INTERACTIVE BROKERS CANADA INC.
A Member of the Interactive Brokers Group

1800, MCGILL COLLEGE AVENUE
SUITE 2106
MONTREAL, QC H3A 3J6
CANADA
TEL: +1 514 287 5900
FAX: +1 514 287 0152

Discount Broker – Order Execution Only Accounts
Member-Canadian Investor Protection Fund

February 3, 2017

DELIVERED VIA EMAIL

Mr. Charles Piroli
Director, Member Regulation Policy
Investment Industry Association of Canada
Suite 2000, 121 King Street West
Toronto, Ontario M5H 3T9
E-mail: cpiroli@iiroc.ca

Re: Request for Comments - Guidance on Order Execution Only Services and Activities - as per Notice 16-0251 issued by the Investment Industry Organization of Canada ("IIROC") on November 3, 2016

Dear Mr Piroli,

Interactive Brokers Canada Inc., an order–execution only ("OEO") dealer and IIROC registrant, would like to take this opportunity to express its views on the "Guidance on Order Execution Only Services and Activities" as per IIROC Notice 16-0251 issued on November 3, 2016 (the "guidance").

A. Introductory Comments

We would start by stating that it is not entirely clear to us what are the exact investor protection concerns IIROC is looking to remedy with this guidance. We suggest these concerns be more clearly defined to ensure completeness and appropriateness of industry responses, comments and suggestions.

It is also unclear to us why IIROC even introduces the question of "*what is a recommendation"* in a guidance addressed at suitability-exempt dealers servicing "self-directed" customers.

1. *Is the issue that certain OEO dealers are actually performing suitability reviews of certain ancillary services offered to their customers or of the trades that result from the use of such ancillary services?*

(i) If so, we believe OEO dealers do not[1] perform such suitability reviews because of their suitability-exempt status.

(ii) Being *suitability-exempt* allows OEO dealers to offer their services only to *self-directed* customers.

(iii) Self-directed customers are customers who wish to, and in fact, make their own investment and trading decisions without reliance on their dealer to confirm that such decisions are suitable for them.

(iv) Self-directed customers also make their own investment and trading decisions without reliance on their dealer for "recommendations" or "advice".

(v) It is irrelevant in the OEO dealer space whether or not ancillary services otherwise constitute recommendations or advice in the eyes of IIROC.

(vi) The issue of whether or not ancillary services otherwise constitute recommendations or advice should only be relevant in the non-OEO or "full-service" space because there is a real risk that non-OEO dealers may feel legitimated in ceasing to perform suitability reviews of services that are also offered by OEO dealers and for which OEO dealers would be "suitability-exempt".

(vii) IIROC should not consider our preceding statement as "unfair" to the non-OEO dealer community. Rather we believe it would be "unfair" to non-OEO dealer customers (who rely on their dealer to confirm that their investment decisions are suitable for them) to have to decipher which service they receive is suitability-exempt and which service is not.

(viii) OEO customers are NEVER owed a suitability duty; non-OEO customers are ALWAYS owed a suitability duty, regardless of whether or not a service (information or tool) is captured by IIROC's proposed definition of "recommendation" (save and except for situations of unsolicited trades where non-OEO customers implement their own trading ideas in disregard for the advice to the contrary by their non-OEO dealer).

(ix) Providing ancillary services that are clearly, fully and truthfully disclosed to OEO customers as not triggering suitability *obligations* for the OEO dealer and corresponding suitability *rights* for the OEO customer is all that is needed to ensure investor protection and efficient functioning of markets. There is no need to enter into interpretative journeys and debates to distinguish a "recommendation" from a "non-recommendation".

(x) The fact that self-directed customers make their own investment and trading decisions without reliance on their dealer to confirm that such decisions are suitable for them does not imply that they may not otherwise want to rely on ancillary services, as described in the guidance, when in the process of formulating their investment or trading decisions.

[1] If, to IIROC's knowledge, there are OEO dealers who currently provide advisory services to their clients, obviously this raises a legitimate regulatory concern justifying IIROC's prompt intervention.

