Introduction

The IDA (since 2008, the Investment Industry Regulatory Organization of Canada (IIROC)) is the national self-regulatory organization (SRO) that is responsible for policing investment dealers and Member firms that trade in the debt and equity markets in Canada (Jenah 2008: 1-4). IIROC sets educational requirements, ethical standards, and compliance rules that govern the conduct of its registered members and Member firms (Jenah, 2007: 2, 8, & 15). Registered members and Member firms must comply with these rules, or face penalties that range from a written reprimand to permanent bans from participating in the market (see IIROC, 2008: 4). IIROC's nine District Councils across Canada are responsible for enforcing these rules (IIROC, 2010: para. 1).

An Overview of the Problem

Public criticisms of the IDA being lenient on its members are well documented. One of the harshest critics of the IDA, *Vancouver Sun* columnist David Baines, argues "that the financial penalties" imposed by the IDA are "grossly inadequate" (Baines, 2006: para. 3). In one example an IDA Member firm and its three principals engaged in "persistent compliance breaches," yet neither the Member firm nor the principals "were suspended for a single day. All they had to do was pay $1,775,000 in fines, and they were back in good standing" (para. 2). Others note "a widespread perception that the IDA is not impartial in its policing of the brokerage industry and that the penalties imposed on firms and their employees are often too lenient" (Howlett, 2003: para. 7). A task force commissioned by the Ontario Securities Commission (OSC) in 2001, found that "many do not perceive the IDA to be responsive to retail investors. It is seen as a trade association catering more to the interests of its members than to the interests of investors" (Ontario Securities Commission, 2003: 8157; also see Ojo, 2011: 142).

Other problems with the enforcement arm of the IDA pertain to the manner in which complaints are resolved.

> A review of IDA disciplinary actions by *The Vancouver Sun* shows that, in the four years and five months since [an] earlier audit [covering the period from August 1995-July 1996], the IDA has not held a single contested hearing and has assessed only one suspension … (Baines, 2001: 14 emphases added).

Even when fines are imposed, they are often not collected. According to Baines,

> *The Sun* also found that, since the earlier audit, the IDA has assessed only $427,028 in fines, costs and disgorgements against British Columbia's registrants, about 11 per cent of the national total. According to the IDA's regional director Warren Funt, less than half this amount has actually been collected (Baines, 2006: para. 15).

That said however, brokers must pay their fines to continue working in the industry (para. 15). Brokers "who have defaulted have left the industry, either by choice or because they cannot find employment "(para. 15).

The accusations of weak enforcement forces one to ask the following question: are the penalties imposed by the IDA "grossly inadequate"? To address this question, this article will analyze the aggravating and mitigating factors considered by the IDA's hearing panels when determining penalties. In order to do this, I will first conduct a brief review of the extant literature surrounding self-regulation in the securities industry. Next, I outline the methodology that was employed to collect and code the data. This is followed by an analysis of the major findings on the key aggravating and mitigating factors that were considered in penalty imposition. The study concludes with a review of the broader implications of the findings and recommendations for hearing panels to achieve consistency in enforcement hearings.

Self-regulation and its Application in the Securities Industry

Of the work that has been done on self-regulation in the securities industry to date, three key observations have emerged. First, from the empirical evidence presented, the penalties imposed by SROs on market participants are not proportionate to the offences. McCaffrey and Hart (1998) examined the regulatory activities of the National Association of Securities Dealers (NASD) and New York Stock Exchange (NYSE) from 1990 to 1996 and found that there were firms that faced fewer regulatory sanctions and avoided major fines during the period (p. 17). DeMarzo, Fishman, and Hagerty (2005) analyzed the NYSE's enforcement of antifraud rules and found that the organization chose a "lax enforcement policy," meaning it conducted "less frequent investigations... than what customers would choose" (p. 687-688). Similarly, the Canadian Foundation for Advancement of Investor Rights (FAIR Canada) reviewed the penalties imposed on fifteen high profile entities and individuals that were registered with the provincial securities commissions and SROs[i] in Canada, and found that the laxity of sanctions imposed by securities regulators "did not send a sufficiently strong deterrence message to market participants" (FAIR Canada, 2011: 26).

Second, there seems to be a consensus among the studies that the laxity of sanctions imposed by SROs, is a result of their willingness to protect the interests of their members at the expense of the investing public (see Brockman, 2004: 63; Dorn, 2011: 77-80). McCaffrey and Hart (1998) found that the larger retail firms in their study “faced fewer regulatory sanctions," while firms dealing with institutional investors "avoided major fines in the period" examined (p. 17). The larger retail and institutional firms seem to be benefiting from their position in an industry that is funded mostly by its members. DeMarzo *et al*. (2005) started from the premise that the SRO’s “objective is to maximize the welfare of its members, the agents” (p. 688).

Consequently, SROs will choose an enforcement policy that will achieve this objective (Pp. 687-688). These findings indicate that SROs get morphed into servicing their members and when the interest of the public clashes with the interests of the members, the SROs puts their members first (also see Rosen and Rosen, 2010: 30).

Third, SROs will chose an enforcement policy that is just stringent enough to avoid government intervention. DeMarzo *et al*. found that “the threat of government enforcement leads to more aggressive enforcement by the SRO” (2005: p. 689). However, this calculated approach to enforcement by SROs in the securities industries exposes “the SROs and member firms to hard questions when major violations surface” (McCaffrey & Hart, 1998: 43). Government regulators can most certainly scrutinize the SRO and inquire on “how decisively the…SRO remedied the violation and whether the case illustrates a wider breakdown in the …SROs [disciplinary] system” (p. 43). In such a scenario, “government oversight [whether it is central like the SEC in the U.S. or decentralized as in the provincial securities commissions in Canada] of self-regulation can benefit customers by leading the SRO to engage in more aggressive enforcement” (DeMarzo *et al*., 2005: 702). The SRO would retaliate proactively by “choos[ing] an enforcement policy that is just aggressive enough to pre-empt the government from doing its own enforcement” (p. 702).

As with most SROs, the enforcement of by-laws in the securities industry is done through administrative proceedings. However, while the use of aggravating and mitigating factors in criminal proceedings are well documented, little, if anything is known about the use of these factors in administrative proceedings (see Kirchmeier, 1998: 361-374; Baldus, Woodworth, and Grosso, 2002: 508-514). This study will attempt to address this gap by examining data from the IDA’s tribunal cases.

