

Marketing



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Marketing - Laws and Regulations

EMD Sweep Findings

Things To Avoid

Things To Do

Guidance and Examples

- Full, true and plain disclosure has been a cornerstone of securities regulation since 1844 when the English Joint Stock Companies Act imposed disclosure requirements on incorporating companies.
- In Canada, by 1930 most provinces had adopted statutes outlawing:
 - Intentional omission of material facts
 - Outlandish promises

- Section 75.2 of the Act requires firms to deal fairly, honestly and in good faith with their clients
- Section 75 of the Act states that you cannot act, directly or indirectly, as a dealer or adviser or fund manager, unless you are registered in that category
- Section 100(1) of the Act prohibits the holding out of registration unless the representation is true and the category of registration is specified

- **Section 100(2) of the Act** prohibits registrants from “making statements about matters that a reasonable investor would consider important ... if such statements are untrue or omit information that is necessary to prevent the statements from being false or misleading”

Section 101 of the Act:

“No person or company shall make any representation that the Commission... or any person employed by the Commission has in any manner expressed an opinion or passed judgment on:

- the financial standing, fitness or conduct of a registrant or the merits of a security or issuer...”

NI 81-102 applies to prospectus-qualified mutual funds and funds designated as reporting issuers

- Part 15 “Sales Communications and Prohibited Representations” contains some general principles and some required disclosures and warnings
- NI 81-102 and its companion policy may be useful as guidance for exempt funds as well, in terms of the general principles concerning truthfulness, fairness and full disclosure

- **CSA Staff Notice 31-325** *Marketing Practices of Portfolio Managers (July 2011)* is used to assess marketing practices of portfolio managers and other registered firms, including EMDs
- **ASC Notice 33-705** (May 2017) *Exempt Market Dealer Sweep* contains discussion of unacceptable marketing practices observed, as well as guidance to promote compliance

CSA Multilateral Staff Notice 51-336 speaks to mass advertising of securities through television, radio, internet, social media or print, stating mass advertising:

- May be contrary to securities legislation
- May be misleading to investors
- May be contrary to the public interest
- May draw regulatory action



Marketing includes:

- Online advertising, including websites, social media platforms, blogs and chat rooms
- Print advertising, including newspaper, magazine and brochures
- Television and radio advertising
- Email and text message marketing
- Seminars and presentations, including verbal representations made by registrants
- Performance advertising

- Inadequate oversight of marketing materials
- Inadequate marketing policies and procedures
- Unsubstantiated claims, unbalanced or misleading information and inadequate disclosure



- Some DRs who had their own websites made non-compliant statements that demonstrated a lack of oversight
- Foreign language marketing
- DR websites where it looked like the DRs themselves (or the trade name they operated under) were the registered dealers
 - “I am John Smith and I am a dealer in private investments”
 - “John Smith Financial Ltd. is an independent agent offering alternative investments”



- Some firms used issuer brochures, offering memoranda and term sheets without reviewing them and ensuring claims could be substantiated and were not misleading
- Every marketing review must be documented



Things To Avoid

- An untrue statement
- A material omission
- Information that conflicts with the Offering Memorandum
- Presenting information that gives rise to misleading implications or impressions:
 - Cherry-picking results
- High-pressure statements or extravagant claims



- Unduly promotional language such as “unique,” “lucrative” or “best in class.”
- Words such as “guaranteed” or “secure”
- Unbalanced presentation of the investment:
 - For example, if a claim is made that the investment offers “opportunities for significant growth,” then the associated downside risks should be given equal prominence
- Presenting opinion as fact:
 - “Our investors have more expertise working for them than anyone else in the business”

Example

“We have thoroughly investigated and rejected hundreds of offerings.

The result is that the only opportunities we offer to our clients have superb management, unparalleled track records and secure futures.”

- If redemption features are claimed (“redeemable”) then equal prominence should be given to restrictions and qualifications on the ability to redeem
- If income distributions are promoted where the distributions include a return of principal, then the presentations should prominently disclose that fact
- If income distributions are promoted, the presentation should clearly disclose that distributions are not guaranteed and may be modified at management’s discretion

- Have policies and procedures for the development, review and approval, monitoring and supervision and retention of appropriate marketing materials
- Follow the firm's policies and procedures
- Ensure all statements are objectively supportable and substantiated
- Provide sources for third party information
- Maintain and update source data necessary to support claims
- If selling securities under the OM Exemption, obtain written issuer approval before distributing any OM marketing materials – this is expressly required by NI 45-106
- Regularly monitor DR and referral agent websites

Challenges posed by social media:

- Type of supervision required
- Retaining adequate books and records

Guidance (recent CSA Staff Notice 33-321):

- Establish policies and procedures for the review, supervision, retention and retrieval of materials on social media web sites
- Designate an appropriate individual to be responsible for the supervision or approval of communications
- Monitor social media
- Review the adequacy of systems and programs to ensure compliant record retention and retrieval capability



Section 101 of the Act:

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- *“We are registered with the Alberta Securities Commission, which ensures our full compliance with all regulatory requirements.”*
- *“The Alberta Securities Commission has approved our dealer.”*
- *“We have been successfully audited by the Alberta Securities Commission.”*

- If you use benchmarks, they should be relevant, similar and comparable
- Document the firm's policies and procedures dealing with selection and presentation of benchmarks
- Any comparison between investments or services must disclose all material differences between them, including:

- Investment objectives
- Liquidity
- Guarantees or insurance
- Tax features
- Costs and expenses
- Risk
- Fluctuation of principal or return

- Hypothetical performance data is performance data that is not the performance of actual client portfolios. It is sometimes referred to as “simulated” or “theoretical” performance data and typically consists of either back-tested performance data or model performance data
- Regulators recommend presenting actual client performance returns and not hypothetical performance data with its inherent risks and limitations (see CSA Staff Notice 31-325)

Unsubstantiated and misleading comparisons between exempt market securities and publicly traded securities

- Claims of exempt products having lower volatility than publicly traded securities
- Statements lacking in substantiation
- Failure to disclose that price stability does not indicate stability in the value of underlying assets
- Problem of meaningful measurement of volatility of illiquid securities
- Implying or stating that exempt securities are lower risk than publicly traded securities

“For higher returns with lower risk, you should consider the Exempt Market:

A more diversified, profitable portfolio;

Lower volatility than stocks or mutual funds; and

A government-regulated market.”

- Claiming exempt securities are “hard assets” or “real assets” compared to public securities
- Touting benefits of diversification without disclosing that these benefits were not provided to clients:
 - No portfolio analysis performed
 - No ability or expertise within the firm to provide meaningful portfolio analysis and diversification



- Statements promoting private capital allocation models used by institutional investors (e.g. pension funds) without providing fair and balanced disclosure of the significant differences between retail investors and institutional investors in relation to financial circumstances, knowledge, risk tolerance, time horizon and investment objectives
- David Swensen, of the Yale Endowment Fund, has said his approach should not be a model for replication. At Yale, he has institutional and structural resources that advisors and investors don't have

- The ASC will continue to monitor marketing practices and may direct resources to ad hoc sweeps:
 - Unannounced desk reviews of marketing materials, websites and social media
- Increase severity of regulatory action for significant non-compliance in marketing activities:
 - Terms and conditions on registration (e.g., requirement for pre-approval by the UDP, compliance consultant or external legal counsel)
 - Issuance of cease and desist letters
 - Enforcement

Thank you!



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