2. *Is the issue that certain ancillary services provided by OEO dealers, as described in the guidance, trigger suitability obligations towards their customers?*

   (i) If so, we believe suitability obligations do not and cannot apply to OEO dealers.

   (ii) Ancillary services, when provided by OEO dealers, do not trigger suitability requirements, regardless of whether or not they could also be considered recommendations.

   (iii) Self-directed customers are solely responsible, and agree to be solely responsible for any suitability determination of their investment decisions;

   (iv) Self-directed customers do not sign up for, nor expect to be provided with "suitability confirmation services" when they open accounts with OEO dealers.

3. *Is the issue that OEO customers are being misled into considering certain ancillary services offered by an OEO dealer (as described in the guidance) as trading "recommendations" or "advice" without an appropriate accompanying suitability review?*

   (i) If so, then we respectfully submit that it is totally unnecessary to introduce the notions of "recommendations" and "advice" into the equation and to debate whether or not certain informations and tools provided to the OEO customer could be considered "recommendations or advice".

   (ii) Disclosure in the best regulatory technique to fix this issue.

   (iii) Self-directed customers do not view ancillary services as "recommendations" or "advice" and therefore are not confused into believing they can all of a sudden rely on the OEO dealers to determine suitability of the trades resulting from such services.

B. Initial Thoughts and Discussion

We believe IIROC needs to resolve any or all perceived issue stemming from ancillary services as offered by OEO dealers not so much from the perspective of "*what is a recommendation?* " or the perspective that *if a particular ancillary service equates to a recommendation then OEO dealers cannot offer such under their suitability-exempt status* but instead, and only, from the perspective of the customer of a dealer, OEO or non-OEO, and the contractual relationship such customer wishes to have with his or her IIROC registered dealer.

In other words, what level or "type" of relationship does such customer have, or wishes to have, with such dealer?

Is customer seeking the services of a suitability-exempt dealer or of an "advisory" or "full-service" dealer?

We believe the issue of whether or not a "recommendation" is present should not be relevant when applicable to OEO dealers.

Deeming an ancillary service a "recommendation" triggering suitability obligations for the OEO dealer can only be disruptive to existing OEO dealer-customer relationships and any supervisory procedure that the dealer would need to implement to ensure compliance to such obligations would not be practically enforceable on customers who do not want to go through such a "suitability analysis process" with OEO dealers[2].

If IIROC agrees with this proposed view, then the only question for IIROC to be concerned with and ultimately answer is "*does the dealer provide suitability confirmation of customer's trade under the account opening and customer agreement*"?

If a dealer does not perform such services, as is the case, in our understanding, for all OEO dealers, then it really should be irrelevant whether or not ANYONE, including IIROC, believes an ancillary service equates to a recommendation.

This is because at the end of the day, what matters to IIROC is ensuring investor protection. The fact is that customers of OEO dealers do not need nor do they wish to bear the costs for such "suitability-confirming" protection.

We feel very strongly that any resolution to any perceived or real concerns regarding this issue of ancillary services must not only be applicable and enforceable compliance-wise on a day-to-day basis by OEO dealers but the solution must be introduced in a manner that will not be disruptive to the actual contractual arrangements between the customer and his or her dealer. Forcing OEO customers to submit themselves to a "suitability validation exercise" against their wish is disruptive to say the least to customers.

In other words, IIROC should not introduce new requirements that have the effect of changing customers' legal arrangements with their dealers against their wish. Any perceived regulatory issue potentially compromising investor protection and stemming from OEO dealers offering ancillary services needs to be approached and ultimately resolved through regulatory means that do not offend the customer's expectations in regards to the "level" of service expected from his or her dealer.

If customer is choosing a dealer that best meets customer's expectations in regards to services offered, IIROC needs to respect this choice. Considering a resolution to a perceived problem by approaching the issue from the perspective of whether or not a "recommendation" or "advice" would result from the provision of ancillary services only leads and equates to OEO dealers being told by IIROC, albeit unintentionally, that they can no longer offer these ancillary services.

