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

Contact: Paige Ward
General Counsel, Corporate Secretary and Vice President, Policy
Phone: 416-943-5838
E-mail: pward@mfda.ca

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MFDA Bulletin

Policy

For Distribution to Relevant Parties within your Firm

Publication of Revised MFDA Sanction Guidelines

On May 23, 2018, the MFDA published for a 90-day public comment period proposed changes to the existing MFDA Penalty Guidelines, which have been in force in their current form since 2006 (see Bulletin #0749-P). The changes are intended to adopt a more principles-based approach to sanctioning and to move away from the recommendation of specific fine amounts and penalties.

Five submissions were received in response to the Request for Comments. Commenters generally expressed support for a move towards a principles-based approach to sanctioning, and commenters made other comments on specific aspects of the Guidelines.

The final form of the revised MFDA Sanction Guidelines is attached as Appendix "A" to this Bulletin, and is effective on November 15, 2018.

Also attached as Appendix "B" is a summary of comments received and the responses of MFDA staff.

The MFDA Sanction Guidelines are available in the Enforcement section of the Mutual Fund Dealers Association of Canada's website at http://mfda.ca/enforcement/sanction-guidelines/.

Appendix "A"
MFDA Sanction Guidelines

MUTUAL FUND DEALERS ASSOCIATION OF CANADA

SANCTION GUIDELINES

NOVEMBER 15, 2018

MUTUAL FUND DEALERS ASSOCIATION OF CANADA

SANCTION GUIDELINES

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PURPOSE OF SANCTION GUIDELINES

The MFDA is the national self-regulatory organization for the distribution side of the Canadian mutual fund industry. The MFDA regulates the operations, standards of practice and business conduct of its members and their representatives with a mandate to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry.

The Sanction Guidelines are intended to promote consistency, fairness and transparency by providing a framework of applicable regulatory principles to guide the exercise of discretion in determining sanctions.

The Sanction Guidelines have been prepared to assist:

- MFDA Staff and Respondents in conducting disciplinary proceedings and in negotiating settlement agreements pursuant to s. 20 and s. 24 of MFDA By-law No. 1.
- Hearing Panels in the fair and efficient imposition of sanctions in settled or contested disciplinary proceedings commenced pursuant to s. 20 and s. 24 of MFDA By-law No. 1.

The Sanction Guidelines are not mandatory. The determination of the appropriate sanction in any given case is discretionary and a fact specific process. The appropriate sanction depends on the facts of a particular case and the circumstances of the conduct. The Sanction Guidelines are intended to provide a summary of the key factors upon which discretion may be exercised consistently and fairly in like circumstances, but are not binding on Hearing Panels. The list of key factors in the Sanction Guidelines is not exhaustive, and Hearing Panels may consider other aggravating and mitigating factors as appropriate.

Hearing Panels should always exercise judgment and discretion, and consider appropriate aggravating and mitigating factors in determining appropriate sanctions in every case. In addition, Hearing Panels should identify the basis for the sanctions imposed in the Reasons for Decision.

OVERVIEW OF SANCTION GUIDELINES

The Sanction Guidelines are divided into two parts:

Part I – Key Factors to be Considered in Determining Sanctions sets out the key factors that are taken into consideration with respect to decisions on sanctions in all disciplinary cases.

Part II – Types of Sanctions outlines the various types of sanctions that may be imposed pursuant to s. 24 of MFDA By-law No. 1.

PART I – KEY FACTORS TO BE CONSIDERED IN DETERMINING SANCTIONS

INTRODUCTION

The primary goal of securities regulation is the protection of the investing public.[1]

Disciplinary sanctions imposed in a securities regulatory context are protective and preventative, intended to be exercised to prevent likely future harm.[2]

KEY FACTORS

The following key factors provide a framework that should be considered in fashioning an appropriate sanction in all cases. This list is illustrative, not exhaustive. Hearing Panels should consider case specific factors in addition to those listed here.

