

**Crawley Meredith Brush**  
LLP  
Corporate and Securities Litigation

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Alistair Crawley  
direct line: (416) 217-0806  
acrawley@CMBLaw.ca

October 31, 2008

Ontario Securities Commission  
SECRETARY'S OFFICE

**DELIVERED**

Mr. John Stevenson  
Secretary to the Ontario Securities Commission  
PO Box 55, 19<sup>th</sup> Floor  
20 Queen Street W.  
Toronto, ON M5H 3S8

Dear Mr. Stevenson:

**Re: Mutual Fund Dealers Association of Canada Bylaw No. 1  
Application for an order quashing the decision of the Ontario Securities  
Commission (the "Commission") approving the proposal to amend Section  
24.3 of MFDA By-law No. 1**

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We act for the Independent Financial Brokers of Canada ("IFB").

The IFB requests a formal hearing and review of the decision of the Commission approving the proposal of the Mutual Fund Dealers Association of Canada (the "MFDA") to amend Section 24.3 of MFDA By-law No. 1, "regarding suspensions in certain circumstances", which was published on August 1, 2008 in the OSC Bulletin: (2008) 31 OSCB 7589 (the "By-law Amendment") pursuant to sections 21.7 and 144 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "*Securities Act*").

The IFB makes application for:

- (a) An order quashing the decision of the Commission approving the proposal of the By-law Amendment;
- (b) A declaration that the By-law Amendment is contrary to Ontario securities law; and
- (c) Such further and other relief as may seem just to this Honourable Commission.

The grounds for the application are:

- (a) The IFB is an association of independent financial services advisors. The majority of IFB members are "Approved Persons" with the MFDA and are registered to sell mutual funds. IFB members are also licensed with the Financial Services Commission of Ontario and equivalent regulators across Canada to sell insurance products. The IFB advocates and lobbies on behalf of its members with all levels of government and various regulatory authorities;
- (b) The MFDA published the proposed By-law Amendment on October 27, 2006 and requested comments. The comment period was announced as being open for 30 days;
- (c) On November 8, 2006, only 12 days into the 30 day comment period, the Board of Directors of the MFDA approved the proposed By-law Amendment;
- (d) On November 27, 2006, the IFB submitted comments in respect of the By-law Amendment. Unbeknownst to IFB, the amendment had already been approved by the MFDA Board;
- (e) The By-law Amendment was approved at the Annual General Meeting of the MFDA on December 1, 2006, within 4 days of the close of the comment period;
- (f) It would appear that the IFB submissions in response to the request for comments were not considered by the MFDA Board nor were the issues raised therein reported to the membership at the Annual General Meeting;
- (g) The By-law Amendment adversely affects the rights of MFDA Approved Persons and Members by establishing expansive grounds for the MFDA to make orders to suspend or terminate the registration of Approved Persons and Members without notice or a right to be heard;
- (h) Specifically, new section 24.3.1 contains 8 grounds upon which a Hearing Panel can grant an application by Staff of the MFDA to suspend, terminate or impose conditions on the registration of an Approved Person without notice;
- (i) The grounds include;
  - (i) A person failing to cooperate with an examination or investigation;
  - (ii) A person failing to comply with the provisions of any By-law, Rule or Policy of the MFDA; and
  - (iii) The MFDA receives information regarding the incapacity of the person, by reason of mental or physical illness, other infirmity or addiction to or excessive use of alcohol or drugs;

- (j) The only restraint on a hearing occurring without notice or a right to be heard is that the Hearing Panel must determine that providing notice to an Approved Person would be likely to result in financial loss or harm to the public, or that the length of time to arrange for and conduct a hearing pursuant to the normal disciplinary process would be prejudicial to the public interest. The latter ground has potentially broad application;
- (k) After receiving notice of a decision rendered *ex parte* affecting their registration, an Approved Person is entitled to request a review of the decision by another Hearing Panel, such review to be heard within 21 days unless otherwise directed;
- (l) The process in the By-law Amendment is unfairly prejudicial to Approved Persons since they will be faced with a reverse onus to cause a Hearing Panel to overturn the decision of another Hearing Panel. Accordingly, the review hearing will operate on the basis of an assumption of wrongdoing or unfitness to be *disproved* by the Approved Person, rather than the normal situation of MFDA enforcement counsel having to prove misconduct or unfitness on the basis of clear, convincing and cogent evidence;
- (m) The By-law Amendment is contrary to section 26(3) of the *Securities Act*, R.S.O. 1990, Ch. S-5 (the "Act"), which provides that the Director shall not refuse to grant, renew, reinstate or amend registration or impose terms and conditions thereon without giving the applicant an opportunity to be heard, and subsections 127(4) through (7) of the Act, which provides that no order in the public interest shall be made against a person or company without a hearing and, when a temporary order is made, it may be extended in circumstances where a hearing is commenced within 15 days;
- (n) The registration of MFDA Approved Persons is a statutory power that has been delegated to the MFDA by the Commission under section 21.5 of the Act and the MFDA is required to comply with sections 26(3) and subsections 127(4) through (7) of the Act;
- (o) In any event, section 21.6 of the Act provides that no by-law, rule, regulation, policy or procedure of a self regulatory organization shall contravene Ontario securities law;
- (p) The process regarding suspensions in certain circumstances set out in the amendment to section 24.3 of the MFDA By-law is also contrary to the following legal standards,
  - (i) section 6 of the *Statutory Powers and Procedure Act*, R.S.O. 1990, Chap. S. 22, which requires the provision of reasonable notice;
  - (ii) section 9 of the MFDA Recognition Order, which stipulates that the MFDA apply due process, including notice and an opportunity to be heard, with respect to the denial or termination of membership; and

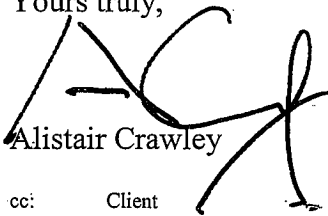
- (iii) established administrative law principles of procedural fairness and natural justice;
- (q) The process by which the By-law Amendment was approved by the MFDA Board and membership was inconsistent with the practice established by the Commission for the approval of rules as no regard was given to the practice of soliciting and considering comments from the public;
- (r) Notably, there is no public record of the memorandum of understanding that the MFDA was required by section 11(a) of the MFDA Recognition Order to enter into with the Commission to set out the approval process for changes to MFDA rules;
- (s) The applicant requests that the Commission invoke its jurisdiction under sections 21.5, 21.7 and 144 of the Act to review the legality and appropriateness of the amendment to section 24.3 of MFDA By-law No. 1; and
- (t) Such further and other grounds as counsel may advise.

The following documentary evidence will be used at the hearing of the application:

- (a) The affidavit of John Whaley, to be sworn; and
- (b) Such further and other evidence as counsel may advise and this Honourable Commission may permit.

Should you have any questions respecting this Notice, please do not hesitate to contact the writer.

Yours truly,

  
Alistair Crawley

cc: Client

Larry Waite, President and Chief Executive Officer, MFDA