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Jason D. Bennett
Corporate Secretary & Director, Regional Councils
Mutual Fund Dealers Association of Canada
121 King St. West, Suite 1000
Toronto, ON M5H 3T9

Re: Mutual Fund Dealers Association of Canada Proposed Amendments to MFDA Rule 2.4.1 *Payment of Commissions to Unregistered Corporation*

Thank you for providing Advocis with the opportunity to comment on the Mutual Fund Dealers Association of Canada (MFDA) Proposed Amendments to Rule 2.4.1.

Advocis, The Financial Advisors Association of Canada, is the largest and oldest voluntary professional membership association of financial advisors and planners in Canada. Our members are provincially licensed to sell life and health insurance, mutual funds and other securities, and are primarily owners and operators of their own small businesses who create thousands of jobs across Canada. Advocis members are professional financial advisors who provide comprehensive financial planning and investment advice, retirement and estate planning, risk management, employee benefit plans, disability coverage, long-term care and critical illness insurance to millions of Canadian households and businesses.

General Comments

Recognizing the regulatory and jurisdictional limitations placed on the MFDA through the Recognition Orders issued by the Recognizing Jurisdictions, Advocis is generally supportive of the MFDA Proposed Amendments to Rule 2.4.1. We appreciate that the MFDA is operating under considerably tight timelines as a number of Recognizing Jurisdictions have indicated that they will not extend the current exemption order for Rule 2.4.1, beyond March 31, 2010, and have instructed the MFDA to present a proposed solution for consideration by March 31, 2009¹. Regardless of this arbitrary time constraint, the MFDA proposal should take a comprehensive approach to resolving the incorporation issue.

¹ The Ontario Securities Commission (OSC), Nova Scotia Securities Commission (NSSC) and the Saskatchewan Financial Services Commission (SFSC) have stipulated that the extension of the exemption order until March 31, 2010 was conditional on the MFDA submitting proposed amendments that will address this ongoing problem by May 31, 2009. The Joint Notice and Request for Comment clearly states, "... staff do not support any further extensions. An expiry date of March 31, 2010 would provide sufficient time for MFDA Members and Approved Persons to restructure any commission direction arrangements, to ensure compliance with Rule 2.4.1, should the MFDA not submit a proposal by May 31, 2009." We note that this date has already passed and remain concerned that time constraints may result in a less than satisfactory resolution to this matter. This very issue was raised by Advocis in our submission to the British Columbia Securities Commission on September 29, 2008.

The MFDA's proposal essentially codifies the existing practices with respect to the payment of commissions to unregistered corporations in all Recognizing Jurisdictions except Alberta. This, we feel, is a reasonable approach to correcting the problem, and is consistent with the proposed solution Advocis circulated to all CSA members.

We would like to highlight your statement with respect to the expressed desire of a number of stakeholders, where the MFDA notes "... commenters expressed the need for a solution that is harmonized across the industry and all jurisdictions, indicating their preference for the adoption of legislative amendments allowing for an incorporated salesperson model". While recognizing the MFDA's jurisdictional limitations, we are of the view that the MFDA should put forward not only the proposed changes to Rule 2.4.1, but also a suggested course of action on the part of the CSA for complementary legislative changes to provincial securities acts that would allow for advisor incorporation.

We would remind the MFDA of the existence of securities legislation in Canada that allows for the incorporation of licensed salespersons². We would also note that two additional jurisdictions have draft securities legislation that, if adopted and proclaimed, would provide the legislative solution promoted by Advocis³.

Advocis proposes that the MFDA present their Proposed Amendments to Rule 2.4.1 as part one of a two part process that is intended to provide a comprehensive solution to the incorporation issue. In our view, the initial phase to the process is the current attempt to amend Rule 2.4.1, allowing for the payment of commissions to unregistered corporations in all Recognizing Jurisdictions that have in principle accepted the proposal. Part one would represent a solution that exhausts the full scope of the MFDA's regulatory authority. Part two of the process would be a clear expression from the MFDA for the CSA to commence a process to make the necessary legislative changes to provincial securities acts. We recognize that part two of the process is beyond the scope of MFDA regulatory authority, however, it is completely within their authority to indicate what actions are needed, and to provide suggested solutions to the CSA. Advocis believes such action on the part of the MFDA would demonstrate meaningful leadership on a clear issue of importance to a large and significant contingent of MFDA stakeholders.

