

IIROC NOTICE

Rules Notice Exemption

Dealer Member Rules

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Decision of the Board of Directors – Application requesting relief from the requirement to provide position cost information to retail customers

On March 26, 2020, IIROC’s Board of Directors (the “IIROC Board”) considered an application submitted by TD Waterhouse Canada Inc. (“TDW”) requesting an exemption from certain aspects of IIROC Dealer Member Rules 200.2(d)(ii)(F) and 200.2(d)(ii)(H).

IIROC Dealer Member Rule 17.15 states that the IIROC Board may exempt a Dealer Member from the requirements of any provisions of the IIROC Rules where it is satisfied that to do so would not be prejudicial to the interests of the Dealer Members, their clients and the public.

The IIROC Board has considered the application submitted carefully and determined that exercising its discretion in granting the exemption would not be prejudicial to the interests of clients, the public or Dealer Members, subject to certain provisos, and provided that TDW complies with all of the conditions imposed by the IIROC Board.

A copy of the IIROC Board’s decision is attached.

**Decision of the Board of Directors
of the
Investment Industry Regulatory Organization of Canada**

IN THE MATTER OF

TD Waterhouse Canada Inc.

**Application requesting relief from the requirement to provide position cost information
to Retail Customers**

Dealer Member Rule sub-clauses 200.2(d)(ii)(F) and 200.2(d)(ii)(H)

IIROC Board authority to grant exemptions

1. IIROC Dealer Member Rule (**DMR**) 17.15 permits the IIROC Board of Directors (the **IIROC Board**) to exempt a Dealer Member from any provision of the DMR where the IIROC Board is satisfied that to do so would not be prejudicial to the interests of Dealer Members, their clients or the public.
2. In granting an exemption, the IIROC Board may impose such terms and conditions as are considered necessary.

IIROC's requirements to provide clients with account position cost information

3. As part of Client Relationship Model rule changes implemented on December 31, 2015, IIROC prospectively implemented requirements to provide Retail Customers with quarterly account position cost information.
4. Specifically, starting on the rule effective date, firms were required to disclose for each account position held:

- the amount paid by the client for the position¹ (**position cost**)
 - for positions added to the account prior to December 31, 2015², one of:
 - position cost
 - an estimate of position cost using the market value of the position as at December 31, 2015 (**2015 estimated position cost**)
 - where neither position cost nor estimated position cost could be determined, a notation within the account statement informing the client of this (**not determinable notation**)
5. The intention of the requirements was, even if dealers were not in a position to provide clients with exact cost information for positions acquired prior to the effective date of the rule, they should make every possible effort to ensure that clients could, at a minimum, assess how their individual positions are performing from the effective date of the rule onwards. Providing clients with either position cost information or 2015 estimated position cost information equips clients to make that assessment.

Determination that TDW was not complying with requirements to provide clients with account position cost information and subsequent events

6. In late April 2017, IIROC staff determined that TD Waterhouse Canada Inc. (**TDW**) was not complying with the requirement to provide position cost information for all positions within certain client accounts.
7. Following discussions with IIROC staff, TDW provided affected clients with an estimate of position cost using the position's market value as at December 31, 2018 (**2018 estimated position cost**) rather than the 2015 estimated position cost information the rule required.

¹ The requirements specify that position cost must be calculated in accordance with either the "book cost" or "original cost" definition requirements as set out in IIROC Dealer Member Rule subsections 200.1(a), 200.1(b) and 200.1(e).

² There are similar transitional provisions that apply to account positions that a client has purchased at another firm that are transferred into a client account at the dealer.

8. The matter was also referred to IIROC's Enforcement Department for investigation. An enforcement proceeding relating to this matter was completed in December 2019 and the IIROC Hearing Panel released its [decision](#) on March 17, 2020. As part of its decision, TDW was ordered to pay, and paid, a fine in the amount of \$4 million.

TDW exemption application

9. TDW first applied for this exemption in November 2018. The IIROC Board deferred its review of the application until the related enforcement proceeding was concluded. Following the release of the Hearing Panel's decision in March 2020, TDW renewed its application.

10. The TDW application requested a permanent exemption from the requirements in Dealer Member Rule clauses 200.2(d)(ii)(F) and 200.2(d)(ii)(H) to provide affected clients with cost information estimates using December 31, 2015 market value information for those positions where:

- estimated cost information as at December 31, 2015 could have been provided but was not provided, and
- estimated cost information as at December 31, 2018 has been provided for the remaining portion of the December 31, 2015 position still held in the account as at December 31, 2018.

