IIROC OCRCVM
Investment Industry Regulatory Organization of Canada
Organisme canadien de réglementation du commerce des valeurs mobilières

IIROC NOTICE

Rules Notice
Request for Comments
Dealer Member Rules and UMIR

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Republication of Proposed Consolidation of IIROC Enforcement, Procedural, Examination and Approval Rules

On March 23, 2012, staff of the Investment Industry Regulatory Organization of Canada ("IIROC") published for comment a rule proposal to consolidate and rationalize certain enforcement and related rules currently contained within the Universal Market Integrity Rules ("UMIR") and the Dealer Member Rules into a set of new rules (the "Consolidated Rules"). See IIROC Rules Notice 12-0104, *Consolidation of IIROC Enforcement, Procedural, Examination and Approval Rules* (Mar. 23, 2012), online: http://www.iiroc.ca/Documents/2012/98f7935f-aa2a-44c8-a028-95b9da92c2ef_en.pdf (the "Original Notice"). The Original Notice identified all of the amendments being proposed at that time

in connection with the Consolidated Rules and provided detailed explanations of the most important amendments.

Following an extensive review of the public comments received in response to the Original Notice, and with input from the Canadian Securities Administrators (the "CSA"), IIROC staff has made certain material revisions to the Consolidated Rules. The purpose of this Notice is to republish the Consolidated Rules, as revised (the "Revised Consolidated Rules"), for public comment and to provide an explanation of the material revisions made. The Revised Consolidated Rules are attached, in blackline and clean versions, as Attachments A and B. We have also made minor amendments to the Consequential Amendments to Dealer Member Rules, UMIR, and Transition Rule No. 1 Rule, which are attached, in a blackline and clean version, as Attachments C and D.

In addition, IIROC staff has prepared consolidated responses to the public comments received in response to the Original Notice; these responses are attached as Attachment E.

Analysis & Discussion

The detailed explanations provided in the Original Notice concerning each of the material amendments proposed in the Consolidated Rules will not be repeated here; instead, this Notice will focus on the material revisions made to those proposed amendments.

The following are the material revisions being proposed as part of the Revised Consolidated Rules.

Definitions [*Revised Consolidated Rule 1200*]

One public commenter raised a question about possible discrepancies between the defined terms set forth in Consolidated Rule 1200 and equivalent defined terms set forth in the Plain Language Rewrite ("PLR") version of Rule 1200, which was published for comment in January 2012.

The definitions in both the Consolidated Rules and PLR versions of Rule 1200 were reviewed, and appropriate changes have been made to both the Consolidated Rules and PLR proposals to ensure that the definitions common to both proposals are identical. In addition, for ease of reference, we have added five defined terms to subsection 1201(2) of Consolidated Rule 1200 (which have been taken from the PLR version of this rule, namely: "applicable", "associate", "beneficial ownership", "business location", and "carrying broker"), as these terms are used elsewhere in the Consolidated Rules. We have also added language to subsection 1201(1) to clarify that many other terms that do not appear in Consolidated Rule 1200 will continue to be defined as set forth in the Dealer Member Rules and UMIR (as well as General By-Law No. 1), which will remain in force until the PLR rules have been implemented.

In addition, we have made certain technical revisions to existing terms of Consolidated Rule 1200. We have also made non-material changes to Consolidated Rule subsection 1201(1) and to certain defined

terms in subsection 1201(2), including "control", "laws", "public member", "securities legislation", and "securities regulatory authority". All of these changes are highlighted (in blackline format) in Attachment A.

We have also modified the definition of "employee" to make it clear that the term (when italicized) refers only to employees of a Dealer Member, rather than employees of any Regulated Person.[1] The reason for the change was to prevent the inadvertent imposition of Dealer Member Rule-based obligations on employees of non-Dealer Member Regulated Persons, i.e. firms referred to as "Access Persons" under UMIR or as "non-*Dealer Member* users and subscribers of a *Marketplace* for which [IIROC] is the regulation services provider" under the Consolidated Rules. Employees of Access Persons will continue to be bound by the relevant provisions of UMIR. At a future date, we intend to insert the UMIR rulebook into a placeholder that has been reserved for it in connection with the PLR project (referred to as the "6000 Series", see Original Notice at 3-4); at that time, additional changes may be made to further rationalize certain defined terms that are common to both UMIR and the Dealer Member Rules still in effect, including the terms "employee", "director" and "officer".

