

October 6, 2011

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RE: Request for Comment on Proposed Amendments to MFDA Rule 2.2.1 (“Know-Your-Client”) and Policy No. 2 *Minimum Standards for Account Supervision*

FAIR Canada is pleased to offer comments on the amendments proposed by the Mutual Fund Dealers Association of Canada (“MFDA”) intending to clarify that the suitability obligations in MFDA Rule 2.2.1 (“Know-Your-Client”) and MFDA Policy No. 2 (*Minimum Standards for Account Supervision*) apply equally to leverage strategies, and codifying minimum standards for Members and Approved Persons in assessing the suitability of client leveraging contained in MFDA Bulletin #0487-P published on July 11, 2011 (the “Proposed Amendments”).

FAIR Canada is a national, non-profit organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

FAIR Canada Comments and Recommendations – Executive Summary:

1. FAIR Canada supports the Proposed Amendments which will clarify that suitability obligations apply to leverage strategies and will prescribe minimum standards in assessing suitability of leverage strategies.
2. FAIR Canada believes that some Approved Persons and their firms push consumers to borrow money to invest (i.e. leverage) by presenting a misleading picture of the risks and benefits of leverage. This results from the misalignment between the interests of the financial intermediary and those of the investor. FAIR Canada cautions that the industry must present the risks associated with an investment strategy that incorporates leverage clearly, fully, and explicitly to investors in language the client can understand. Specifically, marketing materials should not be permitted to play down the associated risks.
3. FAIR Canada recommends a requirement for full disclosure to the client of commissions and other

remuneration that would be paid to the Approved Person/intermediary as a result of the use of leverage by the client.

4. FAIR Canada views the minimum criteria for leverage suitability outlined in the Proposed Amendments to be too low to adequately protect investors. FAIR Canada recommends that there be a presumption that leverage is unsuitable for retail investors, and thus place the onus on salespeople recommending leverage to prove that leverage is in fact suitable for that client. FAIR Canada calls for additional or increased protections relating to investment knowledge; risk tolerance; net worth; gross income; employment status; and ability to withstand loss.
5. FAIR Canada recommends that Canadian securities regulators, including the MFDA and IIROC, endeavour to improve investor protection by adopting a Clients First Model, which would require that all client recommendations be in the best interest of the investor, rather than requiring mere suitability which is a concept that is not understood by consumers and which can be misleading.
6. FAIR Canada proposes a certification requirement, which would oblige Approved Persons to certify, at the time of a leverage recommendation, that they have explained the risks associated with leverage to the client and certify their belief that the client understands the associated risks. The client would acknowledge that the risks have been explained and are understood. We suggest a form for such certification in Appendix 1. The certification form proposed is an amended version of Appendix “B” to MFDA MR-0074 (long form leverage risk disclosure).
7. FAIR Canada is concerned about the absence of branch and head office supervisory requirements for leveraged trades and leverage recommendations relating to RRSPs and RESPs and recommends that review by branch or head office be required.

1. FAIR Canada supports requirements for leverage suitability assessment

- 1.1. FAIR Canada endorses the proposed amendments to MFDA Rule 2.2.1 that would explicitly require Members and Approved Persons to ensure that:
 - a) each recommendation to borrow to invest is suitable for the client;
 - b) a client is advised where a transaction proposed by that client, involving the use of borrowed funds, is not suitable; and
 - c) an assessment of the suitability of the use of borrowing to invest is undertaken upon certain triggering events.
- 1.2. Although the MFDA notes that it has always interpreted Rule 2.2.1 as including a requirement to assess leverage suitability, we believe that expressly requiring an assessment of leveraging suitability, including at the time of prescribed events, will enhance investor protection. Leverage magnifies the risk associated with a portfolio. As stated in the MFDA’s Leverage Supervision Guide, “[l]everaging is likely unsuitable for unemployed, low income, self-employed (i.e. those with unstable income) or retired individuals”. It is essential that, at a minimum, leverage is evaluated for its suitability for the client. FAIR Canada believes it is important for MFDA Rules to expressly require suitability assessments of recommendations to borrow to invest or transactions that involve the use of borrowed funds.