11. In support of its request, TDW stated that, for the affected client positions, a resetting of those position costs to new values, based on December 31, 2015 market values, would confuse clients and complicate any performance tracking clients may have been doing based on the position cost values they have had since December 31, 2018.

Assessment

12. As required by DMR 17.15, the IIROC Board has assessed the impact of the requested exemption on the interests of:

- clients
- TDW and other Dealer Members and
- the public

Impact on clients

13. For affected clients, the IIROC Board has determined that approving the TDW request:

- would deny them the opportunity to assess individual position “dollars and cents” performance for the affected positions from January 1, 2016 to December 31, 2018 (**2016 to 2018 “dollars and cents” performance**)
- could confuse them if:
 - position cost information has been provided for one group of account positions
 - 2015 estimated position cost information has been provided for a second group of account positions
 - 2018 estimated position cost information has been provided for a third group of account positions

without an adequate explanation.

14. However, the IIROC Board has concluded that the lack of opportunity to assess individual position 2016 to 2018 “dollars and cents” performance will only significantly impact those account positions where the holding quantity has materially changed during the period.³ For these positions, clients will not have access to 2016 to 2018 “dollars and cents” performance unless they themselves manually estimate position cost.

15. While not optimal, the IIROC Board has concluded that this impact is not unduly burdensome on clients because:

- clients already have a similar obligation to calculate and maintain records of the “adjusted cost base” amount for each account holding for individual tax reporting purposes

³ For account positions that remain unchanged over the three-year period individual position 2016 to 2018 “dollars and cents” performance can be determined by comparing the position market values reported in their December 31, 2015 and December 31, 2018 statements.

- the number of affected account positions has declined significantly since TDW made its initial exemption request.

16. The IIROC Board also does not see client confusion as being a significant issue because TDW has provided clients with:

- an explanation as to why the affected positions originally included a “position cost not determinable” notation
- information of how the position cost estimate that the client received as at December 31, 2018 was arrived at.

17. The IIROC Board has not identified any direct impacts that approving the TDW exemption request would have on other clients. See the separate discussion below of “public” impacts.

Impact on Dealer Members

Impact on TDW

18. For TDW, the IIROC Board has determined that approving its request will result in material cost savings from being required to implement a full-compliance solution. The estimated cost of implementing the full-compliance solution is considerably more expensive five plus years later than it would have been in 2015. Specifically, implementing the full-compliance solution in 2020 or later would require:

- obtaining 2015 estimated position cost information, where available, for all positions where a compliant position cost could not be calculated as at December 31, 2015
- manually adjusting and updating this information for all subsequent client transactions and transfers relating to the affected positions

19. Further, TDW estimates that it would take approximately two years for any full-compliance solution to be implemented.

20. The approximate cost of TDW providing clients with 2018 estimated position cost information is more comparable to the costs borne by other IIROC Dealer Members when they built and implemented the capability of providing position cost estimates at the end of 2015.

21. The result of approving the exemption is that TDW will have:

- incurred comparable costs to all other dealers to implement a position cost disclosure solution
- addressed its historical non-compliance with the IIROC position cost disclosure requirements by complying with the decision reached in the separate IIROC enforcement process.

Impact on other Dealer Members

22. The IIROC Board considered the concerns that granting this exemption could:

- create an incentive for other Dealer Members to not comply with these or other IIROC rules if they think that they now have the option of resolving a non-compliance situation by seeking an exemption
- be unfair to the other Dealer Members who dedicated significant resources to comply with the new position cost reporting requirements as at December 31, 2015.

23. However, in this instance, the IIROC Board believes that the combined impact on TDW of:

- having to mitigate its non-compliance by providing cost estimate disclosures for the affected client positions in 2018,
- the reputational and financial costs imposed by the Hearing Panel in the related Enforcement case, and
- obtaining this exemption

do not create an incentive for other Dealer Members to not comply with IIROC rules, and do not result in unfairness to other Dealer Members.

