



## **GUIDE TO THE MFDA DISCIPLINARY HEARING PROCESS**

This Guide is intended to provide an overview of the disciplinary hearing process in cases conducted by the Mutual Fund Dealers Association of Canada (the “MFDA”). You should also review the MFDA’s Rules of Procedure (the “**Rules of Procedure**”) and sections 20 and 24 of MFDA By-law No. 1, which set out the rights and obligations of the participants in a disciplinary hearing. You can obtain a copy of the Rules of Procedure and By-law No. 1, as well as additional information about the MFDA and the disciplinary hearing process, from the MFDA’s website at [www.mfda.ca](http://www.mfda.ca).

### **I. THE MFDA DISCIPLINARY HEARING PROCESS**

#### *The Role Of The MFDA*

The **MFDA** is the recognized self-regulatory organization for mutual fund dealers in Canada. As part of its regulatory mandate, the MFDA is authorized to commence disciplinary hearings against its **Members** (mutual fund dealers) and **Approved Persons** (individuals who conduct or participate in the business of a Member, such as a mutual fund salesperson) who have allegedly engaged in conduct contrary to the MFDA’s By-laws, Rules or Policies (referred to generally as “**misconduct**”). A Member or Approved Person against whom a disciplinary hearing has been commenced is referred to as a **Respondent**. There may be more than one Respondent in a disciplinary hearing. The MFDA is permitted to commence a disciplinary hearing up to five years after the Respondent has ceased to be a Member or Approved Person.

Other parties involved in the disciplinary hearing process include MFDA Staff, the Hearing Panel and the Corporate Secretary’s Office of the MFDA, each of which has a distinct role to play in the proceeding.

**MFDA Staff** is comprised of members of the MFDA’s Enforcement Department including MFDA Investigators and MFDA Enforcement Counsel. If the MFDA has reason to believe that a Member or Approved Person has engaged in misconduct, MFDA Staff will conduct an investigation to determine whether there is sufficient evidence of violations of MFDA By-laws, Rules or Policies to justify the commencement of a disciplinary hearing. If MFDA Staff believes that there is sufficient evidence of misconduct, then MFDA Enforcement Counsel will prepare a document called a **Notice of Hearing** to commence the proceeding.

A **Hearing Panel** is usually comprised of three members of the MFDA Regional Council for the region in which the alleged misconduct occurred. The Hearing Panel is responsible for the hearing process, determining whether any misconduct occurred and if so, whether any penalties should be imposed on the Respondent. A Hearing Panel usually includes two members with securities industry experience and a “Chair” of the Hearing Panel who is a lawyer or retired judge with experience conducting disciplinary hearings. At the conclusion of a hearing, the Hearing Panel issues written reasons for its decisions concerning misconduct and penalties.

**The Corporate Secretary's Office** plays a neutral role in the hearing process with primary responsibility for organizing, scheduling and coordinating the proceedings. Members of the Corporate Secretary's Office: (i) issue the Notice of Hearing that is drafted by Enforcement Counsel; (ii) appoint the Hearing Panel and schedule all appearances before it; (iii) act as a go-between to convey all documents or communication that MFDA Staff or a Respondent wish to submit to the Hearing Panel at any time other than during an appearance before it; and (iv) publish news releases and postings to the MFDA website, giving notice to the public of each Notice of Hearing, Hearing Panel order/decision and any penalties imposed. If there is some aspect of the disciplinary hearing process that you do not understand, members of the Corporate Secretary's Office can answer general questions but they do not provide legal advice.

### ***Participation By A Respondent***

If you are named as a Respondent in a Notice of Hearing, you can participate in the hearing process by yourself or with the assistance of **legal counsel** or another person (known as an **agent**) authorized by you to represent you and speak on your behalf to MFDA Enforcement Counsel and the Hearing Panel.

