NEO EXCHANGE
155 University Avenue, Suite 400
Toronto, Ontario M5H 3B7
P: 416.933.5900
neo.inc

Rethink your stock exchange.

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
E-mail: consultation-en-cours@lautorite.qc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
E-mail: comments@osc.gov.on.ca

Copy to:
British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Prince Edward Island
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 Sirs/Mesdames,

Re: Canadian Securities Administrators (the "CSA") Consultation Paper 25-403 *Activist Short Selling* (the "Consultation Paper")

As one of Canada's recognized stock exchange, the NEO Exchange Inc. ("NEO", "we" and "our" have the corresponding meaning) is home to an increasing number of publicly listed corporations. We have had the opportunity to observe short selling activities in a subset of NEO listed securities and are aware of similar activities taking place in securities listed on other Canadian recognized stock exchanges.

Our responses to the Consultation Paper are informed by the following observations.

General Considerations

We commend the CSA for their desire to understand and address the concerns with respect to short-selling in the Canadian capital markets.

While activist short selling deserves regulatory scrutiny, we believe that securities regulators should also understand and address the concerns with other forms of short selling:

- Naked short selling, where the current Canadian regulatory regime is not stringent enough to ensure that short sellers take all steps necessary to ensure proper settlement of their executions. The lack of pre-borrow or locate requirements for short selling and the lack of mandatory buy-in for short sellers failing to settle, eliminate some of the risk and cost hurdles that short sellers face in other jurisdictions, like the U.S. and the European Union, which contribute to more discipline.
- Short selling in connection with prospectus offerings and private placements, where short selling by informed parties takes place before the public or private raise is publicly announced. This from of short selling harms the issuer, its shareholders and the investors trading against the short sellers and has been largely addressed in the U.S. We believe that implementing the Ontario Capital Markets Modernization Task Force recommendations related to this form of short selling, would address this issue.

With respect to activist short-selling itself, we are of the view that when based on factual research and analysis, it contributes to price discovery. Numerous case-studies of activist short selling based on facts, whether in Canada or in other jurisdictions, corroborate this view.

On the other hand, when activist short selling is based on misleading or untrue information, it is harmful to the integrity of the market and the affected issuers and their shareholders. While issuers targeted by such a campaign can respond to or disprove allegations, and while securities regulators can invoke existing securities law prohibitions against market manipulation, making misleading statements and fraud to address such scenarios, in today's world of social media and rapid dissemination of information none of these actions will be timely enough to prevent a potentially distorting impact on the price of the security.

Based on the analysis in the Consultation Paper, we are not convinced that additional disclosure by activist short sellers will adequately address the issue of short selling based on misleading or untrue information. We are, however, very supportive of the idea of a minimum holding period that would apply to a short seller that opens a meaningful position and disseminates market moving information. This would allow the issuer targeted by a campaign to respond and the market to absorb and evaluate all relevant information before a malevolent activist short seller can generate an unwarranted profit. This will however require adequate coordination with other jurisdictions as activist short sellers targeting Canadian companies operate out of multiple jurisdictions. A minimum holding period would, as mentioned in the Consultation Paper, not only help address "short-and-distort" campaigns but also "pump-and-dump" campaigns.

One last consideration we would like to bring to the attention of the CSA is that we do not agree that short selling is subject to a well-developed reporting and oversight framework by IIROC. IIROC's visibility is currently limited to the activities and positions of Canadian investment dealers. In other words, there is no visibility on positions held with custodians or dealers established in other jurisdictions. A substantial part of the trading activity in Canadian listed securities takes place outside of Canada, particularly the U.S. and Germany. On top of that, any short seller with malevolent intentions will ensure their positions are not held with a Canadian investment dealer.

Responses to specific questions in the Consultation Paper

While our general considerations provide our overall point of view on many of the questions raised in the Consultation Paper, we wanted to provide some additional comments on a number of specific questions.

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

   Please see General Considerations.

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

   Please see General Considerations.

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?*

   We believe that "short-and-distort" campaigns can be initiated by prominent, less prominent and pseudonymous activist short sellers. Identification can only take place through investigative efforts and cooperation with securities regulators in other jurisdictions. Assessing whether a short selling campaign is genuine or a "short-and-distort" campaign, will take time and therefore we strongly support that the securities regulators further analyze the idea of implementing a minimum holding period that would apply to a short seller that opens a meaningful position and disseminates market moving information.

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

   We believe that the most important step to take with respect to short selling data is to establish a better understanding of what short selling is really taking place on Canadian listed issuers. The data currently available to IIROC and the Canadian securities regulators is inadequate, as discussed under General Considerations.

   Tracking social media channels is an important source to identify activist short selling, and we would like to understand what monitoring tools are currently in place to do so, as some reference is made to them in the Consultation Paper.

