

Summary of Public Comments Respecting Proposed Amendments to MFDA Recognition Order and MFDA by-law No.1 (Definition of "Public Director")

On May 23, 2008, the British Columbia Securities Commission published proposed amendments to the MFDA's Recognition Orders in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia and to the definition of "Public Director" in MFDA By-law No. 1. (the "**Proposed Amendments**") for a 30-day public comment period.

The public comment period expired on June 23, 2008.

Two submissions were received during the public comment period from:

1. Portfolio Strategies Corporation
2. Kenmar Associates

Copies of 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.

Amendment of Recognition Orders

Kenmar noted that there was no benefit to investor protection in removing the definition of "Public Director" from the MFDA's Recognition Orders on the basis that it duplicates the MFDA's By-laws which can be changed without prior approval from securities commissions.

MFDA Response

The MFDA is not able to change its By-laws without the prior approval of the relevant members of the Canadian Securities Administrators.

Broadening Definition of "Public Director"

Kenmar questioned whether the amendments to the definition of Public Director designed to permit individuals currently ineligible to act as Public Directors to qualify would enhance investor protection or degrade it. It questioned whether as an example it would be wise to have a registered lobbyist or organization as a Public (or Industry) Director.

MFDA Response

The purpose of the proposed amendments to the definition of MFDA Public Director is, among other things, to permit a broader range of persons to be considered as Public Directors . This provides the MFDA governance process with a wider choice of potential candidates. At the same time, however, the MFDA governance and nominating procedures are robust and judgment can be brought to decisions on whether any particular individual is appropriate or not to serve as a Public Director. With respect to the particular example of a registered lobbyist qualifying as a Public Director, if the candidate lobbied on behalf of the mutual fund industry and derived a material part of his or her income from such activities, it is doubtful that the candidate would be appropriate as a Public Director. On the other hand, a person who was registered as a lobbyist in respect of an entirely unrelated industry may or may not be appropriate according to his or her circumstances.

Aggregate Term of Office Extended to Eight Years

Kenmar observed that Boards get stale and that six years is about the maximum period for a director as long as there is a plan for rotation.

MFDA Response

The MFDA believes that a maximum term of eight years for Industry and Public Directors is appropriate. In the case of Public Directors, in particular, eligible persons with appropriate experience are not always readily available and ensuring that they will be available to serve the industry for a period of eight years is not viewed as being unreasonable.

Experience in Selecting Directors

Kenmar notes that no rationale was provided for the experience of MFDA's Governance Committee being that the current definition of Public Director may be too rigid and inappropriate.

MFDA Response

It is not possible to discuss in a public forum particular candidates but, as an example, the MFDA has in the past identified potential candidates who were entirely appropriate and could act without any real or perceived conflict of interest but who were disqualified as a result of being technically a crown employee or having a remote family relationship with other ineligible persons.

Representative Public Directors

Kenmar observed that representative seniors groups, retired regulator commission personnel, retail investors and investor advocates ought to be considered for MFDA Public Directors.

MFDA Response

The MFDA believes that representatives of any such groups, as well as any other groups, ought to be eligible as Public Directors. In fact, such representatives are, unless otherwise disqualified, eligible and a number of former securities commissioners are MFDA Public Directors.

Chair of the Board to be a Public Director

Kenmar stated that it should be mandatory that the Chair of the MFDA Board be a Public Director.

MFDA Response

The MFDA is a self-regulatory organization which conducts its activities in the public interest. As a self-regulatory organization, members of the mutual fund dealer industry must be represented on the Board as well as Public Directors. In fact, to date the Chair of the MFDA Board has been a Public Director.

Definition of Public Director and Roles and Responsibilities

Kenmar indicates that the roles and responsibilities of Public Directors in the different committees and their composition should be clearly defined.

MFDA Response

The governance structure of the MFDA is reflected in its By-laws as well as the various committee mandates, procedures and directors' handbooks and manuals which together are a complete statement of Board member and committee roles and responsibilities as measured against comparable governance benchmarks. Such materials are under ongoing review by the appropriate committees to ensure they are current and responsive to the requirements of the MFDA, its Members and the public.

Nomination Versus Recommendation of Directors

Portfolio Strategies commented on the proposed amendment to the MFDA By-law to clarify that members have the opportunity to recommend rather than nominate individuals for election to the MFDA Board of Directors. In support of their position that the change is of concern to many members, Portfolio Strategies attached its paper previously circulated to the CSA relating to the MFDA Board selection process.

MFDA Response

The proposed change of wording in the MFDA By-law reflects the result of the debate previously engaged in by Portfolio Strategies, other Members, the MFDA and members of the CSA relating to the MFDA Board selection process and the issues raised in the position paper of Portfolio Strategies. At that time the procedures of the MFDA were confirmed and the result – for the reasons summarized below - was that the MFDA nomination process, i.e. the act of putting a candidate before the annual meeting of Members for election as a director was confirmed. It was widely regarded (including support by Members in approving the By-laws and the lack of objection by all but a few Members in responding to a Members' survey) that this approach was the most reliable one for ensuring that a Board representative of the wide diversity of MFDA Members as well as the public would be elected. However, it is part of the process that Members should have the opportunity to recommend to the Governance Committee appropriate candidates although they would not be able to make nominations directly to the membership at the annual meetings. The latter approach, it was widely felt, would be simply unworkable in view of the many constituencies that should be represented and the size of the MFDA Board.

The basic governance structure for constituting the MFDA Board reflects the objectives and principles of the Corporate Governance Committee Report of February 2003. That Report was the result of the requirements of the Recognition Orders of various CSA members to the effect that MFDA's governance structure should properly and fairly represent the diversity of its Members. The Report was commented on by CSA staff and the MFDA By-laws implementing the principles of the Report were all approved by the MFDA Board, its Members, the CSA members and Industry Canada. Notwithstanding the foregoing and as indicated above, the basis on which the MFDA Board of Directors was to be constituted was the subject of considerable discussion and review following the Annual General Meeting of Members held in December 2003. In summary, at that time the MFDA took the following steps

- *Review and Assessment – the process for constituting the MFDA Board was reviewed and assessed including a careful analysis of the criticisms and comments raised as well as the views expressed by staff of the CSA*
- *Alternatives – several possible alternatives and/or amended processes for the MFDA were identified and reviewed*
- *Legal Status – the legal status and compliance of the existing and proposed process as well as the By-laws of the MFDA were reviewed and confirmed*
- *Member Views – a detailed notice by the MFDA containing a survey was sent to all of its Members explaining the background of the issues under review and soliciting comments*

- *Responses to Survey – the response to the notice and survey referred to above was very limited and, apart from a few specific continuing criticisms of the process, MFDA Members did not express concern with respect to the adopted processes.*

The conclusion of the foregoing review was that there was no reliable basis on which the diversity of MFDA Members could be fairly represented upon the MFDA Board without the nominating process of the kind provided for. A 13 person board is a relatively small group in which the diversity of members in terms of region, industry or public, small and independent, large institutional interests etc. can be represented. Although a nominating process was generally agreed to be necessary to effect the desired result, the process did not preclude wide solicitation of Members and interested parties for recommendations as to nominees and the MFDA has solicited Member participation in that regard. The MFDA has also recognized the importance of continuing and complete communication to its Members so that they have confidence in the Board of Directors that serves the MFDA and its Members.