### ***An Overview Of The Hearing Process***

A MFDA disciplinary proceeding usually includes most of the following important steps:

- 1) **Appointment Of A Hearing Panel** – A Hearing Panel is appointed by the Corporate Secretary's Office. (See MFDA By-law No. 1, ss. 19.9-19.13.)
- 2) **Notice Of Hearing Is Issued & Served** – The **Notice of Hearing** setting out the allegations of misconduct against each Respondent is prepared by MFDA Enforcement Counsel, issued by the Corporate Secretary's Office (formally commencing the proceeding) and **served on** (delivered to) each Respondent. (See Rule 7 of the Rules of Procedure and MFDA By-law No. 1, s. 20.1.)
- 3) **Reply Is Served And Filed By Each Respondent** – Within 20 days after receiving a copy of the Notice of Hearing, each Respondent must prepare a **Reply** responding to the allegations in the Notice of Hearing. The Reply should specify which allegations in the Notice of Hearing the Respondent admits and which the Respondent denies. The Reply should also set out the Respondent's version of the relevant facts. (For additional information on how to prepare a Reply, see Section II below.) The Respondent must ensure that the Reply is **served on** (delivered to) MFDA Enforcement Counsel and any other Respondent named in the Notice of Hearing and that 4 copies of the Reply are **filed** with (delivered to) the Corporate Secretary's Office, which will distribute copies to the members of the Hearing Panel. (See Rule 8 of the Rules of Procedure and MFDA By-law No. 1, ss. 20.2-20.4.)
- 4) **First Appearance** – The **First Appearance** of MFDA Enforcement Counsel and the Respondent(s) before the Hearing Panel is held to schedule a date for the presentation of evidence and argument at the **Hearing on the Merits** (Step 10 below) and to deal

with any other procedural matters of concern. The date, time and location of the First Appearance are stated on the front page of the Notice of Hearing. The First Appearance will usually be more than 30 days after the Notice of Hearing has been delivered to each Respondent. The Notice of Hearing will state whether the First Appearance will be held before the Hearing Panel in person or by conference call. Usually, it will not be necessary for MFDA Staff or a Respondent to present evidence or argument about the allegations in the Notice of Hearing at the First Appearance.

- 5) **Pre-hearing Disclosure By MFDA Staff** – MFDA Staff will provide each Respondent (but not the Hearing Panel) with **pre-hearing disclosure** of the information, documents and transcripts or recordings of interviews that were obtained during the course of the MFDA investigation. The pre-hearing disclosure process informs each Respondent of the information that MFDA Staff has collected that relates to the allegations in the Notice of Hearing so that the Respondent can prepare for the hearing. At the Hearing on the Merits (Step 10 below), MFDA Staff and each Respondent (collectively referred to as the “**Parties**”) will usually present some or all of the disclosed material to the Hearing Panel as evidence to support their position. Each Respondent is also entitled to receive a list of the names and addresses of witnesses that MFDA Staff intends to call to testify at the Hearing on the Merits and a transcript or summary of their anticipated testimony. (See Rules 10-12 of the Rules of Procedure.)
- 6) **Pre-hearing Disclosure By Each Respondent** – At least 14 days before the Hearing on the Merits, each Respondent must provide MFDA Enforcement Counsel and any other Respondent (but not the Hearing Panel) with pre-hearing disclosure of any additional documents or summaries of witness testimony (including testimony that the Respondent intends to give him or herself) that the Respondent intends to rely upon at the Hearing on the Merits and a list of witnesses that the Respondent may call to testify. A Hearing Panel may prevent a Respondent from calling a witness to testify or from introducing evidence at the Hearing on the Merits if the Respondent failed to disclose the information, documents or witness testimony prior to the Hearing on the Merits. (See Rules 10-12 of the Rules of Procedure.)
- 7) **Motions** – A Motion is a procedure by which MFDA Staff or a Respondent can request an Order from the Hearing Panel usually before, but also during, the Hearing on the Merits (Step 10 below). For example, the Respondent may wish to request an extension of the deadline to file a Reply. In such circumstances, the Respondent must contact the Corporate Secretary to schedule the motion and then prepare, serve and file a document called a **Notice of Motion**. The Notice of Motion should: (i) state the date and time of the motion obtained from the Corporate Secretary’s Office; (ii) specify whether the motion is to be heard in person in front of the Hearing Panel, in writing or by conference call; (iii) describe the Order requested; and (iv) set out the reasons why the order should be granted. Whoever brings a motion to request an Order from the Hearing Panel is called the **Moving Party**. If the Respondent is the Moving Party, Staff would be the **Responding Party** because Staff must respond to the motion. A Responding Party can either consent to the Order requested or make an argument to the Hearing Panel to explain why such an Order should not be made. If