Confidentiality of Investigations *[Revised Consolidated Rule Section 8106]*

Section 8106 is being adopted for the reasons set out in the Original Notice, namely, to protect the integrity of IIROC investigations and the reputation of persons who are subject to them. It is thus intended to ensure that persons contacted in connection with an impending or ongoing IIROC investigation will not disclose any information relating to the investigation, except where authorized to do so. Public commenters raised a number of concerns with respect to section 8106, as initially published, including its compliance with *Charter* values and operational difficulties that may have flowed from the initial version.

IIROC staff considered the concerns raised and has made material revisions to the rule to address these concerns, taking into account the *Charter,* relevant case law and similar confidentiality provisions in the various provincial securities laws, including legislative amendments made to them to address the relevant case law.

As revised, section 8106, will operate as follows:

- The rule applies to any person who receives an investigation request, is present at or informed of an entry by Enforcement Staff conducting an investigation, or is informed by Enforcement or other Corporation staff of an investigation.

- In general, any person subject to the rule is prohibited from disclosing, except to the person's counsel or another individual who represents the person or as required by law, the following types of information ("Confidential Information"):

[1] The defined term "*employee*" will also continue to include agents of a Dealer Member that have entered into a principal/agent relationship contemplated under IIROC Rules. This element of the definition has not changed.

- the nature or content of the investigation or request;
- the fact of an entry by staff;
- the fact that any report, record, other document or thing was requested, produced, provided, inspected, copied or taken;
- the name of any person required to attend and answer questions; or
- any questions asked by or any answers given to staff.

- New subsection (2) sets out three blanket exemptions to the confidentiality obligation, namely:

  (1) where the person became aware of the Confidential Information otherwise than as a result of the conduct of the investigation;

  (2) where Enforcement Staff consents to disclosure of the Confidential Information (which consent may be on terms and conditions); or

  (3) where a hearing panel, on motion, determines that disclosure of the Confidential Information would not impede the conduct of the investigation and is otherwise justifiable (subject to any terms and conditions that the hearing panel considers appropriate).

- New subsection (3) provides for further discrete exemptions, allowing a person to disclose some types of Confidential Information (namely, any of the types of information listed above *except* questions asked by or answers given to staff) if at least one of the following conditions is met:

  (1) The disclosure is required to fulfill an obligation of the person under a Corporation requirement;

  (2) The disclosure is in connection with the imposition by a firm of restrictions on a person who is a subject of the investigation (but only to the extent necessary to implement the restrictions); or

  (3) Unless otherwise requested by Enforcement Staff:

    - the disclosure of the information is required to fulfill a fiduciary or contractual obligation of the person to his or her firm (e.g. pursuant to an internal firm policy);

    - a person is disclosing the information to his or her employer by informing another firm employee with supervisory authority over the person; or

    - a person is disclosing the information to a fellow employee of the firm who is senior to the person.

In summary, as revised, section 8106 imposes a relatively narrow confidentiality obligation because:

1. It applies only to persons who are informed of an investigation by Enforcement Staff, whether through the conduct of the investigation or by delivery of written notice from Enforcement Staff concerning the investigation, and to others whom these persons are allowed to inform.

2. It has been amended to apply to a narrower universe of Confidential Information as a result of

the deletion of the basket clause ("or any other information relating to the investigation") that subsection 8106(1) previously contained.

3. It builds in several blanket exemptions, as well as certain discrete exemptions, in recognition of the various routine circumstances in which disclosure of what would otherwise be Confidential Information is legitimate and necessary. In particular, the rule now expressly enables Enforcement Staff to consent to the disclosure of any information that would otherwise be confidential; and where Enforcement Staff does not consent, the rule expressly allows a person to request, on motion to a hearing panel, an exemption from the confidentiality obligation.

IIROC staff believes that Revised Consolidated Rule section 8106 satisfies *Charter* values, and adequately addresses the practical difficulties raised by commenters. It generally follows the approach taken in sections 16 and 17 of the Ontario *Securities Act*, which were amended in 1994 to meet *Charter* requirements. It also takes into account the holding in *Shapray v. British Columbia (Securities Commission)*, 2009 BCCA 322 (CanLII) and securities act provisions adopted in response to that decision (see e.g. B.C. *Securities Act*, s. 148), achieving an appropriate balancing between the needs of individuals and firms to communicate about an ongoing investigation that affects them and Enforcement Staff's need to protect the integrity of ongoing investigations by maintaining confidentiality.

