in the nomination process by proposing director candidates, and in the election process by casting a vote. In term of the representation of any particular organization, the Governance Committee does consider whether a representative of the organization was previously nominated, and if so, assesses the benefits to the Board of such representation.

Investor Advocate Representation

The retail investor and investor advocate commenters expressed concern with respect to the lack of retail investor representation on the MFDA Board and recommended that there should be at least one Board Member who specifically represents these stakeholders. However, one investor advocate suggested that Board seats should not be designated for advocates representing specific interest groups since that may result in Directors playing set roles instead of engaging in balanced deliberation. This commenter recommended, however, that the MFDA should include some Public

Directors who possess a deep understanding of retail investor concerns, but without creating an expectation that individual directors would advocate for a specific stakeholder interest.

In addition, some investor advocates and retail investor commenters encouraged the MFDA to establish an investor advisory panel or committee that could provide the Board with informed feedback on investor related matters.

MFDA Response

The MFDA is an SRO that conducts its activities in the public interest. The protection of the public interest is a primary goal of the MFDA, and all Directors (Industry and Public) must act in the best interests of the MFDA having regard to the public interest and the interests of other stakeholders. We note that MFDA's By-law No. 1 does not preclude the participation by investors as Public Directors.

With respect to soliciting and obtaining investor views, the MFDA seeks input from all stakeholders through our public comment process and has received submissions from individual investors and investor associations on proposed policy instruments. In addition, MFDA staff meets with investor associations to obtain input and comment on specific concerns and will continue to do so.

Issues with Categorizing Directors as Public

Several commenters suggested that there are Public Directors on the MFDA Board who are too closely connected with MFDA Members and the investment industry to be considered "Public" Directors. Several commenters suggested that the MFDA should require at least a three-year cooling off period in order for a Director to qualify as a Public Director.

MFDA Response

Under MFDA By-law No. 1 a "Public Director" means a director that is not an officer (other than the Chair or Vice-Chair) or an employee of the MFDA, a current partner, director, officer employee or person acting in a similar capacity of, or the holder of a significant interest in, a Member, an associate or an affiliate of a Member, or an as associate of a partner, director, officer, employee or person acting in a similar capacity of, or the holder of a significant interest in, a Member. The definition of the term "Public Director" is intended to ensure that individuals appointed as Public Directors do not raise conflicts of interest or other undesirable concerns with respect to that individual's independence. In the case of all selections of Public Directors, the Governance Committee, the Board and, ultimately, the Members have the opportunity to assess the circumstances of each individual and exercise discretion to ensure that appropriate selections are made. Under the Governance Committee's Terms of Reference, the one year cooling off period is a minimum and the Governance Committee may determine that a longer period is warranted in the circumstances.

Increasing Public Directors on Governance Committee and for Quorum

Commenters supported increasing the number of Public Directors on the Governance Committee and the number required for quorums at meetings of this Committee and of the Board of Directors.

One commenter stated that it is unclear how the MFDA Governance Committee's inclusion of Industry Directors reflects its broader mandate.

MFDA Response

MFDA staff acknowledges the comments expressing support for the proposed amendments.

In addition to nominating both Industry and Public Director candidates, the MFDA Governance Committee is also responsible for approving applications for MFDA Membership, Compensation and Pension Structure, Public Director and Chair compensation and CEO selection. The inclusion of Industry Directors with experience in these matters is intended to assist the MFDA Governance Committee in fulfilling its responsibilities.

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