Looking for Leniency From FINRA? Don't Count on Mitigation

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No one begins their career thinking that they will one day be a respondent in a Financial Industry Regulatory Authority disciplinary hearing, but the reality is that even a small lapse in judgment can lead to a career-killing sanction. Disciplinary penalties are designed, in theory, to take mitigating circumstances into account, but respondents should have a clear-eyed understanding of how mitigation arguments often face long odds.

FINRA's approach toward disciplinary penalties is embodied in its Sanctions Guidelines, which are the starting point for a discussion of the sanctions aspect of FINRA's enforcement regime. As a general principle, sanctions are supposed to be remedial, not punitive, and the Guidelines instruct hearing panels to fashion penalties that, while sufficient to deter future misconduct, are nevertheless appropriate after considering the facts of each case.

In that spirit, for many types of misconduct, the Guidelines suggest a range of possible outcomes. The possibilities can vary widely. As an illustration, the recommended sanction for excessive trading is a fine between $5,000 and $110,000 and a suspension of anywhere between one month to two years (or even an industry bar in the case of intentional churning).

Ranges like these are meant to give hearing panels the flexibility to tailor a sanction that accounts for the circumstances of each case, and the Guidelines lay out a number of factors that bear on the severity of penalties. These include the respondent's prior disciplinary history; whether respondents have been disciplined already by other regulators or their employers for the same misconduct; whether the respondent voluntarily tried to remedy the misconduct prior to being caught; whether respondent engaged in misconduct over an extended period of time; and the size and nature of the transactions involved in the misconduct.

These factors are not the only things hearing panels consider when tailoring a penalty. The Guidelines discuss a number of other factors that apply to all cases, and they also include factors that apply to specific types of misconduct. In a forged signature case, for example, the Guidelines instruct hearing panels to consider, among other things, the nature of document that was signed. Importantly, the Guidelines are not meant to be exhaustive; on occasion, respondents successfully raise mitigation arguments based on factors that FINRA did not include in its guidance.

This flexible approach naturally gives hearing panels important leeway in tailoring an appropriate penalty, but this flexibility comes with a number of important caveats.

First, respondents who engage in certain types of serious misconduct will rarely, if ever, benefit from mitigating circumstances. To give two examples, individuals found to have stolen customer funds will virtually always be barred from the industry regardless of the amount of money that was stolen. Similarly, respondents who ignore requests for information from FINRA under Rule 8210 will usually be barred. In Guidelines parlance, a "bar is standard" for these types of violations, a position that reflects FINRA's unforgiving attitude toward violations that, in its view, are incompatible with professional integrity.

Second, some of the sanctions considerations have the potential only to aggravate, not mitigate, a penalty. Hearing panels routinely reject arguments that the lack of prior disciplinary history should be mitigating. In FINRA's view, a registered representative should not be rewarded for compliance with industry regulations. In other words, while recidivism can lead to a harsher than usual sanction, respondents with clean records get no mitigation credit because it is assumed that registered representatives will follow the rules.

Third, the mitigating factors can be narrowly applied. Sometimes this is clear on the face of the Guidelines themselves. For instance, the Guidelines give credit to respondents who accepted responsibility for their misconduct, but only when acceptance of responsibility comes "prior to detection." Effectively, then, only respondents who self-report can receive mitigation credit on this basis; a respondent who accepts responsibility after being interviewed about the misconduct by her employer, for example, would not be eligible.

In other cases, mitigation factors are analyzed through a precedent-based framework that adds gloss to how they are applied. Respondents who reasonably rely on competent legal advice may cite their attorney's advice as a mitigation factor, but the written decisions suggest that respondents may not get mitigation credit if their attorneys had no experience in securities regulation or compliance (i.e., the legal advice was not "competent") or where respondents did not tell their lawyers all the relevant facts (i.e., the reliance on the lawyer's advice was not "reasonable").

Likewise, a medical condition might be reason to mitigate a sentence, but only if the ailment somehow affected a respondent's ability to comply with FINRA's rules. Written decisions addressing this argument make clear that a respondent arguing for mitigation on this ground bears a heavy burden.

None of this is to say that mitigation arguments are not an important part of the FINRA enforcement process. In the right case, they can help secure a penalty on the low end of the Guidelines range. And, just as important, introducing mitigating facts into the case may help put otherwise unexplained violations into context. But be forewarned: The flexibility built into the Guidelines is not guaranteed to soften the blow.

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