Data and Methods

To eliminate arbitrariness in the decision making process, in 2003, the IDA adopted its new Disciplinary Sanction Guidelines ("Guidelines"). To conduct this research, *Quicklaw*'s database Securities Regulation Tribunal Decisions were searched for all decisions made by the IDA between 2003 and June of 2008. This paper analyzes the 238 cases that were found. Of the 238 cases, 25 were written in French, which were translated into English by a French- immersion Simon Fraser University graduate.

The Guidelines list the aggravating and mitigating factors that hearing panels must take into consideration when determining sanctions. Central to the Guidelines is that "sanctions should be tailored to address the misconduct involved in a particular case," and "a penalty must be proportionate to the gravity of the misconduct and the relative degree of responsibility of a respondent" (IDA, 2006: 7). Each case was read twice and the aggravating and mitigating factors identified were coded using an excel spreadsheet (see IDA, 2006: 7-11).There were cases where aggravating factors were identified in the summary of facts, but were not explicitly considered in the imposition of sanctions by the hearing panels. For example, there were cases where the hearing panels explicitly made reference to "losses to clients" as an aggravating factor; however, there were also cases where "losses to clients" were present in the material facts of the case, but were not identified as aggravating factors by the hearing panels when imposing penalties. These were coded as "Aggravating Factors Identified, But Not Considered." Therefore, the three attributes coded were: Aggravating Factors Identified and Considered (N=174), Aggravating Factors Identified, But Not Considered (N= 209), and Mitigating Factors (N= 378).

The Guidelines (2006: 7-11) list the factors that the hearing panels should consider when determining sanctions for individual offenders and Member firms. The list is "illustrative, not exhaustive," (2006: 7) and consists of the following factors:

- Harm to Clients, Employer and/or the Securities Market
- Respondent's Blameworthiness
- Degree of Participation
- Extent to which the Respondent was Enriched by the Misconduct
- Prior Disciplinary Record
- Acceptance of Responsibilities, Acknowledgement of Misconduct and Remorse
- Credits for Cooperation
- Voluntary Rehabilitative Efforts
- Reliance on the Expertise of Others
- Planning and Organization
- Multiple Incidents of Misconduct over an Extended Period of Time
- Vulnerability of Victim
- Failure to Cooperate with the Association's Investigation
- Significant Economic Loss to the Client and/or Member Firm[ii]

Findings

Aggravating Factors

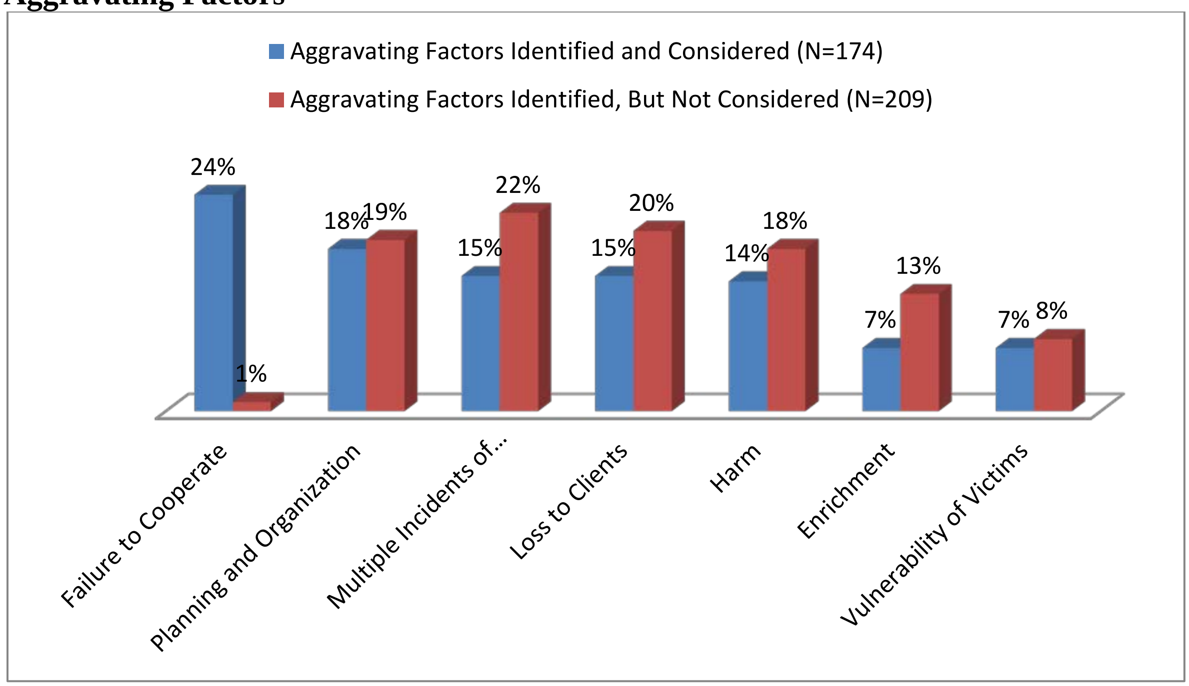

Figure 1: Aggravating Factors Considered and Aggravating Factors Identified, But Not Considered in the Imposition of Penalties

Figure 1 shows the aggravating factors that were identified and considered, as well as the aggravating factors that appeared in the factual description of the case but were not mentioned in the imposition of the penalties. With the exception of failure to cooperate, what stands out most is that for each factor, the proportion of aggravating factors that appeared in the factual description, but were not mentioned in the imposition of penalties, exceeded the proportion of aggravating factors that were considered in the imposition of sanctions by the hearing panels. This finding points to the possibility that the IDA hearing panels were more likely not to see (than to see) aggravating factors where they existed.

Failure to Cooperate

Failure to cooperate with the Association's request for information comprised 24% of the aggravating factors considered in the imposition of penalties. The Association takes a Respondent's "failure to attend and be questioned" by Enforcement staff as a serious issue because it "'compromised the Association's ability to complete [an] investigation' " (*IDA v. Bagnell*, 2003: para. 17). A failure to cooperate with the Association's request for information, "even if based upon a matter of principle, strikes at the very integrity of the Association's duty and ability to police itself" (*IDA v. Union Securities Ltd*, 2005: 55). More importantly, the impact of non-compliance can "stop the investigation completely" (*IDA v. Crittall*, 2004: para. 8). For example, in *Stewart*, the Association noted that the " Respondent's failure to provide the information and documentation and failure to attend for an interview, as requested, resulted in the Association not being able to proceed further in the investigation of the Respondent's activities" (*IDA v. Stewart*, 2005: para. 15).

