

# MARKETING CRYPTOCURRENCY PLATFORMS IN CANADA

Posted on October 29, 2021

**Categories:** [Insights](#), [Publications](#)

Many of our past articles on the intersection of securities law and cryptocurrency (and digital assets more generally) have focused on enforcement actions taken, or threatened to be taken, by members of the Canadian Securities Administrators (“**CSA**”) and, more particularly, the Ontario Securities Commission. To date, securities law enforcement actions have been the epicentre of Canadian regulatory involvement arguably because of two factors: the offering of cryptocurrency derivatives through trading platforms and the existence of investors and users of those platforms who are identifiably resident in Canada.

Beyond these circumstances, the question of how Canadian regulators could apply securities laws to decentralized conduct arises. There remains a very valid question at law as to whether a transaction related to the transfer of cryptocurrency itself involves a security. There is also the challenge of jurisdiction: Where and how do cryptocurrency transactions take place such that any particular Canadian securities regulator could claim jurisdiction?

The CSA and Investment Industry Regulatory Organization of Canada (“**IIROC**”) have recently published a staff notice expressing their “Guidance for Crypto-Trading Platforms”. As described below, this guidance does not target the transactions themselves but peripheral conduct by crypto-trading platforms (“**CTPs**”).

The authority of Canadian regulators to target this peripheral conduct arises from the requirement that dealer or marketplace CTPs doing business in Canada register under the appropriate category of dealer registration. The CSA and IIROC views on the requirement for CTPs to register are set out in CSA-IIROC Joint Staff Notice 21-329 and was discussed in our recent bulletin, [Canadian Regulatory Direction and Pressure for Cryptocurrency Platforms](#). Registration by a CTP gives the applicable regulatory authority the express jurisdiction over a CTP.

## **CSA-IIROC Joint Staff Notice 21-330, Guidance for Crypto-Trading Platforms**

CSA-IIROC Joint Staff Notice 21-330 (the “**Notice**”) provides the CSA’s and IIROC’s views on how securities law may apply to: (1) false or misleading statements in advertising and marketing, (2) the use of promotions to encourage investments in crypto-assets, and (3) the use of social media. The guidance is intended for registered CTPs, CTPs that have applied or will be applying for registration and other market participants that

may be considering establishing a CTP.

The Notice begins with a firm reminder for registered CTPs and prospective CTP registrants: regulators may review advertising and marketing practices at any time in a compliance review or a registration review process, and take enforcement action.

#### *(1) False or Misleading Statements*

False or misleading statements in advertising and marketing materials are prohibited. This includes information that a reasonable investor would consider relevant or important that is omitted, or altered in a manner which results in it being untrue.

Any suggestion in advertising or marketing materials that a CTP is registered under securities legislation, where this is not the case, is false and misleading. CTPs must also be cautious to not suggest that any type of regulator has approved or endorsed anything related to the CTP. For example, using the word “exchange” or “marketplace” in connection with a CTP is misleading as it refers to a regulated entity under Canadian securities laws.

Additionally, CTPs should not make statements in advertising or marketing materials without sufficient evidence to verify such claims. A CTP should also include in marketing materials a candid discussion about the risks associated with investing in crypto or digital assets. Otherwise, boastful statements may be considered as false or misleading.

With respect to claims that a CTP charges zero commissions, the Notice indicates that advertising in this manner may be considered to be false and misleading if the CTP, instead of charging a commission, charges a markup on the best price it is able to obtain, takes a spread on the trade, or otherwise monetizes client order-flow. Any additional charges which an investor will be responsible for in connection with a transaction in lieu of a commission should be disclosed.

It may also be false or misleading if the CTP advertises that the platform is “commission free”, yet only offers commission free trades on only certain products. Accordingly, it is important that all fees charged to investors be adequately disclosed, especially for registered CTPs operating a marketplace.

