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Re: CIRO Consultation Request: Non-tailored Advice in the Order Execution Only Channel

The Osgoode Investor Protection Clinic (“IPC”) appreciates the opportunity to comment on the Canadian Investment Regulatory Organization (“CIRO”) proposal to update the Guidance for Order Execution Only (“OEO”) dealers working with Do-It-Yourself (“DIY”) investors.

By way of background, the IPC, the first clinic of its kind in Canada, is dedicated to providing free legal advice and services to retail investors across the country. Since launching in 2016, we have worked with a wide range of clients who have suffered investment losses. From seniors whose adviser mismanaged their entire life savings on the cusp of their retirement, to low-income individuals whose advisers recommended leveraged loans, we have worked with vulnerable retail investors who need assistance in seeking redress but cannot afford a lawyer.

We are pleased to bring their voices to the proposal.

We appreciate your consideration of our comments. While CIRO's questions are thoughtful, our insights do not fit neatly within the defined discussion points. However, we ask that you consider the following, which reflect the IPC's experiences in assisting DIY investors through our clinic. In line with our mission, this letter focuses on three critical elements shaping investor protection in the DIY investing landscape. First, clarifying what constitutes a "Recommendation" as defined in the Guidance. Second, enhancing investor education through a balanced approach. Third, refining the wording and conceptualization of "Recommendation" to better safeguard DIY investors from the perspective of the IPC. The third section hopes to provide a working definition that CIRO can either use, or garner inspiration from, in formulating the definition of Recommendation in the Guidance Note. Through these key points, we aim to highlight broader concerns about investor harm in OEO

platforms and provide essential messaging on the evolving investing landscape.

Sincerely,

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The Osgoode Investor Protection Clinic

Introduction

The rapid growth of Do-it-Yourself (“DIY”) investing has raised critical questions about whether the current investor protection regulatory framework—designed around the investor-advisor relationship—adequately addresses the unique risks and realities faced by DIY investors.¹ While DIY investing was originally intended for knowledgeable investors capable of independently managing their portfolios, the current landscape reveals a different reality: many retail investors are navigating these platforms without sufficient financial literacy, guidance, or regulatory safeguards to protect them against harm.² The consequences of this shift are profound, with DIY investors increasingly vulnerable to financial harm, misleading or inadequate advice from Finfluencers, and information disparity amongst the investing community.

At the Osgoode Investor Protection Clinic (“IPC”), we have seen numerous instances of investors suffering harm while utilizing DIY platforms. Many of the retail investors we assist have suffered significant losses due to access to high-risk investments and a lack of protections in the Order-Execution Only (“OEO”) model. The current OEO framework was established under the assumption that investors using these platforms were highly knowledgeable and capable of making informed decisions without professional advice. However, there are no mechanisms preventing inexperienced investors from making high-risk trades without proper understanding. This was the issue in one of our cases where the OEO’s onboarding process failed to detect that a DIY account was inappropriate for our clients, and the process then failed to either deny them entry onto the OEO platform or refer them to the dealer’s advice channel. The reality is that DIY investing is not a level playing field, and retail investors—particularly those with lower incomes, lower financial literacy, and limited investment experience—are disproportionately exposed to financial loss and its accompanying physical and mental health consequences.³

The current investor protection regulatory framework has not adapted to the evolution of self-directed investors trading on OEO platforms, specifically the growing number of them being given unrestricted access to high-risk investments, notwithstanding their low investment knowledge. These DIY investors seek or need advice, information, or support; many turn to unregulated sources such as social media, online finfluencers, and friends and family for investment information. According to recent surveys, 53% of primary DIY investors rely on online sources, and 38% use social media to guide their investment decisions.⁴ Younger investors, in particular, are more likely to trust information from social media platforms such as TikTok, raising concerns about the quality and reliability of the advice they receive.⁵ Without regulatory oversight, these sources can expose investors to misinformation, speculative trading trends, and financial harm.

¹ The IPC has observed a rise in DIY investing cases in recent years, with 7 cases in 2024, 5 in 2023, and 5 in 2022.

² Canadian Securities Administrators [CSA], “2024 CSA Investor Index” (April 2024), online (pdf): <https://www.securities-administrators.ca/investor-tools/investing-basics/research/>.