1. General and specific deterrence

Deterrence refers to the imposition of a sanction for the purpose of discouraging the Respondent and others from engaging in similar conduct. When deterrence is aimed at the Respondent, it is called specific deterrence, when directed at others, general deterrence. Without effective deterrence, inappropriate conduct may continue and public confidence in the mutual fund industry and the fairness of the markets may be seriously damaged. An appropriate sanction should achieve both specific and general deterrence.

A general deterrent is preventative. The notion of general deterrence is neither punitive nor remedial. A sanction that is meant to generally deter is a sanction designed to discourage or hinder like behaviour in others. It is therefore reasonable to consider general deterrence as a factor in imposing an appropriate sanction.

Members and Approved Persons have significant responsibilities that they should meet if investors are to be protected. Members and Approved Persons who choose to act in ways that are incompatible with MFDA By-laws, Rules and Policies should have the expectation that they will be held accountable through enforcement action.

Specific deterrence may be achieved when a sanction imposed is significant enough to prevent or discourage a Respondent from engaging in future misconduct. General deterrence may be achieved if a sanction strikes an appropriate balance between a Respondent's specific misconduct and expectations as to an appropriate sanction to be imposed. General deterrence serves to improve overall standards in the securities industry.

2. Public confidence

The industry, investors and other members of the public should be able to rely on and have confidence in the integrity and capability of mutual fund industry participants. If a sanction is less than what the public would reasonably expect for the misconduct under consideration, it

[1] *Pezim v British Columbia* (*Superintendent of Brokers*), [1994] 2 SCR 557 at para 59.
[2] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario* (*Securities Commission*), [2001] 2 SCR 132 at para 42.

may undermine the goals of the disciplinary process. Similarly, excessive sanctions may reduce respect for the enforcement process and diminish its deterrent effect. Any sanction imposed should be proportionate to the conduct at issue. The sanction should reflect the relevant mitigating and aggravating factors.

3. The seriousness of the allegations proved against the Respondent

In appropriate cases, distinctions may be drawn between misconduct that was unintentional or negligent, and misconduct that was intentional, manipulative, fraudulent or deceptive. Distinctions should also be drawn between isolated incidents and repeated, pervasive or systemic violations. The following should also be taken into consideration:

Deception – Attempts by the Respondent to conceal the misconduct or to lull into inactivity, mislead, deceive or intimidate an investor, the Member or regulatory authorities, should be considered an aggravating factor.

Vulnerable investors – If there is evidence that the Respondent's conduct involved vulnerable investors, then this may be seen as an aggravating factor worthy of a greater sanction. The MFDA disciplinary process aims to protect the investing public and in particular vulnerable investors, such as those who are at risk due to age, disability, limited investment knowledge or other factors, and those who place a high level of trust or reliance in a Respondent. The corollary is not true however: the fact that an investor who was victimized by a Respondent is a sophisticated investor should not be a mitigating factor.

Premeditation – Evidence of planning and premeditation should be considered as aggravating factors. Hearing Panels should consider the degree of organization and planning associated with the misconduct, including the number, size and character of the transactions.

Reasonable reliance – A Respondent's demonstrated reasonable reliance on competent supervisory, legal or accounting advice may be considered by Hearing Panels as a mitigating factor.

Prior warnings – Hearing Panels should consider whether the Respondent engaged in the misconduct at issue notwithstanding prior warnings or concerns expressed by the MFDA, the Member, or another regulator, which may be considered an aggravating factor.

4. Whether the Respondent recognizes the seriousness of the misconduct

Hearing Panels should consider whether the Respondent accepted responsibility for and acknowledged the misconduct prior to detection and intervention by the MFDA. An admission of wrongdoing may also be a mitigating factor if it saves the MFDA and affected investors from a lengthy, complicated or expensive hearing. Attempts by the Respondent to improperly frustrate, delay or undermine the investigation or hearing, such as concealing information or intentionally providing inaccurate or misleading information, should be considered an aggravating factor.

5. The benefits received by the Respondent as a result of the misconduct

As a general principle, wrong-doers should not benefit from their wrong-doing. In cases where the Respondent benefited financially from the misconduct, the sanction should, if possible, reflect the extent to which the Respondent obtained or attempted to achieve a financial or other

benefit from the misconduct, whether directly or indirectly. Financial benefit may include any loss avoided as a result of the misconduct.

