Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

PIPA08-017

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TO:	Special Committee to Review the Personal Information Protection Act
COMPANY:	Office of the Clerk of Committees
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FROM	Ian Strulovitch Enforcement Policy Counsel
DATE:	February 12, 2008
SUBJECT:	Submissions regarding the Special Committee to Review the Personal Information Protection Act
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Via Fax (250) 356-8172
Original Via Courier

February 12, 2008

Special Committee to Review the Personal Information Protection Act
Office of the Clerk of Committees, Room 224
Parliament Buildings
Victoria, BC
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Dear Committee Members:

Re: Special Committee to Review the *Personal Information Protection Act* ("*PIPA*")

The Mutual Fund Dealers Association of Canada ("MFDA") is the national self-regulatory organization ("SRO") for the distribution side of the mutual fund industry. We are writing to provide our comments and observations regarding *PIPA*, which we hope the Special Committee will take into account when preparing its forthcoming report.

Structure and Functions of the MFDA

The MFDA has been formally recognized under the *British Columbia Securities Act* as an SRO by the British Columbia Securities Commission ("BCSC"). As an SRO, the MFDA develops its own Rules, By-laws, Policies and Forms (collectively, the "Rules") and assumes front-line responsibility for the administration of securities regulation on behalf of the BCSC. Even though the BCSC retains its jurisdiction over MFDA Members and Approved Persons under the *British Columbia Securities Act*, it is the MFDA that primarily exercises the regulatory function in relation to Members and Approved Persons.

MFDA Members are mutual fund dealers that are licensed with the provincial securities commissions across Canada, including the British Columbia Securities Commission. Approved Persons are employees and agents of the dealers who conduct or participate in the business of the dealer and are subject to the regulatory jurisdiction of the MFDA. The MFDA performs no industry representation or trade association activities for its Members - the function of the MFDA is strictly regulatory in nature.

Upon application for membership in the MFDA, a mutual fund dealer and its Approved Persons contractually agree to comply with MFDA Rules and acknowledge that they will be subject to MFDA oversight and may be the subject of investigations and disciplinary actions should they breach the Rules. Furthermore, the recognition order by which the MFDA has been recognized as an SRO by the BCSC sets forth additional obligations for the MFDA, Approved Persons and Members.

MFDA Enforcement Department

The MFDA Enforcement Department enforces regulatory standards by assessing complaints, conducting investigations and litigating breaches of MFDA Rules. Many of the cases investigated and prosecuted by the Enforcement Department relate to serious matters such as theft, fraud and white collar crime.

In the course of performing its regulatory duties, the MFDA Enforcement Department is often required to

collect, use and disclose personal information of clients of MFDA Members and Approved Persons. For example, Enforcement staff often need to review the records of the activities of particular client accounts to determine whether there has been inappropriate trading by an Approved Person in the account. This would necessarily involve disclosure by the Member to the MFDA of personal information relating to individual clients and the collection and use of such information by the MFDA in the course of its investigation.

In order to comply with *PIPA*, MFDA Members are required by the MFDA to notify clients of the purposes for which their personal information may be collected, used and disclosed, including that it may be disclosed to the MFDA. This requirement is intended to obtain the clients' consent to such collection, use and disclosure.

However, we have encountered practical difficulty in situations where clients attempt to revoke their consent, in particular where the client may be a joint actor with a Member or Approved Person in activity that is being investigated by the MFDA. In these circumstances a Member or Approved Person may seek to use the client's withdrawal of consent as a tactical shield from regulatory investigation.

In addition, the effectiveness of an MFDA investigation often depends on the collection of information from third parties that are not under the jurisdiction of the MFDA, but which are subject to *PIPA*. While the third party may be willing to voluntarily provide such information, *PIPA* may be perceived as a barrier to the institution doing so, at least without a court order or specific reference to an authority permitting disclosure of personal information to the MFDA. We recognize that *PIPA*, like its counterparts elsewhere, permits the collection, use and disclosure of personal information for the purposes of investigations and proceedings but, in our experience, it remains difficult for the MFDA to obtain access to the information necessary for the performance of effective investigations absent a specifically-applicable exception.

Submissions

Given our daily experience with the practical implications of *PIPA*, we respectfully recommend that the Special Committee consider certain amendments. These amendments would assist the MFDA in removing the barrier that *PIPA* may in some cases present in obtaining timely access to personal information for the purpose of the MFDA's regulatory activities.

To assist the Committee, we have set out below specific submissions as to how amendments might be structured to achieve the desired result. We believe that these submissions would accomplish the objective; however, we recognize that the Special Committee will no doubt bring its expertise to bear in determining whether other mechanisms may resolve the issues identified above.

(a) Wording of subsection 18(1)(j)

Section 18(1)(j) of *PIPA* permits an organization to disclose personal information without the knowledge or consent of the individual to whom the personal information relates, if the information is disclosed to a "public body" or "law enforcement agency" concerning an offence under the laws of Canada or a province to assist in an investigation or in making a decision to undertake an investigation.

The requirement that the offence under section 18(1)(j) relate to an offence under the laws of Canada or a province poses practical difficulties for the MFDA. The MFDA's activities are generally in the nature of enforcement of regulatory standards. However, some third parties may consider that the MFDA's Rules may not fall within the scope of "the laws of Canada or a province." Therefore the MFDA cannot reliably benefit from the exception set out in section 18(1)(j) of *PIPA*, and this inability can sometime interfere

with the MFDA's ability to carry out its investigations and regulatory activities. Third parties may also contest the MFDA's standing as a "public body" or "law enforcement agency", or at least not have sufficient certainty that they feel they can safely rely upon this exception.

We note that section 18(1)(j) can generally be invoked for the benefit of the BCSC for breaches of the *British Columbia Securities Act* but cannot be applied to the MFDA for breaches of its Rules, even though the MFDA generally operates through delegated authority from it recognition as an SRO by the BCSC. This is anomalous.

We submit that the amendment set out below to section 18(1)(j) would assist the MFDA and other SROs recognized under the *British Columbia Securities Act* in carrying out their investigations and other regulatory activities.

> 18 (1) An organization may only disclose personal information about an individual without the consent of the individual, if
>
> ...
>
> (j) the disclosure is to a public body, a law enforcement agency or regulatory organization in Canada, concerning an offence under the laws of Canada, ~~or~~ a province or the by-laws, rules, regulations or policies of a self-regulatory organization recognized by the British Columbia Securities Commission, to assist in an investigation, or in the making of a decision to undertake an investigation,
>
> (i) to determine whether the offence has taken place, or
>
> (ii) to prepare for the laying of a charge, or the commencement or prosecution of proceedings ~~or the prosecution of~~ in respect of the offence

An alternative suggestion is to modify section 18(1)(j) to include the by-laws and rules of "prescribed" regulatory organizations in addition to the laws of Canada or a province. This would allow the government to prescribe through regulation or other means the by-laws and rules of certain regulatory organizations that the government has determined should be treated in a similar fashion to the laws of Canada or a province under section 18(1)(j). This would provide the government with a certain degree of flexibility in determining which regulatory organizations' by-laws and rules should be included in the exception set forth in section 18(1)(j).

We would be pleased to discuss our comments with you and provide such further particulars as might be helpful in your work going forward.

Thank you for considering our remarks.

Yours truly,

Shaun Devlin
Vice-President, Enforcement