Standards of Conduct *[Revised Consolidated Rule 1400]*

A) <u>The proposed negligence standard remains the same as in the Original Notice</u>

As explained in greater detail in the Original Notice, the purpose of Consolidated Rule 1400 is to consolidate Dealer Member Rule 29.1 and UMIR 2.1 by prohibiting conduct that is

- unbecoming,
- detrimental to the public interest, and/or
- inconsistent with just and equitable principles of trade

in the same provision, thereby making the various existing standards of conduct applicable to all Regulated Persons. Additionally, the rule was intended to clarify that negligence may be a basis for a determination that IIROC's general standard of conduct has been violated. The rule, however, was not intended to create new obligations, nor was it intended to expand the jurisdictional scope of existing Dealer Member Rule 29.1 and UMIR 2.1.

Public commenters raised a number of concerns regarding the negligence standard codified in proposed clause 1402(2)(i). We believe that this provision is consistent with, and clarifies the intent of, the current Dealer Member Rule and UMIR requirements. As with other professional regulatory bodies, IIROC's existing and proposed standards-of-conduct rules are principle-based standards, the scope of which, for any particular case, is ultimately determined by a hearing panel comprised of industry experts, both active and retired, as well as a legally trained panel chair. Like existing Dealer

Member Rule 29.1 and UMIR 2.1, Consolidated Rule 1400 is not meant to be a prescriptive rule because it is impossible to anticipate, all types of conduct that may fall below the accepted standard.

As noted in our response to public comments, in a number of cases over the past decade, with increasing frequency, hearing panels have interpreted "conduct unbecoming" to require unethical, dishonest, intentional or reckless conduct or aggravated or gross negligence.[2] The decisions based on this interpretation of "conduct unbecoming" are inconsistent with numerous other hearing panel decisions finding violations of Rule 29.1 based on negligence, rather than gross negligence. Examples include successful disciplinary actions in the context of undisclosed or otherwise improper outside business activities, failures to prevent manipulative trading by a client, failures to properly handle client complaints, negligent misrepresentation, and improper off-book distributions.[3]

In one recent decision, the hearing panel attempted to further clarify the various interpretations of conduct unbecoming, noting that: "[F]or conduct to be 'conduct unbecoming' under Rule 29.1, there must be some element of wrongdoing or falling below the standard of conduct reasonably accepted in the securities industry in order to maintain the public trust in the members who handle the public's money."[4]

It is Staff's view that certain negligent conduct may, depending upon all of the circumstances, fall below such a standard "reasonably accepted in the securities industry" and therefore constitute a breach of our existing and proposed general standards-of-conduct rules.

Proposed clause 1402(2)(i) is an express recognition that negligent conduct may constitute a breach of the proposed standard of conduct rule. This rule reflects our understanding that conduct unbecoming, within the context of IIROC's rules, is not—and has never been—a penal standard,[5] but is a self-regulatory standard, consistent with the obligations of Regulated Persons to comply with IIROC's rules and maintain high standards of conduct. This approach is similar to that of other securities

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[2] See e.g. *Re Zosiak*, 2012 IIROC 59 at paras. 59-60, discussing earlier decisions.

[3] See e.g. *Re Lotz*, 2008 IIROC 2 at paras. 12-13 (implicitly applying a negligence standard to charge, under Dealer Member Rule 29.1, of failing to disclose outside business activities to IIROC); *Re Faiello*, [2007] I.D.A.C.D. No. 4 at paras. 36-37 (finding respondent liable under Dealer Member Rule 29.1 where he "ought to have recognized that [the] account was being used by his client to further [a] [m]anipulation"); *Re Leduc & Associés Valeurs Mobilières (Canada) Ltée*, [2004] I.D.A.C.D. No. 66 (finding UDP liable under Dealer Member Rule 29.1 for failing to deal effectively and diligently with a client complaint); *Re Morrison*, [2002] I.D.A.C.D. No. 5 (in uncontested matter, finding a breach of Dealer Member Rule 29.1 where respondent recommended an investment product and "provided his client... with erroneous and misleading information" regarding that product); *Re Beaty*, [2000] I.D.A.C.D. No. 46 (finding violation of Dealer Member Rule 29.1 where respondent placed off-book trades in violation of provincial securities law, industry standards, and his firm's internal policies).