the Responding Party opposes the Order that is requested, the motion will be somewhat like a mini-hearing, as both parties will be granted an opportunity to present evidence, typically in affidavit form, and written or oral argument in support of their position on the motion and the Hearing Panel will decide whether or not to grant the Order requested. A motion concerning a procedural matter can be heard by the full Hearing Panel or by one designated representative of the Hearing Panel. The Hearing Panel can grant the Order requested in whole or in part, dismiss the motion (reject the request for an Order) or adjourn (postpone) the motion. (See Rule 6 of the Rules of Procedure.)

- 8) **Settlement** – A Respondent and MFDA Staff may each initiate settlement discussions with the other at any time for the purpose of attempting to resolve the allegations of misconduct at a **Settlement Hearing** rather than at the Hearing on the Merits (Step 10 below). The parties that are seeking to settle (meaning MFDA Staff and at least one Respondent) are required to enter into a written **Settlement Agreement** that contains a description of the facts acceptable to those parties, an admission by the Respondent(s) to some or all of the allegations of misconduct and an agreement as to the penalties to be imposed on the Respondent(s). Once the Settlement Agreement has been finalized, MFDA Staff will notify the Corporate Secretary's Office, which will schedule a Settlement Hearing, usually on at least ten days notice to the public. At the Settlement Hearing, a Hearing Panel will, usually in the absence of the public, review the Settlement Agreement and hear the arguments of the parties to the settlement in support of the proposed terms of settlement. The Hearing Panel then determines whether the proposed settlement is reasonable and in the public interest. The Hearing Panel is only permitted to accept or reject the Settlement Agreement in its entirety- it is not permitted to modify the Settlement Agreement or substitute its own terms of settlement.

If the Hearing Panel accepts the Settlement Agreement, then it will issue an order imposing the agreed upon penalties on the Respondent(s) and the Settlement Agreement and the Hearing Panel's Reasons for Decision will be released to the public. (The disciplinary proceeding against the Respondent(s) who participated in the settlement is then at an end.) If the Settlement Agreement is rejected, then the Settlement Agreement will not be disclosed to the public and the parties may continue to try to negotiate a new settlement. If the parties are unable to settle the matter, then it will proceed to the Hearing on the Merits.

Settling a disciplinary proceeding usually reduces the time, expense and uncertainty involved in proceeding to the Hearing on the Merits. There is usually no harm in attempting to negotiate a settlement because even if the Respondent and MFDA Staff are unable to reach an agreement, the settlement negotiations are "without prejudice", meaning that the settlement discussions and any written proposals exchanged during the negotiations (including any draft agreements, admissions or compromises that were proposed) cannot be disclosed to anyone who was not involved in the settlement negotiations, including the Hearing Panel at the Hearing on the Merits, except with the consent of all parties to the negotiations. (See MFDA By-law No. 1, s. 24.4 and Rules 14 and 15 of the Rules of Procedure.)