- 1.3. **In 2010, the New Brunswick Securities Commission issued a report on its review of leverage practices within New Brunswick.¹ The report noted a positive correlation between files that were considered to be aggressive² and files that were noted in a loss position. A high positive correlation was also observed between unsuitable investments and loss experienced.** Both these observations were said to highlight the risk involved in leveraging accounts and stated “[t]hese statistics suggest that when a client account is not being reviewed appropriately for suitability, clients will most likely experience consequences of inappropriate asset allocation.”³ FAIR Canada believes that these observations highlight the importance of assessing leveraging suitability.
- 1.4. MFDA By-laws, Rules and Policies are prescriptive while Notices (including guidelines) are non-binding instruments which are intended to provide interpretation or guidance only. By amending Rule 2.2.1 and Policy No. 2, the MFDA will codify minimum standards in assessing the suitability of client leveraging, making them requirements rather than suggested interpretations. FAIR Canada fully supports codifying standards in order to enhance investor protection.

2. Investors need clear disclosure of risks associated with leverage

- 2.1. FAIR Canada believes that some Approved Persons and their firms suggest the idea of leverage to consumers and persuade consumers to borrow money to invest (i.e. to leverage) by presenting a misleading picture of the risks and benefits of leverage. Advisors and firms are incited to do so because of the misalignment between the interests of the financial intermediary and those of the consumer.
- 2.2. Firms and advisors benefit from convincing their clients to invest using borrowed funds in a number of ways. Clients’ leveraging results in increased commissions, charges, and fees for the firm and advisor. It also increases the amount of invested funds that that the firm and advisor have to manage.
- 2.3. Investment loans are highly profitable for the financial institutions that make such loans. Firms and advisors benefit from generating such business for associated firms, particularly in firms with banking arms.
- 2.4. Given this misalignment of interests, FAIR Canada believes it is essential that, at a minimum, the suitability standard apply to any strategy or investment involving leverage.
- 2.5. Some leverage marketing materials play down the risks associated with using leverage to invest in a way that misleads investors. For example, on RBC Wealth Management’s website, an article called “Make More of Your Time & Money” includes the following information regarding leverage:

Leverage money to invest more profitably

Leverage is a powerful concept. It lets you use one dollar to control more than one dollar. You use leverage when you buy a house or when you finance a car. You have the asset but you’ve had to put up only a fraction of the price.

You can do the same thing with investing – it’s called investing on margin – and it allows your investment dollars to go farther.

¹ Regulatory Affairs Division New Brunswick Securities Commission, “Leverage Sweep Industry Report” (June 2010), online: < <http://www.nbsc-cvmnb.ca/nbsc/docs/2010-08-03-Sweep-Report-FINAL-EN-web.pdf>>. Note that this review covered both MFDA and IIROC member firms.

² In the report, aggressive referred to leveraged accounts where staff of the NBSC would question the merits of allowing a particular client to use leverage as part of their investment strategy.

³ *Supra* note 1 at page 12.

Once you qualify for a margin account with your broker, you would be able to borrow money against your marginable securities, which can be anything from GICs and money market instruments to stocks, bonds and mutual funds.

You can typically borrow up to 50% of their value. So if you had \$50,000 worth of marginable securities, you could borrow up to \$25,000 against them.

You can then use that \$25,000 to invest in anyway you like. If the value of your investments increases by more than the interest rate on your margin loan, you're ahead of the game.

On the other hand, if the value of your investments goes down, or if the value of the marginable securities you borrowed against goes down, you may receive a "margin call", requiring you to deposit more funds to make up for the lost value.

Investing can be risky. Investing with borrowed money increases the risk. If you're going to use this strategy, you should feel comfortable about investing using credit.

For many investors, the advantages can often outweigh the risks.

Simply put, investing on margin may not be appropriate for all investors. You should always consider your time frame, asset allocation and your risk tolerance. In short, only you know whether a margin strategy is right for you.⁴ [Bolded emphasis added by FAIR Canada.]

