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The Secretary
Ontario Securities Commission
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Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Dear Secretary and Me Lebel,

Re: CSA Consultation Paper 25-403 - *Activist Short Selling*

The Canadian Investor Relations Institute (CIRI), a professional, not-for-profit association of executives responsible for communication between public corporations, investors and the financial community, is pleased to provide comments on Consultation Paper 25-403 regarding Activist Short Selling (the



Consultation Paper). CIRI membership represents more than 230 non-investment fund reporting issuers with a combined market capitalization of \$1.9 trillion. More information about CIRI is provided in Appendix A.

CIRI welcomes the opportunity to provide its comments on the Consultation Paper, particularly given the negative impact activist short selling has had on some of our issuer members and the resulting impact on the Canadian capital markets. We commend the Canadian Securities Administrators (CSA) for addressing this issue and for their diligence in undertaking the extensive research and analysis presented in the Consultation Paper. CIRI strongly supports appropriate regulatory action to address activist short selling that could further perpetuate the devastating impact that these actions have on a company's reputation, its valuation and its shareholder's assets.

General Comments

CIRI and our members are extremely concerned about activist short selling, particularly given recent activity related to issuers such as GameStop and Blackberry. Their experience illustrates the negative impact activist short selling has on market efficiency and price discovery. The fact that an activist short seller can publish research that contains potentially false or misleading market-moving information without having to go through any regulatory process is in blatant contradiction to the rigorous disclosure regime required of issuers. Activist short seller reports are disseminated instantly and globally over social media and sent directly to the target issuer's shareholders, having an immediate impact on the company's valuation. Many activist short sellers also leverage mainstream media to express their views, some of which are false and/or misleading, and amplify their reach. In addition, the activist short seller can do this virtually undetected as a result of Canada's nebulous short position reporting requirements, leaving the issuer vulnerable and unprotected with no recourse to the activist. Ultimately, it is in the best interest of all market participants to know who the activist short seller is and whether they have a large short position against the company. This provides the market with more fulsome information with which to make investment decisions.

Recommendations

CIRI recommends the CSA introduce a regulatory regime:

- that requires the activist short seller to provide their report to the issuer in advance of publishing, to ensure factual accuracy;
- that requires all short sellers disclose their opening, changes in and closing positions as well as their identity and that such disclosure be made daily;
- that bans the practice that allows shares to be sold short without first borrowing the security, in line with the Capital Markets Modernization Taskforce recommendations;
- that implements a 10-day minimum holding period that would apply to any short seller who opens a short position and disseminates market-moving information; and
- that includes recourse for activist short sellers that disclose inaccurate or misleading information.

CIRI also recommends that the CSA review the impact that the removal of the tick test has had on the market since 2012.

CONSULTATION QUESTIONS

While we have reviewed the entire Consultation Paper, we have chosen to comment on those questions that we are best equipped to answer based on our knowledge and interaction with issuers and their investor relations professionals.

1. *What is your perception about activist short sellers? Please describe the basis of that perception.*



Issuers generally have a negative perception of activist short sellers because there is significant potential for unwarranted decreased valuations. Our experience has been that activist short sellers have a short-term focus that can greatly and negatively impact issuers, shareholders and stakeholders more broadly. Further, our experience is that the ultimate objective of activist short sellers is personal financial gain with little regard for any negative impact on the capital markets, such as loss of shareholder value, reduced market efficiency and transparency, or lack of price discovery.

The results of an activist short selling campaign can also have negative impacts beyond valuation. Activist strategies and tactics, which often include disclosing false and/or misleading information to the public, can represent an attack on an issuer's brand, its corporate reputation and the reputation of executives and Directors, with concomitant negative implications for other aspects of the business including sales, marketing, operations and human resource recruitment.

A major concern for investor relations professionals is that activist short selling activity is conducted behind a wall of secrecy whereby the source of the trading activity, as well as the identities of participants in the lending/borrowing of shares that is integral to short selling, is hidden from the targeted issuer and the investing public. In addition, there is no disclosure of the activist's short position at any point during their campaign. This is in stark contrast to the extensive and forthright requirement for complete and non-selective disclosure requirements faced by reporting issuers in Canadian capital markets.