Planning and Organization

Planning and organization made up 18% of the aggravating factors identified and considered in the imposition of penalties. In *Armstrong*, the Hearing Panel noted that

> [t]his was not an isolated incident or conduct involving a limited number of transactions over a limited period of time. The Respondent's misconduct involved a large number of clients, hundreds of transactions and extended over a period of four years… and involved a loss of those clients of approximately $2 million… (*IDA v. Armstrong*, 2003: para. 37).

In other cases, the Panel took into consideration the deliberate or intentional conduct of the Respondent. In *Djordjevic*, the Panel noted that "[t]he respondent's behaviour was egregious. He deliberately forged the signature of a client on a guarantee of another client's account. His activity was not negligent, but deliberate and deceptive" (*IDA v. Djordjevic*, 2007: para: 46). In *McCaffrey*, the Panel reasoned that "[t]he Respondent's violations extended over several months… His conduct was … serious, wrong, fraudulent, conscious and deliberate" (*IDA v. McCaffrey*, 2003: para. 18).

Figure 1 also shows that in 19% of the cases where issues regarding planning and organization of the offence existed, the panels did not identify them as such in the imposition of penalties. These issues were no different from the issues that were identified as planning and organization of the offence, and considered in the imposition of penalties in other cases. For example, in *IDA v. Tang* (2003), the respondent was involved in the planning and organization of the offence, yet the Panel did not identify this as an aggravating factor in the imposition of penalties. More specifically, the respondent misappropriated approximately $925,000 from the accounts of family and friends by causing the Member firm "to engage in transactions involving the exchange of Canadian dollars and US dollars with the holders of the accounts which improperly benefited the holders of the accounts…(*IDA v. Tang*, 2003). Similarly, in another case involving 33 clients and 76 acts of forgery, planning and organization of the offence was present, but was not identify by the Hearing Panel when determining penalties. In the *IDA v. Holowatiuk*

> [t]he Respondent has advised the Association that he committed the acts of forgery as a response to his emotions of feeling overwhelmed at times by the number of referrals and the paperwork involved in the transaction of his business and the lack of administrative support (*IDA v. Holowatiuk*, 2004: para. 16).

These examples suggest that even though there was evidence of pre-mediation and planning in the respondents' conduct, they were not addressed by the hearing panels when determining the penalties they imposed.

Multiple Incidents of Misconduct over an Extended Period of Time

Multiple incidents of misconduct over an extended period of time made up 15% of the aggravating factors identified and considered, and 22% of aggravating factors mentioned in the facts, but not considered in the imposition of penalties. In assessing multiple incidents of misconduct over an extended period of time, the hearing panels seemed to put considerable weight on repeated behaviour that ignored the "red flags," which led to the misconduct. In *Graham*, the Hearing Panel noted that even though there was only one error, in their view,

> "the error was seminal and grave and was repeated over and over. Mr. G… was presented with many "red flags" - as the Guidelines label them - and he chose to ignore them (*IDA v. Graham*, 2005: para. 28).

In other cases, the hearing panels looked at the extent of the misconduct when considering sanctions. In *Armstrong*, the Panel noted that what was

> [m]ost important is the scope of the Respondent's misconduct. This was not an isolated incident or conduct involving a limited number of transactions over a limited period of time. The Respondent's misconduct involved a large number of clients, hundreds of transactions and extended over a period of four years (*IDA v. Armstrong*, 2003: para. 37).

Similarly, in *Michaels*, the Panel noted that "[t]he Respondent's deception of the Association continued over an extended period of time and had the effect of delaying completion of the Association's investigation" (*IDA v. Michaels*, 2007: para: 26).

Although the hearing panels considered multiple incidents of misconduct over an extended period of time in some cases, in other cases such behavior was present but not addressed by the hearing panels when considering sanctions. For example, in one case, the Respondent admitted that

> B]etween September 2000 and February 2002 while employed as a Registered Representative at Canaccord Capital Corporation, a Member firm, the Respondent, effected 7 unauthorized transactions in the accounts of 3 separate clients, namely; DM, HM, and SN without prior authorization from those clients and thereby acted contrary to Association By-law 29.1. (*IDA v. Miller*, 2005: para. 50).

In another case, the Respondent misappropriated funds from clients and her employer over a two year period without being detected by regulatory authorities (see *IDA v. Judt*, 2005: para. 4). Likewise from January, 2001 to June, 2001

> the Respondent engaged in the conduct of forgery of the signature of V.E, at all material times a Registered Representative with the Member, BMO Nesbitt Burns, to V.E. client account documentation, which conduct is unbecoming a registrant and detrimental to the public interest, contrary to Association By-law 29.1 (*IDA v. Blaker*, 2007: para. 42)

These are just a few examples of cases where multiple incidents of misconduct were identified, but appeared not to be taken into consideration in the imposition of the penalties.

Economic Loss to Client and/or Member Firm

Economic loss to the client and/or Member firm made up only 15% of aggravating factors identified and considered in the imposition of sanctions. The identification of losses taken into account by the hearing panels was rather straightforward. In *Thompson*, the Panel noted that “[t]he Respondent’s clients lost one quarter or more of their investment together with the opportunity costs on the funds recovered” (*IDA v. Thompson*, 2004: para. 74). Similarly, in *Gareau*, the Panel took into consideration the fact that "[v]ery significant losses were caused as a result of the Respondent's conduct... No fewer than 14 clients lost a total of $724,000 (*IDA v. Gareau*, 2005: para. 68).

More striking however, is that in 20% of the cases, losses to clients’ accounts were mentioned but not considered in the imposition of sanctions. In one case, a married couple lost $202,000 in unauthorized trades from their joint account (see *IDA v. Brazeau*, 2005: para. 7-17). In *Konidis*, the investors “lost their entire investment …which totaled $26,353.80” (*IDA v. Konidis*, 2003: para. 19). Similarly, in *Grieve*, a 63 year-old widow lost $150,000 because of unsuitable investments; another client who was a “50-year-old electrician with less than a complete high school education and very limited investment knowledge…lost his entire investment …a total of approximately $22,400” (*IDA v. Grieve*, 2003: para. 5 and 6). Yet, none of the losses incurred in these cases were used as an aggravating factor in considering the appropriate penalties.