- 2.6. The "warnings" in the above excerpt fail to inform investors of the true extent of the risk of leveraging, particularly the fact that leveraging magnifies losses. The marketing focuses on the advantages rather than the risks. FAIR Canada regards this marketing material to be a misleading statement, per the MFDA's Member Regulation Notice "Misleading Communications Regarding Leverage" (MR-0070)⁵. Specifically, we believe it includes "statements that promise returns but provide inadequate disclosure of downside risk or potential negative returns", which the MFDA lists as an example of misleading communications.
- 2.7. Framing the potential losses in terms of a possible margin call disregards the potential downside of borrowing to invest. Likening a financial investment strategy that incorporates leveraging to borrowing to finance the purchase of a car or a house completely mischaracterizes the risks inherent in borrowing to invest and is an irresponsible analogy in this context.
- 2.8. While this is merely one example of marketing of leverage by a large Canadian investment firm, it is our belief that the risks of leverage are not being clearly conveyed to many Canadian investors. **The risks associated with an investment strategy that includes leverage are too significant to not require firms and advisors to present them clearly, fully, and explicitly to investors in language they will understand, regardless of whether they are presented in marketing materials, during investment discussions, or in any other manner.**
- 2.9. In particular, FAIR Canada views instances of advisors encouraging seniors to use leveraging strategies to be particularly egregious.
- 2.10. Suggesting the idea and encouraging investors to borrow against their homes is of particular concern to FAIR Canada. **In our view, it would not be appropriate for the vast majority of the population to borrow against their home to invest, particularly since the downside would**

⁴ RBC Wealth Management, "Make More of Your Time & Money", online: <<http://www.rbcfinancialplanning.com/RBC:uNHu56wWAAsAC3FoMcwAAA3/IP-leverage-money-invest-profitably.html>>.

⁵ Mutual Fund Dealers Association of Canada, "Member Regulation Notice: Misleading Communications Regarding Leverage" (MR-0070) (May 12, 2008), online: <<http://www.mfda.ca/regulation/notices/MR-0070.pdf>>.

involve jeopardizing their home at a time at which they would have already incurred significant investment losses. In the rare case where it would be appropriate for a retail investor to borrow against their home to invest, they should be required to obtain independent legal advice prior to doing so.

3. Full disclosure of commissions and other remuneration is essential

- 3.1. Given the misalignment of interests outlined in section 2 above, it is essential that investors are made aware of incentives for financial intermediaries to recommend that they borrow for the purposes of investment.
- 3.2. FAIR Canada recommends that, at any time the use of leverage is recommended to a client, intermediaries be obligated to disclose the amount of additional commissions and other remuneration that they (and any other related entity) would be paid as a result of the leverage. This requirement should be in addition to the full disclosure of commissions and other remuneration from the investment products recommended.

4. Leverage should be presumed unsuitable, criteria for leverage suitability are too low

- 4.1. **FAIR Canada recommends that there be a presumption that leverage is unsuitable for retail investors, and thus place the onus on salespeople to prove that leverage is in fact suitable and that the client understands the risks.** We believe that requiring salespeople to demonstrate that leverage is suitable for a particular retail investor will increase investor protection; FAIR Canada anticipates that placing the onus on salespeople could address some of the issues outlined in section 2 above relating to a misalignment of interests. Leverage should be considered to be “bad” for retail investors generally, with exceptions in cases where it is clear that the investor has a sufficient tolerance for risk to take on a particular amount of leverage. Salespersons could address the onus by completing the certification referred to in section 6 below.
- 4.2. FAIR Canada views several of the minimum criteria outlined under Leverage Suitability in MFDA Policy No. 2 (*Minimum Standards for Account Supervision*) that the MFDA suggest require further supervisory review and investigation to be too low to adequately protect investors.

Investment Knowledge

- 4.3. **FAIR Canada recommends that, in order to use leverage to invest, retail investors be required to meet a minimum level of investment knowledge regarding financial markets and the risks associated with leverage.** This knowledge could be independently certified, or certified by dealers who are members of the MFDA, who are backed by a compensation fund and subject to a strict liability standard. Meeting a minimum knowledge requirement will protect investors by ensuring that those who use such a strategy are aware of the inherent risks.