- 9) **Pre-hearing Conference** – Sometimes it is beneficial for a Respondent or MFDA Staff to schedule a Pre-Hearing Conference, which is a confidential meeting between a Respondent, MFDA Staff and a Pre-hearing Conference Officer. The Pre-hearing Conference Officer will be one of the Chairs appointed to sit on MFDA Hearing Panels (but will not be eligible to sit on the Hearing Panel in the same proceeding in which s/he serves as a Pre-hearing Conference Officer). The Pre-hearing Conference Officer may be able to assist the Parties in reaching a settlement, narrowing the issues in dispute or in addressing any procedural or scheduling matters of concern. (See Rule 9 of the Rules of Procedure.)
- 10) **Hearing On The Merits** – If the Parties do not settle the disciplinary proceeding at a Settlement Hearing (Step 8 above), then the Hearing on the Merits will be held. At the Hearing on the Merits, the Hearing Panel will hear the evidence and argument of the Parties and then decide whether MFDA Staff has proven on a balance of probabilities that any Respondent engaged in misconduct. The Hearing on the Merits is like a trial. Usually, all members of the public and the media are permitted to attend. MFDA Staff and each Respondent are given an opportunity to make an opening statement, present documentary evidence, examine and cross-examine witnesses and make a closing statement summarizing the evidence that was presented and making any relevant arguments. (See Rule 13 of the MFDA Rules of Procedure.)

The Hearing on the Merits has two stages: a “misconduct phase” and, if necessary, a “penalty phase”.

- a) During the **misconduct phase**, MFDA Staff and each Respondent will have an opportunity to present evidence and make arguments about whether the Respondent engaged in the misconduct alleged in the Notice of Hearing. At the conclusion of the misconduct phase, the Hearing Panel will decide whether the evidence and argument establish that the Respondent engaged in misconduct.
- b) If the Hearing Panel determines that a Respondent(s) did engage in misconduct, then the Hearing on the Merits will continue with a **penalty phase**, during which MFDA Staff and the Respondent(s) found to have engaged in misconduct are permitted to present additional evidence and make arguments concerning the appropriate penalty to impose. The Hearing Panel then determines whether it is appropriate to impose one or more of the penalties listed in MFDA By-law No. 1, s. 24.1.1 (Approved Persons) or s. 24.1.2 (Members) on the Respondent, including: (i) a reprimand; (ii) a fine; (iii) terms and conditions on the Respondent’s authority to conduct securities related business; and/or (iv) a temporary or permanent prohibition on the Respondent’s right to conduct securities related business in the future.

If most or all of the facts are not in dispute, the Parties may be able to reduce or eliminate altogether the need to present evidence and call witnesses during either or both the Misconduct Phase and the Penalty Phase by jointly preparing a written **Agreed Statement of Facts** which can be filed with the Corporate Secretary’s Office

and considered by the Hearing Panel at the hearing. In such a case, the Parties would limit their oral presentation to arguments based on the agreed upon facts.

In addition to imposing penalties for misconduct, a Hearing Panel can order a Respondent to pay all or part of the **costs** incurred by MFDA Staff to investigate and prosecute the case. (See MFDA By-law No. 1, s. 24.2.)

11) **Reasons For Decision** – After the Hearing on the Merits, the Hearing Panel will provide written reasons for its decision which will be distributed to MFDA Staff and to each Respondent by the Corporate Secretary’s Office and posted to the MFDA website. (See MFDA By-law No. 1, ss. 20. 7 and 24.5.)

12) **Review Of Decision** – If MFDA Staff or a Respondent believes that the decision of the Hearing Panel was incorrect or unfair, a review of the decision can be requested. In a case involving a Member, the decision can be reviewed by the Board of Directors of the MFDA in accordance with the process described in Rules 16 and 17 of the MFDA Rules of Procedure (See also MFDA By-law No. 1, s. 24.6.) In a case involving an Approved Person or a decision of the MFDA Board of Directors, the decision can be reviewed by the securities commission in the province where the hearing took place in accordance with procedures established in the province’s securities legislation. You can contact your provincial securities commission for details (See MFDA By-law No. 1, s. 26.) Strict time limits (usually 30 days from receipt of the decision) usually apply for filing a request to have a MFDA Hearing Panel decision reviewed. (See for example Rule 16.1 of the Rules of Procedure.)

