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VIA EMAIL

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Dear Sir/Madam:

Re: Republication of Proposed Consolidation of IIROC Enforcement, Procedural, Examination and Approval Rules (the "Revised Consolidated Rules")

The Investment Industry Association of Canada (the "IIAC" or "Association") appreciates the opportunity to comment on the above noted Revised Consolidated Rules as outlined in IIROC Notice 13-0275 (the "Notice").

The IIAC commented earlier on the previous set of rules published by IIROC on March 23, 2012 and we note that a number of changes have been made to the Revised Consolidated Rules as a result of IIAC comments and input from other industry participants. In particular, we are pleased that substantive revisions have been made to Revised Consolidated Rule 8106 pertaining to the Confidentiality of Investigations. The revisions address many of the concerns that the IIAC had with the provisions relating to the disclosure of confidential information and how the requirements could potentially conflict with other regulatory and legal requirements, in addition to operational issues. IIROC has appropriately redrafted Rule 8106 to satisfy IIAC concerns while balancing the need to ensure the integrity of investigations.

While the Association recognizes the many amendments that have been made to the Revised Consolidated Rules, we continue to have questions and concerns with some of the provisions, which are outlined below.

INVESTIGATIONS

Enforcement Investigations [Consolidated Rule 8100]

Notification

We note that in the IIROC response to public comments on Proposed Consolidation of IIROC Enforcement, Procedural, Examination and Approval Rules (the "IIROC response"), IIROC stated that no changes were made to the notification provision and that Staff will continue to have discretion to give notice of an investigation when they consider it appropriate to do so. However, the IIAC and its members remain concerned with the potential lack of notice and the impact that this may have on a member firm's ability to supervise effectively.

The IIAC believes that the member firm should be made aware of the investigation in order to ensure that they are alerted to potentially problematic activity of an individual and are able to respond accordingly to address the issue.

As we mentioned in our previous response, despite a member firm having adequate policies and procedures in place to identify and prevent improper conduct and to ensure they carry out ongoing supervisory obligations, it is possible that in certain cases, specifically those in the retail environment, such as fraudulent activity, the member may be completely unaware of the activity by an employee. This could also occur in the case of an improper outside business activity. The registrant may have conducted some outside business activities that are relevant to the investigation, of which the member should be made cognizant, and potentially prohibit the registrant from continuing, but cannot do so if the firm is not informed that an investigation is underway.

By not alerting the member that one of its registrants is the subject of an investigation, IIROC would fail to allow the member to properly execute its gatekeeper responsibilities and ensure that the investing public is adequately protected.

We ask that IIROC reconsider and adopt the approach in the current Dealer Member Rules which require that a person who is the subject of an investigation be informed in writing of the matters under investigation.

IIROC's jurisdiction over employees and other non-approved persons

The IIROC response stated that there would be no change to Consolidated Rules 8104(3) and 8208(3) which obligate a Regulated Person to require its non-approved employees to cooperate with an investigation and attend at a hearing.

We recognize that it is up to the firm to take reasonable steps to ensure that their employees cooperate with an investigation request or a request to provide testimony at a hearing. We appreciate that IIROC outlines possible ways to accomplish this via clear policies and procedures, annual employee

acknowledgements, express terms in an employee's employment contract, etc. Members take their responsibility to assist IIROC investigations seriously, and to the extent able, require cooperation by their employees.

However, the language in Revised Consolidated Rule 8104(3) that a Regulated Person "must require its employees, partners, directors and officers to cooperate" and in Revised Consolidated Rule 8208(3) that the "Regulated Person must direct the individual to attend" are challenging to ensure proper compliance. Moreover, the IIROC response itself states that:

As not all such employees are contractually obligated to comply with such requests, the Consolidated Rules impose obligations on Regulated Persons who employ these individuals *to take reasonable steps to ensure* that their employees will cooperate with an investigative request or to provide testimony at a hearing. [Emphasis added]

As such, the Association suggests that the Revised Consolidated Rules mirror the above language to state in the applicable provisions that a Regulated Person take reasonable steps or act on a best efforts basis to ensure the individuals cooperate or attend and give evidence.