CIRI and our members recognize that there is a role for some short selling activity in achieving efficient capital markets. This in no way legitimizes activist short selling activities such as 'short and distort' campaigns, manipulative falsehoods and anonymous negative commentary.

2. *Can you give examples of conduct in activist short selling Campaigns that you view as problematic?*

Activist short sellers do not make any effort to meet with management of the target issuer to discuss concerns or gain further insight into what they may consider a contentious issue(s). Their research is generally conducted in secret, even to the point, as experienced by one of our member companies, seeking information through the investor relations function under a false identity. It is clear that activist short sellers prefer to go undetected prior to issuing their report.

Communication from the activist short seller to the market (investors, potential shareholders, analysts, portfolio managers, etc.) is done without any notice to the target issuer and these research reports are not shared with management in advance of release, thus denying the issuer an opportunity to identify and potentially correct factual errors. Such reports frequently contain false information and have an immediate, often significant, impact on the issuer's share price, their business, reputation and resources needed to respond and mitigate any fallout.

A major frustration for issuers is the lack of transparency surrounding the identity and financial stake of activist short sellers. The identity of the activist short seller is not known until the damaging report has been issued. The short seller's equity position is nebulous given the existing reporting requirements – too little, too fuzzy and much too late. Aggregated data reports provide no insight into who is shorting and what opening or closing positions they have. Under an activist campaign, a significant amount of damage can be inflicted upon an issuer's valuation by a very insignificant short position and an active misinformation campaign.

3. *Given the focus of the available data is on prominent activist short sellers, what is your view regarding less prominent activist short sellers or pseudonymous activist short sellers targeting Canadian issuers? How can they be identified? Is there any evidence that they are engaging in short and distort campaigns?*

It appears, from the experiences of CIRI members, that less prominent activist short sellers have previously targeted international issuers and may now be increasingly looking to target Canadian issuers. Reasons for this shift in focus are unclear although, as noted in the Consultation Paper, the less restrictive regulatory regime toward short selling in Canada may play a role. Another factor may be the



increased use of social media that allows information to be disseminated to audiences around the world simultaneously while also proactively sending reports to the target's shareholders directly via email.

One such campaign was initiated by an Asian-based short seller who had previously attacked almost exclusively Chinese issuers listed on the U.S. or Australian Exchanges before focusing on the mining and resource sector in Canada. The methodologies of this attacker included questionable tactics such as generating a research report that misrepresented the facts and maligned individuals on the issuer's management team. The activist short seller's report was published online and also sent directly to the email inboxes of a targeted group of the issuer's major shareholders. In addition, the report was distributed directly to other activist short sellers through various social media channels including Twitter. Such strategies bear the hallmarks of a classic 'short and distort' campaign: easy to initiate; rapid report distribution of false or misleading information; and undisclosed individual short position.

As for identifying these activist short sellers, it is clear that the short selling reporting requirements must be more extensive as outlined in our responses to questions 9, 10 and 11.

4. *What empirical data sources related to Campaigns should we consider?*

Initially, it may be instructive to examine the claims in activist short reports relative to the issuer's disclosure record to determine if there is misrepresentation or incorrect facts. If so, the short seller's communication to shareholders and the broader market should be closely examined to determine the impact on the issuer so that appropriate action can be taken, assuming regulators are given the authority to take action.

5. *In 2019, there was a large drop in the number of Canadian issuers targeted by prominent activist short sellers compared to the year before. Are there market conditions or other circumstances that in your view could lead to an increase? Please explain.*

Clearly there are circumstances and market conditions that may be conducive to increased short selling activity. For example, when a sector is overvalued, it is more likely to be targeted by short sellers, some of which may be activist short selling.

Additionally, in a given sector one issuer may be perceived to be more highly valued compared to its peers. If there is no significant or rational reason for its outlier status, then that particular issuer may be seen as a potential candidate for increased activist short selling activity.