With this guidance in mind, the Notice reminds registered CTPs of their obligation under Canadian securities legislation to treat clients fairly, honestly, and in good faith. All registered CTPs should consider their obligations under Canadian securities laws relating to know-your-client, know-your-product, assessing suitability, and identifying and responding to conflicts of interests in the best interest of the client.

#### *(2) Use of Promotions to Encourage Investments in Crypto-assets*

Canadian regulators have specific concerns with advertising and marketing strategies that entice investors for a reward through “gambling-style” promotions. Promotions, contests, and bonuses that attract investors to act quickly for fear of missing out on a reward or a time-sensitive opportunity will likely attract scrutiny from regulators. The concern is that investors may be encouraged to participate in excessively risky trading that they would otherwise normally avoid.

The Notice also emphasizes that it is not acceptable to use a disclaimer to justify an attractive promotion, or any other false or misleading statement for that matter.

Further, advertising and marketing strategies using such promotions may be considered a form of solicitation or invitation to trade. This can trigger conflict of interest and suitability obligations for registered CTPs, which are standards whereby CTPs must put their client's interests first, ensure that an investment product offered is in line with an investor's objectives and risk tolerance and that the client is aware of all material factors associated with the investment.

Suitability obligations have a broad application, and may apply to simple recommendations that are found in enticing promotions. The Notice suggests that even if a CTP is exempt from suitability obligations, there is still an obligation to perform an appropriateness assessment when an investor opens an account with a CTP, which is similar to a suitability determination. Consequently, CTPs must be attentive to the trades they facilitate in any regard, particularly when an investor is participating in response to a “gambling style” promotion.

### *(3) Use of Social Media*

Pursuant to NI 31-103, registered CTPs must maintain records of their business activities, including client communications. With the prevalence of social media sites being utilized amongst CTPs, particularly those that are interactive and post both real time and static content, there is a risk of communications with clients through social media sites violating the record keeping requirements of NI 31-103. Social media sites may not retain or make available the records required for business activities and client communications. It is essential that CTPs use social media systems that allow for record retention and retrieval of interactions and communications.

The use of social media sites increases the risk of misleading or false statements being made in relation to a CTP. With an expansive online presence, it becomes more difficult to manage the content posted on social media sites. Employees, shareholders, or third parties acting on behalf of a CTP may attract the attention of securities regulators if they make misleading or false statements on social media. Accordingly, the Notice warns CTPs that they must supervise their social media activities and those of their employees and agents.

For example, a statement posted on a CTP's social media site that they are “the cheapest source for crypto-

assets” will likely be scrutinized by regulators. Unless the claim can be substantiated or the CTP can demonstrate it has taken all reasonable steps to ensure the best price for its clients, marketing in this manner is prohibited. For a registered CTP, a statement of this type must be accompanied by policies and procedures that outline the process used to verify or achieve the best price possible.

It is also common now for platforms to use celebrities or influencers on social media to endorse their products. The Notice cautions against this, as the individual used to promote the product, and the CTP, may trigger the application of securities laws in respect of the representations they make. To avoid this, CTPs must carefully comply with requirements for available exemptions relating to the provision of general investment advice, and should consult with legal counsel prior to providing any advice.

Lastly, if a marketing effort on social media makes reference to a third party in any way, for example, that a third party agency is cited to have rated the CTP as “trusted” (or similar recommendations), specific steps must be taken. The CTP is required to conduct due diligence to verify the credentials of the third party and maintain supporting documentation to support the reference to the third party’s rating or recommendation.

## **Conclusion**

Given the concerns Canadian regulators have noted in the Notice in regard to advertising, marketing, and social media use, registered CTPs are strongly encouraged to adopt policies and procedures relating to the:

1. preparation, review, storage, and retrieval of all advertising and marketing materials; and
2. designation of an individual responsible for the supervision and/or approval of all advertising and marketing communications.

Many CTPs are international organizations and may not have Canadian specific policies and procedures in place. McMillan is available to assist both domestic and internationally-based clients with compliance in Canada regarding implementation of appropriate documentation.

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## **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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