Risk Tolerance

- 4.4. **FAIR Canada recommends that the use of leverage be further restricted by only assessing it to be suitable for those investors who have a high risk tolerance.** The use of leverage amplifies the risk of any investment. An investor using a leveraging strategy would need to invest in a product with expected returns equal to the cost of borrowing in order to be expected to break even. An investor would need an even higher return (and would thus have to take on higher risk) for the strategy to be profitable. The use of leverage magnifies the risk associated with the investment, and should only be considered suitable for investors with a high risk tolerance.

Net Worth

4.5. FAIR Canada questions the applicability of a net worth assessment in evaluating leverage suitability, since many people have high net worth due to the value of their primary asset – their home. **In our view, net worth that includes a client’s home should only be used to determine whether or not leverage is appropriate in rare cases, where borrowing against the home is appropriate.** As we stressed above, FAIR Canada believes it would only be appropriate to allow investors to leverage their house for investment purposes in rare cases, where investors fully understand all the risks, have a high risk tolerance, and the amount invested does not exceed a set threshold; for example, five percent of the net value of the property (net value being the market value of the property, less the mortgage, any lien, or other encumbrance or charge against the property).

Gross Income

4.6. FAIR Canada also questions whether total debt and lease payments that exceed 35% of gross income is an appropriate figure to trigger further supervisory review and investigation. We question why this would be based on gross income (as opposed to net) and believe the threshold to be too high. **FAIR Canada recommends that the minimum criteria be amended to “total debt and lease payments that exceed 20% of the client’s net income”.**

Employment Status

4.7. “Leverage is likely unsuitable for... retired individuals.”⁶ The suitability of leveraging strategies for retired individuals or those approaching retirement should always be subject to further supervisory review and investigation. In FAIR Canada’s view, the use of leverage for retired individuals or those approaching retirement would only be appropriate in exceptional cases. According to the Autorité des marchés financiers (the “AMF”), “[leveraging] is not suitable for older investors or those approaching retirement who seek to maximize income and preserve capital.”⁷ **An additional minimum criterion that requires further supervisory review where the investor is retired or within 5 years of retirement should be added to the Leverage Suitability assessment under Policy No. 2.**

Ability to Withstand Loss

4.8. FAIR Canada recommends the addition of a new minimum criterion that measures the investor’s ability to withstand loss. As outlined in the AMF’s leverage fact sheet, investors should “[k]now exactly how much money [they] would lose in a worse-case scenario”⁸. It is important for investors to determine whether they can afford to lose the collateral they put up for the loan before making the decision to borrow to invest. This is in line with the recommendation in Kenmar Associates’ submission that loss tolerance be added to the Rule.

5. Canadian securities regulators need to adopt a Clients First Model

5.1. FAIR Canada commends the MFDA for recognizing the risks leverage poses to investors and for taking steps to ensure its Members and Approved Persons are provided with guidance with respect to leverage. FAIR Canada is pleased that the MFDA’s requirements go beyond those of the

⁶ Mutual Fund Dealers Association, “Leverage Supervision Guide” (May 19, 2010), online: <http://www.mfda.ca/regulation/forms/Leverage_Guide.pdf>.

⁷ Autorité des marchés financiers, “Borrowing to invest: Not a strategy for everybody”, online: <<http://www.lautorite.qc.ca/en/borrowing-to-invest.html>>.

⁸ *Supra* note 7.

Canadian Securities Administrators (“CSA”) in National Instrument 31-103. **FAIR Canada believes that the CSA needs to address the issue of leverage in NI 31-103 in order to ensure the protection of all investors, not just those of MFDA Members.**