[4] *Re Deeb*, 2013 IIROC 08, at para. 99.

[5] See *Re Dennis*, (2012) 35 O.S.C.B. 7374 (August 9), at paras. 38-39. For a more detailed discussion of this issue, please see Attachment E at pages 21-24.

regulators, including FINRA (under its equivalent standards-of-conduct rule, FINRA Rule 2110) and Canadian provincial securities regulatory authorities (under similarly broad provisions of their respective securities acts).[6] It would be anomalous and improper if negligent misconduct by IIROC's Regulated Persons could be sanctioned under provincial securities law, but not under IIROC's own self-regulatory standards-of-conduct rule. Codifying the standard of simple negligence in the rule itself, as clause 1402(2)(i) does, brings clarity to the standard to be applied.

IIROC accepts that not all inadvertent acts or errors will constitute a contravention of the proposed rule, but we believe that our basic standards-of-conduct rule should continue to permit Enforcement Staff, in appropriate circumstances, to prosecute misconduct that, while not expressly prohibited by a specific IIROC rule, nonetheless represents a departure from a standard that is reasonably expected of a Regulated Person. This ability to proceed against such negligent conduct will not be unfettered: it will be subject to a respondent's right to bring forth evidence that his or her conduct was reasonable under the circumstances. In addition, under the Consolidated Rules, hearing panels would continue to have discretion to make a determination in the circumstances of each case, taking into account all of the evidence and making a determination as to the reasonableness of the alleged negligent conduct within the securities regulatory context. Where a hearing panel finds a divergence from conduct reasonably expected of a member of the securities industry, the Consolidated Rules will expressly empower the hearing panel to conclude that the conduct in question is unbecoming, detrimental to the public interest, or inconsistent with just and equitable principles of trade and to determine the sanction to be imposed. This approach is both fair and flexible because it leaves discretion with hearing panels and is the only approach that ensures consistency with provincial securities legislation.

B) Material changes made to Consolidated Rule 1400

Public commenters raised numerous other concerns regarding Consolidated Rule 1400. To address these concerns, IIROC staff has amended sections 1402 and 1403 in several respects, as follows.

1. *Section 1402 generally applies to business conduct only*

IIROC disciplinary proceedings typically involve misconduct that arose in the context of the securities business. Proposed clause 1402(1)(ii) would permit a finding of misconduct outside of a business context in appropriate circumstances where a hearing panel concludes that the misconduct is related to a person's integrity. See e.g. *Heath v. SEC*, 586 F.3d 122, 134 (2d Cir. 2009) (holding that former NYSE Rule 476(a)(6), which referred to "just and equitable principles of trade", was "broad enough to encompass conduct that does not involve a security if the conduct reflects on a person's ability to comply with the regulatory requirements of the securities industry" (quoting *Paul K. Grassi, Jr.*, 86 S.E.C. Docket 1954, 2005 SEC LEXIS 3072, 2005 WL 3199274, at *3, *4 n.8) (Nov. 30, 2005)). This is

[6] See e.g. *Re Biovail Corporation*, (2010) 33 O.S.C.B. 8914 (October 8), at paras. 389, 400, 406; *Re Walker*, 2010 BCSECCOM 401 (July 12), at para. 189; *Re Cartaway Resources Corp.*, 9 A.S.C.S. 3092 (August 11).

consistent with IIROC's practice of requiring each individual who applies for or maintains securities registration and IIROC approval to disclose, among other things, any refusal of "registration or a licence under any legislation relating to [the individual's] professional activities unrelated to securities or derivatives," any criminal conviction (whether or not related to the securities business), any pending civil action against the individual "alleging fraud, theft, deceit, misrepresentation or similar misconduct" (whether or not related to the securities business or to any other business), and whether the individual has ever had any petition in bankruptcy. See Form 33-109F4, *Registration of Individuals and Review of Permitted Individuals* at 7-10.

The non-exhaustive list of standards in subsection 1402(2), however, which may be seen as a subset of the more general standards set forth in subsection 1402(1), was not intended to apply to conduct that is not related to business. Subsection 1402(2) has therefore been amended to specify that its scope is limited to business conduct.

