

# Joint Canadian Securities Administrators/Investment Industry Regulatory Organization of Canada

## Staff Notice 21-330

### *Guidance for Crypto-Trading Platforms: Requirements relating to Advertising, Marketing and Social Media Use*

September 23, 2021

#### 1. Purpose of this Notice

This is a joint staff notice by the Canadian Securities Administrators (CSA) and the Investment Industry Regulatory Organization of Canada (IIROC and together with the CSA, we). We are publishing this staff notice (the Notice) because we have recently become aware of certain advertising activities and marketing strategies by platforms that trade crypto assets (Crypto-Trading Platforms, or CTPs) that may breach certain requirements of securities legislation and/or raise investor protection or public interest concerns.

This Notice provides guidance for CTPs on how requirements under securities legislation<sup>1</sup> and IIROC rules relating to advertising, marketing and the use of social media may apply to them.

#### 2. Application of securities legislation to CTPs

As explained in CSA Staff Notice 21-327 *Guidance on the Application of Securities Legislation to Entities Facilitating the Trading of Crypto Assets (CSA SN 21-327)*,<sup>2</sup> if crypto assets that are securities and/or derivatives are traded on a CTP, the CTP would be subject to securities legislation. In addition, securities legislation may apply to CTPs that facilitate the buying and selling of crypto assets, including crypto assets that are commodities, because the user's contractual right relating to the crypto asset may itself constitute a security and/or a derivative.

When we refer to a CTP in this Notice, we are referring to a CTP that is subject to securities legislation because it trades securities and/or derivatives and is therefore a dealer CTP and/or a marketplace CTP.<sup>3</sup>

<sup>1</sup> As defined in National Instrument 14-101 *Definitions* and includes legislation related to both securities and derivatives.

<sup>2</sup> <https://www.securities-administrators.ca/news/canadian-securities-regulators-publish-additional-guidance-for-entities-facilitating-the-trading-of-crypto-assets/>

<sup>3</sup> For clarity, CTPs that trade securities and/or derivatives may be dealers and/or marketplaces as defined in securities legislation. The primary focus of this notice is on CTPs that operate as dealer platforms. However, in some situations, a CTP may be carrying out activities that have elements of both marketplace platforms and dealer platforms, and this Notice describes how existing regulatory requirements could apply to these CTPs. For more information about marketplace platforms and dealer platforms, please see Joint CSA-IIROC Staff Notice 21-329 *Guidance for Crypto-Asset Trading Platforms: Compliance with Regulatory Requirements (CSA SN 21-329)*

### 3. Scope of this Notice

This Notice includes an overview of the principal requirements under securities legislation and IIROC rules in relation to advertising and marketing, including through the use of social media, and is intended to assist

- CTPs that are registered as a dealer under securities legislation (**registered CTPs**),
- CTPs that have or will be applying for registration as a dealer but are not yet registered (**prospective CTP registrants**), and
- other registrants that may be considering establishing a CTP as a new business line.

The Notice provides guidance regarding

- statements in advertising and marketing materials that could be considered false or misleading,
- concerns over the use of gambling-style contests, promotions or schemes, such as the offering of bonuses or rewards based on the level of trading, that may encourage excessive trading by retail investors,
- compliance and supervisory challenges when using social media to promote CTPs, and
- complying with securities legislation generally.

We have included examples of statements that could be considered false or misleading in **Appendix A**.

We remind registered CTPs and prospective CTP registrants that CSA staff may review advertising and marketing as part of the registration review process and following registration as part of a compliance review. False or misleading advertising and improper marketing strategies raise concerns relating to the fitness of the firm and its principals for registration (particularly in terms of the fitness for registration criteria of integrity and proficiency).

While we provide guidance on ways that registered CTPs and prospective CTP registrants can meet their obligations, these are examples only. A CTP can use other methods provided the CTP complies with securities legislation and, if applicable, IIROC rules.

CSA members may take enforcement action against CTPs, including foreign-based CTPs that have investors in Canada, that do not comply with the requirements of securities legislation.

### 4. Summary of securities legislation and IIROC Rules in relation to false or misleading advertising

A number of provisions in securities legislation and IIROC rules apply to prohibit false or misleading statements in advertising or marketing materials. These prohibitions can apply to the making of statements

- that suggest that a CTP is registered under securities legislation where this is not the case;

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[https://www.securities-administrators.ca/uploadedFiles/Industry\\_Resources/JointCSAIIROCNotice21-329\(March29\\_2021\).pdf](https://www.securities-administrators.ca/uploadedFiles/Industry_Resources/JointCSAIIROCNotice21-329(March29_2021).pdf)

- that suggest that a securities regulatory authority or regulator has approved or endorsed the CTP, any products offered on the CTP or any disclosure or other representation made by the CTP; or
- about any matter that a reasonable investor would consider relevant or important in deciding whether to enter into or maintain a trading or advising relationship with the CTP if the statement is untrue or omits information necessary to prevent the statement from being false or misleading in the circumstances in which it is made.