³ *Ibid.*; Fair Canada, “Understanding Do-It-Yourself (DIY) Account Holders” (October 2024), online (pdf): https://eclass.yorku.ca/pluginfile.php/6187238/course/section/912116/2024_10_01_FAIR_Understanding%20DIY%20Account%20Holders_Eng_ver.0.pdf.

⁴ British Columbia Securities Commission [BCSC], “DIY Investing National Survey Report” (April 2024), online (pdf): <https://www.bsc.bc.ca/-/media/PWS/New-Resources/About/Reports-and-Publications/2024-DIY-Investing-Full-Report.pdf>.

⁵ *Ibid.*

The barriers to accessing registered advisors further exacerbate these risks. The traditional wealth management industry has evolved in ways that exclude many retail investors, particularly those with smaller investment portfolios. As a result, younger investors and those with lower incomes often turn to DIY platforms, not by choice but by necessity.⁶ Yet, DIY investing was never intended to be the default option for retail investors. It requires a high level of financial literacy, independent research, and risk assessment—skills that many DIY investors lack. According to the CSA Investor Index, 44% of Canadians have low investment knowledge, and those with lower incomes score the lowest in financial literacy.⁷ Additionally, 39% of investors do not have an advisor, with the largest decline occurring among those under 45 and those with portfolios under \$100,000.⁸ Given these realities, it is clear that the preconditions for the OEO model are no longer substantiated and must be reconceptualized.

To address these challenges, we believe regulatory changes are necessary in three key areas:

1. Clarifying the definition of a "Recommendation": The current guidance does not adequately define what constitutes a "Recommendation," creating ambiguity that can lead to investor harm. A clearer definition is needed to ensure that investors receive appropriate disclosures and protections when engaging with OEO platforms.
2. Enhancing investor education through a balanced approach: Currently, investor education operates on a pull-based model, requiring investors to proactively seek out information. Incorporating a push-based system alongside the existing framework would help bridge this gap to promote enhanced and better-informed decision-making by delivering critical timely information to DIY investors.
3. Refining the wording and conceptualization of "Recommendation": We propose developing a working definition of "Recommendation" that CICO can adopt or use as inspiration in its Guidance. This definition should be designed to better protect DIY investors by ensuring that they receive appropriate pop-ups/alerts/warnings, disclosures, and educational resources.

The IPC continues to work with DIY investors and has witnessed firsthand the consequences of inadequate regulatory protections. One of our recent cases involved an investor who -despite having no prior investment experience and low financial literacy- was directed to an OEO platform by a leading Canadian bank. The investor purchased over 100 different penny stocks, priced at less than \$1 per unit. Several stocks were subject to price adjustments due to reverse stock splits, which the investor misinterpreted as reporting gains and consequently did not understand that continued penny stock trading was destroying their entire savings. This case illustrates how DIY investing with a lack of financial literacy on an OEO platform can lead to significant losses. For inexperienced investors, speculative trading in capital markets may lead to significant financial losses. This case, among many others, highlights the urgent need for regulatory reform. Digital KYC updates alone are insufficient to capture investors' personal circumstances, cognitive decline, or other potential vulnerabilities over time.

⁶ *Supra* note 3

⁷ *Supra* note 1

⁸ *Ibid.*

Recently, the IPC worked with a client who incurred losses due to unfamiliarity with the OEO platform's settings and functionality. Over two months, the client executed more than 100 option orders intending them to be subject to trailing stop-loss orders; however, due to a lack of familiarity with differences in how the platform processed "native" regular stop-loss orders and "synthetic" trailing stop-loss orders, the client inadvertently became exposed to auto-cancellation of their stop-losses by the OEO platform's trading system. Despite possessing basic financial knowledge, the client struggled to navigate the platform effectively, underscoring the need for proper training and safeguards. This case reflects a broader issue: retail investors are allowed to trade on OEO platforms without sufficient protections or training on complex and opaque aspects of the trading they are undertaking. This gap is particularly concerning when inexperienced investors engage in complex transactions such as options trading. A recurring theme in clinical cases involving DIY investing is that, without meaningful safeguards, OEO platforms will continue to expose retail investors to significant and preventable harm.