Advocis proposes that the key legislative amendment that the MFDA would promote to the CSA is the need to amend the definitions sections of the applicable securities acts to explicitly state that an 'adviser', 'salesperson', or 'person' captures the concept of a corporation⁴. Further, a commitment from the commissions to issue Blanket Orders exempting corporations from the registration requirements under the applicable securities acts would provide added clarity.

The permanent solution proposed by the MFDA is, in principle, consistent with the proposal that Advocis presented to CSA members. The Advocis proposal goes further than the MFDA proposal by suggesting that CSA members make the necessary amendments to their securities

² PEI securities act, provides that the definition of 'adviser' and 'person' explicitly accept that a corporation can be an adviser, registrant and market participant. For incorporation purposes PEI also issued Blanket Order 33-504 which exempts a corporation from having to register.

³ The 2003 proposed BC Securities Act which was not proclaimed takes the same approach as PEI. The definition of 'salesperson' was replaced with the concept of a person (including a corporation that trades in securities on behalf of a dealer). The 2008 draft Canadian Securities Act, again adopts the same approach as was taken by PEI and BC.

⁴ ibid

acts. We proposed that the legislation around the definition of salesperson strip away the corporate veil but only against liability for market conduct related to the registered activity in the sale and distribution of securities. Some securities commissions, it was suggested, may wish to impose statutory provisions for greater clarity. Various provinces have adopted legislation that permits some professions to incorporate while preserving the accountability of the individual, such as those found under some Business Corporations Acts. Advocis would consider certain provisions under securities legislation, such as the following:

- The acts of the salesperson corporation are deemed to be the acts of its salesperson shareholders and its employees or agents;
- The liability of an individual salesperson for a claim arising out of his or her obligations as a salesperson is not affected by the fact that the salesperson is engaged in the activities of a salesperson through a salesperson corporation;
- An individual salesperson is jointly and severally liable with the salesperson corporation for all liability claims made against the corporation arising out of the activities of a salesperson in respect of errors or omissions that were made or occurred while the salesperson was a shareholder of the corporation;
- The liability of an individual salesperson cannot be greater than his or her liability would be in the circumstances if he or she were not practicing through the corporation.

Additional assurances that registrant salespersons will not seek shelter from their obligations behind the corporate veil can be accomplished through a requirement that a salesperson, his or her corporation and the dealer enter into a suitable contract with prescribed terms that address that concern. Those contracts would include undertakings and waivers that preserve the status quo of individual accountability and, in effect, reduce the corporation to a conduit for expenses and compensation, as has been the case for other professions and business groups.

Specific Comments

With respect to the MFDA's proposed permanent solution, there are three issues Advocis will address. The first relates to the MFDA statement with respect to stakeholders requiring a solution that is harmonized across the industry and all jurisdictions. In general Advocis supports this statement, however, we are of the view that if the best approach to solving this problem results in less than full harmonization, that all willing Recognizing Jurisdictions move forward with the Rule change supported by the majority, allowing reluctant jurisdictions to opt out or issue a Local Order suspending the practice in their jurisdiction. In this respect, Alberta has already indicated it is not prepared to accept the proposal.

Advocis takes issue with 2.4.1 (b)(i) that states payment of commissions to an unregistered corporation be allowed provided, "such arrangements are not prohibited or otherwise limited by the relevant securities legislation or securities regulatory authority". This clause both weakens the purpose underlying the amendments and is, in our view, an unnecessary compromise clause included to ensure that jurisdictions such as Alberta, that has clearly stated their opposition, can support the MFDA proposal. We feel that the overall effect of this approach weakens the perceived commitment on the part of the MFDA and the majority of Recognizing Jurisdictions to achieving the best solution.

Advocis is of the opinion that the Proposed Amendments to Rule 2.4.1 should be drafted with a focus on the requirements contained in the Orders issued by the vast majority of Recognizing

Jurisdictions⁵ that support the concept of incorporation of licensed salespersons. If a particular jurisdiction wishes to prohibit the right to incorporate, it is within their power to issue a Local Order stating that MFDA Rule 2.4.1 (b) will not apply in their jurisdiction. We feel this is a more appropriate approach to the crafting of a solution for a number of reasons that we are pleased to set out for the MFDA.

Removing sub section 2.4.1 (b)(i) would not alter the incorporation status of advisors in Alberta as the Alberta Securities Commission has clearly stated it will not support this initiative at this time. Accordingly, the absence of this subsection would more clearly reflect the will of the majority of the Recognizing Jurisdictions, and clearly reflect the position of the Alberta Securities Commission.