In addition, registered CTPs should consider their advertising and marketing strategies in the context of their obligation to treat their clients fairly, honestly and in good faith under securities legislation and, if applicable, IIROC rules. Moreover, a registered CTP should consider how the advertising and marketing affects its obligations under Part 13 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103)* and, if applicable, equivalent requirements in IIROC rules relating to:

- know-your-client, know-your-product and assessing suitability, and
- identifying and responding to conflicts of interest in the best interest of the client.

## **5. Concerns over improper “gambling style” promotions and schemes**

We have recently noted some CTPs using advertising or marketing strategies that include contests, promotions, bonuses and time-limits to encourage investors to engage in trading and to act quickly for fear of missing out on an investment opportunity or a reward. For example, a promotion involving a bonus scheme may offer a financial reward or a bonus interest in a particular type of crypto asset for the first 500 investors who take an action within the next 24 hours.

We are concerned that some of these strategies may inappropriately encourage investors to engage in excessively risky trading, taking on risks that they would normally avoid.

We wish to remind CTPs that registered dealers have an important role as gatekeepers of the integrity of the capital markets. They should not, by act or omission, engage in or facilitate conduct that brings the market into disrepute. Advertising and marketing strategies designed to encourage excessively risky trading may, depending on the circumstances, violate the registrant’s obligation to treat clients fairly, honestly and in good faith.

In addition, advertising and marketing strategies designed to encourage trading may be considered a form of solicitation or invitation to trade and may therefore trigger suitability obligations for registered CTPs. These suitability obligations can apply to recommendations relating to global trading strategies as well as individual securities. Some CTPs have or will seek an exemption from suitability on condition of not providing recommendations or advice. CTPs relying on such exemptions must exercise caution to ensure that actively soliciting trading through advertising is not inconsistent with the conditions of their exemption.<sup>4</sup>

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<sup>4</sup> For helpful guidance on this point, see the reference to an IIROC publication in footnote 9.

## **6. Compliance and supervisory expectations for firms using social media**

We expect registered CTPs to consider compliance and supervision when using social media websites and platforms (**social media sites**) as a means of communicating with clients and the general public for business purposes. They must maintain records of their business activities, financial affairs and client transactions<sup>5</sup>. The use of social media sites increases the risk that registered CTPs may not be retaining adequate records of their business activities and client communications. This is the result of interactive social media web sites that include the posting of both real time and static content. Registered CTPs must design systems that allow for compliant record retention as well as retrieval capability.

The use of social media web sites is also challenging in terms of supervision, and CTPs must determine the level or extent of supervision necessary, particularly considering the provisions in securities legislation relating to the use of misleading and false statements. This may include the use of a risk-based approach to determine whether a CTP's review of electronic communications is sufficient to meet its supervisory obligations. These supervisory obligations are not just restricted to social media use by the CTP but also by its directors, officers, employees, shareholders and other third-parties acting on behalf of the CTP.

## **7. Guidance on policies and procedures**

CTPs are required to adopt appropriate policies and procedures governing the use of social media for marketing. The policies and procedures should provide for:

- the review, supervision, retention and retrieval of advertising and marketing materials, including marketing done on social media web sites,
- the designation of an appropriate individual to be responsible for the supervision or approval of marketing communications, and
- a system to monitor compliance with policies and procedures, including record retention and retrieval capability.

## **8. Complying with Securities Legislation**

We encourage CTPs to consult with their legal counsel and to contact staff of their local securities regulatory authority on the appropriate steps to comply with securities legislation and IIROC rules.

As the technology and operational models of CTPs continue to evolve, the CSA and IIROC welcome continued dialogue with CTPs and stakeholders on issues that are developing and possible ways of complying with requirements and additional areas where flexibility may be appropriate.

## **9. Questions**

Please refer your questions to any of the following CSA and IIROC staff:

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<sup>5</sup> Subsection 11.5(1) of NI 31-103.

