

IIROC NOTICE

Rules Notice Request for Comments

Dealer Member Rules

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Contact:

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11-0051

February 7, 2011

Request for comments on the updated draft Guidance Notice MR0281: “Guidelines for the review, supervision and retention of advertisements, sales literature and correspondence”

IIROC Dealer Member Rule 29.7 sets out the requirements relating to the review, supervision and retention of advertisements, sales literature and correspondence. In response to the increasing use of social media web sites, such as Facebook, Twitter and blogs, IIROC staff has updated the content of the existing Guidance Notice MR0281 to address the unique compliance and supervisory issues when using social media web sites to communicate with clients and the public for business purposes, as well as to provide Dealer Members will considerations when designing firm policies and procedures for the review, supervision, retention and retrieval of various forms of communications.



Dealer Members and other interested parties are requested to provide comments on the issues discussed in this updated draft Guidance Notice which is attached. Comments should be provided 60 days from the publication date of this request for comments.

Comments on the updated Guidance Notice may be delivered in writing or by fax or e-mail within 60 days of the date of this notice to:

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Guidance Note - Draft
Dealer Member Rules

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11-xxxx
xx, 2011

Guidelines for the review, supervision and retention of advertisements, sales literature and correspondence

This Notice replaces Member Regulation Notice MR0281 issued on April 12, 2004, and is effective immediately.

Member Regulation Notice MR0281 (“Notice MR0281”) provides guidance to Dealer Members in the development and implementation of policies and procedures for the review, supervision and retention of communication materials, such as advertisements, sales literature and correspondence. As such, Notice MR0281 focuses on the nature of various communications and not on the methods by which such communications are disseminated. However, over the last decade, the available methods of communication have changed significantly with the increasing use of social media web sites, such as Facebook, Twitter and blogs. These changes in available communication methods have led to a number of enquiries by Dealer Members regarding the application of the IIROC Rules and Notice MR0281 to newer forms of social media communication as noted above.

All methods used to communicate including, but not limited to, Facebook, Twitter, blogs, and chat rooms, are subject to the IIROC Dealer Member Rules. The content of Notice MR0281 has been updated to clarify that regardless of the method by which communication takes place, Dealer Members must ensure compliance with applicable regulatory requirements and securities legislation.



This Notice also addresses the unique compliance and supervisory issues Dealer Members and their registered representatives must consider when using social media web sites to communicate with clients and the public for business purposes, and when designing firm policies and procedures for the review, supervision, retention and retrieval of these materials.

I. Definitions

Dealer Members' policies and procedures should contain clear and comprehensive definitions of what constitutes advertising, sales literature and correspondence. Whether materials are classified as advertising or sales literature will generally be determined by their content and purpose rather than by the method of communication used. Accordingly, electronic communication, including social media web sites, may constitute advertising, sales literature or correspondence depending upon their content and purpose. Dealer Members should therefore consider the following guidelines when designing policies and procedures:

1. Advertisements may be conveyed using all forms of communications media, including print, broadcasting and electronic media.
2. While password protected web sites, for example those designed solely for existing clients to enter orders, would not normally fall within the definition of advertising, material on search sites regarding specific securities or strategies may constitute sales literature.
3. A simple link on another entity's web site, whether or not paid for, is not an advertisement. However, if the link also contains any accompanying text or graphics promoting the Dealer Member's services that would constitute an advertisement.
4. A letter, e-mail or other communication sent to more than one client, whether or not purporting to be tailored to their specific requirements or objectives would generally fall within the definition of sales literature, unless the communication includes a recommendation with respect to a security or trading strategy. Given that these types of communication can be sent by individual registered representatives, Dealer Members should ensure that the policies, procedures and educational efforts clearly define sales literature.
5. General market and economic commentaries as well as educational seminars not designed to sell particular securities do not fall within the definition of advertising or sales literature. Having said that, Dealer Members' policies and procedures should include a process to approve the involvement of particular individuals in such endeavours, and guidance and training to ensure that they are aware of the boundaries between general commentary and advertising or sales literature.