In removing subsection 2.4.1 (b)(i) Alberta, could easily issue an Order striking the MFDA Rule in their jurisdiction. Advocis believes the MFDA and Recognizing Jurisdictions should draft the proposed amendment with the foresight that the concerns preventing Alberta from extending the right to incorporate to licensed salespersons in that province will eventually be addressed. It makes sense that Alberta, in issuing an Order disallowing MFDA Rule 2.4.1 (b) would attach to it a termination date, at which point the Alberta Securities Commission could extend the Order, or in the more likely event that their concerns have been addressed, allow the Order to expire, thus bringing it in line with all other Recognizing Jurisdictions and extend the benefits associated with incorporation to advisors in that province. This is a practical approach to dealing with the issue, as it is difficult to imagine that industry, the CSA, and the MFDA will not be able to address the concerns of the Alberta Securities Commission that prevent them from harmonizing their approach on this issue with all other Recognizing Jurisdictions.

The exemption orders currently issued by all Recognizing Jurisdictions, with the exception of Alberta, suspending MFDA Rule 2.4.1, has established a sense of permanence and confidence in the policy position that the Proposed Amendments attempt to codify. Advocis' concern with respect to the drafting of Rule 2.4.1 (b)(i) is that it undermines the progress that has been made on this issue and needlessly reintroduces uncertainty. This is clearly contrary to the policy position established through the various exemption orders issued to accommodate the incorporation of unregistered corporations.

A condition to incorporation contained in the proposal is that "such arrangements are not prohibited or otherwise limited by relevant securities legislation"⁶. Currently both the definition sections of most securities acts, and the registration requirements are legislative barriers to incorporation⁷. The same subsection further states, as a condition of incorporation, that the arrangements not be prohibited by, "securities regulatory authorities"⁸. We believe that business is best served through regulation that clearly indicates the long-term intention of regulators. The inclusion of subsection (b)(i) significantly weakens the confidence of stakeholders in the long-term intent of the MFDA, and, more specifically, Recognizing Jurisdictions to maintain a consistent position on this issue. Accordingly, we strongly urge the MFDA to remove this subsection and have dissenting jurisdictions issue an order suspending the payment of commissions to unregistered corporations. Such an approach is more clearly in

⁵ Currently, the only Recognizing Jurisdiction that has not suspended MFDA Rule 2.4.1 is Alberta. British Columbia, Ontario, Nova Scotia, Manitoba and New Brunswick have all suspended Rule 2.4.1.

⁶ Proposed Amendment to Rule 2.4.1 (b)(i).

⁷ This is an example of why Advocis feels the MFDA should make the point to the CSA that the Proposed Amendments to Rule 2.4.1 are part one of a two part process.

⁸ Proposed Amendment to Rule 2.4.1 (b)(i).

keeping with what we understand the policy position of the MFDA and the majority of CSA members to be.

Removing 2.4.1 (b)(i) would preserve the integrity of the Orders that the MFDA amendments are codifying. It would do so without introducing any new uncertainty and would provide a smooth transition path for Alberta once their concerns become clear to all stakeholders and regulators, and are dealt with. The requirement for a harmonized approach between Recognizing Jurisdictions, while laudable, should not become a hurdle to the best possible solution.

Advocis has one comment with respect to the drafting of the Proposed Amendments to Rule 2.4.1. We would encourage the MFDA to adopt a plain language approach in the drafting of this section. For example 2.4.1 (b) reads, “**Payment of Commissions to Unregistered Corporation.** For the purpose of this Rule, ‘unregistered corporation’ shall be understood to mean a corporation that is, itself, not registered as a dealer or salesperson. Notwithstanding paragraph (a), any remuneration, gratuity, benefit or other consideration in respect of business conducted by an Approved Person on behalf of a Member may be paid by the Member to an unregistered corporation provided that :...” Advocis would be pleased to work with the MFDA in arriving at a clearer and simpler introduction to this proposed section as we feel compliance is likely greater when rules are more easily understood by all stakeholders.

We thank you for the opportunity to present our views on this very important initiative, and remain available to meet and discuss any questions or concerns you may have.

Sincerely,



Greg Pollock
President and CEO



Kristan K. Birchard
Chair, National Board of Directors

C.c. Sarah Corrigan-Brown, Senior Legal Counsel, British Columbia Securities Commission