## **II. ADDITIONAL INFORMATION FOR RESPONDENTS**

### **The Notice of Hearing**

The Notice of Hearing will state the date, time and location of the First Appearance and set out the significant facts and allegations that MFDA Staff intends to prove.

If you are a Respondent named on the front page of the Notice of Hearing, a copy of the Notice of Hearing will usually be delivered directly to you or to the lawyer or agent that is representing you. If MFDA Staff is unable to locate you or is having difficulty providing you with a copy of the Notice of Hearing, MFDA Staff can seek directions from the Hearing Panel as to how to notify you about the proceeding.

When a copy of the Notice of Hearing is sent to you, copies are also sent to: (i) the Member that you were affiliated with at the time of the alleged misconduct; (ii) the provincial securities commissions; and (iii) complainants and other important witnesses who provided information to MFDA Staff about your conduct. The MFDA also publishes the Notice of Hearing on its website and notifies the media about the hearing. Individuals who receive a copy of the Notice of Hearing but are not named as a Respondent do not have to respond to the Notice of Hearing but can attend the hearing.

## **Service And Filing Of Documents**

In order to ensure that MFDA Staff and each Respondent receives a copy of important documents like the Notice of Hearing and each Respondent's Reply, the Rules of Procedure require certain documents to be delivered by the author of the document to the other Parties. This delivery process is referred to as **service** of the document. If the Rules of Procedures require you to **serve** a document, then you must ensure that each of the other Parties to the proceeding receives a copy of the document by way of personal delivery, mail, courier, fax or e-mail as described in Rule 4.3 of the Rules of Procedure.

In most cases, a copy of a document that is required to be served must also be delivered to the Corporate Secretary's Office, which in turn will provide copies to the members of the Hearing Panel. The process of delivering a copy of the document to the Corporate Secretary's Office in this way is called **filing**. If you are required to file a document, you must provide four copies of the document to Corporate Secretary's Office by personal delivery, courier, mail or fax (as described in Rule 4.6 of the MFDA Rules of Procedure) to: The Corporate Secretary's Office of the MFDA, 121 King Street West, Suite 1000, Toronto, Ontario, M5H 3T9.

## **You Must Deliver A Reply To The Allegations In The Notice of Hearing**

The first thing that you are required to do after receiving a Notice of Hearing is to serve and file a document called a **Reply** (as noted in Section I, Step 3 above). The purpose of the Reply is to identify which facts and allegations you dispute among those listed in the Notice of Hearing. In your Reply, you must set out your response to each allegation listed in the Notice of Hearing and provide your own description of the relevant facts.

The Reply should be prepared using consecutively numbered paragraphs in a form similar to the Notice of Hearing. A blank copy of a Reply that you can complete can be copied or printed from the Enforcement section of the MFDA website. Generally, the form of a Reply should follow the format described below:

- The first paragraph of your Reply should list the paragraph numbers in the Notice of Hearing that contain facts or allegations that you admit are true.
- The second paragraph of your Reply should list the paragraph numbers in the Notice of Hearing that contain facts and allegations that you deny because you believe them to be incorrect.
- The third paragraph of your Reply should list the paragraph numbers in the Notice of Hearing that contain facts or allegations that you deny because you have no knowledge of them (e.g. a fact alleged about a client or another Respondent that you know nothing about).
- Since it is possible that a paragraph in the Notice of Hearing may contain, for example, some facts or allegations that you admit and some that you deny, you may wish to include the paragraph in more than one category and identify the specific facts or allegations relevant to each category.

- After you have stated your position in respect of each paragraph in the Notice of Hearing, any additional paragraphs in your Reply should be used to set out your version of events and in particular, any facts relevant to:
  - (i) why you disagree with any of the allegations that MFDA Staff has made against you;
  - (ii) defences to MFDA Staff's allegations that you intend to present at the hearing; and
  - (iii) the appropriate penalty to impose on you if findings of misconduct are made against you.

