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RE: Request for Comment on Proposed Amendments to Sections 1 (Definitions) and 3 (Directors) of MFDA By-law No. 1

FAIR Canada is pleased to offer comments on the amendments proposed by the Mutual Fund Dealers Association of Canada (“MFDA”) which change the definitions of Public Director and Associate in Section 1 of By-Law No. 1, in order to broaden the category of persons who can serve as Public Director, and change section 3.6.2 of By-law No. 1 to increase industry director participation on the audit committee (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 believes that the restrictions on who can become a Public Director, as were previously contained in the MFDA’s amended, varied and restated recognition orders, are, on the whole, still warranted today and should not be removed in their entirety from the definition of Public Director contained in the MFDA’s Section 1 of By-Law No. 1.
2. FAIR Canada urges the MFDA to increase its efforts to find individuals who can serve as Public Directors, and in particular, in finding individuals who will bring an investor perspective. FAIR Canada would be pleased to be of assistance in conducting such a search.
3. FAIR Canada supports an evergreen list of potential candidates as was recommended by staff of the British Columbia Securities Commission and contained in the CSA’s Oversight Review of the MFDA: Corporate

Governance Report¹ (the “Corporate Governance Report”).

4. FAIR Canada does not believe that allowing currently disqualified individuals to act as Public Directors will further the MFDA’s public interest mandate, enhance the reputation of the MFDA, or increase stakeholder confidence in the Board’s ability to discharge its oversight responsibilities.³

1. Existing Public Director Definition, on the Whole, Not Unduly Restrictive

- 1.1. The MFDA states that it proposes to change the definition of Public Director (and the related definition of Associate) in order to align its governance standards with current SRO practices and to increase the number of qualified individuals who meet the requirements to act as Public Directors. In the Request for Comment, the MFDA explains that it has experienced difficulty in identifying qualified Public Directors as a result of the unduly restrictive qualifications. The consultation document states that the Proposed Amendments “...will help to ensure that there is an appropriate pool of individuals who qualify as Public Directors and that individuals who act as Public Directors are best suited to make decisions that properly reflect the public interest.”
- 1.2. FAIR Canada acknowledges but is also surprised by the MFDA’s inability to find qualified individuals who can serve as Public Directors under the existing criteria. The current definition of Public Director contained in MFDA By-law No. 1 disqualifies certain individuals from acting as Public Directors on the MFDA Board of Directors. These individuals include:
- (i) a director, partner, significant shareholder, officer, employee or agent of (or an associate or affiliate of) (i) a Member protection fund or of the IDA or IFIC, or (ii) a member of such fund, the IDA or IFIC;
 - (ii) an employee of a federal, provincial or territorial government or Crown agency;
 - (iii) a member of the House of Commons or of a provincial or territorial legislature;
 - (iv) an employee of a federal, provincial or territorial Crown agency;
 - (v) a provider of services to the MFDA, a Member protection fund or a Member; and
 - (vi) an individual who is a member of the immediate family of an individual who would otherwise be disqualified from being a Public Director pursuant to clauses (i) to (v) above.

In addition, individuals who, within two years prior to their election as a Public Director, would have been disqualified from acting as a Public Director under clauses (i) to (iv) above are not eligible as Public Directors.

- 1.3. FAIR Canada welcomes the opportunity to comment and is of the view that, on the whole, the current definition in By-Law No.1 does not appear to overly narrow the field of potential candidates who could serve on the Board in the public interest. FAIR Canada believes that the current definition of Public Director properly restricts persons associated with, involved in or representing the interests of the investment industry rather than the public interest and does not agree with the Proposed Amendments

¹ Oversight Review of the Mutual Fund Dealers Association of Canada, Corporate Governance Report (Review Period: July 1, 2005 to December 31, 2008) dated July 4, 2011 (the “Corporate Governance Report”) at page 8.

³ The BCSC staff set out its concern in the Corporate Governance Report about prolonged Public Director vacancies and stated it did not find any evidence that it negatively affected or influenced the Board’s decision-making or oversight activities but that this continued breach “...is a reputational risk and may undermine stakeholders’ confidence in the board’s ability to discharge its oversight responsibilities.” at page 5.

in their entirety.

- 1.4. **FAIR Canada urges the MFDA to increase its efforts in finding individuals who could serve as Public Directors, and in particular, in finding individuals who would bring an investor perspective. We would be pleased to be of assistance in conducting such a search.**
- 1.5. There are certain prohibitions within the current definition of “Public Director” which FAIR Canada agrees can be relaxed without compromising the interests of investors. For example:
 - a) An employee of a federal, provincial or territorial government,
 - b) An employee of a federal, provincial or territorial Crown agency.
- 1.6. FAIR Canada does not see the potential for conflicts with such employees, provided they are not associated with or involved in the financial services sector. We would agree with relaxing the prohibition to that extent.
- 1.7. However, with respect to the current restriction against “an individual who is a member of the immediate family of an individual who would otherwise be disqualified from being a Public Director pursuant to clauses (i) to (v)”, we are puzzled by the comments made in the Summary of Public Comments Respecting Proposed Amendments issued in 2008.
- 1.8. In the Summary of Public Comments Respecting Proposed Amendments issued in 2008, the MFDA stated:

