Summary of Public Comments

Respecting

Proposed Amendments to Section 24.3 – Suspensions in Certain Circumstances and Related Provisions of MFDA By-law No. 1

and

Response of the MFDA

On October 27, 2006, the British Columbia Securities Commission published for public comment proposed amendments to Section 24.3 – Suspensions in Certain Circumstances and related provisions of MFDA By-law No. 1 (the "Proposed Amendments").

The public comment period expired on November 27, 2006.

Three submissions were received during the public comment period:

1. The Investment Funds Institute of Canada ("IFIC");
2. Independent Financial Brokers of Canada ("IFB"); and
3. Portfolio Strategies Corporation ("Portfolio Strategies").

Copies of the 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. Unless otherwise indicated, all references are to sections of MFDA By-law No. 1, including the Proposed Amendments.

1. Consistency between Self-Regulatory Organizations

IFIC, IFB and Portfolio Strategies commented that there is a lack of consistency between the provisions of the Proposed Amendments and the requirements under Investment Dealers Association of Canada ("IDA") rules on similar matters. For example:

(a) IFIC cited section 24.3.2(d)(iv) [sic, should read "(vi)"] of the Proposed Amendments**,** which does not require the MFDA to demonstrate that a Member's failure to cooperate with an examination or investigation gives rise to a risk of imminent harm to the public before summary action may be taken;

(b) both IFB and Portfolio Strategies commented that any application by the MFDA without notice to an Approved Person or a Member must make a clear case that there is an immediate harm/threat to the public interest before it is granted;

(c) IFB expressed the concern that under section 24.3.1(b) of the Proposed Amendments a Hearing Panel can impose penalties on an Approved Person if

his/her license has been suspended, cancelled or terminated not only by a securities body but also by a "financial services regulator or professional licensing or registration body";

(d) IFB expressed the concern that section 24.3.1(f) of the Proposed Amendments broadened the offence to include both criminal and regulatory offences;

(e) with respect to section 24.3.1(g) of the Proposed Amendments, IFB commented that there was no analogous IDA provision for incapacity of Approved Persons and was concerned that the provision could be broadly interpreted. IFB also expressed the concern that this section could breach privacy rights.

MFDA Response

In maintaining its commitment to regulatory best practices, the MFDA reviewed the regulatory practices of various self-regulatory organizations, securities regulators and professional bodies in developing the Proposed Amendments. While the Proposed Amendments are generally consistent with the processes followed by the IDA (now the Investment Industry Regulatory Organization of Canada ("IIROC")), they are not identical. We believe the Proposed Amendments will provide Hearing Panels with the measures necessary to address the full range of regulatory concerns they may be called upon to determine in a flexible, timely and responsive manner.

It should be noted that the fact that an application can be made by Staff does not mean that in every instance the Hearing Panel will make an order. The Hearing Panel is required to act in accordance with the principles of natural justice and fairness and must determine the application solely on the basis of the evidence before it. The Hearing Panel will decide each application on a case-by-case basis in determining whether it is fair and appropriate to make an order under the summary process provided for in section 24.3 of the Proposed Amendments. It should be noted that most of the Public Representatives who chair MFDA Hearing Panels are retired justices and will generally have experience with similar matters.

Implicit in the amendments as initially published for comment was the requirement that any order imposed by the Hearing Panel would have to meet the test of being in the public interest. This public interest test would include but not be limited to situations that involve an element of financial loss or imminent harm. As a result of comments received during the CSA approval process, the MFDA further amended s. 24.3.1 and 24.3.2 to explicitly include the public interest test. These changes make it clear that there is a threshold for the making of an order, and we note that the threshold is substantially similar to that of the IDA.

(a) In section 24.3.1(b) of the Proposed Amendments, the MFDA has expanded the category of agencies beyond securities regulatory authorities to include financial services regulators and professional licensing or registration bodies in the interests of increasing collaboration and cooperation with these agencies. The amendment recognizes that these agencies may, for example, commence proceedings against or

sanction a Member or Approved Person for misconduct under their jurisdiction, which may in turn give rise to grounds for the MFDA to make an order against the Approved Person or Member (e.g. in cases of allegations or findings of theft).

(b) The MFDA has included "regulatory" offences in section 24.3.1(f) of the Proposed Amendments in order to capture so called "quasi-criminal" offences prosecuted under provincial securities legislation (e.g. insider trading, illegal distribution of securities) as well as other serious regulatory offences that are not "criminal" offences under the *Criminal Code*.

