

INVESTOR ADVISORY PANEL

June 14, 2018

By Email

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Re: IAP Response to Request for Comment on Proposed MFDA Sanction Guidelines

The Investor Advisory Panel (IAP) welcomes the opportunity to respond to the Mutual Fund Dealers Association of Canada's (MFDA) request for comment on its proposed Sanction Guidelines. The IAP is an initiative by the Ontario Securities Commission (OSC) to enable investor concerns and voices to be represented in its rule and policy making process.

We support the stated intent of the proposed Sanction Guidelines "to promote consistency, fairness and transparency by providing a framework to guide the exercise of discretion in determining sanctions in MFDA disciplinary proceedings". Furthermore, we believe most of the Sanction Guidelines are relevant and appropriate considerations in a disciplinary context.

The proposed Sanction Guidelines could be even better in our view if their focus was broadened from promoting a fair and consistent disciplinary process to include achieving fair and equitable investor outcomes. We believe that adopting this wider perspective would be both appropriate and warranted in this proposal that identifies the protection of the investing public as "the primary goal of securities regulation".

The IAP has identified several specific Sanction Guidelines that could benefit from a more sensitive accommodation of the investor perspective:

1. General and specific deterrence

As currently proposed, this initial and, to some extent, overarching guideline does not include any reference to investor needs and expectations. In FINRA's recently published disciplinary sanction policy, the initial guideline included the following statements – "the purpose of FINRA's disciplinary process is to protect the investing public" and "sanctions should be more than a cost of doing business." The IAP believes that these concepts are integral to promoting investor trust in the disciplinary process and merit inclusion in the MFDA's initial guideline.

2. Industry expectations

The IAP acknowledges the relevance of industry expectations in crafting appropriate regulatory decisions; however, we also believe that expectations of the investing public are equally relevant and should be included in the guidelines.

3. The seriousness of the allegations proved against the Respondent

This proposed guideline states that “in appropriate cases, distinctions *may* (emphasis added) be drawn between misconduct that was unintentional or negligent, and misconduct that was intentional, manipulative, fraudulent or deceptive.” We would recommend that a much firmer distinction be drawn between inadvertent wrongdoing and intentional misconduct. These two types of transgressions involve fundamentally different degrees of fault. The appropriate sanction in each of the two normally should be substantively different and we therefore recommend that the guideline highlight this distinction.

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

The IAP recommends that this proposed guideline include a clear and unambiguous statement that, in every circumstance where misconduct is established, the disciplinary action must ensure that a net negative financial outcome results for the Respondent. Respondents should never profit from their wrongdoing, nor should the outcome ever be just a wash.

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

For the investing public the most meaningful and impactful industry response to instances of misconduct is the assurance of uncontested, prompt and full restitution. Consequently, the IAP believes that “making victims whole” constitutes the appropriate fundamental response to misconduct. By this reasoning, voluntary acts of compensation, restitution or disgorgement should not, in our view, be considered a mitigating factor. Rather, the absence of full restitution should be treated as an aggravating factor.

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

The IAP contends that ability to pay should never be a mitigating factor in setting an appropriate sanction because doing so undermines the general deterrent effect of the decision. At most, inability to pay should be considered relevant to the setting of a payment plan. We appreciate that fines should not be set to act effectively as

barriers to industry re-entry, but in our view it is not contrary to the public interest for re-entry to be denied where a proper monetary sanction remains unpaid.

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

Given that Respondents are required to cooperate fully with investigations, the IAP expects this cooperation to be as fulsome and forthcoming as possible in every instance. Therefore, we do not regard full or even proactive cooperation as a mitigating factor; rather, we would consider anything short of complete and unequivocal cooperation to be an aggravating factor.

In describing the purpose of the Sanction Guidelines, the request for comment document notes that 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* (emphasis added)." The IAP notes that, as proposed, the Sanction Guidelines do fully reflect this basic mandate. However, the proposed sanctions, in our view, are very process orientated and do not adequately reflect public expectations for outcomes consistent with investor protection. Fortunately, this omission can be readily corrected, and we urge the MFDA to consider our comments and suggestions before finalizing this Sanction Guidelines policy.

Sincerely,

"Letty Dewar"

Letty Dewar
Chair, Investor Advisory Panel