



March 3, 2021

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 Ontario Securities Commission

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](mailto:consultation-en-cours@lautorite.qc.ca)

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
22<sup>nd</sup> Floor  
Toronto, Ontario M5H 3S8  
Email : [comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

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

TMX Group Limited (“**TMX**” or “**we**”) welcomes the opportunity to comment on the analysis of the issues relating to activist short selling and its impact on Canadian capital markets in published the Canadian Securities Administrators (“**CSA**”) entitled CSA Consultation Paper 25-403 – *Activist Short Selling* (the “**Consultation Paper**”). Capitalized terms used in this letter and not otherwise defined have the meaning given to them in the Consultation Paper

**TMX Group**

TMX’s key subsidiaries operate cash and derivatives markets for multiple asset classes, including equities and fixed income, and provide clearing facilities, data driven solutions and other services to domestic and global financial and energy markets. Toronto Stock Exchange, TSX Venture Exchange (“**TSXV**”), TSX Alpha Exchange, the Canadian Depository for Securities, Montreal Exchange, Canadian Derivatives Clearing Corporation, Shorcan Brokers Limited and other TMX

companies provide listing markets, trading markets, clearing facilities, data products and other services to the global financial community and play a central role in Canadian capital and financial markets.

### **General Comments on Activist Short Selling**

It is vital to our clients and to all investors that the Canadian capital markets remain fair, efficient and competitive. The practice of short selling plays a role in maintaining a healthy, efficient market. Short selling is essential for efficient price discovery and legitimate short selling activities provide liquidity and information to capital markets.

Activist short selling can serve as an important source of price discovery by providing an opportunity for negative views about the issuer to be reflected in the price of a security. This is the case when activist short sellers produce research and analysis about issuers based on factual information. However, our listed issuer stakeholders have raised concerns about activist short selling activities that involve the short seller publishing intentionally misleading research reports. This problem is exacerbated when the short seller disseminates such information through social media, as the issuer is constrained in its ability to respond via social media channels. Therefore, we support the CSA's continuing enforcement of existing securities law prohibitions against market manipulation, making misleading statements and fraud in situations where activist short sellers are intentionally publishing misleading publications. While we understand that social media's implications on the capital markets is a broader issue than just activist short selling, we support the CSA engaging in a review of the regulatory framework around disclosure through social media.

### **Other Recommendations**

TMX supports CSA efforts to revisit aspects of the regulatory framework for short selling. While our recommendations below are not specific to activist short selling, we believe that enhancements to the existing regulatory framework will increase confidence that the short selling regime is fair to all participants in the capital markets. We note that the Ontario Capital Markets Modernization Taskforce ("**Taskforce**") has recently considered issues related to modernizing Ontario's short selling regulatory regime, and several of our recommendations align with the Taskforce's recommendations. We support the CSA and IIROC working together with the Province of Ontario on regulatory developments in this area to ensure a harmonized approach across Canada.

### ***Pre-Borrow Requirements***

We note that securities law and UMIR prohibit short selling activities that are manipulative and/or deceptive. However, we recommend that the CSA and IIROC consider modifications to existing legislative and regulatory requirements that clarify existing rules, which we believe will deter behaviour that is abusive and/or manipulative, while allowing short selling that provides price discovery and liquidity to continue in an efficient manner.

TMX is supportive of IIROC examining recommendations made by the Taskforce to revise UMIR to require an investment dealer to confirm the ability to borrow securities prior to accepting a short sale order from another person or entering into an order for its own account. We acknowledge that UMIR currently requires investment dealers that engage in short selling to have a reasonable expectation of settling the trade that results from the execution of a short sale and, as such, naked short selling is not permitted in Canada. However, we believe that IIROC should consider whether there is value to clarifying and strengthening existing rules in this regard by requiring investment dealers to confirm the ability to borrow the security. We note that the Taskforce outlined types of confirmation that may be appropriate.