2. *Clarifying the nature and scope of the individual standards of conduct in section 1402*

In preparing the Consolidated Rules, IIROC staff analyzed UMIR 2.1 and jurisprudence applying that rule and its predecessor rules. This analysis led us to conclude that the ethical standard at the heart of the duty imposed on Access Persons by UMIR 2.1(2) to "transact business openly and fairly" was completely subsumed within the broader duty to "transact business ... in accordance with just and equitable principles of trade," which is set forth in UMIR 2.1(1) and is expressly made applicable only to Participants under that rule.[7] For this reason, Consolidated Rule section 1402(1) omitted the phrase "transact business openly and fairly".

However, to allay any concern that Consolidated Rule section 1402 has expanded the obligations of Access Persons, we have decided to retain the phrase "transact business openly and fairly" by adding it to clause 1402(1)(i) and to clarify that the duty owed under section 1402 by Regulated Persons who are Access Persons (i.e. "non-*Dealer Member* users or subscribers of a *Marketplace* for which [IIROC] is the regulation services provider") is limited to the "obligation to transact business openly and fairly when trading on a *Marketplace* or otherwise dealing in securities that are eligible to be traded on a *Marketplace*", as set forth in current UMIR 2.1(2). To accomplish this, we have added a new subsection 1403(3) to that effect and thereby carried forward the text of current UMIR 2.1(2) *verbatim*.

In the public comments, concerns were also raised that Consolidated Rule 1403 was substantially broader than Rule 29.1 in that (1) it purported to apply to all Regulated Persons, and (2) unlike Rule

[7] The only practical difference identified by staff between the "openly and fairly" standard and the "just and equitable principles of trade" standard in the UMIR context is that the duty owed by Participants and Access Persons under subsection (2) (to "transact business openly and fairly" when trading) is owed to the market, whereas the duty owed by Participants under subsection (1) (to transact business "openly and fairly and in accordance with just and equitable principles of trade") is owed more broadly to the market *and* to individual client investors of the Participant. (Since Access Persons do not have "clients"—at least not in the same way that Participants under UMIR do—no such client-facing obligations are owed under UMIR by Access Persons.)

29.1, it did not explicitly provide that the requirement was in place "for the purposes of disciplinary proceedings pursuant to the Rules." These commenters also felt that the new provision was broader than UMIR 10.3, which provides that a Participant or Access Person "may be found liable ... for the conduct of any director, officer, partner, employee or individual holding a similar position with the Participant or Access Person...." IIROC acknowledges that we cannot hold an individual who is not subject to our jurisdiction liable for a violation of an IIROC Rule and that, as originally drafted, subsection 1403(2) suggested that non-approved individuals employed by a Dealer Member could be held liable for causing their employer to violate an IIROC Rule. To resolve this ambiguity, Revised Consolidated Rule subsection 1403(2) has been split into two clauses:

- clause (i), which applies only to "Approved Persons" of a Dealer Member (i.e. individuals associated with a Dealer Member over whom IIROC clearly exercises contract-based jurisdiction); and

- clause (ii), which applies to the employees, partners, directors and officers (all non-defined terms) of a non-Dealer Member user or subscriber of a Marketplace for which IIROC is the regulation services provider (i.e. the same individuals who are currently the subject of existing UMIR 10.3(1)).[8]

In addition, we have added the introductory phrase, "For purposes of *Corporation requirements*" to Revised Consolidated Rule subsection 1403(1). This phrase is a simplified version of similar language in existing Dealer Member Rule 29.1 and makes clear that the standards in subsection 1403(1) are also relevant to compliance.

3. *Addressing concerns regarding the "due diligence" aspect of clause 1402(2)(ii)*

Public commenters raised the possibility that, by failing to exercise due diligence, someone might be found to have violated clause 1402(2)(ii), even if the conduct did not result in the actual breach of another substantive rule (whether an IIROC Rule or any "legal, regulatory, contractual, or other obligation, including the rules, requirements, and policies of a *Regulated Person*"). The provision, however, was not intended to create a new "failure to exercise due diligence" charge that could stand in the absence of a violation of any other rule or law.