Customer chooses a dealer by looking at the different categories (and subcategories of investment) dealers available to him or her. Customer will ultimately choose the dealer best suited for the customer's needs and expectations:

(i) If the customer seeks the dealer to confirm that the investment is suitable to the customer, then the customer will seek out the services of a non-OEO or "full-service" dealer;

[2] We would go as far as suggesting that in our experience, a typical "self-directed" OEO customer would most likely reject any attempt by its OEO dealer to perform any form of suitability review of an investment the customer wished to initiate. This is because "suitability confirmation" is simply not a service the OEO customer needs, wishes to pay for nor is even interested in obtaining from an OEO dealer. Information yes; confirmation of suitability no.

(ii) If the customer seeks to be solely responsible for his or her investment decision, which in other words means the customer wants to make his or her own determination as to suitability of the investment, then the customer will seek out the services of an OEO dealer.

Whatever investor protection concerns IIROC is looking at remedying, we respectfully submit that IIROC's proposal to deem certain ancillary services provided by OEO dealers as "recommendations" or "advice" (triggering a suitability "duty") is not warranted, and possibly inappropriate practically because:

(i) OEO customers are NEVER owed a suitability duty because they contractually do not agree to receive (nor to pay higher fees than typically charged by OEO dealers) for such a service at the time of account opening.

(ii) OEO customers SHOULD NOT be granted a suitability review "right" based on the notion that certain information or tools may be subjectively seen by IIROC as "advice" or "recommendations".

(iii) IIROC should only care that OEO customers are clearly warned by their OEO dealers that whatever service or tool the OEO dealers might provide their OEO customers to assist them in their trading should not be relied upon as investment or trading advice or recommendations.

IIROC should bear in mind that OEO customers know (or at least should know) that OEO dealers, by contract, do not agree to provide suitability reviews of their customers' investment decisions. This is true regardless of whatever ancillary information or tool the customers might have relied on to come to such investment or trading decisions, and whether or not these ancillary services are provided by the OEO dealer or by a third-party information source or service provider.

Because such third-party information sources or service providers are (very often, if not always) themselves exempted from suitability requirements under current applicable securities legislation in Canada, so should OEO dealers.

C. Disclosure-Based Solution

We simply wish to suggest a much easier and less costly[3] solution to the investor protection concerns that IIROC is looking at remedying instead of more or less forcing OEO dealers to choose between :

(i) ceasing to offer ancillary services (highly unappealing[4]); or

(ii) convert to a full-service or "advisory" model (totally useless and impractical[5]).

[3] Not only to the industry but to IIROC also. Continuous and ongoing analysis of these constantly evolving ancillary services to determine whether or not they are recommendations will require tremendous time and efforts on the part of IIROC personnel. A drain on valuable IIROC resources whose time is better spent on more important regulatory concerns.

[4] IIROC's OEO customers survey acknowledges the fact that OEO customers appreciate and view these ancillary services are useful and valuable.

[5] Again, we examine this option from the perspective of the OEO customer who does not wish to pay for, sign up for, nor needs suitability confirmations of his or her investment decisions. Converting to a non-OEO dealer platform to offer these ancillary services will not help OEO dealer retain its customers who will simply stay with

IIROC should absolutely ensure that OEO customers understand clearly what services they can expect from an OEO dealer and, in particular, understand clearly that suitability confirmation of trades is *never* a service they can expect nor will receive from an OEO dealer.

Again, the sole regulatory response IIROC should consider when dealing with these issues is to ensure OEO dealers always provide their customers with full, true and plain disclosure in customer account opening or account upgrade documents of the services they will receive from OEO dealers and ensure customers acknowledge in writing their understanding of such disclosure.

We propose the following disclosure:

a) *OEO dealer does not provide investment or trading advice or recommendations;*

b) *OEO dealer does not perform suitability reviews of customer's investment and trading decisions;*

c) *Any information or tool provided by OEO dealer to assist customer in making investment or trading decisions are not, nor are they designed to be :*

   (i) investment or trading advice or recommendations;

   (ii) tailored to the individual needs and circumstances of the OEO customer;

d) *OEO customer cannot and should not rely on OEO dealer to perform suitability reviews of customer's investment and trading decisions;*

e) *OEO customer is at all times solely responsible for customer's investment and trading decisions.*

This simple and easy disclosure-based solution, we believe, ensures IIROC is fulfilling its investor protection mandate without disrupting the efficient functioning of the markets.

