FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

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RE: Request for comments on the updated draft Guidance Notice MR0281: "Guidelines for the review, supervision and retention of advertisements, sales literature and correspondence"

FAIR Canada is pleased to offer comments on the **updated draft Guidance Notice MR0281: "Guidelines for the review, supervision and retention of advertisements, sales literature and correspondence"** (the "Notice") contained in the Request for Comments (the "RFC") published by the Investment Industry Regulatory Organization of Canada ("IIROC") on February 7, 2011.

FAIR Canada is a national, non-profit organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

FAIR Canada Comments and Recommendations – Executive Summary

1. FAIR Canada welcomes the Notice and IIROC's proactive attempts to help the industry embrace and incorporate new technologies such as social media.
2. FAIR Canada believes that certain aspects of the Notice require further mandatory language, and clearer language, in order to prevent the Notice from "reading down" the provisions of Rule 29.7.
3. FAIR Canada continues to encourage IIROC to adopt a regulatory model that requires Dealer Members to put the best interests of their clients first, and to adopt and design rules related to correspondence and advertisements that place the interests of investors first.

1. FAIR Canada welcomes the Notice and IIROC's proactive attempts to help the industry embrace and incorporate new technologies such as social media.

1.1. FAIR Canada supports IIROC's initiative to revise its guidelines to assist Dealer Members in dealing with the challenges and pressures of communicating with clients via social media. The

clarifications in the Notice and the RFC are positive ones that will help Dealer Members understand that communications via social media are identical (from the point of view of Rule 29.7 of the *Dealer Member Rules*) to communications via any other medium, from conversation to newsprint.

1.2. FAIR Canada is pleased that IIROC has made it clear that Dealer Members are not to be held to a lesser standard regarding their recordkeeping and supervisory obligations regarding communications via social media. FAIR Canada considers this to be an approach that respects the rights and interests of investors and clients.

1.3. The importance of regulating technologies such as social media has been recognised by securities regulators for a long time. In 2001, IOSCO released its *Report on Securities Activity on the Internet II* ("IOSCO's Report"), in which Internet Discussion Sites ("IDSs") were considered. An IDS in the context of IOSCO's Report is any internet-based facility that allows multiple parties to communicate, and would therefore encompass all of the social media considered in the Notice – blogs, Twitter, Facebook, chat rooms, and the like. IOSCO concluded that:

> *Regulators should therefore be aware of the risk that IDS facilities will be misused in this or similar ways, and consider how best to deal with that risk in the context of the regulatory framework that operates in their jurisdiction. It is reasonably clear that* ***existing laws on market manipulation and other abusive practices apply regardless of the medium through which they are carried out, so the starting point for regulatory consideration will most often be the application of those existing laws to the IDS context.*** [Emphasis added]

1.4. FAIR Canada considers that the Notice constitutes exactly this application of existing laws (and self-regulatory practices) to the particular aspects of advertising and communicating via social media, and therefore is entirely in line with IOSCO's recommendations in dealing with the application of securities regulation to new challenges posed by the internet.

1.5. FAIR Canada furthermore considers social media and their judicious use to be important from the point of view of investors. Investors want their dealers and advisors to communicate with them and many want to be able to use all of the technological tools at their disposal to do so; in addition, investors, like other Canadians, enjoy using social media. The high rate of adoption of such technologies and media in Canada is a testament to this. Preventing Dealer Members from communicating with their investor clients via social media, or significantly impeding this form of communication, would be a disservice to both Dealer Members and their clients.

1.6. FAIR Canada considers that the Notice does not impose any significant roadblocks to the use of social media by Dealer Members. Perhaps the most difficult aspect of the Notice (and Rule 29.7) for Dealer Members, from a compliance standpoint, is the supervisory and recordkeeping aspects. However, FAIR Canada is not aware of any commonly used social media platforms where it is not possible to keep accurate records of communications.

2. FAIR Canada believes that certain aspects of the Notice require further mandatory language, and clearer language, in order to prevent the Notice from "reading down" the provisions of Rule 29.7.

2.1. FAIR Canada views certain aspects of the Notice to be too lenient in allowing Dealer Members latitude to supervise advertisements, sales literature and correspondence in ways that we believe are not in accordance with Rule 29.7.

