



**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.<sup>1</sup>

Disciplinary sanctions imposed in a securities regulatory context are protective and preventative, intended to be exercised to prevent likely future harm.<sup>2</sup>

## **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

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<sup>1</sup> *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at para 59.

<sup>2</sup> *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