



Contact: Paige L. Ward
Director of Policy and Regulatory Affairs
Phone: 416-943-5838
E-mail: pward@mfda.ca

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MFDA Bulletin

Policy

For Distribution to Relevant Parties within your Firm

Rule 2.4.1 (Payment of Commissions to Non-Registered Entities) – Extension of Suspension to March 31, 2010

The securities regulatory authorities in British Columbia, Nova Scotia, Ontario and Saskatchewan (the “Applicable Jurisdictions”) have approved an extension of the suspension period for Rule 2.4.1 (Payment of Commissions to Non-Registered Entities) until March 31, 2010 with a requirement for the MFDA to submit proposed Rule amendments to Rule 2.4.1 by May 31, 2009.

MFDA Rule 2.4.1 requires that any remuneration in respect of business conducted by an Approved Person on behalf of a Member be paid by the Member (or an affiliate) directly to and in the name of the Approved Person. As a result, provided that certain conditions are satisfied, Members with Approved Persons registered in Applicable Jurisdictions are permitted to pay commissions on behalf of those Approved Persons to a corporation that is not registered as a dealer or a salesperson, notwithstanding the provisions of Rule 2.4.1.

As described in MFDA Bulletin #0325-P, published on September 9, 2008, the MFDA submitted an application to the Applicable Jurisdictions to amend the Recognition Orders to extend the suspension of Rule 2.4.1 to December 31, 2010. The application and related documents were published for comment on August 29, 2008, with the comment period expiring on September 29, 2008. The MFDA received seven comment letters with respect to the application. A summary of comments and the MFDA response is attached as Schedule “A”.

In the Joint Notice of Approval issued on December 19, 2008, the Applicable Jurisdictions expressed the view that the March 31, 2010 expiry date would provide sufficient time for the recognizing regulators to consider the regulatory impact of the MFDA rule proposal and for the MFDA to implement the resulting approved amendments. The Applicable Jurisdictions have indicated that if the MFDA does not meet the May 31, 2009 deadline to submit a rule proposal,

the Applicable Jurisdictions will provide a status update on the suspension of Rule 2.4.1 and will inform the industry which jurisdictions will be bringing Rule 2.4.1 into force on April 1, 2010.

The Alberta Securities Commission has not suspended Rule 2.4.1 and, accordingly, in Alberta commissions must be paid directly to the registered salesperson. The Manitoba Securities Commission and New Brunswick Securities Commission suspended Rule 2.4.1 in Manitoba and New Brunswick until such time as a decision or legislative amendments have been made with respect to the payment of commissions to non-registered entities.

Next Steps

MFDA staff, as requested by the Applicable Jurisdictions, will consider what Rule amendments are appropriate, which may include codifying the MFDA's current practice of directed commissions.

Further Information

The Joint Notice of Approval and the respective Variation Orders and Amended Recognition Orders of the Applicable Jurisdictions extending the suspension of MFDA Rule 2.4.1 can be accessed at:

http://www.osc.gov.on.ca/MarketRegulation/SRO/mfda/ro/sro-mfda_20081219_amd-cert-ro.jsp

http://www.osc.gov.on.ca/Regulation/Orders/2008/ord_20081128_225_mfda_variation.jsp

<http://www.bcsc.bc.ca/comdoc.nsf/comdoc.nsf/webpolicies/CF370070A74A1EFB882575240059362E?OpenDocument>

<http://www.gov.ns.ca/nssc/whatsnew.asp#rules>

<http://www.sfsc.gov.sk.ca/ssc/gennews2008.shtml>

DOCs#157799

SCHEDULE A

Summary of Public Comments Respecting Proposed Amendments to the MFDA's Recognition Order to Extend the Suspension of Rule 2.4.1

On August 29, 2008, the British Columbia Securities Commission, Nova Scotia Securities Commission, Ontario Securities Commission and Saskatchewan Financial Services Commission (collectively "Applicable Jurisdictions") published Proposed Amendments to the MFDA's Recognition Order to Extend the Suspension of Rule 2.4.1 for a 30-day public comment period that expired on September 29, 2008.