Industries and sectors impacted by significant extenuating circumstances, such as the global COVID-19 pandemic, may well produce conditions and/or forecasts akin to a bubble that, as history well documents, will at some point burst and facilitate wealth generation through a short selling strategy.

6. *Is there any specific evidence that would suggest that Canadian markets are more vulnerable to activist short selling, including potentially problematic activist short selling (e.g., size and type of issuers, industries/sectors represented or other market conditions)? Please provide specific examples of these vulnerabilities, and how they differ from other jurisdictions.*

Canadian markets have features that could make some issuers more attractive as short selling targets. Both the oil & gas and mining sectors constitute a considerable portion of Canadian capital markets and set Canada apart from many other markets worldwide. Both sectors are characterized by high volatility, which can potentially provide substantial opportunities for short selling. While many of the issuers in these sectors are smaller players with perhaps less liquidity than short sellers prefer, there are a sufficient number of medium to large issuers to satisfy the usual needs of those seeking to profit from selling short.

Within the Canadian context, markets have recently become more attuned to environmental, social and governance issues. As investors continue to place increasing importance on such issues and their relationship to valuation, there will naturally be the kind of price fluctuations that investors, holding both long and short positions, will attempt to exploit. It will also present additional opportunities for activist



short sellers to ‘tell a story’ that presents perhaps a perspective on an issuer’s performance and valuation that is somewhat different than the market has been accustomed to.

In Canada, investors can take a short position without committing to borrow the shares (i.e. naked short selling). This practice has been illegal in the U.S. since 2008. In fact, short selling and naked short selling is going to be investigated by the U.S. Congress given recent events. Both the House Committee on Financial Services and the Senate Banking Committee have scheduled hearings in the near future. In Canada, the recently released final report of the Capital Markets Modernization Taskforce is recommending that the Ministry ban the practice that allows shares to be sold short without first borrowing the security. CIRI would support this regulatory change.

Canadian markets are also characterized by a reporting regime that is less vigorous and transparent than other jurisdictions. The depth of reporting is inadequate since reporting is limited to aggregate data with no inclusion of the short seller’s identity, specific transaction volumes, the aggregated position of the individual short seller, nor the sellers opening and closing positions.

In addition, the Canadian system currently also suffers from a lack of timeliness compared to other jurisdictions. Reporting of aggregated data in Canada is done only twice monthly to IIROC who then posts it on their website. Whereas, in other key jurisdictions, such as the U.S., EU and Australia, daily reporting of at least some short selling data is the norm. It should be noted that in some cases, particularly the U.S., individual transactions are disclosed less frequently, but they are disclosed. Both the EU and Australia are committed to more timely disclosure, a disclosure regime that CIRI strongly supports.

7. *Do issuers have practical limitations in terms of their ability to respond to allegations made in a Campaign? If so, what are these limitations, and do you have any recommendations on how to alleviate them?*

Issuers are significantly limited in their ability to respond effectively to allegations made by an activist short seller during a Campaign. Once an allegation of any type has been published to the market, the targeted issuer has to marshal and redirect appropriate resources within the organization; analyze the threat to its reputation by thoroughly reviewing each accusation in the short seller’s report; determine the best course of action; construct and write a rebuttal position; and ensure it is vetted and supported by appropriate legal resources, all of which takes time. Unfortunately, given the speed of today’s communication technologies and the significant impact that social media can have, much of the damage to the issuer’s reputation and valuation has been done before the issuer even gets a copy of the damaging report, making it far more difficult to respond effectively. Issuers are not even able to identify the presence of an activist short seller based on current aggregated short position reporting, despite monitoring said reports.

Further, as there is likely no pre-existing relationship between an issuer and an activist short seller, CIRI recommends that before a report is issued to the investing public, an issuer should have the opportunity to review the report, identify factual errors and perhaps have a means to provide their own rebuttal commentary that would be issued concurrently or be included within the activist short seller’s report. CIRI has long advocated that such a mechanism be applied to voting recommendation reports issued by proxy advisory firms (PAFs). It should be noted that the Capital Markets Modernization Taskforce has included a recommendation in their report calling for the introduction of a securities regulatory framework for PAFs by September 1, 2022 to ensure that PAFs’ institutional clients are provided with the issuer’s perspective concurrent with the PAF’s recommendation report. Thus, there is precedent for this type of pre-review of research reports that significantly impact reporting issuers. CIRI believes this should also apply to reports issued by activist short sellers and cannot understand why these reports are allowed to be issued with no checks or balances given the material impact they can have on an issuer’s stock.