Confidentiality of Investigation

As noted above, while significant revisions have been made to the provisions on the Confidentiality of Investigations, the IIAC would like to request clarity that an employee, representative or agent of a Regulated Person who meets the conditions under sections (i) to (iii) of Consolidated Rule 8106(1) would be required to disclose the items under sections (iv) to (vii) to a Regulated Person's compliance, legal or human resources department, as applicable.

DISCIPLINARY HEARINGS

A. *Standards of Conduct* [Consolidated Rule 1400]

Negligence Standard

Despite OSC staff (but not the Commission itself) stating that Dealer Member Rule 29.1 was broad enough to encompass a simple negligence standard, the IIAC wishes to reemphasize its objection with the continued inclusion of negligence as a possible basis for a determination that a general standard of conduct has been violated.

As the IIAC outlined in our earlier submission, we have concerns with such a broad and far-reaching standard of conduct, especially given that hearing panels will be granted the discretion to make the determination of a disciplinary action for a breach of the negligence standard.

We question how such a negligence standard will be applied and interpreted by hearing panels.

A standard of negligence is one that does not include an element of intent. The IIAC strongly believes that intentional or knowing conduct is a necessary prerequisite to a finding of conduct unbecoming or detrimental to the public interest.

As the IIAC stated in its previous submission, we are not aware of other forms of professional discipline that are based upon a standard of simple negligence. Civil proceedings are the more appropriate venue for raising the issue of negligent conduct rather than under IIROC jurisdiction. Otherwise, a member's business conduct review could simply be transferred into a notice of hearing.

We are concerned that negligence does not include any element of intent and this is an unrealistic standard to be met.

The Association wishes to underscore our belief that a more appropriate standard is recklessness or willful blindness.

Failure to comply with legal, regulatory, contractual or other obligations

Revised Consolidated Rule 1402(2)(ii) provides that any business conduct that fails to comply with a legal, regulatory, contractual or other obligation may contravene the standards of conduct. In contrast with existing UMIR 2.1 and Dealer Member Rule 29.1, the scope of the proposed revision is overly broad and subjective. While IIROC indicated that the emphasis is placed on "business" conduct, we are concerned that the provision as drafted would subject a Regulated Person's personal dealings and obligations of any nature to this requirement. In this regard, we strongly suggest that IIROC remove the reference to "other" obligations or alternatively, provide clear guidance on IIROC's interpretation of "other obligation".

Unreasonable departure from expected standards

The IIAC continues to have concerns with the incorporation of a standard of conduct that "displays an unreasonable departure from standards that are expected to be observed by a Regulated Person".

Our members are unclear as to how this standard is defined and how it differs from compliance with IIROC rules and guidance. Who measures what this standard actual is in practice? Are industry standards higher and more comprehensive than the standards articulated in the prescribed IIROC requirements? Certainly, it is quite likely that a new and higher standard could be established through expert evidence or other avenues thereby creating a new industry best practice that is a departure from the minimum IIROC requirements and creating a higher threshold against which member firms might be measured.

This is problematic as it sets the bar where industry members will not have advance knowledge of what is expected of them. Further, member firms will likely be unaware of what other firms are doing with respect to, for example, supervisory system best practices.

It is also concerning that a hearing panel may make a determination of what an appropriate industry standard is without the benefit of being cross examined on this evidence. It is questionable if a hearing panel should have the ability to create an industry standard in this manner.

We recommend that this standard of conduct be removed. In the alternative, it should be clarified that the standard to be applied is a securities industry standard, by revising the term "standard" to read "securities industry standard".

Investor Confidence

The proposed amendment to Revised Consolidated Rule 1402(2)(iv) would include consideration of investor confidence in the integrity of the securities, “commodities or derivatives” markets. The addition of the commodities and derivatives markets would appear to broaden IIROC’s jurisdiction over marketplaces that are not regulated by IIROC. Thus the IIAC respectfully submits that the phrase “commodities or derivatives” markets be removed.

