

Summary of Public Comments on Proposed Amendments to MFDA Rule 2.3.1 (Power of Attorney / Limited Trading Authorization / Discretionary Trading)

On March 10, 2016, the British Columbia Securities Commission (“BCSC”) published, for a 90-day public comment period, proposed amendments to MFDA Rule 2.3.1 (Power of Attorney / Limited Trading Authorization / Discretionary Trading).

The public comment period expired on June 8, 2016.

The following five submissions were received during the public comment period:

1. The Canadian Advocacy Council for Canadian CFA Societies;
2. The Investment Funds Institute of Canada;
3. Kenmar Associates Investor Education and Protection;
4. OSC Investor Advisory Panel;
5. Quadrus Investment Services Ltd.

Below is a summary of the comments received, together with MFDA staff’s responses.

Support for Proposed Amendments

Three commenters expressed general support for the proposed amendments. One of these commenters noted that proposed amendments to Rule 2.3.1(a), which would delete the words “other similar authorization” and more clearly set out the types of control or authority to which reference is being made, effectively address the need for clarification while maintaining appropriate risk controls and investor protection.

One commenter supported the proposed amendments and expressed the view that the changes should only apply in cases where the registrant is acting for a related person.

MFDA Response

We acknowledge comments expressing support for the proposed amendments. An Approved Person may not exercise full or partial control or authority in respect of the financial affairs of a client unless certain conditions are met. These conditions, as set out under proposed Rule 2.3.1(c), include the requirement that the client be a “Related Person” of the Approved Person, as defined under the Income Tax Act (Canada).

Requirement to Transfer Account

The proposed amendments would delete the requirement to transfer the account to another Approved Person, which is currently a condition of the exception set out under Rule 2.3.1(b).

An industry commenter noted that the proposed removal of the account transfer requirement is balanced by the proposed new requirement for the Approved Person to obtain written Member approval prior to accepting or acting upon the control or authority, as set out under Rule

2.3.1(c)(iii). The commenter also noted that under this new requirement, Members will have discretion as to whether to permit the Approved Person to accept or act upon the control or authority and, in conjunction with the exercise of such discretion, will need to have an appropriate due diligence and enhanced oversight process in place.

One industry commenter expressed its opposition to this change, noting that transferring the account to another Approved Person is a good control mechanism that serves to protect vulnerable investors.

An investor advocate expressed the view that the current requirement to transfer the account to another Approved Person is not unduly onerous or unreasonable and that if there is no transfer, an irreconcilable conflict of interest is created. This commenter also expressed the view that it is incompatible for a registered representative to have full or partial control or authority over the financial affairs of a client, while also being the Approved Person of record on that client's account.

MFDA Response

The proposed amendments to Rule 2.3.1(c) are intended to address situations where an Approved Person has full or partial control or authority over the financial affairs of a client who is a family member. Transferring the account to another Approved Person, as is currently required under Rule 2.3.1(b)(ii), would, in such circumstances, require disclosure of personal financial information and personal circumstances (e.g. illness or incapacity of a family member). In the view of MFDA staff, where the Approved Person is appropriately qualified to handle the affairs of their family member and where appropriate controls are in place (i.e. those adopted under proposed Rule 2.3.1(c)), the requirement to transfer the account to another Approved Person is unnecessary, and invasive in a manner that is unwarranted.

The exercise of control or authority, as contemplated under Rule 2.3.1(c), is subject to a number of limitations and compliance controls:

- *an Approved Person may only exercise full or partial control or authority over the financial affairs of a client if that client is a “Related Person” of the Approved Person, as defined by the Income Tax Act (Canada) (i.e. the exercise of such control or authority does not extend to clients generally, but is limited to specific types of clients);*
- *the Approved Person must notify the Member of the appointment and obtain written Member approval prior to accepting or acting upon the control or authority (i.e. an Approved Person may neither accept nor act upon such control or authority until the Member has had an opportunity to consider the appropriateness of such activity, having regard to the Member's obligations under MFDA Rules, including those respecting compliance and supervision).*

In addition, under MFDA Policy No. 2, accounts subject to such control or authority must be readily identifiable, and are also subject to specific trade review requirements at the branch level (daily reviews) and head office level.

In the view of MFDA staff, the limitations and compliance controls noted above are simple, effective, will appropriately manage conflicts of interest, and maintain investor protection.

Requirement for Member Approval

An investor advocate suggested that the proposed amendments be clarified to indicate that the Member has the right, but not the obligation, to grant approval for the Approved Person to assume full or partial control or authority over the financial affairs of a client.

MFDA Response

Rule 2.3.1(c)(iii) requires the Approved Person to obtain written Member approval prior to accepting or acting upon the control or authority (i.e. the Approved Person must request such advance approval from the Member). The Rule does not require the Member to grant the requested approval. Staff is satisfied that the provision, as currently drafted, is sufficiently clear in respect of this matter.

MFDA Member Oversight

An investor advocate suggested that Members be required to have enhanced internal controls to ensure that cash outflows are directed to the beneficiary or to the estate. This commenter also suggested specific internal controls (e.g. ensuring that the letter of direction is valid and covers the scope of activities for which approval is sought, that the dealer explains the risks to the client, and that the dealer considers E&O insurance for the executor). This investor advocate also suggested that the account should be deemed to be the business of the dealer and not an outside (business) activity.

MFDA Response

Requirements under Rule 2.3 address circumstances where an Approved Person assumes full or partial control or authority over the financial affairs of a client. This is Member business, for which the Member would be responsible, and not an outside activity.

For controls and procedures to be effective, they must be tailored to the specific circumstances and take into consideration factors such as the Member's operations and business model. Once the Rule has been adopted in final form, MFDA staff will develop guidance (i.e. in the form of a revised Companion Notice) that will assist Members in complying with requirements under the Rule.

Related Person

One industry commenter expressed support for the adoption of the "Related Person" definition, as set out under the Rule 2.3.1(c)(i) exception. Another industry commenter sought clarification as to the parties included within the definition of "Related Person", as the amendments refer to the *Income Tax Act (Canada)*.

MFDA Response

“Related Person”, as defined under section 251 of the Income Tax Act (Canada), includes individuals connected by blood relationship, marriage, common-law partnership, or adoption. As noted above, once the Rule has been adopted in final form, MFDA staff will develop guidance to assist Members in complying with requirements under the Rule. Such guidance will include clarification in respect of this matter.

DM #490209v4