The regulatory framework must evolve to reflect the realities of today's investment landscape. With nearly half of Canadians now holding DIY accounts and increasing numbers of investors unable to access professional financial advice,⁹ it is imperative to modernize the guidance for OEO dealers. By addressing these three critical areas, CRO can take meaningful steps to enhance investor protection, reduce regulatory blind spots, and ensure that OEO platforms operate in a manner that truly serves and protects retail investors.

1. Clarifying the Definition of a "Recommendation"

The definition of "Recommendation" under s. 3.1 of Guidance Note 3400-21-003 is notably broad and over-inclusive, covering any communication or statement of opinion that could reasonably be expected to influence an investor's decision regarding a security. This definition has created significant challenges- and practical concerns for dealers- in distinguishing between recommendations, general information, and investor education—particularly in the context of OEO platforms. The IPC respectfully submits that conflating these essential, yet distinct terms poses a significant risk to investor protection and has adversely impacted retail investors.

OEO dealers are prohibited from providing recommendations; however, the broad definition may inadvertently classify certain investor tools or educational materials as recommendations, creating uncertainty around permissible content. This discourages the dissemination of valuable information due to compliance concerns, depriving retail investors of critical knowledge needed for informed decision-making, potentially leading to harmful outcomes.

We are of the view that not all communications related to investments should be classified as recommendations, with the need to distinguish among three distinct concepts: information, recommendation, and education.

⁹ *Ibid.*

Information

Information consists of objective, factual data that does not advocate for or against a particular investment decision. It includes details such as market prices, risk disclosures, and security performance data. The key distinction is that information is neutral and does not influence an investor's choice to buy, sell, or hold a security. For example, a warning about potential volatility in a stock is considered information rather than a recommendation.

Recommendation

A recommendation is any communication that explicitly or implicitly influences an investor's decision to buy, sell, or hold a security. This includes statements that guide investors on the timing, method, or rationale for trading a security. Unlike neutral information, a recommendation suggests a specific course of action. For instance, a tool that advises an investor to buy a specific stock based on an algorithm's analysis constitutes a recommendation.

Education

Education refers to instructional content that explains investment concepts, strategies, or market mechanisms. While educational material may include factual information, it does not necessarily influence an investor toward a specific investment decision. The distinction lies in intent—education aims to enhance understanding rather than direct action. For example, a tutorial explaining how dividends work is educational. However, if the tutorial advises when and which dividend stocks to buy, it crosses into recommendation territory.

Failing to properly classify these concepts could lead to unfavorable outcomes for DIY investors. First, platforms may restrict investor access to valuable information if they fear that providing market analysis or interactive tools could be interpreted as recommendations, limiting access to crucial financial insights. Additionally, ambiguities in classification could expose OEO dealers to potential liability and regulatory action, even when their intent is merely to educate or inform investors. Lastly, if warnings or factual disclosures are mistakenly classified as educational content, investors may not fully understand the risks associated with certain investment decisions, compromising their ability to make informed choices.

A clearer, more precise distinction between information, education, and recommendation would support regulatory compliance by OEO dealers and promote investor protection.

Reconceptualizing the definition of 'Recommendation' is inherently linked to the push-pull dynamics of DIY platforms, which will be explored in the following section.

2. Enhancing Investor Education Through a Balanced Approach

The push/pull model of information dissemination is a crucial aspect of how OEO platforms interact with investors. It influences the type of information provided and how effectively investors can access and use that information. Understanding these models is key to improving investor education and enhancing the user experience on OEO platforms.

Under the pull model, information is made available, but the onus is on the investor to actively seek out and engage with it. This could include seeking out and reading resources, reviewing market data, or exploring risk disclosures provided by the OEO platform. While this may be effective for proactive investors, inexperienced investors may struggle to find, interpret, or apply critical information, leading to potentially misinformed decisions.

For example, OEO platforms may offer educational materials on risks like cryptocurrency volatility, but investors must actively seek and interpret them. While this approach is effective for proactive users, certain investors may overlook key resources. This self-directed approach can lead to delayed or misapplied information, especially for those unsure of what, where, or when to look.

As part of our mandate to promote investor education, we recognize that the pull model works to an extent, but it requires an investor's effort and adaptation to understand and apply the information to their individual circumstances. This is where the limitation lies: the more novice the investor, the less likely they are to fully engage with educational resources or to know there's something they need to know before they invest.