In addition, we note that clause 1402(2)(ii) was not intended to enable Enforcement Staff to prosecute someone for both a violation of a given substantive IIROC Rule (a "*Corporation requirement*" as set forth in clause 1402(2)(ii)), as well as for a breach of clause 1402(2)(ii) itself, all on the basis of the same conduct. In fact, double-charging (i.e. issuing two counts for a single act of misconduct) would

[8] Similar revisions to expressly distinguish between Approved Persons and employees, partners, directors, and officers of non-Dealer Member users or subscribers of a Marketplace for which IIROC is the regulation services provider were made to section 8210 (Sanctions for Regulated Persons other than Dealer Members) to make clear that only individuals subject to IIROC's jurisdiction may actually be sanctioned by an IIROC hearing panel.

be at odds with existing internal Enforcement Staff policy.

The purpose of clause 1402(2)(ii) is to make clear that business conduct that results in a violation of any obligation of a Regulated Person, including an obligation arising under provincial law, a contract, or a firm's policy, may in some circumstances be viewed as a breach of the new consolidated basic standard of conduct set forth in subsection 1402(1). As a result, we have deleted the reference to due diligence so that clause 1402(2)(ii) plainly achieves this result. The provision now reads:

> (2) Without limiting the generality of the foregoing, any business conduct that:
> ...
> (ii) fails to comply with a legal, regulatory, contractual, or other obligation, including the rules, requirements, and policies of a *Regulated Person*;
> ...
> may contravene one or more of the standards set forth in subsection 1402(1).

Finally, we have made certain additional, non-material revisions to subsections 1402(1) and (2) and 1403(2) to simplify and clarify these provisions. All of these changes are identified in blackline format in Attachment A.

Sanctions for Dealer Members *[Revised Consolidated Rule Section 8209]*

Some inadvertent omissions appear to have occurred in the consolidation into subsection 8209(1) of UMIR 10.5 and Dealer Member Rule 20.34. Consequently, section 8209 has been amended to:

- state expressly in clause 8209(1)(v) that terms or conditions may include limits on access to a Marketplace;
- add a new clause 8209(1)(vi) to provide for expulsion from membership and termination of the rights and privileges of membership, including access to a Marketplace; and
- include a new subsection 8209(3) that clarifies that a sanction imposed under 8209(1) relating to a Marketplace applies to all Marketplaces.

Removal of Duplicative Extension of Responsibility (aka "Vicarious Liability") Provisions *[Revised Consolidated Rule Section 8210]*

After considering certain public comments, and upon further review, staff determined that subsections (2) and (4) of section 8210 were unnecessary. These subsections were originally intended to support IIROC's vicarious liability jurisdiction (i.e. the liability of a firm for an associated individual's conduct and vice-versa); however, they are rendered unnecessary as a result of the proposed amendments to section 1403, a rule of general applicability that consolidates elements of UMIR 10.3 and Dealer Member Rule 29.1 relating to the extension of responsibility. In particular, subsection 1403(1) makes clear that Dealer Members and non-Dealer Member users or subscribers of a Marketplace for which IIROC is the regulation services provider are responsible for the acts and omissions of their employees,

partners, directors, and officers; this obviates the need for subsection 8210(2). Similarly, if an individual is found to have caused his or her firm to have violated an IIROC Rule that applies to the firm, then that individual will be found liable for a breach of new subsection 1403(2) (which is itself a "Corporation requirement") and, therefore, he or she may be sanctioned under subsection 8210(1); this obviates the need for subsection 8210(4). We have therefore deleted subsections (2) and (4) of section 8210.

Protective Orders *[Revised Consolidated Rule Section 8212]*

Section 8212, formerly known as the "Expedited Hearings" rule, has been revised and relabeled the "Protective Orders" rule to more accurately reflect this provision's function in the Revised Consolidated Rules. Section 8212 is derived from Dealer Member Rules 20.42 and 20.43 concerning expedited hearings, and was so entitled in the initial proposals, but it no longer performs exactly the same function as the existing rules. The current expedited hearings rule is an emergency disciplinary provision that permits hearings without notice in order to protect investors, Dealer Members and IIROC in circumstances in which a Dealer Member or Approved Person should not be allowed to continue in business. Under the Revised Consolidated Rules, emergency disciplinary situations are addressed in proposed section 8211, which, following similar provisions in securities legislation, authorizes a hearing panel to issue a temporary order in circumstances in which the time required for a hearing could be prejudicial to the public interest. Such orders may be issued without notice, and section 8211 provides a procedure for their continuation after notice is given.