- 5.2. Recognizing that the proposed leveraging suitability requirements go beyond the suitability requirements provided in NI 31-103, FAIR Canada is not satisfied that current suitability and know-your-client rules provide adequate investor protection. We continue to encourage all Canadian regulators to implement a Clients First Model, which would require that all client recommendations be in the best interests of the client, rather than simply requiring that they be suitable. FAIR Canada believes that such a change is essential to remedying the imbalance and misalignment of interests and expectations in current registrant-client relationships.
- 5.3. Implementing a Clients First Model would better protect investors from inappropriate uses of leverage. Such a model could be introduced as an element of suitability, which could reduce the amount of time it would take to implement such a standard.
- 5.4. The fundamental principle of the Clients First Model would be a general rule stating that, in all aspects of their dealings with their retail investor clients, including recommendations, compensation practices, disclosure, management of conflicts of interest, and all ongoing aspects of the client relationship (such as performance reporting), financial service providers must put the interests of clients foremost.
- 5.5. Suitability requirements are not sufficient to provide an acceptable level of investor protection. Any industry participant who professes to be an advisor purporting to provide financial advice or investment recommendations should be required to act in the best interest of their client – that is, to put the client’s interests ahead of their own interests and those of their firm.
- 5.6. The current obligations of financial service providers are not aligned with the expectations of investors. Under the existing framework, registrants are often compensated and incentivized to sell products that may be “suitable” for a client, but not necessarily in the client’s best interests. This is particularly true of products with high fees and commissions that are not clearly disclosed to investors. It is important that advisors not mislead investors as to the true nature of the relationship through marketing and advertising (including titles used by sales representatives).
- 5.7. **The Retail Investor Focus Group Report, commissioned by the OSC’s Investor Advisory Panel (the “IAP”), found that “[o]verwhelmingly, participants put unconditional confidence and trust in their advisor. Advisors, as investors refer to them, are the main source of investment information and a good proportion blindly trust the advice they are given. There is a real belief among participants that their advisor always acts in their best interest.”⁹ It was also concluded that “all [participants in the focus groups] believe that their advisor has a fiduciary duty.”¹⁰ FAIR Canada believes that this impression can be attributed, at least in part, to advertising and marketing by the financial services industry designed to promote financial consumers’ trust.**
- 5.8. It is unfair and harmful to investors to permit industry participants to profit from this trust and confidence when registrants are only obligated to meet a suitability standard. **The IAP’s report draws attention to a serious misalignment of obligations and expectations; if the problem is not remedied in a timely fashion, the only conclusion that can be drawn is that financial service**

⁹ Report of the Brondesbury Group for the Investor Advisory Panel, “Focus Groups with Retail Investors on Investor Rights and Protection”, (April 7, 2011), at 1 in Appendix A, online: <http://www.osc.gov.on.ca/documents/en/Securities-Category1-Comments/com_20110427_11-765_ananda.pdf>.

¹⁰ *Supra* note 9.

providers and regulators support a system which knowingly misleads consumers and induces trust in an industry that misrepresents its services. As commented by James Angel, Georgetown University professor, in response to the SEC's request for comments regarding a fiduciary duty for brokers, dealers, and investment advisors:

If the product sold is that of advice, then the appropriate standard should be that of a fiduciary and that advice should be in the best interest of the client. Anything else is fraud, because the seller is delivering a service different from what the consumer thinks he or she is buying. It should not matter whether the advice sellers call themselves brokers, advisors, planners, wealth managers, or financial consultants.¹¹

- 5.9. Regulators and legislators in developed markets, particularly the U.S., the U.K. and Australia have introduced or are in the process of developing investor-friendly reforms which include new measures to bolster financial service providers' obligations to investors. In our view, Canadian regulation is lagging behind in this area.
- 5.10. We note that the OSC's Investor Advisory Panel advocates for the imposition of a full fiduciary duty for financial service providers.
- 5.11. FAIR Canada suggests that under the Clients First Model, advisors should also be obliged to clearly explain the costs of the investments recommended, advise clients of any lower cost alternatives, and explain why they have determined that such lower cost products would not be in the clients' best interest.
- 5.12. Additionally, commissions and incentives to the advisor from the transaction should always be clearly and fully disclosed in the interest of transparency and to address conflicts of interest concerns, but disclosure should never negate the advisor's obligations under the Clients First Model. **Disclosure does not validate an unsuitable recommendation.**