6. The harm suffered by investors as a result of the Respondent's misconduct

Harm may sometimes be quantified by considering the types of transactions, the number of transactions, the size of the transactions, the number of investors affected by the misconduct, the length of time over which the misconduct took place and the size of the loss suffered by the investor, other individuals or the Member.

Harm may also be measured reasonably using subjective factors, such as the impact of the misconduct on the investor (emotionally, physically or mentally), the reputation of the Member, and the integrity of the mutual fund industry and the regulatory process. The risk of harm to which the investor was exposed may be a relevant factor, even if actual harm did not result.

7. The Respondent's past conduct, including prior sanctions

Hearing Panels should consider a Respondent's relevant disciplinary history in determining sanctions. Relevant disciplinary history may include (a) past misconduct similar to that at issue; or (b) past misconduct that, while unrelated to the misconduct at issue, demonstrates prior disregard for regulatory requirements and investor protection.

Past misconduct includes disciplinary measures imposed by the MFDA, other regulators and licensing tribunals, including terms and conditions or other restrictions placed on the Respondent.

A Respondent's prior disciplinary record should be considered an aggravating factor and generally, Hearing Panels should impose progressive or escalating sanctions on a Respondent for each successive instance of misconduct.

8. Whether a sanction was imposed on the Respondent for the same misconduct by the Member or other regulator

A sanction imposed by the Member or another regulator against a Respondent for the same misconduct may be considered a mitigating factor.

9. Previous decisions made in similar circumstances

Hearing Panels should consider previous decisions made in similar circumstances. The amount of a fine or other sanction depends on the facts of each case, including the need for specific and general deterrence. While prior decisions are instructive, the nature and extent of the sanction to be imposed will depend on the facts of the case.

10. For multiple violations, the total or cumulative sanction should appropriately reflect the totality of the misconduct

Depending on the facts of the case, the existence of multiple or similar violations may be treated as an aggravating factor and may warrant higher sanctions. The totality principle should be considered where there are multiple violations; the overall sanction imposed should not be excessive or disproportionate to the gravity of the total misconduct. Hearing Panels may adopt a

global approach to sanctioning where the imposition of a sanction for each contravention would have the effect of imposing an excessive sanction on the Respondent.

11. Ability to pay is a consideration when imposing an appropriate monetary sanction

Ability to pay – The Respondent's ability to pay may be a consideration in determining the appropriate monetary sanction to be imposed. However, it is only one of the factors to be weighed in relation to all other applicable factors including general and specific deterrence and the need to ensure public confidence in the MFDA's disciplinary processes.

The burden is on the Respondent to raise the issue and to provide evidence of inability to pay, such as tax returns or audited financial statements. Evidence of a *bona fide* inability to pay may result in the reduction or waiver of a fine, or in the imposition of an installment payment plan. In cases in which Hearing Panels impose a lesser monetary sanction based on a *bona fide* inability to pay, the Reasons for Decision should so indicate.

Financial resources – When a Respondent has significant financial resources, a higher fine may be warranted in order for the sanction to be a specific deterrent.

12. Whether the Respondent voluntarily implemented corrective measures after the misconduct

Hearing Panels should consider whether the Respondent voluntarily implemented corrective measures to avoid recurrence of the misconduct, for example, where a Member revises procedures or internal controls.

13. Whether the Respondent made voluntary acts of compensation, restitution or disgorgement to remedy the misconduct

Voluntary acts of compensation, restitution or disgorgement made by the Respondent should be considered a mitigating factor. Relevant considerations include whether the Respondent's voluntary corrective action was timely, and whether efforts were made to pay full compensation or restitution, or to disgorge all of the financial benefits obtained by the Respondent from the misconduct.

14. The Respondent's proactive and exceptional assistance to the MFDA

Respondents are required to cooperate fully with the MFDA's investigations, to respond to requests for information in a timely and straightforward manner, and to report certain events or information to the MFDA.

Only proactive and exceptional assistance by a Respondent, going beyond those general requirements, should be considered a mitigating factor in imposing sanctions.