In light of the authority under section 8211, a hearing under section 8212 must be on notice to the respondent. As a result, section 8212 no longer performs the disciplinary function of Dealer Member Rules 20.42 and 20.43. Rather, it permits the imposition of regulatory requirements, including terms and conditions, that address circumstances in which a Dealer Member or other Regulated Person cannot continue to carry on its business or cannot carry on its business without protective measures to prevent harm to investors, other Regulated Persons or IIROC. Section 8212 has been retitled and revised to reflect this regulatory function.

Amendments have also been made to the complementary procedural rule, section 8426; moreover, throughout the Revised Consolidated Rules, any reference to "expedited hearings" has been deleted and replaced with a reference to "protective orders", in accordance with the revisions to section 8212.

Public Member Nominating Committee *[Revised Consolidated Rule 8300]*

Consolidated Rule 8300 has been amended to create a more effective process for nominating public members of hearing committees. These amendments are the result of a benchmarking analysis undertaken by staff to compare the hearing committee nomination process in use by several other regulatory organizations comparable to IIROC (namely, the Mutual Fund Dealers Association, the National Futures Association, the Chicago Board Options Exchange, and the Financial Industry

Regulatory Authority), and of discussions with IIROC's Corporate Governance Committee and National Advisory Committee, both of which have endorsed the proposed amendments.

Under the existing rules, District Councils and Marketplace Members are responsible for nominating individuals to be members of the hearing committee in a given District. Nominated individuals are reviewed and formally appointed to the hearing committees in each District by the Corporate Governance Committee. While members of District Councils and Marketplace Members generally have personal knowledge of candidates nominated as industry members, including knowledge of their qualifications, suitability and reputation in the industry and, appropriately, bring that knowledge to bear in the nomination process for industry members, the same level of industry involvement is not required for the nomination of public members, who must be qualified to practise law and are often former judges.

Consolidated Rule 8300, therefore, has been amended to provide that District Councils and Marketplace Members will continue to nominate individuals as industry members of hearing committees; however, public members will now be nominated by a new "public member nominating committee" composed of the chair of IIROC's Corporate Governance Committee, the chair of the applicable District Council and IIROC's president and CEO. The nomination process for public members will continue to include industry participation through the applicable District Council chair. All appointments to hearing committees will continue to be made by IIROC's Corporate Governance Committee.

Other Revisions to the Consolidated Rules

1. *Privilege*

One public commenter expressed the view that any form of privilege[9], rather than just solicitor-client privilege, should entitle a person to refuse to disclose a document under clauses 8103(3)(ii) and 9104(3)(ii). After considering this comment, we have used the new term "legal privilege" in both provisions as the applicable basis for declining to disclose a document. We believe that this term is broad enough to encompass solicitor-client and litigation privilege, as well as any other form of privilege recognized by law.

2. *Individuals affected by IIROC Rules*

In instances where a Consolidated Rule referred only to "employees", for consistency and completeness, we have amended the rule to refer to "employees, partners, directors and officers" (or, in the context of individuals associated with a Dealer Member, "*employees*, partners, *Directors* and

[9] In common law jurisdictions, the law of privilege encompasses a body of rules that protect communications between a professional legal adviser and his or her clients from being disclosed without the permission of the client. The privilege is that of the client and not that of the lawyer.

officers," three of which are defined terms, as indicated by the italicization). We determined that this enumeration of terms will cover all individuals who may be associated with a Regulated Person and who are bound or impacted by our rules. See e.g. Consolidated Rule ss. 8103(1), 8104(3), 8107(1)(iii), 8206(1)(iii), 8208(1), 8208(3), 8421(3), 9105(2).

3. *Minor revisions to Rules 9100, 9200, 9300, and 9400*

Several revisions have been made to the Rule concerning compliance examinations (Consolidated Rule 9100) and to various provisions of the rules concerning IIROC approvals, regulatory review of such approvals, and the procedures applicable to opportunities to be heard prior to decisions concerning approval or compliance matters (Consolidated Rules 9200, 9300, and 9400, respectively), primarily to clarify or correct drafting deficiencies found in these rules. While the changes to proposed subsections 9203(5) and 9209(1) and (5) (to make clear that an approval decision is effective as of the date on which notice of the decision has been provided to both parties, as well as to provide a 30-day period for a request for review, rather than only 10 business days) may be seen as a substantive modification to the original rule proposal, these changes have been made to make IIROC Rules consistent with equivalent provisions governing registration decisions under provincial law. The other revisions to the rule proposal generally do not alter the intent or overall operation of these rules as originally published.