Impact on the public

24. Given the foregoing analysis, and the totality of the circumstances described above (including the significant fine paid by TDW for its non-compliance), the IIROC Board does not believe that the public would conclude that Dealer Members have the “option” of non-compliance with an IIROC requirement that will be cured by an exemption.
25. As noted above, the approximate cost of TDW providing clients with 2018 estimated position cost information is comparable to the costs borne by other IIROC Dealer Members when they built and implemented the capability of providing position cost estimates at the end of 2015. TDW has incurred comparable costs to all other dealers to implement a position cost disclosure solution, and has addressed its historical non-compliance with the IIROC position cost disclosure requirements by complying with the decision reached in the separate IIROC enforcement process.
26. IIROC’s disciplinary process is the appropriate venue for the regulator to assess and impose sanctions for past conduct that violates IIROC’s requirements. The IIROC Board does not participate in that process. The exemption process, on the other hand, is focused on the Dealer Member’s prospective conduct and the interests of the Dealer Member’s clients and the public (along with other Dealer Members). This is the venue in which the IIROC Board participates, and the basis on which the IIROC Board has made its decision.

Decision

27. Upon application by TDW for exemptions for specified positions within Retail Customer accounts maintained at TDW, other than “custodial accounts” at TDW (as defined in the separate resolution of the IIROC Board passed September 26, 2018 approving a different exemption request of TDW) (“**Specified Retail Customer Account Positions**”) from the requirement to provide Retail Customers with position cost information, and upon considering the interests of Dealer Members, their clients and the public:
 1. Based on the representations of TDW, Specified Retail Customer Account Positions are exempt from the requirements to provide Retail Customers with position cost information on a quarterly basis within the applicable account statements in accordance with the requirements

set out in Dealer Member Rule sub-clauses 200.2(d)(ii)(F) and 200.2(d)(ii)(H), subject to the attached *Conditions relating to the TDW custodial account exemption order*.

2. The IIROC Board reserves the right to reconsider the TDW position cost information exemption order, at any time upon 30 days' notice to TDW.

28. The TDW position cost information exemption order is conditional on TDW complying with all of the following provisions:

1. The exemption shall only apply to Specified Retail Customer Account Positions where all of the following apply:

(a) A portion or all of the security position was held in the TDW Retail Customer account as at December 31, 2015.

(b) For the portion (or entirety) of the security position that was held in the TDW Retail Customer account as at December 31, 2015:

(i) the client was provided with:

(A) a notation informing the client that a position cost could not be determined or could not be assigned, or

(B) in the case of security positions held in registered accounts, a position cost of either \$0.00 or a dollar amount based on the cost of subsequent purchases and/or sales in respect of the security position,

within one or more client account statements delivered prior to December 31, 2018, and

(ii) market value information as at December 31, 2015 was available and could have been used to calculate an estimated position cost as specified by Dealer Member Rule subclause 200.1(b)(ii)(B).

(c) Where a portion or all of the security position to which both (a) and (b) above applies:

(i) was held in the TDW Retail Customer account as at December 31, 2015, and

(ii) was still held in the TDW Retail Customer account as at December 31, 2018,

market value information for the security position as at December 31, 2018, where available, was used to calculate an estimated position cost, and that estimated position cost (as modified to reflect subsequent changes to the security position) was included in account statements delivered after December 31, 2018.

2. The exemption for Specified Retail Customer Account Positions from the requirement to provide position cost information on a quarterly basis within the applicable account statements in accordance with the requirements set out in Dealer Member Rule sub-clauses 200.2(d)(ii)(F) and 200.2(d)(ii)(H) is conditional on TDW including within all future quarterly account statements provided to the client, while the security position identified in paragraph 1. above remains in the client's account at TDW:

(a) where a position cost estimate using market value information as at December 31, 2018 was available and disclosed in the December 31, 2018 account statement:

(i) an estimate of position cost for the current position as at the current quarter end that takes into consideration all purchases, sales, transfers, and corporate actions that affect the position cost that have occurred during the quarter,

(ii) the following position notification or a notification that is substantially similar: *"Market value information as at December 31, 2018 has been used to estimate part or all of the [book cost/original cost] of this security position."*

(b) where a cost estimate using market value information as at December 31, 2018 was not available and not disclosed in the December 31, 2018 account statement, TDW

including the following position notification or a notification that is substantially similar:
"The [book cost/original cost] of this security position cannot be determined."

Dated this 27th day of May, 2020.

"Paul D. Allison"
On behalf of the Board of Directors