PART II – TYPES OF SANCTIONS

Hearing Panels may impose any of the sanctions authorized pursuant to s. 24 of MFDA By-law No. 1. The list below is illustrative, not exhaustive, and it is included to provide examples of the types of sanctions that may address the misconduct at issue in each case.

Fine

A fine is a monetary sanction imposed on a Member or an Approved Person found to be in contravention of MFDA By-laws, Rules and Policies. Fines are frequently imposed in disciplinary proceedings, but are not required in all cases. Generally, the amount of a fine should, at a minimum, have the effect of disgorging the amount of the financial benefit received by the Respondent as a result of the misconduct.

The amount of a fine should be commensurate with the seriousness of the misconduct. In the most egregious cases, Hearing Panels may consider the maximum fines permitted under s. 24 of MFDA By-law No. 1. A fine should not be tantamount to a licensing fee to engage in the misconduct.

Suspension

Hearing Panels may impose a suspension of the rights and privileges of membership of a Member for a specified period of time and upon such terms and conditions as may be considered appropriate.

Hearing Panels may impose a suspension on an Approved Person's authority to conduct securities related business, while an employee or an agent of a Member of the MFDA, for a specified period of time and upon such terms and conditions as may be considered appropriate.

The length and the terms and conditions of the suspension may depend on the facts of the case and other relevant factors. For example, when the contravention relates to a Respondent acting in a supervisory capacity, it may be appropriate to suspend the Respondent from performing supervisory functions for a period of time, or from all registered activities when the supervisory failings are so severe as to call into question the Respondent's general fitness to act in any registered capacity.

Permanent Prohibition and Termination

Termination of all rights and privileges of membership of the Member, or the permanent prohibition of the authority of an Approved Person to conduct securities related business in any capacity are generally regarded as the most severe sanctions that Hearing Panels may impose.

A fine may be considered even where a permanent prohibition is imposed in cases involving significant harm to investors or to the integrity of the mutual fund industry as a whole.

Other Remedial Sanctions

To address misconduct effectively in any given case, Hearing Panels may, under MFDA By-law No. 1, also impose any one or more of the following remedial sanctions in addition to, and other than, a fine or suspension:

- a reprimand;
- conditions on the authority of an Approved Person to conduct securities related business, for example, to require professional requalification by the writing of an exam or the successful completion of a remedial course of study;
- terms and conditions on the membership of a Member;
- the appointment of a monitor or independent consultant to oversee and report on the Member's activities, or to develop and implement procedures for improved compliance with regulatory requirements; or
- directions for the orderly transfer of client accounts from the Member.

DM #599477

Appendix "B"
Summary of Comments and MFDA Staff Responses

Summary of Public Comments Respecting Proposed MFDA Sanction Guidelines

On May 23, 2018, the MFDA published Proposed MFDA Sanction Guidelines for a 90-day public comment period that expired on August 20, 2018.

Five submissions were received during the comment period:

1. The Canadian Advocacy Council for Canadian CFA Institute Societies
2. Canadian Foundation for Advancement of Investor Rights
3. The Investor Advisory Panel
4. Kenmar Associates
5. PFSL Investments Canada Ltd.

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. Factors #7 and #8 have been renumbered as Factors #12 and #13, and this summary reflects that renumbering.

I. General Comments

Most commenters expressed general support for the intent of the proposed Sanction Guidelines and the move to a principle-based approach to sanctioning.

One investor advocate questioned whether the Sanction Guidelines, without dollar ranges, can lead to consistent application by Hearing Panels and expressed the view that it would be useful if the MFDA provided detail as to why the current sanction system requires change. In addition, this commenter expressed the view that the proposal does not identify the risks that could result from a conversion to principles-based sanctions, which include: variability in fines in time or by region; and the inability of stakeholders, including investors, to benchmark the appropriateness of fines and sanctions.

One investor advocate questioned whether the Guidelines applied to both individual and Member Respondents.

MFDA Response

The move to a principled-based approach to sanctioning is consistent with the prevailing practice of Canadian securities regulators and self-regulatory organizations ("SROs"). There is a significant body of decided cases which provide ample guidance to Hearing Panels with respect to the appropriate quantum of sanction. This will assist in ensuring consistency of fines, and it will allow stakeholders to benchmark the appropriateness of sanctions.