“It is not possible to discuss in a public forum particular candidates but, as an example, the MFDA has in the past identified potential candidates who were entirely appropriate and could act without any real or perceived conflict of interest but who were disqualified as a result of being technically a crown employee or having a remote family relationship with other ineligible persons.”⁴
- 1.9. We do not understand why a “remote” family relationship would disqualify an individual from being a candidate under the existing definition since the prohibition is a “member of the immediate family” of an individual who would otherwise be disqualified.
- 1.10. FAIR Canada believes an objective prohibition regarding immediate family increases confidence in the governance of the MFDA, which we view as preferable to the approach preferred by the MFDA as described in the Proposed Amendments (in Part II, Section C) which is to allow the Governance Committee to assess in each instance whether a particular family relationship gives rise to a conflict. The current objective criteria allow for a transparent and objective process.
- 1.11. We do not agree with the MFDA’s statement in Part II, Section C of the Proposed Amendments that “...the judgment of a spouse or other immediate family member would be able to be exercised independently of the influence of another family member who might be disqualified as a Public

⁴ Summary of Public Comments Respecting Proposed Amendments to MFDA Recognition Order and MFDA by-law No. 1 (Definition of “Public Director”), November 28, 2008, available online at http://www.bcsc.bc.ca/uploadedFiles/Response_to_public_comments.pdf.

Director. This circumstance can be distinguished from cases such as security trading restrictions, where the mutual economic interests of family members may be more difficult to separate.”⁵ Such a statement does not instil confidence that the appropriate analysis will be made. Perhaps a more robust definition of immediate family member is required to provide transparency and objectivity while not disqualifying “remote” family members who would not have a potential or actual conflict of interest.

- 1.12. In addition, with respect to the disqualification of individuals associated with IFIC: It may very well be the case that if the Proposed Amendments were made, the Governance Committee of the Board of Directors, using principles-based criteria as to who would qualify as a Public Director, would necessarily exclude persons associated with IFIC, the mutual fund industry’s lobby group, from being a Public Director. However, removing the prohibition leaves the door open for the argument to be made that there are, indeed, circumstances where a person from or associated with IFIC could be put forth as a Public Director by the Governance Committee. We do not see such an amendment as being in furtherance of the public interest.
- 1.13. Similarly, an objective two-year cooling off period is preferable to the one-year cooling off period proposed by the MFDA to be added to the terms of reference of the Governance Committee, with flexibility being provided to the Governance Committee to extend the period in some cases (also described in Part II, Section C of the Proposed Amendments).
- 1.14. FAIR Canada does not believe that permitting those who are currently disqualified (other than the employees described in section 1.5 above) will result in increasing the pool of candidates who can serve on the board in the public interest .

2. Oversight Review of the MFDA: Corporate Governance Report

- 2.1. The recognizing regulators conducted an oversight review of the MFDA from January 26 to March 13, 2009. BCSC staff performed a review of the MFDA’s corporate governance for the period July 1, 2005 to December 31, 2008. On July 9, 2010 the CSA published a consolidated report of the review but deferred issuing the corporate governance section (i.e. the Corporate Governance Report) until July 2011.
- 2.2. The Corporate Governance Report found that due to the delay in filling intermittent vacancies during the period it reviewed, the board composition did not comply with the requirements of its recognition order and by-laws governing the appointment of public directors. It did not find any evidence that a prolonged Public Director vacancy negatively affected or influenced the Board’s decision-making or oversight activities but that this continued breach “...is a reputational risk and may undermine stakeholders’ confidence in the board’s ability to discharge its oversight responsibilities.”⁶
- 2.3. Accordingly, the BCSC staff recommended that “[t]he MFDA should act expeditiously to correct the noted imbalance in its board composition.”⁷
- 2.4. The MFDA’s written response to the recommendation, noted in the Corporate Governance Report, was:

⁵ MFDA Proposed Amendments to Sections 1 (Definitions) and 3 (Directors) of MFDA By-Law No. 1 at page 5.

⁶ Corporate Governance Report, at page 5.

⁷ Corporate Governance Report, at page 5.

The MFDA acknowledges and agrees with the requirements of its [recognition orders] with respect to board composition and believes it currently complies with them and will continue to do so. ...MFDA through its Governance Committee is currently assessing some of its governance processes including those that have been the subject of prior proposals such as the implementation of By-law No. 15 and related procedural amendments.⁸

- 2.5. The BCSC staff recommendation, in order to deal with the delay in filling public director vacancies on the Board, was for the MFDA to develop and maintain a pool of potential candidates that meet or could meet its director eligibility criteria in the short run (an “evergreen list”).⁹
- 2.6. The MFDA did not agree with the “evergreen list”, viewing it as not practical in light of “continuously changing circumstances and required director competencies”¹⁰, but noted that the Governance Committee and individual directors are mindful on an ongoing basis of identifying potential candidates. **FAIR Canada supports an evergreen list and does not view the evergreen list to be impractical given that the candidate(s) selected from such a list would depend on the requisite director competencies and circumstances at the time. This would be an improvement to being simply “mindful of identifying potential candidates.”**
- 2.7. FAIR Canada does not believe that allowing currently disqualified individuals, aside from the exceptions noted in section 1.5 above, to act as Public Directors will further the MFDA’s public interest mandate, increase the reputation of the Board, or increase stakeholder confidence in the Board’s ability to discharge its oversight responsibilities.
- 2.8. FAIR Canada is of the view that relaxing the current criteria as to who can serve as a Public Director of the MFDA will not necessarily result in increasing the pool of candidates who can serve on the board in the public interest. FAIR Canada does not support the Proposed Amendments subject to its narrowing the definition to include certain employees noted in section 1.5 above.

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 416-214-3443/ ermanno.pascutto@faircanada.ca or Marian Passmore at 416-214-3441/ marian.passmore@faircanada.ca.

Sincerely,



Canadian Foundation for Advancement of Investor Rights

⁸ Corporate Governance Report, at page 5.

⁹ Corporate Governance Report at page 8.

¹⁰ Corporate Governance Report, at page 9.