The threshold requirement under sections 24.3.1(f) and 24.3.2(g) of "charged" as opposed to "convicted" of an offence is consistent with the IDA's analogous By-law 20.43(1)(d).

(c) The incapacity provision in section 24.3.1(g) of the Proposed Amendments is designed to enhance investor protection in circumstances where an Approved Person is no longer fit to conduct securities related business. In addition to receiving evidence of the incapacity, the Hearing Panel must be satisfied that the Approved Person cannot continue to conduct securities related business without risk of imminent harm to the public, other Members or the MFDA. Pursuant to MFDA Rule of Procedure 1.8(2), the Hearing Panel may order that all or part of the application be heard in the absence of the public where it is of the opinion that matters of a highly personal or sensitive nature may be disclosed at the hearing, such that the desirability of avoiding disclosure of the matters outweighs the desirability of adhering to the principle that all hearings be open to the public. Section 24.3.1(f) is based on the analogous provision contained in Ontario's *Law Society Act*, the statute pursuant to which the Law Society of Upper Canada regulates lawyers in Ontario.

2. Due Process

IFIC commented that processes should not be arbitrarily imposed without recourse for a Member who disagrees with the conclusion or action. IFIC requested an explanation of the recourse available to a Member who disagrees with a finding by the MFDA that there has been a failure to cooperate.

MFDA Response

The MFDA currently provides Members and Approved Persons with a reasonable opportunity to rectify any alleged failures to cooperate before commencing a disciplinary proceeding under sections 20 and 24 of By-law No. 1. The MFDA provides the Member or Approved Person with multiple written notices of the alleged failure. The notices specify the documents, information or reports that the Member or Approved Person is required to provide to the MFDA in order to rectify the failure. The MFDA also considers and responds to submissions received from a Member or Approved Person disputing an alleged failure to cooperate. The MFDA will continue the same practices with respect to failure to cooperate applications brought under sections 24.3.1(c) and 24.3.2(d)(vi) of the Proposed Amendments.

In failure to cooperate situations involving *bona fide* differences of opinion between the MFDA and a Member or Approved Person concerning, for example, the jurisdiction of the MFDA to request production of certain documents, the MFDA will, absent unusual circumstances, provide notice of the application to the Member or Approved Person under section 24.3.1 or 24.3.2 respectively. Under section 24.3.4, the Hearing Panel may also on its own initiative require that notice of the application be given to the Member or Approved Person at any stage of the application.

Further, under section 24.3.6, where an application is brought without notice, the Member or Approved Person may, within 30 days of receiving notice of the Hearing Panel's decision, request that a differently constituted Hearing Panel review the decision. The Member or Approved Person is afforded full participatory rights on the review of an application.

3. Reasons for the Amendments

IFB expressed the view that the Proposed Amendments, as they pertain to Approved Persons, increased powers that exceeded any reasonable, demonstrable need. IFB sought clarification for the reasons why the Proposed Amendments were necessary.

MFDA Response

As noted above, we believe the Proposed Amendments will provide Hearing Panels with the measures necessary to address the full range of regulatory concerns they may be called upon to determine in a flexible, timely and responsive manner. Currently, MFDA By-law No. 1 does not permit the MFDA to proceed summarily against an Approved Person except in the case of the non-payment of a fine. The Proposed Amendments will enhance the ability of the MFDA to protect investors in circumstances where it is not reasonable or practical to proceed by way of a regular disciplinary hearing.

4. Procedural Fairness

The IFB expressed the concern that the Proposed Amendments would sacrifice procedural fairness and Approved Persons will suffer the consequences. The IFB recommended the implementation of a requirement that MFDA Staff demonstrate a need to move without notice and that the time within which a review of an application must be conducted be reduced from 21 days to 15 days in section 24.3.7 of the Proposed Amendments.

MFDA Response

All applications brought under section 24.3 will be heard by a Hearing Panel consisting of two Industry Representatives and one Public Representative, who will sit as the Chair of the Panel. As noted above, most of the Public Representatives who chair MFDA Hearing Panels are retired justices and will generally have experience with similar matters. The Hearing Panel is required to act in accordance with the principles of natural justice and fairness in determining the application.

Section 24.3.4 of the Proposed Amendments authorizes a Hearing Panel, at any stage of an application, to require that the application be converted from a "without notice" application to one brought on notice by requiring that notice be provided to the Approved Person or Member on such terms and conditions as it considers appropriate.

The 21 day time period for the review of an application contained in section 24.3.7 of the Proposed Amendments is consistent with the time prescribed by IDA By-law 20.47(2).