Harm to clients, employers and/or the securities market

Harm to clients, employers and/or the securities market were only identified and considered as aggravating factors in 14% of the cases. In the majority of the cases, the amount of financial losses incurred by the clients was the key factor that was taken into consideration in determining what constitutes harm. In *Youden* for example, the Panel noted that two of the Respondent’s clients “sustained losses over a two year period” (*IDA v. Youden, 2005*: para. 116). In *Leung*, the Panel noted that the Respondent “fraudulently circumvented regulatory requirements resulting in substantial harm to members of the investing public” (*IDA v. Leung*, *2005*: para. 1). In *Djordjevic*, the Panel stated that "[f]orgeries of this nature cause harm to the employer and harm to the securities markets... They sap the confidence of market participants that the system operates fairly and honestly" (*IDA v. Djordjevic*, 2007: para. 50).

Approximately 18% of the cases involved harm that was identified, but not considered as an aggravating factor. In keeping with the trend to identify harm based on financial losses, the Panel in *Dempsey* noted that

> [f]rom January 1, 2000 to June 30, 2002 MAP's RIF Account had a rate of return of -70% and the value of the account declined by $38,589.53. From January 1, 2000 to August 31, 2001 the C Margin Account had a rate of return of -48% and the value of the account declined by $97,627.93 and RC's RSP Account had a rate of return of -29% and the value of the account declined by $20,040.39… (*IDA v. Dempsey*, 2005).

All of the clients' accounts noted above declined substantially in value, but at no point throughout the case were there any references made to the harm caused to the clients. In another case, the Respondent and the Branch Manager were "involved in an illegal distribution of securities by breaching the prospectus exemption available under the *Alberta Securities Act*" and contravened the Member firms's policies (*IDA v. Cubbon*, 2006**:** para. 17 and 21). Yet, the Hearing Panel neither identified nor considered such conduct as harmful to the Member and securities market.

Respondents' Enrichment

The Respondents' enrichment comprised 7% of the aggravating factors that were identified and considered in the imposition of sanctions. In assessing the "extent to which the respondent was enriched by the misconduct," particular attention was given to the commissions earned from the misconduct. In *Armstrong*, the Panel found "that the Respondent benefited significantly from the misconduct in question... her commission participation in the transactions complained of over the period of five years amounted to $241,000.00 (*IDA v. Armstrong*, 2003: para.39). Similarly, in *Dimitriadis*, the Panel highlighted the fact that the Respondent made $76,000 in gross commission, of which 68% was given to him (*IDA v. Dimitriadis*, 2004: para. 185). In *Petriello*, the Panel made reference to the fact that “[t]he Respondent misappropriated amounts totaling $124,000 belonging to his client over a long period of almost two years" during which, he continued to benefit from the scheme (*IDA v. Petriello*, 2007: para. 25).

The Respondents’ enrichment comprised 13% of the aggravating factors identified, but were not considered in the imposition of penalties. Note that this is five percentage points more than the number actually considered as aggravating factors by the hearing panels. In one particular case, the commission charged by the Respondent was more than half of the client’s original investment (*IDA v. Xiao*, 2004: para. 35-39). The client “was single, 42 years old, employed as a hotel housekeeper for an annual salary of $20, 000,” and “deposited $50,000 in her account; however, the “total purchases amounted to approximately CDN $8,276,047” (para. 18, 36, and 38). The client reportedly “paid approximately CDN $25,258 in commissions” for these purchases (para. 39). There were also cases where the Respondent benefitted financially from fees charged, but these fees were not considered as enrichment by the Hearing Panel. For example, in *Tobin*, the Respondent was involved in discretionary trading in six clients’ accounts (*IDA v. Tobin*, 2006). “All of the client accounts...were fee based accounts” (para. 64).

> The Respondent's gross fees for this time period (January 2003 to April 2003) for the above client accounts were approximately $60,000. After deductions for his split (50/50) and reasonable branch expenses that the Respondent was required to cover, the agreed upon amount to be repaid for fees is accordingly $28,000 (para. 64).

Yet, in discussing the aggravating factors in this case, no reference was made by the Hearing Panel to the Respondent’s enrichment (see para. 5-9).

Vulnerability of Victims

The vulnerability of victims was only taken into account as an aggravating factor in 7% of the cases. In *Hart*, the Respondent misappropriated funds from two elderly widows' accounts. In determining the appropriate penalties, the Panel noted that the case "showed a clear plan of forgery and deceit and was an egregious breach of trust committed against two vulnerable individuals" (*IDA v. Hart*, 2006: para. 10). In other cases, the Hearing Panel focused on the level of the clients' market sophistication. In determining the Respondent's penalties in *Yanor,* the Panel made reference to the fact that the client's "sophistication was minimal" (*IDA v. Yanor*, 2005: para. 27). In *Schillaci*, the client's inability to recognize an experienced advisor, made the client vulnerable in the eyes of the Hearing Panel (*IDA v. Schillaci*, 2007: para. 84).

In 8% of the cases, the vulnerability of victims was identified, but was not considered in the imposition of sanctions. In *Wong* for example, the Respondent recommended and purchased Government of Argentina bonds for six elderly and unsophisticated clients "without first using due diligence to ensure that the recommendation was suitable for those clients based on their financial situation, investment knowledge, investment objectives and risk tolerance" (*IDA v. Wong*, 2005: para. 62). These recommendations resulted in significant losses to the clients' accounts. In one particular instance, the clients were an elderly married couple who could not "read English and...went to the Respondent's office on a monthly basis because they had difficulties understanding their monthly account statements" (para. 55). In *Gurion*, the Respondent misappropriated $353,587 from an 89 year old novice female investor, and then left Canada and settled in Russia (*IDA v. Gurion*, 2004: para. 2 and 10). While the Panel acknowledged the "extreme gravity of the Respondent's conduct," at no point did they allude to the client's vulnerability as an aggravating factor (para. 8).