II. Recordkeeping Responsibilities

Pursuant to National Instrument 31-103 (“NI 31-103”), firms must retain records of their business activities, financial affairs, client transactions and communication. Dealer Members must therefore design systems and programs with compliant record retention and retrieval functionalities for all methods of communication. For instance, the content posted on social media web sites, such as Twitter, Facebook, blogs, chat rooms and all material transmitted through emails, are subject to the above-noted legislative and regulatory requirements. Section 11.5(2) of NI 31-103 requires Dealer Members to maintain transaction related documents entered into on behalf of each client. These documents may include, but are not limited to, trade confirmation statements, emails and notes of oral communications with clients.

The following are considerations for Dealer Members when designing and implementing compliant retention and retrieval practices:

1. Policies and procedures should include record retention requirements that cover both copies of the material itself as well as records of reviews and approvals.
2. Where a post-use or sampling review uncovers problems, records should be kept of the action taken to correct them.
3. The need to prohibit access to social media web sites that do not allow for compliant retention practices.

III. Suitability and Recommendations

Dealer Members must be mindful of the additional regulatory obligations that may be triggered as a result of the content of the communication delivered to clients. For instance, a “recommendation”, whether delivered via a social media web site or by way of written correspondence, must take into consideration the suitability requirements set out in IIROC Dealer Member Rule 1300. Dealer Members should take measures to monitor and/or prohibit electronic communications that constitute recommendations which must comply with IIROC’s suitability rules.

IV. Supervisory Responsibilities

Dealer Members must establish policies and procedures that are consistent with their supervisory obligations and protect clients from misleading or false statements. It is at the discretion of Dealer Members to determine whether to employ:

- pre-use approval,
- post-use review, or
- post-use sampling



as the most effective means of monitoring communications in accordance with IIROC Dealer Member Rule 29.7(3).

Dealer Members should consider the following:

1. Post-use or sampling reviews may be appropriate for specific instances of template advertisements, daily comments following up on published research or correspondence to single clients or small groups of similar clients.
2. Research reports, market letters, telemarketing scripts, promotional seminar texts, original advertising and any material that is used to solicit clients and contains performance reports or summaries must be subject to pre-use approval for both content and disclosure requirements.
3. When pre-use approval is required, the record of approval should evidence the fact that the review and approval was based upon the final draft or proof, not a preliminary draft or proof in which changes have been requested.
4. Original advertising refers to the first instance of an advertisement and requires pre-approval.
5. Template advertising is an advertisement that has a preset format which serves as a starting point each time it is used. The first instance of a template advertisement requires pre-approval; however, minor variations in specific placements of template advertisements, such as the name of the registered representative or location of the branch office, do not require continuous approval.
6. Any advertising, sales literature or correspondence used to solicit clients that contains performance reports or summaries must be pre-approved. This does not include, for example, software-generated portfolio reports to clients or material containing price and volume charts for specific equities or yields for specific fixed income securities. It does cover advertisements containing performance reports on mutual funds or asset allocations services, which should be reviewed for compliance with both IIROC Dealer Member Rule 29.7 and National Instrument 81-102 (“NI 81-102”).

It is the Dealer Member’s responsibility to evaluate the adequacy of their systems to review all forms of communication: incoming, outgoing, printed or electronic. This can be done by providing secure remote access to the Dealer Member’s systems to employees and agents, by prohibiting the sending of business-related communication through home and web sites that are not supervised, or by requiring that copies of all business-related communication be sent to the Dealer Member on a pre/post approval basis. There is also software available that will enable Dealer Members to review outgoing and incoming emails for keywords indicating that it should be reviewed.



A Dealer Member's policies and procedures should outline the type of review required, including who is responsible for conducting reviews and taking remedial action if necessary, sampling frequency or techniques and record retention requirement for each type of material used by the Dealer Member. Policies and procedures should provide for cross-supervision; individuals should not be responsible for the supervision or approval of advertising or sales literature which they themselves have prepared, and where specific types of advertising, sales literature or correspondence are prohibited by the Dealer Member, the policies and procedures should explicitly state the prohibition.