The MFDA Sanction Guidelines apply to both individual and Member Respondents and wording in Factor #3 has been amended in that regard.

II. Key Factors

1. General and specific deterrence

Investor advocates expressed the view that the expectations of the investing public should be included as an important consideration to achieve deterrence.

MFDA Response

This comment has been addressed in the amended Factor #2 – Public confidence.

2. Industry expectations

Investor advocates expressed the view that the expectations of the investing public should also be included in the Guidelines.

MFDA Response

This comment has been addressed in the amended Factor #2 – Public confidence.

3. The seriousness of the allegations proved against the Respondent

Investor advocates recommended suggestions that include:

- a firmer distinction should be drawn between inadvertent wrongdoing and intentional misconduct
- undue influence on vulnerable investors exerted by a Respondent should be an explicit aggravating factor
- the definition of vulnerable investor should not depend upon the existence of a unique or special relationship with a Respondent
- concealment of misconduct by a Respondent should be an aggravating factor, and
- the seriousness of the allegations proven against the Respondent should not be limited to MFDA requirements and should extend to violations of securities regulations.

MFDA Response

Factor #3 clearly makes a distinction between inadvertent wrongdoing and intentional misconduct. The importance of the distinction in any particular case is within the discretion of the Hearing Panel.

The suggestion to include undue influence on vulnerable investors as an aggravating factor is addressed by this factor under "Vulnerable Investors". Undue influence is one example of the manner in which an investor can be vulnerable to a Respondent's conduct.

Staff agrees with the comment suggesting that the definition of vulnerable investor should not depend upon the existence of a unique or special relationship with a Respondent. Staff has amended the factor accordingly.

Concealment of misconduct by a Respondent is already addressed in this factor under "Deception".

This factor has been amended to reflect that these principles apply to all violations for which a Respondent may be disciplined.

4. Whether the Respondent recognizes the seriousness of the misconduct

Specific comments were not made on this factor.

5. The benefits received by the Respondent as a result of the misconduct

The industry association and one investor advocate suggested that this factor should be expanded to include that disciplinary action must ensure that a net negative financial outcome results for the Respondent. Alternatively, it was suggested that this addition could be a separate factor, as noted in the IIROC Sanction Guidelines where it is a fundamental tenet that wrong-doers should not benefit from their wrong-doing.

MFDA Response

This factor has been amended to include reference to the general principle that wrong-doers should not benefit from their wrong-doing, and that in cases where the Respondent benefited financially from the misconduct, the sanction should, if possible, account for the extent to which the Respondent obtained or attempted to achieve a financial or other benefit from the misconduct, whether directly or indirectly.

6. The harm suffered by investors as a result of the Respondent's misconduct

One investor advocate expressed the view that the risk of losses to investors should also be considered and even though a risk may not have resulted in actual investor losses, the risk itself should be considered a factor.

The MFDA Member commenter expressed the view that where a Respondent's actions were done solely to convenience the client and not for financial gain to the individual, that should be considered a mitigating factor. This commenter also agreed that it is important to recognize emotional and mental harm, but was of the view that a tempered approach should be applied when factoring these unquantifiable determinants.

MFDA Response

This factor has been amended to clarify that the risk of harm to which the client was exposed may be a relevant factor, even if actual harm did not result.

MFDA Hearing Panels have treated the issue of client convenience in various ways, particularly in signature falsification cases, and it would not be possible to state as a general principle that client convenience is a mitigating factor. We have however clarified in the "Purpose" section of the Sanction Guidelines that the list of factors is not exhaustive and that parties are free to argue additional principles before the Hearing Panels.

This factor has been amended to clarify that harm may be measured reasonably [*emphasis added*] *using subjective factors, such as the emotional and mental impact of the misconduct on the investor.*

7. The Respondent's past conduct, including prior sanctions

The industry association and one investor advocate expressed the view that this factor should be revised to contemplate whether the Respondent engaged in the misconduct over an extended period. Additionally, the investor advocate suggested that a history of client complaints, including OBSI decisions, should be considered.