Mitigating Factors

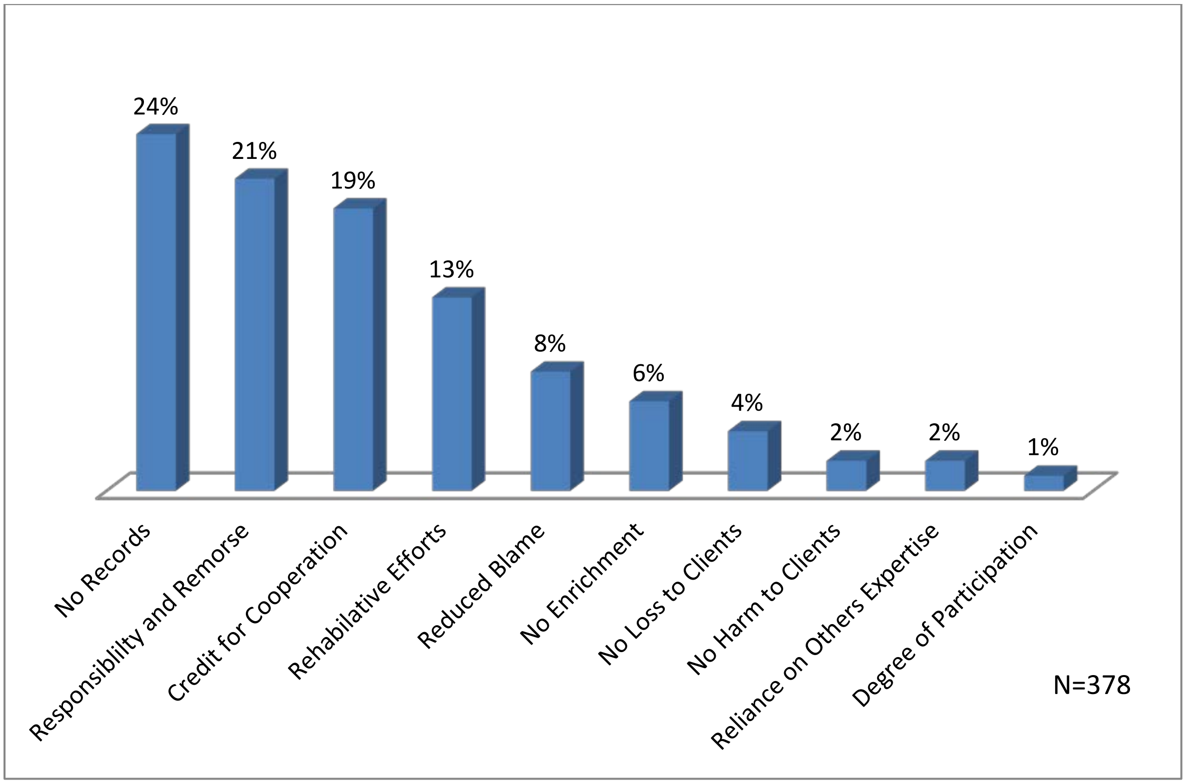

Figure 2 Mitigating Factors Considered in the Imposition of Penalties

No Prior Disciplinary Records

Figure 2 presents the mitigating factors considered by the hearing panels in the imposition of penalties. The Respondents' lack of a "prior disciplinary record" made up 24% of the mitigating factors considerd by the hearing panels, and was often used to mitigate against harsher penalties. In *Chan*, the fact that the Respondent had no prior record was one of the factors taken into consideration in reducing her penalty from a fine of $3,000 to a reprimand (*IDA v. Chan*, 2003: para. 2-3). Similarly, in *Loftus*, the Panel reduced the fine from $30,000 to $25,000, and the costs from $10,000 to $7,500, taking into account the cooperation of the Respondent and the fact that he did not have a prior disciplinary record (see *IDA v. Loftus*, 2004: para. 27). In *Wright*, the Panel's decision was influenced by the fact that, "in a career of some 25 years in the industry Mr. W has never been the subject of any disciplinary action" (*IDA v. Wright*, 2005: 5).

The acceptance of responsibilities, acknowledgement of misconduct and remorse

The acceptance of responsibilities, acknowledgement of misconduct and remorse, made up 21% of the mitigating factors considered in the imposition of sanctions. When this was considered as one of the mitigating factors against harsher sanctions, the hearing panels made specific reference to the Respondents' acknowledgement of their responsibilities and misconduct. In *Gawthrop*, the Panel noted that "the Respondent should not be visited with a serious fine because...he admitted his responsibility" for his misconduct (*IDA v. Gawthrop*, 2003: para. 10). Similarly, in *Saturley*, the Panel noted that "[t]he Respondent appears to have accepted his responsibility in this matter" (*IDA v. Saturley*, 2004: para. 8). In other cases, the hearing panel noted that the acceptance of responsibility included or implied remorse. For example in *Graham*, the Panel reasoned that "there is agreement that Graham has accepted responsibility and is remorseful"(*IDA v. Graham*, 2005: para. 26). Likewise in *De Long*, the Panel stated that one of the reasons that they accepted the Settlement agreement was because the Respondent "admitted to the inappropriateness of his conduct and has expressed remorse regarding any negative impact his conduct may have had upon the reputation of [the Member firm] and its business relationship with its trustee" (*IDA v. De Long*, 2005: para. 10).

Credit for Cooperation

Credit for cooperation made up 19% of the mitigating factors considered in the imposition of sanctions. In assessing this factor, the hearing panels paid particular attention to whether or not the Respondent fully cooperated with the Association's investigation. In *Boulieris*,

> the Association's investigators acknowledged that the Respondent had co-operated with every aspect of the investigation and had provided all requested files and documents (*IDA v. Boulieris*, 2003: 29).

In *Thompson*, the Panel noted that the Respondent

> has cooperated throughout with the Association in its investigation ...Most importantly, the Respondent did not walk away from the situation. Using his own resources, he pursued [Mr. D] with the Department of Lawyer Regulation of the Florida State Bar. It is largely due to his efforts that the majority of the money was recovered for the investors in the Debtors Certificates (IDA v. *Thompson*, 2004: para.87-88).

In *Doering*, the Panel noted that the Respondent's cooperation worked to advance the proceedings by “collaborati[ng] with enforcement counsel to produce the Agreed Statement of Facts” (*IDA v. Doering*, 2007: para. 20). By doing so, the Respondent saved the Association from incurring unnecessary costs and a great deal of time (para. 20).

