Registered and unregistered crypto asset trading platforms must comply with advertising and marketing rules

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On September 23, 2021, the Canadian Securities Administrators (CSA) and the Investment Industry Regulatory Organization of Canada (IIROC, and together with the CSA, the regulators) published *Staff Notice 21-330 Guidance for Crypto Trading Platforms: Requirements relating to Advertising, Marketing and Social Media Use* (the Staff Notice). The Staff Notice provides guidance for crypto asset trading platforms (CTPs) on the requirements under securities legislation and IIROC rules in relation to advertising and marketing, including through the use of social media, and should be carefully reviewed by all CTPs and any firms considering establishing or operating a CTP in Canada.

Julie Mansi, Partner in BLG's Cryptocurrency and Blockchain Group confirms that "a critical variable in assessing whether a platform triggers registration in Canada is how it 'holds itself out to the market' through its internet and social media presence and marketing strategy. Further, as part of preparing a dealer registration for clients, BLG lawyers are charged with reviewing the firm's marketing materials and developing policies and procedures to address review and approval protocols."

Regulators may review advertising and marketing materials as part of the registration review process and following registration as part of a compliance review. False or misleading advertising and improper marketing strategies may raise concerns relating to the fitness of the firm and its principals for registration. 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, including those described in the Staff Notice.

Key takeaways

- **Avoid false or misleading statements** – CTPs should avoid advertising or marketing strategies or materials that promote false or misleading statements, or that may cause the CTP to breach its obligations under securities legislation and, if applicable, IIROC rules. For examples of statements that could be considered

false or misleading as identified by the regulators, see Appendix A of the Staff Notice.

- **Do not encourage gambling-style trading activity** – CTPs should avoid advertising or marketing strategies (such as contests, promotions, bonuses and time-limits) that encourage investors to take risks that they would normally avoid.
- **Adopt adequate policies and procedures that govern the use of social media** – CTPs should adopt appropriate policies and procedures that provide for compliance and supervision of electronic communications when using social media sites for marketing purposes and as a means of communicating with client and the public for business purposes.
- **When compliance in doubt, seek assistance** – CTPs should consult with legal counsel and contact regulators to ensure compliance with securities legislation and IIROC rules as it relates to their advertising and marketing activities.

Guidance and observations

The Staff Notice provides guidance and observations in the following key areas.

1. False or misleading advertising

False or misleading statements in advertising or marketing materials are prohibited under securities legislation and IIROC rules. Therefore, CTPs should refrain from making statements that:

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

Registered CTPs have an obligation to treat clients fairly, honestly and in good faith in relation to any advertising and marketing strategy. Registered CTPs also need to consider how their advertising and marketing affects their obligations in relation to other aspects of their business, such as know-your-client, know-your-product, assessing suitability, and identifying/responding to conflicts of interest.

2. “Gambling-style” promotions and schemes

The regulators expressed concern with some CTPs’ use of advertising or marketing strategies that include contests, promotions, bonuses and time-limits to encourage investors to engage in excessively risky trading or to act quickly for fear of missing out on an investment opportunity or a reward. For example, the Staff Notice refers to a promotion involving a bonus scheme that offers a financial reward or a bonus interest in a particular type of crypto asset for a specified number of investors who take an action within a specified period.

The Staff Notice reminds CTPs that registered dealers have an important role as gatekeepers of the integrity of the capital markets, and should not, by act or omission, engage in or facilitate conduct that brings the market into disrepute, or that may, depending on the circumstances, violate the their obligation to treat clients fairly, honestly and in good faith.

Additionally, the Staff Notice notes that 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. Accordingly, given that some CTPs have or will be seeking an exemption from the suitability obligations on the condition that they will not be providing recommendations or advice, the regulators remind CTPs relaying (or expect to rely) on such exemption to exercise caution to ensure that actively soliciting trading through advertising is not inconsistent with the conditions of their exemption. For additional guidance, the regulators encourage CTPs to see *IIROC Guidance on Order Execution Only Services and Activities*.

3. Use of social media sites

CTPs are expected to consider compliance and supervisory controls when using social media websites and platforms (social media sites) to communicate and engage with clients and the public for business purposes.

Registered CTPs must retain adequate records of their business activities and communications. If a registered CTP uses social media sites, it must also establish internal systems that facilitate compliant record retention, including retrieval capabilities, of business activities and communications through social media sites.

The Staff Notice also notes that CTPs are required to adopt policies and procedures governing the use of social media, which should provide for the following:

- 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.

Contact us

If you have any questions about the Staff Notice, please contact one of the authors or any other member of BLG's Cryptocurrency and Blockchain Group. Our Cryptocurrency and Blockchain Group leverages BLG's expertise in legal areas such as investment management, corporate finance, derivatives and fintech, to provide advisory and transactional support right from the start.

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