ADDITIONAL REVISED CONSOLIDATED RULE CHANGES

Applicability – Consolidated Rule 1403

The IIAC appreciates the amendment to Revised Consolidated Rule 1403 to include the introductory phrase, “For the purposes of Corporation requirements”. However, we are concerned that IIROC did not incorporate our suggestion to include language from UMIR 10.3. It would provide comfort and greater clarity to reference the language “may be found liable” to avoid concerns with the creation of absolute vicarious liability on the part of Regulated Persons for all acts and omissions of their employees.

In fact, even the IIROC response states that if “those individuals violate IIROC rules, their employer or principal may, in appropriate circumstances, be liable for the violations.”

The IIAC recommends that similar language to be incorporated in Revised Consolidated Rule 1403.

Deemed Undertakings – Consolidated Rule 8420(6)

The IIAC wishes to reiterate its concern with Revised Consolidated Rule 8420(6) pertaining to deemed undertakings.

As we stated in our previous submission, in the normal course, the evidence and other information that is produced in a proceeding may only be used for the purposes of the particular regulatory matter. Therefore, if privilege was waived on a document, production is limited to the purposes of the particular regulatory investigation and hearing and not for production during a civil case.

Nevertheless, plaintiffs in civil cases often wish to obtain access to documents produced in a regulatory proceeding. However, the understanding of the Working Group is that where the plaintiff has attempted in the past to subpoena the regulatory files, they have not been granted access to these records.

Now, under Revised Consolidated Rule 8420(6), a hearing panel may permit the use of information that is subject to this section for the purposes other than those of the proceeding in which it was disclosed, provided the hearing panel approves. This is a new provision that was not highlighted in the Notice.

This would allow plaintiffs in civil cases access to this evidence and information. As such, the IIAC suggests that this provision be removed. In the alternative, the IIAC requests clarification on the criteria that might be used by hearing panels to permit the use of information for a purpose other than the proceeding in which it was disclosed or provided. The IIROC response states that generally “a party will not be permitted to use information that is subject to this undertaking for purposes of an action other

than the one in which it was required to be provided.” If this is the case, under what circumstances would the information be permitted to be disclosed? Furthermore, exactly how is it intended that the information be used?

General Comments

Trading or Advising Activities of Regulated Person in Commodities Contracts or Derivatives

The Revised Consolidated Rules provide that IIROC may investigate, impose sanctions, and conduct examinations relating to a Regulated Person’s trading or advising in respect of securities, *commodities contracts or derivatives* (for example, Revised Consolidated Rules 8102, 8201, 8209, 8210, 9103). In the context of an IIROC Dealer Member and its representatives, the IIAC seeks confirmation that IIROC’s jurisdiction is limited to a Regulated Person’s registerable activities, in accordance with IIROC rules, that are conducted through the books of the IIROC Dealer Member.

Harmonization of Definitions

The Revised Consolidated Rules proposes definitions for a number of terms that are defined in existing National Instruments. For example, we note that (i) the definitions of “securities legislation” and “securities regulatory authority” differ from the definitions of those terms under National Instrument 14-101 *National Definitions*, and (ii) the definition of “ultimate designated person” (“UDP”) contrasts with the responsibilities of UDP which are clearly outlined in NI 31-103. To ensure consistency in the interpretation and application of defined terms, the IIAC suggests the Revised Consolidated Rules should incorporate by reference definitions of terms that already exist in other securities laws, similar to the approach under UMIR 1.2, by referring to the applicable National Instrument for definitions. Similarly, the definitions of the same terms should be harmonized across the Revised Consolidated Rules, UMIR and Dealer Member Rules.

Legal Privilege

By introducing the term “legal privilege”, the IIAC appreciates that IIROC is recognizing solicitor-client, litigation as well as any other form of privilege recognized by law. While legal privilege is expressly incorporated in the Revised Consolidated Rules 8103(3)(ii) and 9104(3)(ii), we strongly suggest that revisions be made throughout the Consolidated Rules to clarify that the provision of any records, documents and other information under the Consolidated Rules is subject to legal privilege.

We would be more than pleased to meet with IIROC staff and discuss this response to the Revised Consolidated Rules at your convenience.

Yours sincerely,