MFDA Response

Cases where Respondents engaged in misconduct over an extended period of time are addressed in Factor #3.

The existence of a client complaint on its own is not evidence of a violation. Only a proven violation arising from such a complaint would be relevant. OBSI decisions are confidential under its Terms of Reference and in any event do not constitute evidence of a violation.

8. Whether a sanction was imposed on the Respondent for the same misconduct by the Member or other regulator

One investor advocate was of the view that the MFDA should take internal disciplinary action into consideration, but expressed the view that internal Member discipline should not take the place of the public enforcement process since sanctions imposed by a Member are not transparent to the public.

MFDA Response

The Sanction Guidelines provide that internal Member discipline is a factor to be considered in relation to MFDA public disciplinary proceedings.

9. Previous decisions made in similar circumstances

One investor advocate suggested that when Hearing Panels deviate substantially from jurisprudence, the reasoning for this decision should be articulated in the Decision.

MFDA Response

This falls under the general principle that Hearing Panels should identify the basis for the sanction imposed in the Reasons for Decision, which appears in the "Purpose" section of the Sanction Guidelines.

10. For multiple violations, the total or cumulative sanction should appropriately reflect the totality of the misconduct

Two investor advocates expressed the view that the application of the totality principle should depend on individual circumstances as should the existence of multiple or similar violations being used as an aggravating factor. One of these commenters further suggested that the totality principle is more suitable in situations where breaches were unintentional, there was no harm to investors and the problem that caused the breach has been addressed so it will not reoccur.

MFDA Response

Factor #10 takes into account individual circumstances, and it makes clear that the totality principle does not apply in every case. The application of the principle in any particular case is an issue for the Hearing Panel to determine.

11. Ability to pay is a consideration when imposing an appropriate monetary sanction

The investor advocates expressed concern with a Respondent's ability to pay as a factor and suggested this should only be considered relevant when:

- setting a payment plan
- the firm has paid compensation to those harmed by the misconduct, and
- it would result in serious financial hardship, which must be objectively proven.

One investor advocate expressed concern that it would require considerable MFDA staff time, effort and expertise to credibly validate a Respondent's inability to pay.

Some commenters suggested that there should be consideration to requiring the firm to be held accountable to pay for the individual Respondent's misconduct.

The industry association commenter advised that the IIROC Sanction Guidelines state that while the inability to pay is a relevant consideration in determining appropriate financial sanctions, this should not be considered a predominant factor.

MFDA Response

Case law acknowledges the principle that ability to pay may be a relevant consideration when considering the quantum of a fine to be imposed. There is no principle that ability to pay can only be considered when a client has been compensated, although that may be a factor on a case by case basis.

In response to the concern that ability to pay should only be considered relevant when it would result in serious financial hardship and is objectively proven, Factor #11 states that the burden is on the Respondent to raise the issue and provide evidence of a bona fide inability to pay. Currently, MFDA staff is able to assess the adequacy of such evidence if it is presented.

The consideration of whether it would be appropriate to require a Member to be held accountable to pay for the individual Respondent's misconduct is beyond the scope of the MFDA Sanction Guidelines. Where a Member has engaged in misconduct, as for example with a failure to conduct reasonable supervision, a disciplinary proceeding may be brought against the Member.

Staff agrees that ability to pay is only one of the factors to be weighed in relation to all other applicable factors including general and specific deterrence and the need to ensure public confidence in the MFDA's disciplinary processes. We have amended Factor #11 on this point.

12. Whether the Respondent voluntarily implemented corrective measures after the misconduct

One investor advocate recommended that corrective measures taken by either the individual or the MFDA Member should only be a mitigating factor if taken prior to detection and intervention by the MFDA or other regulator.

MFDA Response

Case law acknowledges the principle that voluntary implementation of corrective measures is a mitigating factor and there is no restriction that the measures must be taken by the Respondent prior to detection and intervention by the regulatory body. If corrective measures are taken by the Respondent after detection and intervention by the MFDA or other regulator, it may be a less significant mitigating factor.