Voluntary Rehabilitative Efforts

Voluntary rehabilitative efforts by the Respondents made up 13% of the mitigating factors taken into consideration by the hearing panels when imposing sanctions. In considering voluntary rehabilitative efforts as a mitigating factor, the hearing panels took into consideration acts of restitution taken on behalf of the Respondents. In determining the appropriate penalties in *Chan*,

> the Association considered a number of unique mitigating factors which included the fact that full restitution had been paid to the clients; the [R]espondent, currently aged 69, had delayed her retirement in order to continue to make restitution payments to her former employers (*IDA v. Chan*, 2003: para. 2).

In *Clarke*, The Panel noted that the Respondent’s employer

> has entered into settlement arrangements with the involved clients. It is believed the total losses will in the range of $500,000.00. The Respondent has contributed

> the sum of $368,000.00 toward those settlements. He substantially liquidated his financial holdings and mortgaged his interest in his matrimonial residence to do so (*IDA v. Clarke*, 2007: para. 19).

Blameworthiness

Respondents' blameworthiness made up 8% of the mitigating factors considered in the imposition of sanctions. When considering blameworthiness, the hearing panels took into consideration “illness or other extenuating circumstances of a personal nature [that] may have [an impact] on a registrant’s relative blameworthiness” (IDA, 2006b: 7). In *Brennan*, the Panel was advised that “Mr. B had suffered from severe depression and psychological illness” (*IDA v. Brennan*, 2004: para. 12). In *Pryde*, the Panel took into consideration that the Respondent

> was suffering from severe manic episodes diagnosed as bi-polar disorder for which he has been under regular treatment. This disorder necessitated him being hospitalized between July 28, 1998 and September 1, 1998 and between February 23, 2000 and March 2, 2000…. (*IDA v. Pryde*, 2005: para. 6).

Similarly in Clarke, the Panel made reference to the fact that the Respondent

> unauthorized trading in the CA and RC accounts was the result of a combination of the extreme personal stress he was under at the time, both at home and at work, and his wanting ‘to do very well for CA and RC’. Clarke has been undergoing therapy in order to deal with the underlying conditions that caused his behaviour (*IDA v. Clarke*, 2007: para. 50).

No Enrichment, Losses and Harm to Clients

Even though enrichment, losses and harm to clients were cited as aggravating factors, there were also times when they were considered as mitigating factors by the hearing panels. As can be seen in Figure 2, respondents not enriched by their misconduct made up 6% of the mitigating factors considered in the imposition of sanctions, while no losses and harm to clients' accounts made up 4% and 2% respectively. In *Graham for example*, the Panel noted that "there was agreement that Mr. G. was not enriched" by his misconduct (*IDA v. Graham*, para. 26).

Similarly, in *Blaker*, the Panel "acknowledged...that the Respondent did not receive any financial benefit" from her acts (*IDA v. Blaker*, 2007: para. 21). In references to losses, the Panel in *Cooney*, noted that "[n]o client suffered any loss as a result of any of the" misconduct described in the material facts of the case (*IDA v. Cooney*, 2004: para. 38). With references to harm, the Panel in *Bell* noted that "[t]here was no malicious intent on the part of the Respondent, [and] no harm to clients resulted from the violations" (*IDA v. Bell*, 2005: para. 3). In *Gordon*, the Panel argued that there was no identified illegal trading and therefore no harm to the Respondent's clients and the capital market (*IDA v. Gordon*, 2006).

Reliance on the Expertise of Others and Degree of Participation

A closer look at Figure 9-2 shows that reliance on the expertise of others (2%), and degree of participation (1%), only made up 3% of the mitigating factors considered in the imposition of penalties. In the few cases where the reliance on the expertise of others was considered as a mitigating factor, the Panel put a lot of weight on "whether a respondent demonstrated reasonable reliance on supervisory, legal or accounting advice that subsequent to the misconduct in question was found to have been erroneous"(IDA, 2006b: 10). For example, in *Gareau*, the Panel noted that "[t]he fact that Mr. G relied on Mr. Graham and was encouraged to do so by his employer is definitely a mitigating factor" (*IDA v. Gareau*, 2005: para. 68). With reference to Respondent's' "degree of participation" as a mitigating factor, the Panel considered the Respondent's diminished responsibility in the wrongdoing. In *Gareau*, the Panel noted that, "[a]lthough the Respondent was negligent, his responsibility [was] significantly diminished because of his reliance on his supervisor, SG" *(IDA v. Gareau*, 2005: para. 68). Similarly, in *Youden*, the Panel acknowledged that

> Mr. Y relied on the word and honesty of Mr. B when he should have, among other things, called the clients to confirm that the trading activity in their accounts was

> in accordance with their investment objectives and instructions. While this Panel found that such reliance was inappropriate in view of the many red flags in existence, it is clear that Mr. Y ha[d] a lesser level of complicity than Mr. B, who was a more direct perpetrator (*IDA v. Youden*, 2005: para. 118).

Discussion and Conclusion

Despite the widespread use of SROs to regulate various occupations, SROs remain an understudied institution. This research was designed to gain insight into how one SRO's disciplinary panels (the IDA) used predetermined aggravating and mitigating factors to discipline its wayward members. When examining the aggravating factors identified and considered in the imposition of sanctions, failure to cooperate with the Association's investigation stands out. Failure to cooperate creates a major threat to an SRO's ability to regulate its members, so it was expected that it would be a significant factor.

What was unexpected (and perhaps ought not to have been unexpected) was that the aggravating factors identified and considered were fewer in number than the aggravating factors identified but not considered by the hearing panels when imposing penalties. One plausible explanation for this outcome was that in cases where aggravating factors were identified and considered, they were more serious and transparent in nature, and as such, the hearing panels had no other options but to consider them when determining penalties.

Another finding was that the IDA's hearing panels were more likely to identify mitigating (N=378) rather than aggravating factors (N=174) when considering the appropriate penalties to be imposed on registrants. Was this because the hearing panels were more preoccupied with identifying mitigating factors that would in turn lead to less severe penalties for their members? Were hearing panels reluctant to impose heavy fines that might result in a registered representative weighing the cost and benefits of paying the fines and deciding to quit the industry? In such cases, the hearing panels may find it appropriate to apply mitigating factors and impose lighter penalties on the accused.