Seven submissions were received during the public comment period:

1. Advocis
2. IGM Financial Inc. ("IGM")
3. Independent Financial Brokers of Canada ("IFB")
4. The Investment Funds Institute of Canada ("IFIC")
5. The Investment Industry Association of Canada ("IIAC")
6. Raymond James Ltd. ("RJL")
7. Rogers Group Investment Advisors Ltd. ("RGIA")

Copies of comment submissions may be viewed on the MFDA's website at: www.mfda.ca.

The following is a summary of the comments received, together with the MFDA's responses.

Support for Extension of Suspension

All of the commenters supported an extension of the suspension of Rule 2.4.1.

Recommendation for Permanent Legislative Solution

Advocis, IGM, IFB, IIAC and RGIA expressed support for the MFDA's request to extend the suspension of Rule 2.4.1 as an initial step however recommended that the focus be on creating a structure to allow Approved Persons to provide their services through a personal corporation. IGM, IIAC and RJL commented that such a structure should not mirror the current MFDA model of directed commissions but instead be designed along the lines of the regulations that allow various professionals and other occupations to self-incorporate.

Advocis recommended that a permanent solution involve legislative amendments to provincial securities acts to permit all advisors to carry on securities related activities through incorporated entities.

IGM stated that, although the existing directed commissions approach by the MFDA works, albeit imperfectly, legislation that allows professionals and other occupations to incorporate

addresses the issues in a more elegant and effective way by establishing the requirements directly in law as opposed to doing so indirectly through contract and undertakings.

IGM noted that while allowing mutual fund advisors to use non-registered personal corporations to receive compensation from their dealers does raise potential concerns with respect to supervision and liability to clients, these issues are addressed by current MFDA Rules.

IGM and RJL also noted; however, that the directed commission model is not entirely satisfactory, since it is not the best way to implement the financial planning objectives that lead advisors to use a personal corporation. IGM noted that the directed commission model is not the optimum one for addressing the Canada Revenue Agency requirements. RJL expressed concern that the directed commission model does not permit financial advisors to take advantage of the benefits of the incorporation structure.

IIAC noted that current securities legislation across Canada provides that only individuals may engage in registrable activities and, notwithstanding the suspension of MFDA Rule 2.4.1, securities regulators have been clear that the commissions being redirected to the personal corporation are being earned by the Approved Persons conducting all activities requiring registration and not by personal corporations. IIAC expressed the view that the tax implications of the redirection model are unclear and continuation of this model would create both uncertainty for advisors and the possibility that they would not be able to take advantage of all of the benefits associated with the corporation structure.

IFB supported the MFDA's application to have Rule 2.4.1 suspended and develop a revised Rule. IFB noted that the current practice of provincial securities regulators individually approving extensions to the suspension of Rule 2.4.1 has led to uncertainty and confusion for Approved Persons and dealers. The IFB further noted that not all provinces have suspended the Rule and even in jurisdictions where the Rule has been suspended, some dealers have refused to pay commissions to an Approved Person's personal corporation until the Rule is permanently removed.

Need for CSA/SRO/Industry Committee

All the commenters recommended the establishment of a joint initiative involving the Canadian Securities Administrators ("CSA"), the self-regulatory organizations ("SROs") and industry to address the issue of salesperson incorporation.

IIAC expressed the view that any legislative amendment with respect to the incorporation of salespersons should ultimately require the involvement of the CSA, Investment Industry Regulatory Organization of Canada ("IIROC") and the MFDA in order to be successful. IIAC, RJL and RGIA recommended that a committee be established with representatives from the MFDA, IIROC, IIAC, CSA and the industry to finalize, in a timely manner, a rule that achieves an appropriate regulatory, corporate and tax structure which would permit advisors to incorporate.

IFIC offered to convene a group of industry experts to meet with regulators to explore possibilities for achieving durable change to Rule 2.4.1 that will meet the needs of all stakeholders.

IGM suggested that the MFDA and the CSA work together to develop harmonized rules to apply across Canada using legislation that allows professionals and other occupations to incorporate as a model.