The overriding recommendation for alleviating the concern with activist short sellers is to examine the legitimacy of these firms and then adopt a regulatory stance that will govern them appropriately. One of the hallmarks of the investor relations profession is to establish policies and practices that support open and transparent engagement with shareholders, analysts and other capital market stakeholders such that the markets can establish a fair and accurate valuation based on full and open disclosure. It seems reasonable to establish regulations that hold activist short sellers to a similar standard.

8. *Are issuers reluctant to approach regulators when they believe that they are being unfairly targeted by an activist short seller? If so, why? If not, why not?*

Given the lack of regulatory oversight and consequences for such sellers, issuers know that regulators do not have the authority or resources to initiate enforcement action so there is no point in engaging them. If the regulators did have authority, issuers would not be reluctant to approach them.

9. *Is the existing regulatory framework adequate to address the risks associated with problematic activist short selling? Please explain why or why not and provide specific examples of concerns and areas where, in your view, the regulatory framework may not be adequate.*

CIRI believes the existing regulatory framework is not adequate to address the problems that issuers face as a result of activist short selling. There is currently inadequate disclosure of short seller positions in terms of opening, changes in and closing of positions; the identity of the short seller; and the frequency of reporting. Including this level of detail and with increased frequency (i.e. daily) would bring Canadian regulators more closely in line with other major jurisdictions such as the EU and Australia.

The lack of regulatory-driven disclosure around a short seller's position has the effect of increasing the risks faced by issuers and by the market overall. CIRI believes that participants in the broader market should be able to determine if someone espousing negative allegations against a reporting issuer has a large short position. Knowledge of a short seller's position better allows market participants to make an informed decision as to the validity of the claims being made by the activist short seller and an informed market is a more efficient and transparent market.

Furthermore, there is a lack of regulatory mechanisms to investigate whether the allegations made by an activist short seller regarding a target issuer are legitimate. If regulators are given authority over activist short sellers, consideration needs to be given to issuers with dual listed shares. CIRI believes there should be coordination between regulators (i.e. CSA and SEC) or clear accountabilities as to which jurisdiction has the lead, to ensure appropriate action is taken in a timely manner.

10. *Have there been market developments or new information since 2012, when UMIR amendments regarding short selling and failed trades were implemented, that would warrant revisiting the existing regulatory framework for short selling? If so, please describe these new developments or information and indicate, providing evidence to support your views:*

a. whether, in your view, there is a connection between failed trades and activist short selling;

b. what changes should be considered and why, and specifically with respect to potentially problematic activist short selling activities; and

c. whether there are relevant regulatory requirements in other jurisdictions that should be considered and why.

Activist short selling has become more prominent in Canada since 2012 as evidenced in Figure 2 of the Consultation Paper, particularly in the years since 2015. In the intervening years, the role of social media in the market has expanded exponentially. The ability to disseminate news and opinions, both positive and negative, has mushroomed over the past decade, bringing substantially more players. It is now



easier than ever for malicious claims against an issuer to be disseminated widely over several markets in virtually an instant. Add to that, the online audience is now larger than it has ever been. All of this makes it significantly more difficult for a targeted issuer to respond to allegations made by activist short sellers before the damage has been done.

Given that a primary reason for failed trades is the inability of a short seller to obtain borrowed shares prior to settlement of the short sale, it makes sense to conclude there is a fairly strong connection between failed trades and activist short selling. It is difficult to determine the true nature of the relationship since detailed information and hard data related to the lending/borrowing of shares is not readily obtained. Lending activity is generally conducted through a brokerage and there is little or no regulatory requirement for disclosure of such activity. CIRI believes that it would benefit the market if share lending arrangements were disclosed publicly and in a timely manner, including the identity of the borrower and the size of the transaction.