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<p><b>David Shore</b> Legal Counsel, Securities Division Financial and Consumer Services Commission (New Brunswick) <a href="mailto:david.shore@fenb.ca">david.shore@fenb.ca</a></p>	
<p><b>Doug Harris</b> General Counsel, Director of Market Regulation and Policy and Secretary Nova Scotia Securities Commission <a href="mailto:Doug.Harris@novascotia.ca">Doug.Harris@novascotia.ca</a></p>	
<p><b>Sonali GuptaBhaya</b> Director, Market Regulation Policy IIROC <a href="mailto:sguptabhaya@iiroc.ca">sguptabhaya@iiroc.ca</a></p>	<p><b>Erica Young</b> Policy Counsel, Member Regulation Policy IIROC <a href="mailto:eyoung@iiroc.ca">eyoung@iiroc.ca</a></p>

## Appendix A

### Examples of statements that could be considered false or misleading

Example of statement	Why is this potentially false or misleading?
<p>“Your crypto assets are safe with us because we meet all regulatory requirements as a fully licensed Money Services Business under Canadian legislation.”</p>	<p>This statement may be false or misleading as it suggests that registration as a Money Services Business is sufficient to protect the interests of clients or provides regulation comparable to securities regulatory requirements – CTPs may also be subject to registration and other requirements under securities legislation.</p>
<p>“The BuyEasy Crypto Exchange* is the leading global exchange for trading 16 of the most commonly traded crypto assets”</p> <p><i>* Note: This organization is fictitious and is used for illustrative purposes only</i></p>	<p>The terms “exchange” and “marketplace” refer to a particular type of regulated entity under Canadian securities legislation.</p> <p>A CTP that facilitates trades in securities or derivatives must not refer to itself or hold itself out to investors as an exchange or marketplace unless it is recognized as an exchange or authorized to operate as a marketplace under applicable securities legislation or exempted from such requirements.<sup>6</sup></p> <p>See also discussion below in relation to the need to substantiate the claim that the CTP is the “leading global exchange”.</p>
<p>“Our platform is consistently rated the safest and most trusted platform by leading rating agencies, including Digital Bitcoin Rating Service and Triple A Crypto All Stars”*</p> <p><i>* Note: These organizations are fictitious and are used for illustrative purposes only</i></p>	<p>CTPs should not make statements in advertising and marketing materials without sufficient evidence to verify these claims, or adequate support to substantiate these general statements.</p> <p>CTPs should also avoid making statements in advertising and marketing materials that do not include an adequate discussion of the risks of investing in the product being marketed. Statements in advertising and marketing materials should be fair, balanced and not misleading.</p> <p>It is not acceptable to make an unbalanced and overly promotional statement in advertising and marketing materials or social media and then rely on disclaimers or a description of key assumptions in a client agreement or offering document. Disclaimers and key assumptions should be reasonably related to the statements they apply to and should be located proximate to the statements made.</p>

<sup>6</sup> Section 6.9 of National Instrument 21-101 *Marketplace Operation*.

Example of statement	Why is this potentially false or misleading?
	<p>Disclaimers and assumptions cannot be used to justify a statement that is false or misleading.</p> <p>Where CTPs refer to third-party sources, they must take steps to ensure that the information is not false or misleading. This includes appropriate due diligence on these sources and maintaining supporting documentation and sourcing for third party performance information presented in advertising and marketing materials. CTPs must maintain records of source data and information necessary to support the claims made in advertising and marketing materials disseminated to clients.</p> <p>CTPs should exercise caution in referring to a “rating agency” or similar party if it might inappropriately suggest that the party is a regulated entity or has some expertise that it does not have.</p>
<p>“When I want to buy Bitcoin, I always use the BuyEasy Crypto Platform – it’s so easy to buy!” said noted action movie star ...</p>	<p>We remind CTPs that if they engage an individual to promote products or services on the CTP, this may, depending on the nature of the promotion, be considered a form of recommendation or advice in relation to securities or derivatives and may therefore trigger obligations under securities legislation for both the CTP and the individual making the promotion and may, depending on the circumstances, contravene securities law.</p> <p>Although there exists a general exemption in securities legislation (sometimes called the “general advice” or the “newsletter exemption”) that may apply to these activities,<sup>7</sup> it is a condition of these exemptions that</p> <ul style="list-style-type: none"> <li>• the advice cannot be “tailored to the needs of the person receiving the advice”, and</li> <li>• the person providing the advice must disclose concurrently any “financial or other interest” the person (or certain related persons) has in the issuer.</li> </ul> <p>Accordingly, CTPs that engage individuals to promote products and services on their platforms should assess whether the promotion could be considered a form of recommendation or advice and, if so, take steps to ensure such promotions are made in compliance with securities legislation.</p> <p>We also encourage CTPs to take reasonable steps to monitor internet advertising by entities that may have similar names to, or</p>