In the *IDA v Derivative Services Inc*, the Hearing Panel noted that one of the objectives in determining sentencing is the "[p]rotection of the investing public" (*IDA v Derivative Services Inc*, 2000: 3). The task ahead is to evaluate how the aggravating and mitigating factors cited by the hearing panels work to protect the public interest. Of particular concern are losses to clients and harm to clients, employer and/or the securities market. As mentioned earlier, losses to clients and harm to clients, employer and/or the securities market only made up about 15% and 14% of the aggravating factors considered when imposing penalties, as opposed to 20% and 18% of aggravating factors identified but not considered. One would assume that financial losses and harm to clients, are two of the most important aggravating factors to consider in sentencing decisions (see New Zealand Ministry of Justice, 1997: para 3). Since these factors were mostly ignored, it is difficult to comprehend how and in what context the public interest was served when considering penalties. By ignoring these aggravating factors, an argument can be made that lighter penalties were probably imposed on the accused for their misconduct. The lesser proportion of these two aggravating factors being considered, suggests that the penalties imposed on the offenders did not fit the offences (also see New Zealand Ministry of Justice, 1997: para 3). Given that the primary objective of penalties is the public interest, one would have thought that hearing panels would be more inclined to place increased emphasis on factors such as loss and harm to clients, Member firms, and the securities market when determining the appropriate sanctions.

Another point of contention is the role that mitigating factors that are not directly related to the offender's conduct, played in penalty imposition (see New Zealand Ministry of Justice, 1997: para 6-10). Post-offence mitigating factors such as responsibility and remorse, credit for cooperation, voluntary rehabilitee efforts and reduced blame were among the most frequent factors taken into consideration by hearing panels to mitigate against harsher penalties against the offenders. The problem with this is that one cannot know for sure if the offenders were showing genuine remorse or were making a calculated effort to cooperate because they knew there was a mountain of evidence stacked up against them. Added to these, is the fact that wealthier offenders and Member firms will be at an advantage over their contemporaries because they have the resources and therefore will be more likely to involve in some form of rehabilitative effort geared to compensate the victims (see New Zealand Ministry of Justice, 1997: para. 5).. Victims' preferences to be compensated, along with the fact that wealthier offenders have more resources at their disposal to negotiate deals with the IDA's investigation staff, can all contribute to them receiving lighter penalties (see Reynolds, 2007: 184; New Zealand Ministry of Justice, 1997: para: 5).

The IDA's Sanction Guidelines simply list the factors that should be taken into consideration by hearing panels when determining sanction. As the name suggests, the Sanction Guidelines are just "Guidelines." Hearing panels can use their discretion to apply the Sanction Guidelines in whatever way they see fit. The problem however, is when the hearing panels use the Guidelines in an arbitrary manner to impose lighter sanctions on the offenders. There needs to be a uniform approach when applying the Guidelines to ensure consistency in the imposition of penalties. To achieve consistency, the IDA's hearing panels must seriously take into consideration the factors listed in the Sanction Guidelines and apply them methodologically to each case (also see Buttigieg, 2012: 442-423). By acknowledging the aggravating and mitigating factors in each case when determining a penalty, the IDA (now IIROC) will be one step closer to serving in the public interest and the criticism that their penalties are "grossly inadequate."

References

Baines, D. (2001). “Regulators want errant brokers investigated faster: The investment dealers association is criticized by regulators for its lack of productivity' in disciplining B.C.'s stockbrokers,” available at: http://search.proquest.com/docview/242566098?accountid=13800 (accessed 28 October 2012).

Baines, D. (2006). “IDA settlements are about expediency, optics,” available at: http://search.proquest.com/docview/242181833?accountid=13800 (accessed 28 October 2012).

Baldus, D., Woodworth, G., and Grosso, C. (2002). “Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999),” *Nebraska Law Review*, vol. 81, pp.86-357.

Brockman, J. (2004). “An Update on Self-Regulation in the Legal Profession (1989-2000): Funnel In and Funnel Ou,” *Canadian Journal of Law and Society*, Vol.19, No. 1, pp. 55-84.

Buttigieg, C. (2012) "Implementing CRD for investment firms: challenges for Malta", Journal of Financial Regulation and Compliance, Vol. 20 Iss: 4, pp.417 – 432.

Canadian Foundation for Advancement of Investor Rights. (2011). “A Report on a Decade of Financial Scandals,” available at: http://faircanada.ca/wp-content/uploads/2011/01/Financial-scandals-paper-SW-711-pm_Final-0222.pdf (accessed 12 February 2012).

DeMarzo, P., Fishman, M., and Hagerty, K. (2005). “Self-Regulation and Government Oversight,” *Review of Economic Studies*, Vol. 72, No. 3, pp. 687-706.

Dorn, N. (2011) "The metamorphosis of insider trading in the face of regulatory enforcement", *Journal of Financial Regulation and Compliance*, Vol. 19 Iss: 1, pp.75 – 84.

Jenah, S. (2007). “IDA Report”, available at: http://docs.iiroc.ca/DisplayDocument.aspx?DocumentID=416F4DE0731A46FD918348D658814591&Language=en (accessed 20 October 2004).

Jenah, S. (2008). “ IIROC Submission to the Expert Panel on Securities Regulation,” available at: http://www.expertpanel.ca/documents/submissions/Expert%20Panel%20Submission%20-%20Final%20-%20Letterhead%20(en).pdf (accessed 04 November 20080.

Howlett, K. (2003). “Report seeks IDA revamp,” available at: http://www.investorvoice.ca/PI/491.htm (accessed December 13, 2003).

Investment Dealer Association. (2006) “Disciplinary Sanctions Guidelines,” available at: http://www.iiroc.ca/English/Enforcement/Policies/Documents/IDADisciplinarySanctionGuidelines_en.pdf (accessed October 23, 2008).

Investment Industry Regulatory Organization of Canada. (2008). “Guide for Subjects of an Investigation,” available at: http://www.iiroc.ca/English/Enforcement/Investigations/Documents/GuideSubjectsInvestigation_en.pdf (accessed November 2, 2008).

Investment Industry Regulatory Organization of Canada. (2010). “District Council,” available at: http://www.iiroc.ca/English/About/Governance/Pages/DistrictCouncils.aspx (accessed October 11, 2010).

