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Fondation canadienne *pour* l'avancement *des* droits *des* investisseurs

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Re: Proposed British Columbia Instrument 51-519 - Promotional Activity Disclosure Requirements

FAIR Canada is pleased to provide comments on the proposed British Columbia Instrument 51-519 - Promotional Activity Disclosure Requirements (the Proposed Disclosure or Instrument).

FAIR Canada is a national, independent charitable organization dedicated to being a catalyst for advancing investors' rights in Canada. As a voice of the Canadian investor and financial consumer, FAIR Canada promotes its mission through outreach and education on public policy issues, policy submissions to government and regulators, and proactive identification of emerging issues and other initiatives.[1]

Purpose of the Instrument

We are supportive of the Instrument, which will provide a new framework for regulating promotional activity disclosure and enhancing transparency for investors. As stated in the consultation draft:

> The Instrument would provide investors with improved transparency about the source and reliability of promotional activity, enabling them [sic] make more informed investment decisions. The disclosure would also assist the BCSC to identify and hold responsible those issuers and persons who conduct problematic promotional activity.

Given the increase in the number of "do-it-yourself" investors and reliance on online platforms as a source of investment information, we believe that more investors will continue to be adversely impacted by problematic promotional activity. The Proposed Disclosure, while not a complete

[1] Visit www.faircanada.ca for more information.

solution, adds an important new approach to try to stem this issue.

The Limits of Existing Tools

Existing tools to address this problem in Canada are limited in their scope and application. They include, for example, statutory prohibitions against fraud, market manipulation, or against false or misleading statements that would be expected to have a significant effect on the market price of a security.

Broadly speaking, these tools are focused on outright fraud or dishonest conduct, not on conflicts of interests. In addition, in the case of the noted statutory prohibitions they require regulators to prove that the individual involved knew or reasonably ought to have known they were engaged in prohibited activity. This high evidentiary threshold means that, in practice, they tend to be used selectively for the most serious cases involving investor harm.

The latest Canadian Securities Administrators (CSA) Enforcement Report highlights recent enforcement sweeps by securities regulators in North America targeting websites, social media and digital platforms promoting financial fraud. The sweep uncovered more than 150 frauds and scams targeting investors in our marketplaces.

Despite their tremendous benefit in protecting investors against fraud, these types of sweeps do not address the more pervasive promotional activity that often misinforms investors and leads to poor investment decisions.

The Innovative Aspects of the Proposed Disclosure

In our view the growing nature of the problem requires innovative solutions. We believe that the Instrument has the potential to become one of these solutions. The following two aspects of the Instrument set it apart from the existing tools, thereby making it particularly encouraging:

1. **Improves Transparency for Investors**: By requiring those engaged in promotional activity to proactively disclose any conflicts of interest, the proposed Instrument would provide investors with improved transparency, thereby helping them make informed investment decisions. This is similar to the long-standing U.S. "stock touting" requirements, which make it illegal to promote a security without disclosing the nature and amount of consideration received for the promotion, regardless of the accused's intent.[2]

2. **Strict Liability Threshold:** The second aspect of the proposed Instrument that distinguishes it from existing prohibitions is that establishing liability will not require showing intent or knowledge on the part of the individual alleged to have breached the requirements – either the disclosures required by the Instrument were made, or they were not. Like the U.S. prohibition, the proposal's strict liability aspect would make it an

[2] Securities Act, 1933, s. 17(b) (15 U.S. Code § 77q - Fraudulent interstate transactions, section (b)).

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effective new tool for addressing investor concerns.[3]

Addressing Expected Challenges in Monitoring Compliance

One of the keys to success for the Instrument will be to adopt a proactive approach to monitoring the internet and social media platforms to identify non-compliance with the new requirements. Given the nature of online platforms and the fact the requirements could apply individuals living offshore, significant resources would be required to regularly monitor compliance with the Instrument.

One possible way to address this challenge might be found in the approach taken by the UK.