Where a Dealer Member is organized in two or more separate business units or division, the Dealer Member may assign a Supervisor for each separate business unit or division to ensure compliance with IIROC Dealer Member Rule 29.7. The designated Supervisor should ensure that adequate policies and procedures are in place, are reviewed periodically to ensure that they remain adequate, are revised to incorporate relevant rule changes and are communicated to all applicable personnel. The designated Supervisor should also ensure that any individuals assigned specific responsibilities under the policies and procedures are aware of their duties and are properly fulfilling them.

With regards to social media web sites used for business purposes, such as blogs, LinkedIn, Twitter, chat rooms and Facebook, Dealer Members are faced with supervisory challenges. Specifically, IIROC staff has received a number of enquiries relating to interactive versus static content and password protected versus accessible web sites. Static content, such as a profile, background or wall information, usually considered an 'advertisement', must be pre-approved pursuant to IIROC Dealer Member Rule 29.7(3) and is generally accessible to anyone. An interactive electronic forum such as Facebook and Twitter, on the other hand, includes real time discussions and although it does not require prior approval, must be supervised to ensure compliance with IIROC Dealer Member Rules and securities legislation.

Whether a social media web site is password protected or accessible to all does not determine whether or not it is an acceptable method of communicating with clients. As long as web sites are adequately supervised and do not violate any regulatory or legislative requirements, Dealer Members and their representatives are permitted to use these sites and/or technology to communicate with clients and the public for business purposes. Having said that, it is improper and a violation of IIROC Dealer Member Rule 29.1 for registered representatives to make anonymous representations or recommendations using any method of communication.

V. Electronic or Voicemail Orders

Acceptance of orders by email or voicemail, through anything but a dedicated order-entry system, creates a number of risks, such as delays in opening and executing instructions or inadequate instructions being provided by the client. Clients and registered representatives should be



discouraged from making use of email and voicemail for order instructions, and if they choose to use these methods of communication, clients should be warned of the risks.

VI. Third-Party Communications and Research

Dealer Members must exercise extreme caution when engaging in third party communications, such as permitting third parties to comment or post on a Dealer Member's web site, providing links on a Dealer Member's web site to a third party's web site, and Dealer Members securing sales communication from a third party web site. Third party posts may be attributed or considered an endorsement by the Dealer Member, thereby triggering regulatory and legislative requirements. For example, re-tweeting a client's post or providing a thumbs-up may be considered an endorsement.

Third party research is not governed by IIROC Dealer Member Rule 29.7, but is dealt with under IIROC Dealer Member Rule 3400. However, material provided by a party not at arm's length to the issuer, such as an investor relations firm, would constitute sales literature if disseminated by a Dealer Member. Furthermore, where individual registered representatives who are not employed as research analysts, as defined under Dealer Member Rule 3400, issue reports similar to research reports, such reports must be reviewed for disclosure of relevant conflicts of interest using applicable regulatory and legislative requirements.

VI. Other Regulatory Requirements

Dealer Members' policies and procedures should be designed to ensure that all advertisements, sales literature and correspondence comply with IIROC Dealer Member Rule 29.7(1) and all other applicable regulatory and legislative requirements. Other notable requirements include, but are not limited to, the following:

- CIPF disclosure (IIROC Dealer Member Rule 29.14)
- Restricted share terms disclosure (for example, section 2.2(1)(c) of Ontario Securities Commission Rule 56-501)
- National Instrument 31-103 – Registration Requirements and Exemptions (sections 11.5 and 11.6 – General Requirements for Records)
- National Policy 47-201 – Trading in Securities Using the Internet and Other Electronic Means
- Mutual fund advertising restrictions (section 15 of NI 81-102)
- Supervision of Accounts (IIROC Dealer Member Rule 1300)
- Research Restrictions and Disclosure Requirements (IIROC Dealer Member Rule 3400)
- Member Regulation Notice MR008: Guidelines for the Electronic Delivery of Documents