13. Whether the Respondent made voluntary acts of compensation, restitution or disgorgement to remedy the misconduct

Two investor advocates suggested that full compensation or restitution to investors for their losses should be a mitigating factor and that under-compensating should be an aggravating factor. Another suggestion included considering whether an individual Respondent's firm paid the compensation or restitution.

Two investor advocates suggested that disgorgement payments should be separated from the amount of a fine. Further, one investor advocate suggested that to do otherwise places the Respondent in the position they were in before the misconduct, which suggests inadequate deterrence. Further, it was suggested that the amount disgorged should be the total amount wrongfully earned because of the misconduct and not just that portion received by the Respondent.

MFDA Response

Payment of an amount of compensation or restitution to investors is a mitigating factor, the significance of which is to be determined on a case by case basis. In a case where a particular amount is owed under applicable regulatory requirements and is not fully paid, the breach of applicable requirements may be addressed as an allegation in disciplinary proceedings.

MFDA Hearing Panels do not have a specific disgorgement power.

14. The Respondent's proactive and exceptional assistance to the MFDA

One investor advocate expressed the view that proactive assistance by a Respondent should only be a mitigating factor if accompanied by full compensation of those harmed by the misconduct. Another investor advocate similarly noted that anything short of complete and unequivocal cooperation should be an aggravating factor.

MFDA Response

Proactive assistance and client compensation are different issues under applicable case law.

The Guidelines state that this factor only provides as a mitigating factor if the Respondent's assistance <u>exceeds</u> [*emphasis added*] *regulatory requirements to cooperate, and conversely, failure to comply with the duty to cooperate is a violation.*

III. Types of Sanctions

<u>Suspension and Permanent Ban</u>

The industry association noted that the MFDA's proposed Sanction Guidelines do not specify the conditions under which a suspension or a permanent ban should be considered, as do IIROC's Sanction Guidelines.

MFDA Response

It is not possible to provide an exhaustive list of circumstances that warrant suspensions and prohibitions in contested and settled cases. The Reasons for Decision in previously-decided MFDA cases provide guidance on when suspensions and permanent prohibitions are appropriate in particular situations.

<u>Additional Type of Sanction - Publishing Respondent's Name</u>

The Member commenter suggested that publishing a Respondent's name on the MFDA's website should be considered as a sanction and that Hearing Panels should have the discretion to decide the length of time the decision is posted. Additionally, it was recommended that only the most egregious cases that involve financial harm, personal gain and repeat offenders should be publicly named and that minor offenses that do not show mal intent or personal enrichment

should not be permanently posted. This commenter also recommended that consideration should be given to the potential harm caused to the Respondent for the reputational damage caused by publishing their name. Lastly, this commenter suggested that the MFDA should have a mechanism by which Respondents can apply to have their names removed from the website.

MFDA Response

Under the Recognition Orders of the recognizing regulators, the MFDA is required to maintain a public register of the disposition of any disciplinary action or settlement, including any discipline imposed. The MFDA also participates in the CSA Disciplined List, which is dependent upon discipline records of all participating securities regulators and SROs being available on their respective websites.

IV. Additional Comments

One investor advocate recommended that if the proposed Sanction Guidelines are approved, they should be accompanied by robust user guidance.

The industry association commenter recommended that the MFDA should include a factor to consider whether at the time of the contravention, the Respondent received adequate training and education from their sponsoring firm.

One investor advocate recommended that there should be a training course for Hearing Panel members.

One investor advocate recommended that there should be a historical database of sanctions imposed, which should allow for searches by type of infraction and sanction imposed, allowing for consistency of sanction application.

MFDA Response

Further guidance on sanction principles is found in the Reasons for Decision of previously-decided MFDA cases.

The issue of whether the Respondent was in compliance with a Member's policies and procedures, as well as whether they received and followed training and education from their sponsoring firm, has been considered variously as a violation or as an aggravating or mitigating factor in particular cases. Respondents are able to raise these issues before the Hearing Panels, as the factors in the Guidelines are not exhaustive.

Hearing Panel members receive training through the Director of Regional Councils.

MFDA decisions are searchable on CanLii, which is a public database, and Quicklaw. They are also provided on the MFDA website.