You should bear in mind that you may be required to present evidence (such as your own testimony or the testimony of other witnesses and/or documents) at the disciplinary hearing to establish any of the facts or assertions stated in your Reply. You must also ensure that any evidence you intend to rely on at the Hearing on the Merits has been disclosed to all other Parties.

Your Reply must be served on MFDA Enforcement Counsel and any other Respondents and filed with the Corporate Secretary's Office **within 20 days** of the date that you receive the Notice of Hearing. Rule 8 of the Rules of Procedure contains more information about the process of preparing, serving and filing your Reply.

### **The Consequences Of Failing To Deliver A Reply Or Attend The Hearing**

If you fail to serve and file a Reply, Rule 8.4 of the Rules of Procedure and MFDA By-law No. 1, s. 20.4 permit the Hearing Panel to:

- proceed with the hearing in your absence;
- treat any or all of the allegations set out in the Notice of Hearing as proven and immediately impose appropriate penalties and order costs against you; and
- limit your right to present evidence or call witnesses at the Hearing on the Merits.

According to Rule 7.3 of the Rules of Procedure and s. 20.4 of MFDA By-law No. 1, the same consequences may apply if you fail to attend the First Appearance on the date and at the time and location stated on the front page of the Notice of Hearing or if you subsequently fail to attend the Hearing on the Merits.

### **Settlement Or A Hearing On The Merits**

At any time after being served with the Notice of Hearing, you may contact MFDA Enforcement Counsel to initiate settlement discussions, as described in Section I, Step 7 above. If you want to dispute any of the facts or allegations in the Notice of Hearing or if you are unable to reach a Settlement Agreement with MFDA Staff, then the matter will proceed to the Hearing on the Merits, at which time you will be given an opportunity to present evidence and make arguments in support of your position, as described in Section I, Step 10 above.

## **Recording Devices Prohibited**

The use of recording devices inside a hearing room at any MFDA proceeding without the prior written consent of the MFDA is strictly prohibited. No person shall use, operate or maintain on their person any electronic recording device of any description inside a hearing room without the consent of the MFDA. Any person found to be in possession of an electronic recording device without authorization may be ejected from the hearing room, asked to give the device to the Registrar until the appearance is complete, and/or asked to destroy or hand over all copies of any recordings of the proceedings that were made.

Any request to make a visual or audio recording of a hearing should be made in writing to the MFDA's Corporate Secretary at least 5 days before the day of the hearing. If the request is granted, the Corporate Secretary may impose restrictions and/or conditions on any such recording. Any person permitted to make a visual or audio recording will also be subject to the direction of the Chair of the Hearing Panel and shall not engage in any activity that may disrupt the proceedings.

A party to a proceeding, or any other interested person or member of the public, may obtain copies of the transcripts of a proceeding from the Corporate Secretary, subject to any order of the Hearing Panel marking the transcript or parts thereof as confidential. Copying charges of \$0.25 per page apply.

## **Contact The MFDA If You Have Questions**

If you have any additional questions concerning the disciplinary process, you can contact the MFDA Corporate Secretary's Office at: 121 King Street West, Suite 1000, Toronto, Ontario, M5H 3T9 or by telephone in Toronto at (416) 361-6332 ext. 7431 or toll free at: 1-888-466-6332 ext. 7431 or by fax at: (416) 361-9781. You are also welcome to contact the MFDA Enforcement Counsel whose name appears in the Notice of Hearing by placing a call to the MFDA office in Toronto at either the local or toll free number listed above.

*This Guide is intended to provide an overview of the MFDA's disciplinary hearing process. Please consult the MFDA's Rules of Procedure and sections 20 and 24 of MFDA By-law No. 1 for further clarification of the rights and obligations of Respondents in the disciplinary process. This Guide is not intended as a substitute for legal advice. You are encouraged to consult a lawyer of your own if you are a Respondent in a disciplinary hearing.*