It also frees IIROC from the thankless and frankly impossible interpretative task of trying to determine when ancillary services provided by an OEO dealer (which can take multiple forms) should be also deemed "advice or recommendations". IIROC also avoids interfering with market forces by more or less "deciding" which products or services should or should not be made available to the investing public or that are deemed too "risky, complex or illiquid"[6] to be distributed through the OEO dealer channel.

---

the OEO dealer for trade execution services and get their ancillary services elsewhere; most likely from a non-registered or non-regulated service provider. See note 6 below.

[6] For example, Canadian exchange-traded stocks, including ETFs are issued under a prospectus receipted by one or more provincial regulator(s) and are freely-tradable by public investors regardless of their level of risk, complexity and liquidity. This is because the provincial regulators do not view these factors as legal ground, nor sufficient, to justify denying the prospectus and the free-trading of the securities under their public interest mandate. Provincial regulators rely on full, true and plain disclosure of such factors rather than on an outright distribution/trade ban of the securities (from being issued in the primary market and from being traded in the secondary market). IIROC should be mindful of these core securities regulation principles when they consider barring OEO dealers from the distribution channel of certain of these securities on subjective appreciation of such fluid notions as complexity or riskiness.

A disclosure-based solution is a more efficient way to regulate our industry than "merit-based" regulation of products and services. In the particular context of OEO dealers, full, true and plain disclosure ensures OEO customers are fully aware of the extent of the services they can expect from their dealer. IIROC should not interfere in customers' freedom to determine which level of service they seek from their dealer, OEO or non-OEO, and to pay the associated costs according to such (higher or lower) level of service.

D. General Advice and Ensuring a Level Playing Field

We believe it is useful to highlight in our proposed disclosure that (any) ancillary services provided are "*not tailored to the individual needs and circumstances of the OEO customer*". This is not only to ensure OEO customer is fully informed but also to ensure coherence and harmony with other provisions of securities regulations.

For example, current rules exempt certain "investment advisers" from registration requirements when these "advisers" are solely providers of "general" investment advice[7]. We note with great interest that such "exempt advisers", incidentally, are currently legally able to offer to investment/trading services and tools to Canadian investors without being subjected to Know-Your-Client (KYC) and customer suitability requirements. What we find problematic is the fact that the services and tool they provide (as "general" advice") are not so different, if at all, from the services and tools IIROC mentions in its guidance as potentially "problematic" (as constituting "recommendations" based on IIROC's proposed definition) when offered through the OEO dealer channel.

By specifying that the ancillary services provided are not "*tailored to the individual needs and circumstances of the OEO customer*", a level playing field is ensured between the (IIROC regulated) OEO dealers and these (non-regulated) "general" investment advisers because neither is imposed a higher regulatory burden over the other when providing more or less the exact same services to their respective customers.

Finally, on this point, we believe the proposed IIROC definition of recommendation is way broader than the notion of "general investment advice" and its interpretation by the industry.

Because "any and all communication that *can be expected to influence an investor* to make an investment decision" would be considered a recommendation or advice, we believe IIROC is scoping the notion of "general investment advice" in its definition of recommendation or advice. Because general advice, when made available by a non-registrant to its Canadian customers, is allowed to be provided without triggering investor protection concerns, there is a strong concern that the broad definition IIROC proposes will create an unjustified un-level playing field for OEO dealers (who possibly could not offer the exact same services to their own customers without triggering suitability requirements).

Our proposed disclosure-based solution is highly pragmatic and practical, in light of how the OEO industry operates.

Indeed, our experience in the OEO space indicates clearly that our customers are "self-directed" customers. Again, we believe "self-directed customers" should be defined as *customers who wish to, and make their own investment and trading decisions without reliance on their dealer to confirm that such decisions are suitable for them.*

[7] Section 8.25 of National Instrument 31-103 comes to mind here.

