



## THE SKY IS THE LIMIT

The IDA can break down an advisor's violation into several offences, which can severely increase the penalties. **By Ellen J. Bessner**

**After reviewing** the Investment Dealers Association's (IDA) investigation process in my last column, it makes sense to review the penalties an advisor could face.

If the IDA concludes that the advisor failed to fulfill his or her regulatory obligations, the matter will be referred to an enforcement counsel—the IDA lawyer assigned to settle the file or represent the IDA at a hearing. The hearing would be presented before the District Council—an IDA tribunal that will decide the advisor's fate.

If the District Council concludes the advisor did not meet his or her regulatory requirements, there is a menu of penalties it can choose from. They are as follows:

- a reprimand;
- a fine of up to \$1 million per offence;
- a fine equal to three times the benefit the advisor obtained as a result of breaking the rules—even if this sum exceeds \$1 million;
- conditions placed on the advisor's licence, such as close supervision by the manager or a requirement to take additional courses (such as the Conduct and Practices Handbook (CPH) course);
- a suspension of approval of the advisor's licence for a period of time and on terms that District Council considers appropriate; and

- prohibition of approval of licence.

If these penalties were not bad enough, the District Council may break down what an advisor interprets as a single violation into several offences. As a result, the sky is the limit for the penalties that can be imposed.

Consider the following example: Mr. K was your client. He opened a margin account, an RRSP account and an account for his wife, Mrs. K. The advisor never met Mrs. K, but Mr. K did obtain her signature on the know-your-client form. Mrs. K filed a complaint, which can be broken down into three offences:

**Offence A:** The advisor breached his obligation to know his client, Mrs. K, because he never met her. The advisor could not have used due diligence to learn the essential facts relative to Mrs. K and therefore failed to ascertain her investment objectives directly from her (regulation 1300.1(a)).

**Offence B:** The advisor engaged in discretionary trading because the 30 trades in Mrs. K's account were made without consulting her. The trades were made on Mr. K's instructions without a power of attorney or written authorization from Mrs. K (regulation 200.1(i)(3)).

**Offence C:** The trades in

Mrs. K's account were unsuitable. She was an unsophisticated investor with no earnings and a small sum of savings (regulation 1300.1(d)).

Assuming the IDA concludes that you failed to fulfill your regulatory obligations, the District Council may choose any of the penalties, or any combination of the options. The following could be considered the penalties for the above violations.

**Offence A:**

- a \$40,000 fine
- a two-month suspension
- successful completion of the CPH

**Offence B:**

- a \$30,000 fine
- a two-month suspension
- close supervision for six months

**Offence C:**

- a \$40,000 fine
- a two-month suspension

The advisor may end up with a \$110,000 fine, a six-month suspension and, close supervision for six months when he returns to the firm, after he completes the CPH. Is this a sufficient incentive to ensure you learn the essential facts relative to each client?

**AE**

*Ellen J. Bessner is a lawyer in Toronto at Gowling Lafleur Henderson practising in the area of brokers' liability. ellen.bessner@gowlings.com*