Importantly, however, we note that certain types of securities and certain types of trading activities should not be subject to pre-borrow requirements. Securities that are deemed “easy to borrow” should not be subject to this requirement. Additionally, bona fide market making activities should be exempted from pre-borrow requirements.

### ***Prohibit Short Selling in Connection with Prospectus Offerings and Private Placements***

TMX recommends a bright line rule prohibiting market participants and investors who have previously sold short securities of the same type as offered under a prospectus or private placement from acquiring securities under the prospectus or private placement. TMX notes that the Taskforce made a similar recommendation in its final report.

Our stakeholders have advised us that market participants and investors who expect to purchase under an offering may short sell prior to the offering to depress the price of the offering. This harms the issuer, its shareholders and uninformed investors. TMX notes that such behaviour is likely already prohibited under existing securities law, particularly rules regarding insider trading and market manipulation. However, a simple bright line rule prohibiting short selling in connection with prospectus offerings and private placements would clarify that such activity is not permitted, and would simplify enforcement against persons engaged in this behaviour.

### ***Disclosure Requirements***

TMX recommends that the CSA consider implementing a short position disclosure requirement that would require short sellers to disclose their position when they reach a certain threshold of an issuer’s outstanding shares. While setting the disclosure threshold at ten percent of an issuer’s outstanding shares would align the short position disclosure requirement with disclosure requirements regarding beneficial ownership of shares, we recommend that the CSA consider whether a lower threshold would be appropriate in the short position context. TMX believes that a disclosure requirement will provide transparency to the issuer and its shareholders regarding large short positions in the issuer’s shares. This will enable issuers to respond to concerns the short seller may have about the market price of its shares.

TMX is also supportive of a requirement for activist short sellers that publish a short report to disclose their short position in the report. We believe that this will provide transparency to readers of the report regarding the potential economic gain that may be experienced by the short seller publishing the report.

### ***Mandatory Reporting of Extensions***

TMX is supportive of IIROC considering revisions of UMIR to require participants to disclose to IIROC when they have requested an extension to a buy-in through CDS's buy-in procedures. Pursuant to UMIR, participants must report extended failed trades, i.e., trades that have failed to settle ten trading days following the date for settlement contemplated on the execution of a failed trade, to IIROC. Pursuant to CDS procedures regarding the buy-in function, receivers of securities may force settlement of outstanding positions if they do not receive the relevant securities on the settlement date contemplated on the execution of the trade. The deliverer of the securities has the ability to request an extension, and the receiver of the securities chooses whether to grant the extension. TMX believes that requiring reporting of extension requests will enable IIROC to identify and investigate participants that are repeatedly having difficulties settling trades. IIROC has noted that it receives a small number of failed trade reports each month. However, the current requirement for failed trade reporting provides participants with ten trading days to settle trades without reporting, which is a relatively long period of time in a T+2 settlement environment. TMX believes that requiring disclosure of extension requests will provide IIROC with more information about whether settlement issues are prevalent, which may help it to identify short selling activity that amounts to naked short selling.

### ***Measures for Illiquid Securities***

TMX recommends that the CSA consider implementing tailored short selling requirements for securities of ventures issuers. We note that past IIROC research indicated that the 'tick test' was not an effective tool to restrict significant and rapid systemic declines in prices. IIROC removed the tick test in 2012 on the basis of that and other research it conducted on short selling. However, TMX recommends that the CSA and IIROC consider whether the removal of the tick test has had unintended negative consequences for junior, or more illiquid issuers. We note that some TSXV issuers have indicated to us that the market for venture securities is not large or liquid enough for unrestricted short selling. Therefore, we recommend that the CSA and IIROC consider whether it would be appropriate to reinstate the tick test for less liquid securities.

\*\*\*\*\*

TMX Group Limited appreciates the opportunity to provide comments. We look forward to working together collaboratively with the CSA and IIROC to address concerns related to short selling in the Canadian capital markets. Please do not hesitate to contact us if you have any questions regarding our comments.

Respectfully submitted,

*"Rizwan Awan"*

Rizwan Awan  
President, Equity Trading  
TMX Group Limited