Advocis commented that it is important for the Recognizing Jurisdictions and the other CSA members to be at the table in devising the appropriate solution, noting that if a permanent solution involves a legislative proposal, then the MFDA will likely not present one in any detail as this is beyond its mandate.

IFB expressed disappointment that the CSA chose not to adopt a national solution to the issue of payment of commissions through the registration reform initiative and instead directed the MFDA to consider the merits of extending the suspension deadline and develop wording for a proposed Rule change.

Deadlines for Submission of Proposed Rule Amendment and Expiry of Suspension

IFIC expressed support for the request for an extension of the suspension of Rule 2.4.1 until December 31, 2010 and commented that the approach taken by Ontario, Nova Scotia and Saskatchewan is needlessly constraining in light of the need for extensive further discussion of proposed alternatives.

Advocis expressed concern that possible failure on the part of the MFDA to meet the May 31, 2009 deadline set by the Ontario Securities Commission, Nova Scotia Securities Commission and Saskatchewan Financial Services Commission could have significant and costly consequences for the industry. Advocis noted that a failure to meet the May 31, 2009 deadline could lead to lack of harmonization as some jurisdictions may continue to extend the suspension and others may choose to enforce the existing Rule. Advocis suggested that the May 2009 deadline is reasonable as long as advisor incorporation becomes a priority and the issue is dealt with appropriately by MFDA and CSA members.

Advocis recommended that any variation of the current Order allow the Order to continue until it is either rescinded or a permanent solution is adopted. Advocis also noted that adopting an ongoing interim approach to the suspension until a permanent solution is implemented would provide financial advisors and dealers with a higher level of comfort and lessen the compliance burden in that it would be one less regulatory item to monitor.

IFB commented that while it supports an early resolution of the issue, it would be concerned if the Rule expired in advance of the MFDA amendment being available for public comment.

IIAC and RGIA expressed general support for the MFDA's request for the suspension of Rule 2.4.1 until December 31, 2010 along with the direction of some of the Applicable Jurisdictions to

the MFDA to submit its proposed amendments to Rule 2.4.1 by May 31, 2010. IIAC and RGIA also commented that, in order to promote consistency and a level playing field in the Canadian financial services industry, any changes to Rule 2.4.1 should be considered along with proposed changes to IIROC rules with a view to create a model that can operate for both the mutual fund and securities industries in a seamless and effective manner.

Length of Comment Period

IFIC expressed the view that the 30-day comment period provided for this proposed amendment is not sufficient to provide meaningful comments on this complex issue. IFIC suggested that the MFDA allow for up to 120 days of public comment on new or changed regulations of material impact so that there can be an adequate sounding of the views of industry and the general public.

MFDA Response

MFDA staff acknowledges industry concerns with respect to the lack of regulatory harmonization regarding this matter and agrees with comments expressing the need for a permanent solution that is harmonized across the industry and all jurisdictions. With respect to the approach to be adopted in arriving at such a solution, we acknowledge the comments of the industry that the preferred solution is for an incorporated salespersons model. We further acknowledge comments of IGM that the directed commissions approach, while not the optimum solution, is workable. We agree with the commenters that legislative amendments allowing for incorporated salespersons are beyond the jurisdiction of the MFDA and would need to be adopted and implemented by CSA members.

We recognize and agree with the comments expressing the need for equal and active participation by the CSA, SROs and industry stakeholders in arriving at a timely and appropriate solution. The MFDA is committed to working with the CSA, other regulators and industry stakeholders on any joint CSA/SRO/industry committee established by the CSA to resolve this issue.

MFDA staff also acknowledges industry comments emphasizing the need for an appropriate solution to be developed within the timelines established by the CSA or for the suspension of Rule 2.4.1 to be extended until such time as a permanent solution is reached. As noted, the MFDA is committed to working with the CSA members and other regulators and industry stakeholders towards the development of an appropriate and timely solution. In the interim, the MFDA will continue to consider what amendments to MFDA Rules, if any, are appropriate to address this issue.

With respect to the comment regarding the appropriate length of the comment period, the MFDA will recommend to the CSA that a longer comment period (60 – 120 days) be established for new or amended regulations of material impact going forward.