Conversely, the push model involves delivering information directly to investors at the time it's most relevant—when they are actively engaged in a transaction. In this model, information can be pushed to investors based on their specific trade activity or the securities they're interested in—without tailoring the message to individual portfolios or risk preferences. This prevents an OEO dealer from crossing into the realm of registered advice and ensures that only general, factual information is provided.

We would recommend that the Guidance be amended to clarify that OEO dealers can publish the following types of notifications to enhance investor protection:

- Alerts about known scams or fraud attempts targeting investors.
- Pop-up notifications regarding extreme market movements or speculative activity in specific securities that may entice investors into risky behavior.
- Warnings based on aggregate client activity that signal common risky behaviors, helping investors recognize potential pitfalls.
- Security alerts related to data breaches, phishing attempts, or vulnerabilities in online accounts to safeguard investors from cyber threats.

Case Study: The Wealthsimple Experience

A case in point is Wealthsimple's experience during the GameStop frenzy in 2020, as described by the company's CEO in a Globe and Mail op-ed.¹⁰ During this event, Wealthsimple's platform provided general information to all investors, but due to the nature of the OEO platform, it could only issue non-specific warnings to all clients—whether they were actively involved in GameStop

¹⁰ Michael Katchen, "Wealthsimple CEO: We have a responsibility to help our clients, but outdated regulations are standing in our way" (February 10, 2021) online (article): [<https://www.theglobeandmail.com/business/commentary/article-wealthsimple-ceo-we-have-a-responsibility-to-help-our-clients-but/>](https://www.theglobeandmail.com/business/commentary/article-wealthsimple-ceo-we-have-a-responsibility-to-help-our-clients-but/).

trades or not. This highlights the challenge of the pull model: investors were only able to benefit from this information if they proactively sought it out.

The lesson here is that while general information is useful, investors who are in the midst of making decisions often need timely, context-specific information. A push model could have enabled Wealthsimple to target investors who were trading GameStop shares with relevant warnings about the extreme volatility they might encounter. This would have provided investors with more timely context for their decisions, helping them make better-informed choices in a rapidly changing environment.

To truly support investors, OEO platforms should have the ability to push real-time, non-advisory information to their users. By automating information delivery based on active trade activities or potential risk factors (like market volatility or sudden price drops), platforms can provide essential context at the moment of decision-making. This enhances investor awareness and empowerment without stepping into the realm of offering advice.

Currently, much of the information needed to make informed investment decisions comes from social media and external sources, which often proves to be unreliable, incomplete, or potentially misleading. This gap presents an opportunity for OEO platforms to step in and offer timely, automated push notifications that can guide investors away from uninformed decisions—ultimately creating a safer and more transparent DIY investing environment.

The OSC's Test Lab with behavioral insights offers a promising model for experimenting with push notifications on DIY platforms. By testing how these notifications affect investor behavior, regulators and OEO platform providers can gather valuable data on how to improve investor outcomes and reduce risks. The ability to push educational or risk-related content directly to investors at critical moments could help to address the education gap and prevent negative financial outcomes, especially for less experienced investors.

3. Refining the Wording and Conceptualization of "Recommendation"

We have discussed the need for a material change in the definition and interpretation of "Recommendation" to ensure it only captures advice intended solely to encourage an investor to buy, sell, or hold a particular security.

We would further recommend that a "Recommendation" be defined as a “*communication or statement of opinion specifically designed or intended to influence an investor (or class of investors) to take a particular action with respect to a security (including buying, selling, holding, or exchanging that security)*”. A Recommendation must be tailored to the individual investor’s circumstances or financial goals (including their risk tolerance, portfolio composition, or investment preferences) with the intention of influencing the investor’s decision.

This definition excludes general information, educational content, or risk warnings, even if such content may indirectly inform an investor’s decision-making process. It also excludes automated alerts/notifications or tool-generated outputs that are not tailored to the investor’s specific financial situation. The intent behind the communication is what differentiates it from general information

and investor education, ensuring that only personalized, targeted advice qualifies as a Recommendation.

By clarifying this distinction, the revised definition would introduce DIY investor protection through the dissemination of educational and informational content on OEO platforms. This would provide DIY investors with quality information, tools, and the support they need to make informed decisions.