If we were to provide our view as to when it is relevant for IIROC to provide guidance on when a service equates to a recommendation or advice, **it is solely in the context of non-OEO or "full-service" dealers and their suitability duty to their customers**. In other words, when a customer actually seeks out, and agrees to be provided with suitability review services from its dealer[8] or, stated differently, when a customer requires a confirmation, usually pre-trade, that an investment is suitable to, and therefore should be pursued, by the customer[9].

Respectfully, to our knowledge, OEO firms do not, nor should they be expected to ever be in a position to provide "suitability confirmation services" to their customers[10]. If IIROC is concerned that some OEO dealers might be providing customers with such suitability confirmations[11], then this is a legitimate concern and IIROC should definitely enforce the rules against such a defaulting OEO dealer. We submit that IIROC can easily remedy such a situation, should it arise, without introducing new requirements, such as suggested by the guidance and that would be of general application to all OEO dealers even though most (if not all) conduct their business in full compliance of their suitability-exempt status.

The fact that a customer does not look to its OEO dealer for suitability confirmations of its investment or trading decisions is what makes such customer a "self-directed" customer. **But servicing "self-directed" customers does not and should not equate to preventing the OEO dealer from providing them with ancillary services that are intended to assist the customers in the determination of the merits and risk of a particular investment product**[12].

A "self-directed" customer typically seeks out all the information needed from any and all sources, regulated or unregulated, registered or unregistered with IIROC, including from newsletters, articles in general circulation newspapers or magazines, websites, e-mail, internet chat rooms, bulletin boards, television or radio, but the "self-directed" customer remains ultimately responsible for the final suitability determination of the investment he or she makes. Unless IIROC clearly demonstrates a public policy rationale that would support preventing OEO dealers from being such a source of investment information to their customers, we submit that as regulated entities expressly exempted by IIROC from performing suitability reviews of their customers' investment decisions, surely OEO dealers should be allowed to be such a source of information to their self-directed customers. This conclusion is made even more logical when considering that a completely unregulated entity is currently able to do so without offending public investors' protection concerns[13].

---

[8] Which "suitability review services" can only be offered by a "full-service" (non-suitability exempt) dealer. A non-OEO dealer who would offer its customers the same ancillary services as those described in the guidance would have a suitability obligation to its customers even though an OEO dealer would not and again, this should be viewed as perfectly acceptable to IIROC. Again, this takes us back to our earlier point that this entire issue needs to be appreciated from the perspective of the customer looking at the different categories of dealers to determine which dealer is best suited for the customer's needs and expectations.

[9] We originally were under the impression that the guidance was supposed to provide a much needed update to Member Regulation Notice 098 - *What Constitutes a* "*Recommendation*"? This question is of particular interest to non-OEO dealers who owe suitability duties to their customers. Considering the guidance seems to focus very precisely on the OEO dealers, we believe somewhere along the way, IIROC may have lost track of , or unreasonably broadened its initial goal.

[10] See note 2 above.

[11] Admittedly triggering serious investor protection concerns which IIROC has legitimate grounds to resolve. See also note 1 above.

[12] As is currently the case for registration-exempted advisers who provide "general investment advice" to their customers.

[13] See note 7 above.

Finally, an important point which was not discussed in the guidance notice is the different types of customers OEO dealers may service from time to time. Certainly OEO (individual) customers who also qualify as *accredited investors* or *permitted clients*, namely under prospectus or registration exemption regulations, should be distinguished from retail or "public" investors. Different "categories" of investors have different investor protection needs obviously yet this seems to have been overlooked in the guidance. If such difference was intentionally unaddressed by IIROC, its policy rationale should be made clear as to why.

E. Conclusion

To conclude, we believe that by adopting a "disclosure-based solution" as suggested, IIROC avoids (i) having to prohibit products or services that are in high demand from all types of OEO customers, whether the typical "buy and hold" investor or the customer that qualifies for *accredited investor* or other exempted status, and (ii) the un-leveling of the regulatory playing field, therefore ensuring the right balance between proper functioning markets and investing public protection concerns at relatively no additional cost to the OEO dealer industry.

Respectfully submitted,

INTERACTIVE BROKERS CANADA INC.

(s) Jean-François Bernier

Jean-François Bernier
Managing Director