Implementing a reporting regime in line with the EU would provide much more transparency, not only to the issuer but, to the market. This enhanced disclosure of opening, change in and closing positions as well as identity could limit predatory short selling.

11. Is the existing disclosure regime for short selling activities adequate? Please explain why or why not, indicating:

a. what disclosure requirements would address risks associated with potentially problematic activist short selling and how would such requirements improve deterrence; and

b. what should be the trigger and the timing of any additional disclosure.

CIRI believes that the existing disclosure regime for short selling activities is not adequate and would be improved if there were increased disclosure around short selling, particularly on a short seller's identity as well as the opening, change in and closing positions of the seller's holdings in the issuer's stock and that this information should be available daily. Reporting issuers are required to operate under strict conditions of selective disclosure so anyone, such as an activist short seller with market moving news, should also be held to the same strict standard.

In addition, naked short selling should be banned, and regulators should review the impact that the removal of the tick test has had on the capital markets since 2012.

Regulators may also wish to examine the effects of increased algorithmic trading. Program trading is often triggered by sudden drops in share price due to 50, 100, 200, etc. day moving averages, which may be somewhat influenced by the recent amplification in passive investing, particularly given the relatively recent rapid expansion and influence of ETFs on the Canadian markets.

The Consultation Paper outlines a proposal for a 10-day minimum holding period that would apply to any short seller who opens a large position and disseminates market-moving information. CIRI agrees that this could provide the market with an opportunity to evaluate the quality and credibility of the information as well as allow the target issuer the opportunity to develop and distribute their own message to the market and/or to correct inaccuracies in the report of the short seller.

In fact, CIRI believes that research reports, particularly those published by an activist short seller, should be provided to the target issuer in advance of its release to the market, to allow the issuer an opportunity to review the report and provide corrections to factual inaccuracies. Issuers should also be provided with the final report at the same time as the first market participant.



CIRI is pleased to provide the CSA with its comments regarding the activist short selling. Should you wish to discuss this submission further, please let me know.

Sincerely yours,

A handwritten signature in grey ink, appearing to read "Yvette Lokker".

Yvette Lokker
President & Chief Executive Officer
Canadian Investor Relations Institute



The Canadian Investor Relations Institute

The Canadian Investor Relations Institute (CIRI) is a professional, not-for-profit association of executives responsible for communication between public corporations, investors and the financial community. CIRI contributes to the transparency and integrity of the Canadian capital market by advancing the practice of investor relations, the professional competency of its members and the stature of the profession.

Investor Relations Defined

Investor relations is the strategic management responsibility that integrates the disciplines of finance, communications, marketing, securities law compliance and sustainability to achieve an effective flow of information between a company, the investment community and other stakeholders, in order to support an informed valuation of the company's securities and enable fair and efficient capital markets.

The practice of investor relations involves identifying, as accurately and completely as possible, current shareholders as well as potential investors and key stakeholders and providing them with publicly available information that facilitates knowledgeable investment decisions. The foundation of effective investor relations is built on the highest degree of transparency in order to enable reporting issuers to achieve prices in the marketplace that accurately and fully reflect the fundamental value of their securities.

CIRI is led by an elected Board of Directors of senior IR practitioners, supported by a staff of experienced professionals. The senior staff person, the President and CEO, serves as a continuing member of the Board. Committees reporting directly to the Board include: Human Resource and Corporate Governance; Audit; Membership; and Issues.

CIRI Chapters are located across Canada in Ontario, Quebec, Alberta and British Columbia. Membership is close to 500 professionals serving as corporate investor relations officers in over 230 reporting issuer companies, consultants to issuers or service providers to the investor relations profession.

CIRI is a founding member of the Global Investor Relations Network (GIRN), which provides an international perspective on the issues and concerns of shareholders in capital markets beyond North America. The President and CEO of CIRI has been a member of the Continuous Disclosure Advisory Committee (CDAC) of the Ontario Securities Commission. In addition, several members, including the President and CEO of CIRI, are members of the National Investor Relations Institute (NIRI), the corresponding professional organization in the United States.