6. Certification

- 6.1. FAIR Canada recommends that the MFDA require an Approved Person to explain the risks associated with leverage clearly and completely to a client when they make a recommendation for purchasing securities by borrowing. FAIR Canada has suggested additional information (in the form of an amended Appendix "B" to MFDA MR-0074) to be included in the risk disclosure required to be provided pursuant to MFDA Rule 2.6 in Appendix 1 - Recommended Revised Appendix "B" to MR-0074 (the "Leverage Risk Disclosure Document").
- 6.2. Once full leverage risk disclosure is made, FAIR Canada recommends that Approved Persons be required to complete a certification (at the bottom of the Leverage Risk Disclosure Document) that they have explained the risks of leverage to the client and that they believe that the client understands the risks inherent in borrowing to invest. FAIR Canada also suggests the imposition of a requirement that investors sign an acknowledgment in the document that the risks of borrowing money have been explained to them and that they have a high risk tolerance prior to allowing them to borrow funds to invest. We have included a suggested prescribed form for such certification at the bottom of the Leverage Risk Disclosure Document.
- 6.3. FAIR Canada recommends that MFDA Rule 2.6 be amended to require such certification to be completed at the time of borrowing each and every time a recommendation for purchasing securities by borrowing is made, even if certification has been completed within the six month

¹¹ James J. Angel, Submission re SEC's Study Regarding Obligations of Brokers, Dealers, and Investment Advisers (October 24, 2010), online: <<http://www.sec.gov/comments/4-606/4606-2822.pdf>>.

period prior to such a recommendation or becoming aware of a client borrowing for the purpose of investment.

7. Other concerns and recommendations

- 7.1. FAIR Canada is concerned that the obligation of branch and head offices to review leveraged trades and leverage recommendations does not apply to registered plans (i.e. RRSPs and RESPs). While some investors may borrow to increase their RRSP contribution in order to receive a greater tax refund, this does not necessarily mean that such borrowing to invest is suitable for these investors. **FAIR Canada recommends that the branch and head offices be required to review leveraged trades and leverage recommendations for registered plans above a specified threshold.**

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Ermanno Pascutto at 416-572-2282/ ermanno.pascutto@faircanada.ca or Marian Passmore at 416-572-2728/ marian.passmore@faircanada.ca.

Sincerely,



Canadian Foundation for Advancement of Investor Rights

Appendix 1 - Recommended Revised Appendix “B” to MR-0074

RISKS OF BORROWING TO INVEST – CERTIFICATION BY APPROVED PERSON AND ACKNOWLEDGEMENT BY CLIENT

Here are some risks and factors that you should consider before borrowing to invest:

Is it Right for You?

- Borrowing money to invest is risky. You should only consider borrowing to invest if:
 - You are comfortable with taking on a high level of risk.
 - You are comfortable taking on debt to buy investments that may go down significantly in value.
 - You are investing for the long-term and have a stable income.

You should not borrow to invest if:

- You have a low or medium tolerance for risk.
- You are investing for a short period of time.
- You intend to rely on income from the investments to pay living expenses or to repay the loan. If this income stops or decreases you may not be able to pay back the loan.

You Can End Up Losing Money and Will Still Need to Repay the Loan

- If the investments go down in value and you have borrowed money, your losses will be much larger than had you invested using your own money. Whether your investments make money or not you will still have to pay back the loan plus interest. You may have to sell other assets or use money you had set aside for other purposes to pay back the loan.
- If you used your home as security for the loan, you may lose your home. You must obtain independent legal advice before using your home as security.
- If the investments go up in value, you may still not make enough money to cover the costs of borrowing.
- Risk of a margin call: The lender may force you to sell or may sell without your permission if you do not promptly provide additional funds to cover a fall in the value of your investments.

Other Considerations

- You should not borrow to invest just to receive a tax deduction. Interest costs are not always tax deductible. You may not be entitled to a tax deduction and may be reassessed for past deductions. You may want to consult a tax professional to determine whether your interest costs will be deductible before borrowing to invest.

Benefit to Approved Person and Firm

- Your Approved Person and firm will earn \$_____ in additional fees (including referral fees) and other commissions from selling investments purchased with borrowed money.

Approved Person Certification

This will certify that I have explained to the Client(s) the risks of leverage. I believe that the Client(s) understands the risks inherent in borrowing to invest.

Signature and date

Name (printed)

Supervisor Approval

Signature and date

Name (printed)

Client Acknowledgement

This will confirm that the risks of borrowing money to invest have been explained to me/us, including the potential loss of my/our investment and the need to repay the loan regardless. I/we have a high risk tolerance and understand the risks.

Signature and date

Client Name (printed)

Signature and date

Client Name (printed)