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.*

   We believe that activist short-selling will focus on over-heated sectors where there is perception of overvaluation, as mentioned in the Consultation Paper. The drop between 2019 and 2018 can largely be tied back to the evolution of the Cannabis sector, which was a top target sector for activist short sellers in 2018.

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.*

   We believe that activist short selling is easier in Canada than in other jurisdictions for the following reasons:

   - The lack of pre-borrow or locate requirements for short-selling and the lack of mandatory buy-in for short-sellers failing to settle, eliminating some of the risk and cost hurdles that short-sellers face in other jurisdictions like the U.S. and the European Union.
   - The lack of a holistic view about short selling and short positions in Canadian listed issuers. By solely monitoring the positions held at Canadian investment dealers and by not tracking any activity taking place outside of Canada, Canadian regulators have a very limited view of the real short selling activity that takes place in Canadian listed issuers. As a reminder, beside those dual-listed on foreign recognized stock exchanges, a large number of Canadian listed issuers is traded on the U.S. and German over-the-counter markets.
   - The lack of initiatives seeking to address malevolent short selling, compared to what is happening in other jurisdictions, e.g. the U.S., the European Union or Australia, allows short sellers to be less concerned about regulatory intervention and/or action. We hope this Consultation Paper is the beginning of addressing this shortcoming.

   We also believe that other forms of predatory short selling are not being properly addressed in Canada, i.e. short-selling in connection with prospectus offerings and private placements, while they are looked at in other jurisdictions like the U.S.

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?*

   The biggest issue for issuers is to have the time to respond with factual information. Once allegations are out, the security price will be impacted. Therefore, we strongly support that the CSA further analyze the idea of implementing a minimum holding period that would apply to a short seller that opens a meaningful position and disseminates market moving information. This will act as a deterrent to anyone seeking to achieve a short-term gain based on misleading or untrue information.

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?*

   Yes. Based on our experience with issuers, there is a lot of reluctancy to approach regulators out of fear of the consequences of a subsequent review by the regulators, the anticipated time and effort involved in cooperating with the regulators, and the negative perceptions it may cause about the issuer. We suggest that the regulators consider how they could leverage the Whistleblower Program to address these concerns.

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.*

   See our answers to Question 6.

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.*

    We believe that Canada's leading role in developing some new sectors (e.g. cannabis, block-chain technologies), which experienced over-heating and overvaluations, led to more activist short selling targeting Canadian companies. If the short selling is based on facts, we don't see this as an issue. If it is based on misleading or untrue information, the act becomes harmful for issuers, shareholders and investors.

    Not addressing these concerns as well as other forms of predatory short selling that take place in Canada, are detrimental to the reputation of our capital markets and lead to quality issuers departing from Canada (often a decision driven by international institutional investors).

    We discussed a number of suggested regulatory changes, already present in other jurisdictions, under our answers to Question 6.

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; b. what should be the trigger and the timing of any additional disclosure; c. how can additional disclosure be meaningful without negatively impacting market liquidity; and d. do you foresee any issues with imposing a duty to update once there has been a voluntary disclosure of a short position?*

    See the last two paragraphs under General Considerations.

12. *In your view, do the existing enforcement mechanisms adequately deter problematic activist short selling? If so, why? If not, why not? a. Can deterrence be improved through specific regulation of activist short sellers? If so, how?*

    There is a clear perception, both domestically and abroad, that Canadian regulation with respect to short selling is lax. Addressing a number of obvious shortcomings with respect to short selling, as discussed under our answers to Question 6, and subjecting malevolent behaviours to formal securities regulatory requirements and stronger enforcement would represent major progress.

13. *Are there additional or different regulatory or remedial provisions that could be considered to improve deterrence of problematic conduct? If so, what are these provisions?*

    No comments

14. *Can you provide examples of specific activist short selling conduct that in your view is problematic but may not fall within the scope of existing securities offences such as market manipulation and misrepresentation/misleading statements? In your view, how should this problematic conduct be addressed by regulators?*

    No comments

15. *Is it important that a statement have actual market impact to trigger enforcement action by securities regulators? a. Should another standard be used? For example, in your view is the "reasonable investor" standard a preferable approach (e.g., would a reasonable investor consider that statement important when making an investment decision)? If so, why? What are the potential implications of such a change?*

    Misleading or untrue information that seeks to influence investors in selling ("short-and-distort") or buying ("pump-and-dump") a security is a plague to the Canadian capital markets. We are therefore supportive of reducing the hurdle to trigger enforcement by using the "reasonable investor" standard, as implemented by the B.C. *Securities Act* across Canada. This will act as an additional deterrent and should be applicable for both "short-and-distort" and "pump-and-dump" scenarios. We also believe there is value in providing adequate guidance to issuers that outlines items to consider with respect to their own communication to investors.

We remain at your disposal for any additional questions you may have about our submission.

Sincerely,

"Jos Schmitt"

Jos Schmitt
President and CEO
Neo Exchange Inc.