2.2. More mandatory language is necessary within the Notice regarding the supervisory responsibilities of Dealer Members. For example, although the Notice establishes clearly that Dealer Members must establish policies and procedures regarding communications, the Notice is then not specific about what such policies must cover, even though in our opinion Rule 29.7 is clear.

2.3. The Notice provides only that Dealer Members have discretion to use pre-use approval, post-use approval, or post-use sampling to supervise communications. In FAIR Canada's view, this is inconsistent with the provisions of Rule 29.7(3) which mandate pre-use approval for many types of communications.

2.4. Similarly, the Notice provides only that Dealer Members "should" take into account certain considerations in establishing their policies and procedures. However, many of these considerations are in fact mandated by Rule 29.7; one example of this is the requirement for prior approval of original advertisements and template advertisements.

2.5. FAIR Canada considers that a lack of mandatory language in these elements of the Notice effectively "read down" the provisions of Rule 29.7. It should be made clear that the minimal requirements of the Notice regarding policies and procedures for supervision of communications are mandatory for Dealer Members.

2.6. Furthermore, FAIR Canada considers the discussion of third-party communications within the Notice to be inaccurately worded and in need of re-evaluation.

2.7. There is, from the point of view of Rule 29.7 and of provincial securities legislation generally, no such thing as "third-party" communication in the sense that the Notice provides. Communications by a Dealer Member, using the resources of that Dealer Member, are always "first-party" communications. For example, "third-party" communications as outlined in the Notice include a "re-tweet" of a client's post; sales communication secured from a third-party website (and posted on the Dealer Member's website); and permitting third parties to comment or post on a Dealer Member's website.

2.8. It seems obvious to FAIR Canada that all of these are direct communications by a Dealer Member; to the extent that a Dealer Member "wraps" another party's words in its livery (by publishing a comment on its website, for example, or its twitter feed) the Dealer Member has in effect made that communication directly. The same would apply to attaching a clipping to a letter sent to clients. A re-tweet (to give only one example) is itself a communication to the public, by the Dealer Member, and therefore automatically attracts regulatory and legislative

requirements. The Notice currently says that such a re-tweet "may attract" regulatory and legislative requirements. FAIR Canada considers this vague and incorrect.

3. FAIR Canada continues to encourage IIROC to adopt a regulatory model that requires Dealer Members to put the best interests of their clients first, and to adopt and design rules related to correspondence and advertisements that place the interests of investors first.

3.1. In FAIR Canada's most recent comments to IIROC, in response to its Request for Comments regarding the *Proposals to implement the core principles of the Client Relationship Model* published by IIROC on January 7, 2011, we encouraged the adoption of a principled "Clients First Model" that takes as its fundamental guiding principle that **Dealer Members must, in conducting their relationships with retail clients, put the interests of those clients first**.

3.2. FAIR Canada considers such a model, which adopts a simple and principled basis on which to evaluate both dealer practices and IIROC's own regulatory efforts, to be crucial to better protecting the interests of investors, a goal which remains at the heart of the securities regulatory system. Investor protection must remain the fundamental goal of all regulators, including SROs. A Clients First Model serves this goal by proposing a clear standard: will the act or rule serve to place an investor client's interests first?

3.3. FAIR Canada considers its recommendations above regarding correspondence and advertising to be consistent with a Clients First Model. The fundamental principle in dealing with advertisements, and Dealer Member correspondence with clients, is whether such communications will further the client's financial interests.

3.4. FAIR Canada considers the basic thrust of Rule 29.7 and the Notice to be in keeping with such a principle. Requirements that advertisements not be false or misleading, that they do not omit material facts, that they not exaggerate or make unjustified promises of specific results, and that they clearly present assumptions, are all in keeping with a Clients First Model. Furthermore, requirements for written policies and procedures regarding supervision, and pre-approval where the type of communication has significant potential to prejudice an investor (such as research reports and telemarketing scripts), are in keeping with a Clients First Model.

3.5. As discussed in section 1 of these comments, investors want information. They want to communicate with their advisors and dealers and social media can be a useful tool to help investors gain more knowledge, a better understanding, and increased control of investing and their investments. IIROC should ensure that that the information provided to investors is of use to investors (by ensuring that it is both true and put in its proper context) and that investors' best interests are thereby protected.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Ermanno Pascutto at 416-572-2282/ermanno.pascutto@faircanada.ca or Ilana Singer at 416-572-2215/ilana.singer@faircanada.ca.

Sincerely,

Canadian Foundation for Advancement of Investor Rights