<sup>7</sup> See s. 8.25(2) [*Advising generally*] of NI 31-103. In Ontario, see s. 34(1) of OSA. In British Columbia, see also Proposed British Columbia Instrument 51-519 *Promotional Activity Disclosure Requirements* <https://www.bcsc.bc.ca/securities-law/law-and-policy/bc-notices/current/bcn-202103-may-26-2021>

Example of statement	Why is this potentially false or misleading?
	<p>purport to be from, registered firms. The CSA and IIROC have noted increasing concerns over imposter sites that closely resemble registered firms, regulators and fake endorsements by individuals.<sup>8</sup></p>
<p>“On our platform, you keep more of your money because we never charge any commissions!”</p>	<p>This statement could be false or misleading to investors if the platform does not charge a commission but instead charges a markup on the best price it is able to obtain, takes a spread on trades where it acts as a market maker, or monetizes client order-flow for the CTP’s benefit, and does not provide reasonable disclosure to clients explaining the basis for these alternative forms of compensation.</p> <p>This statement may also be false or misleading if the CTP offers only certain types of products on a commission-free basis, and other types of products are subject to commissions.</p> <p>Registrant obligations under securities legislation include</p> <ul style="list-style-type: none"> <li>• acting fairly, honestly and in good faith towards clients,</li> <li>• providing clear and complete disclosure to clients of all charges and registrant compensation associated with the investment products and services they receive, and meaningful reporting on how their investments perform; and</li> <li>• making reasonable efforts to achieve best execution when acting for clients.</li> </ul> <p>In addition, a registered CTP operating a marketplace must provide disclosure relating to fees charged to its participants.</p>
<p>“We are your cheapest and best source for Bitcoin”</p>	<p>This statement could be false or misleading if the CTP is unable to substantiate the basis for this claim or to demonstrate that it takes reasonable steps to ensure the best price for its clients.</p> <p>CTPs must ensure that any claim that they make is accurate and that they have implemented reasonable policies and procedures to achieve the outcome claimed.</p> <p>Registered CTPs should also assess any claims relating to pricing or execution in the context of their obligations to make reasonable efforts to achieve best execution or fair pricing for clients, as applicable.</p> <p>They must have policies and procedures that outline the process designed to achieve best execution or fair pricing for clients, as applicable. These policies and procedures should describe how the</p>

<sup>8</sup> See CSA Investor Alert: Investment scams imitating well-known financial brands (May 31, 2021), available at <https://www.securities-administrators.ca/aboutcsa.aspx?id=2061>

Example of statement	Why is this potentially false or misleading?
	CTP evaluates whether best execution or fair pricing was obtained and should be regularly and rigorously reviewed.
<p>“We do not have suitability obligations. We make it clear to investors that trading crypto is risky but we are not required to tell clients whether crypto trading is suitable for them or not.”</p>	<p>A CTP will be subject to an obligation to perform an appropriateness assessment at the account-opening stage, even in the circumstances where the CTP that has been granted an exemption from the obligation to make a suitability determination on a trade-by-trade basis.</p> <p>Specifically, the CTP is required to perform account and product assessments, taking into account a client’s</p> <ul style="list-style-type: none"> <li>• experience and knowledge in investing in crypto assets;</li> <li>• experience in using order execution only online brokerages;</li> <li>• financial assets and income; and</li> <li>• risk tolerance.</li> </ul> <p>The CTP must also assess the crypto assets approved to be made available on its platform.</p> <p>The CTP may also be required to adopt policies and procedures to conduct an assessment to establish appropriate limits on the losses that a client can incur. In such case, the CTP should implement controls to monitor and apply such policies and procedures.</p>
<p>“Important Update! BTC skyrockets! Don’t get left behind!”</p>	<p>This type of statement may, depending on the circumstances, be considered a form of recommendation or advice, particularly where the statement is included in a tailored communication (e.g., an e-mail “push” to investors).</p> <p>CTPs granted trade-by-trade suitability relief are generally not permitted to make recommendations or provide advice in relation to crypto asset trading as a condition of this relief.</p> <p>For a discussion of activities that could be considered a form of recommendation or advice, please refer to IIROC <i>Guidance on Order Execution Only Services and Activities</i> dated April 9, 2018.<sup>9</sup></p>

<sup>9</sup> See IIROC Guidance on Order Execution Only Services and Activities at <https://www.iiroc.ca/news-and-publications/notices-and-guidance/guidance-order-execution-only-services-and-activities>