Like the concerns in Canada, the UK's Financial Conduct Authority (FCA) expressed concerns with the financial promotional activity on social media. In a report released in 2020, it stated:

> Online platforms, such as search engines and social media platforms, play an increasingly significant role in communicating financial promotions to consumers. As a result, consumers are being more readily exposed to adverts, ranging from scams and promotions of high-risk investments to false or misleading adverts (falling either side of the regulatory perimeter) which, directly or indirectly, lead consumers onto paths resulting in harm. As the digital world continues to develop, the potential harms to consumers change in both nature and severity.[4]

The starting point in the UK, however, is quite different. There, subject to certain exemptions, it is a criminal offence to "communicate an invitation or inducement to engage in investment activity" unless the promotion is made or approved by a regulated firm or it is exempt.[5]

The FCA has been pursuing harmful promotional activity, in part, by trying to hold social media platforms (such as Google, YouTube, TikTok, etc.) accountable for any financial promotions that are passed on to their users, particularly where the platforms provide "value adding services" (such as hosting ads).

This approach gives the FCA a powerful tool against financial promotions that have not been approved by a regulated firm or are not otherwise exempted under UK law. To this end, the FCA has been in discussions with social media firms about these requirements and signalled that it is "prepared to act" if it fails to see effective compliance.[6]

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[3] Investigations Into GameStop Trading and Reddit: Former SEC Enforcement Chief Provides Insights. Forbes, February 9, 2021.
[4] FCA's annual Perimeter Report 2019/20 (see paragraph 3.29).
[5] Section 21 of the Financial Services and Markets Act 2000. For interpretive guidance, see: The Perimeter Guidance Manual, Chapter 8 – Financial Promotion and Related Activities.
[6] The position that online platform operators should bear "clear legal liability" for financial promotions they pass on was first articulated in the FCA's annual Perimeter Report 2019/20 (see paragraph 3.30).

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In addition, we understand the FCA has an arrangement with the UK domain registrar, enabling them to request that sites that have a UK domain be taken down. The FCA also engages directly with search engines and will request they remove search results that point to the problematic promotions.

We would encourage the BCSC (as well as other members of the CSA) to adopt similar approaches when trying to lessen the reach and impact of misleading or problematic promotional activity. Working with online platforms to ensure they keep their platforms free of problematic promotional activities would go a long way in addressing the challenges in this area.

Comments on Specific Questions posed by the BCSC

Below, we set out our comments in response to specific questions in the consultation draft that we feel are most relevant from an individual investor perspective.

1. *As outlined above under "Application of the Instrument", the Instrument would impose disclosure requirements on all persons conducting promotional activity in British Columbia, with certain exceptions such as for registrants and investment funds. Are there other persons who conduct promotional activity that should also be exempted from the disclosure requirements for promotional communications? If so, please explain.*

Response: We do not believe other persons should be exempted from the Proposed Disclosure. In our view, given the investor protection focus of the Instrument, exceptions should be limited to the greatest extent possible.

2. *Should the proposed Instrument apply to promotional activity in respect of venture issuers only? Why or why not?*

Response: In our view, the Instrument should not be narrowed in this way. The issue of problematic promotional activity is not limited to venture issuers; it is a broader problem that can occur in respect of any issuer, regardless of their size or where they are listed.

3. *We recognize that the format and location of the required disclosure will vary with the platform or medium used.*

    b) *Should the proposed Instrument be prescriptive about the format or location of the required disclosure? Why or why not?*

Response: The Instrument, as drafted, requires any written disclosure to be "presented in a manner that a reasonable person would consider to be prominent." Supplementing this requirement with guidance and examples in the Companion Policy or an FAQ would facilitate compliance. Guidance could focus on things like relative font size for written disclosures, and timing, volume, and speed with which disclosures are presented in the case of video. This

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guidance should be informed by behavioural insights and tested with focus groups to ensure effectiveness. Plain language and clear presentation should also be key attributes of any disclosure.

d) *Are there persons other than directors, officers, or employees whose promotional activity on behalf of an issuer should not trigger the news release or MD&A requirements for the issuer? If so, please explain.*

Response: As stated in our response to Question 1 above, no additional exceptions should be created.

Conclusion

We applaud the BCSC for taking the lead on this significant issue, one that impacts all Canadian investors, and would urge all other securities regulators in Canada to adopt rules that harmonize with the BCSC approach.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting. Please be advised that we intend to make our submission public by posting it to the FAIR Canada website. We would be pleased to discuss our submission with the BCSC should you have questions or require further explanation of our views on these matters. Please contact me at jp.bureaud@faircanada.ca.

Sincerely,

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Executive Director
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