Kirchmeier, J. (1998). “Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme,” *William & Mary Bill of Rights*, Vol. 6, No. 2, pp.210-214.

Rosen, A., and M. Rosen. (2010). *Swindlers*, Madison Press Limited, Toronto, Ontario

Reynolds,J. (2007). *The Naked Investor: Why Almost Everybody But You Gets Rich on Your RRSP*, Penguin, Toronto, Ontario.

McCaffrey, D. and Hart, D. (1998). *Wall Street Polices Itself*: *How Securities Firms Manage the Legal Hazards of Competitive Pressures*, Oxford University Press, NY, New York.

New Zealand Ministry of Justice. (1997). “Sentencing Policy and Guidance - A Discussion Paper,” available at: http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/5.-aggravating-and-mitigating-factors#5.1 (accessed 18 August 2012).

Ojo, M. (2011) "Co-operative and competitive enforced self regulation: The role of governments, private actors and banks in corporate responsibility", *Journal of Financial Regulation and Compliance*, Vol. 19 Iss: 2, pp.139 – 155.

Ontario Securities Commission. (2003). “OSC Bulletin,” available at: http://www.osc.gov.on.ca/documents/en/Securities-OSCB/oscb_20031219_2651.pdf (17 accessed September 2012).

Notes

[1] In addition to the IIROC, the other SROs which operate in the Canadian securities industry are the Mutual Fund Dealers Association (MFDA) and Chambre de la sécurité financière (CSF) in Quebec.
[2] See the IDA's Disciplinary Sanction Guidelines (2006:7-11) for a description of the key considerations when determining sanctions.

Cases Cited

Investment Dealers Association of Canada v. Armstrong, [2003] I.D.A.C.D. No. 19
Investment Dealers Association of Canada v. Bagnell, [2003] I.D.A.C.D. No. 44
Investment Dealers Association of Canada v. Bell, [2005] I.D.A.C.D. No. 15
Investment Dealers Association of Canada v. Blaker, [2007] I.D.A.C.D. No. 15
Investment Dealers Association of Canada v. Boulieris, [2003] I.D.A.C.D. No. 7
Investment Dealers Association of Canada v. Brazeau, [2005] I.D.A.C.D. No. 5
Investment Dealers Association of Canada v. Brennan, [2004] I.D.A.C.D. No. 18
Investment Dealers Association of Canada v. Chan, [2003] I.D.A.C.D. No. 5
Investment Dealers Association of Canada v. Clarke, [2007] I.D.A.C.D. No. 7
Investment Dealers Association of Canada v. Cooney, [2004] I.D.A.C.D. No. 41
Investment Dealers Association of Canada v. Crittall, 2004] I.D.A.C.D. No. 51
Investment Dealers Association of Canada v. Cubbon, [2006] I.D.A.C.D. No. 12
Investment Dealers Association of Canada v. De Long, [2005] I.D.A.C.D. No. 39
Investment Dealers Association of Canada v. Dempsey, [2005] I.D.A.C.D. No. 19
Investment Dealers Association of Canada v. Dimitriadis, [2004] I.D.A.C.D. No. 3
Investment Dealers Association of Canada v. Derivative Services Inc., [2000] I.D.A.C.D. No.26
Investment Dealers Association of Canada v. Djordjevic, [2007] I.D.A.C.D. No. 46
Investment Dealers Association of Canada v. Doering, [2007] I.D.A.C.D. No. 27
Investment Dealers Association of Canada v. Hart, [2006] I.D.A.C.D. No. 2
Investment Dealers Association of Canada v. Holowatiuk, [2004] I.D.A.C.D. No. 64
Investment Dealers Association of Canada v. Gareau, [2005] I.D.A.C.D. No. 25
Investment Dealers Association of Canada v. Gawthrop, [2003] I.D.A.C.D. No. 34
Investment Dealers Association of Canada v. Graham, [2005] I.D.A.C.D. No. 21
Investment Dealers Association of Canada v. Grieve, [2003] I.D.A.C.D. No. 8
Investment Dealers Association of Canada v, Gordon, [2006] I.D.A.C.D. No. 16
Investment Dealers Association of Canada v. Gurion, [2004] I.D.A.C.D. No. 32
Investment Dealers Association of Canada v. Judt, [2005] I.D.A.C.D. No. 17
Investment Dealers Association of Canada v. Konidis, [2003] I.D.A.C.D. No. 1
Investment Dealers Association of Canada v. Leung, [2005] I.D.A.C.D. No. 45
Investment Dealers Association of Canada v. Loftus, [2004] I.D.A.C.D. No. 35
Investment Dealers Association of Canada v. McCaffrey, [2003] I.D.A.C.D. No. 18
Investment Dealers Association of Canada v. Michaels, [2007] I.D.A.C.D. No. 8
Investment Dealers Association of Canada v. Miller, [2005] I.D.A.C.D. No. 4
Investment Dealers Association of Canada v. Petriello, [2007] I.D.A.C.D. No. 21
Investment Dealers Association of Canada v. Pryde, [2005] I.D.A.C.D. No. 38
Investment Dealers Association of Canada v. Saturley, [2004] I.D.A.C.D. No. 60

Investment Dealers Association of Canada v. Schillaci, [2007] I.D.A.C.D. No. 6
Investment Dealers Association of Canada v. Stewart, [2005] I.D.A.C.D. No. 23
Investment Dealers Association of Canada v. Tang, [2003] I.D.A.C.D. No. 25
Investment Dealers Association of Canada v. Thompson, [2004] I.D.A.C.D. No. 49
Investment Dealers Association of Canada v. Tobin, [2006] I.D.A.C.D. No. 8
Investment Dealers Association of Canada v. Union Securities Ltd, [2005] I.D.A.C.D. No. 51
Investment Dealers Association of Canada v. Wong, [2005] I.D.A.C.D. No. 24
Investment Dealers Association of Canada v. Wright, [2005] I.D.A.C.D. No. 33
Investment Dealers Association of Canada v. Xiao, [2004] I.D.A.C.D. No. 38
Investment Dealers Association of Canada v. Yanor, 2005] I.D.A.C.D. No. 46
Investment Dealers Association of Canada v. Youden, [2005] I.D.A.C.D. No. 52