Deletion of Proposed UMIR 2.1(2)(d) and (e)

Among the consequential amendments set forth in the Original Notice was the relabeling of certain provisions of existing UMIR Policy 2.1as a new UMIR 2.1; this included paragraphs (c) and (d) of Part 1 of existing UMIR Policy 2.1, which were to be relabeled paragraphs (d) and (e) of subsection (2) of the proposed new UMIR 2.1. The specific activities prohibited by these two paragraphs were originally addressed in the Toronto Stock Exchange ("TSE") rulebook, which proscribed them at the material time as impermissible activities by traders. The relevant provisions of the TSE rulebook were carried forward into current UMIR Policy 2.1 and made applicable to all Participants when the UMIR rules were implemented.

Following further review undertaken subsequent to the Original Notice, however, IIROC staff has found no evidence that the prohibited activities have ever been undertaken. In any event, these activities would also be in contravention of Consolidated Rule section 1402, which incorporates much of existing UMIR 2.1. Accordingly, staff is now proposing to repeal the provisions put forward with the Consolidated Rules as proposed UMIR 2.1(2)(d) and (e), as reflected in the revised consequential amendments to the Dealer Member Rules, UMIR, and Transition Rule No. 1, set forth in Attachments C (blackline) and D (clean).

Revisions to the Transitional Rule

The Original Notice included a rule amendment to enact a new Schedule C.1 to existing Transitional

Rule No. 1. After further review, IIROC staff came to the conclusion that this new transitional rule, as originally drafted, raised certain concerns.

First, staff now believes it will be preferable to apply the new investigation-related rules (Consolidated Rule 8100) to all investigations as of the date of implementation, including to investigations already in progress, rather than to have both the old and new investigation-related rules applying concurrently. Consequently, we have removed subsection 1.2(1) of the proposed transitional rule.

Second, we have concluded that section 1.3 of the transitional rule was over-inclusive because it required the application of existing rules to all proceedings that began prior to the implementation date. We now believe that it is preferable to limit the application of existing rules to *hearings* that have already begun, rather than all *proceedings* (a broader concept) that have begun. This will prevent the possibility of two sets of procedural rules applying to the conduct of proceedings prior to the convening of a hearing. As revised, the transitional rule will ensure that the procedure for bringing a motion, for example, will be the same whether the proceeding was initiated before or after the implementation date. Moreover, staff believes that case management should be available for an ongoing proceeding that was initiated before the implementation date. As a result, we have made certain amendments to section 1.3 (and conforming changes to section 1.4) of the transitional rule.

The aforementioned amendments, as well as certain drafting-related edits to the transitional rule, are reflected in the consequential amendments to the Dealer Member Rules, UMIR, and Transition Rule No. 1, attached as Attachments C (blackline) and D (clean).

Request for public comment

Comments are sought on the proposed amendments. Comments should be made in writing. Two copies of each comment letter should be delivered by February 12, 2014 (90 days from the publication date of this Notice).

One copy should be addressed to the attention of:

Robert Keller
Policy Counsel, Member Regulation Policy
Investment Industry Regulatory Organization of Canada
Suite 1600, 121 King Street West
Toronto, ON M5H 3T9
rkeller@iiroc.ca

The second copy should be addressed to the attention of:

Manager of Market Regulation
Ontario Securities Commission
19th Floor, Box 55
20 Queen Street West

Toronto, ON M5H 3S8
marketregulation@osc.gov.on.ca

Those submitting comment letters should be aware that a copy of their comment letter will be made publicly available on the IIROC website (**www.iiroc.ca** under the headings "IIROC Rulebook – Dealer Member Rules – Proposed Policy" and "Rules Notices – Marketplace Rules - All – Request for Comments").

Questions may be referred to:

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Attachments

Attachment A –	Proposed Consolidated Rules, as revised (blackline copy), and concordance to existing blacklined provisions
Attachment B –	Proposed Consolidated Rules, as revised (clean copy), and concordance to existing blacklined provisions
Attachment C –	Consequential amendments to the Dealer Member Rules, UMIR, and Transition Rule No. 1 (blackline copy)
Attachment D –	Consequential amendments to the Dealer Member Rules, UMIR, and Transition Rule No. 1 (clean copy)
Attachment E –	Summary of public comments received and IIROC staff responses to comments