CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Staff Notice 25-306
Activist Short Selling Update

December 8, 2022

Part 1. Introduction

On December 3, 2020, the Canadian Securities Administrators (**CSA** or **we**) published CSA Consultation Paper 25-403 *Activist Short Selling* (**Consultation Paper**) for a 90-day consultation period. The purpose of the Consultation Paper was to facilitate discussion relating to activist short selling and its potential impact on Canadian capital markets. We received 23 comment letters and thank all those who provided comments. A summary of comments and responses is attached at **Appendix A**. Since the Consultation Paper was published, we have also conducted informal discussions and consultations with various regulatory advisory committees and industry groups. We have actively monitored international developments related to short selling, including those directly relevant to activist short selling.

Part 2. Executive Summary

Our consultations and comments received in response to the Consultation Paper show that there continue to be negative views associated with activist short selling and, in general, with short selling. This perception is primarily held by issuers targeted in recent campaigns. Some stakeholders believe that changes to the regulatory requirements should be considered to address perceived problems with short selling, including activist short selling. Some commenters acknowledge there are positive aspects of activist short selling, particularly its contribution to price discovery.

We acknowledge the continued and persistent negative perception of short selling and the concerns some stakeholders have with the existing regulatory regime for short selling. Today, we are also publishing Joint CSA-IIROC Staff Notice 23-329 *Short Selling in Canada* (**Joint CSA-IIROC Staff Notice 23-329**) to seek feedback on general short selling issues and the existing regulatory framework. We encourage market participants and other stakeholders to provide comments on this notice. The feedback we receive will inform any future regulatory initiatives in this area.

At the same time, CSA staff, through its existing committees, continues to monitor and analyze activist short selling initiatives, and short selling in general, to understand whether there are gaps in the regulatory regime that need to be addressed to ensure investor protection and foster fair and efficient capital markets. In particular, we:

- continue to enforce securities legislation provisions relevant to activities of dishonest activist short sellers, including misrepresentation, fraud and market manipulation;
- monitor the number of activist short selling campaigns and review trends and campaign statistics;
- review complaints regarding activist short selling and possible manipulation in the regular course;
- monitor other domestic initiatives including, most importantly, the ongoing failed trades study conducted by the Investment Industry Regulatory Organization of Canada (**IIROC**) to see whether the findings support regulatory initiatives that may impact activist short selling; and

- monitor international short selling initiatives.

Part 3. Recent Developments

Since the publication of the Consultation Paper, there have been several developments that are relevant to short selling and activist short selling. We outlined them below and discussed them in more detail in Joint CSA-IIROC Staff Notice 23-329.

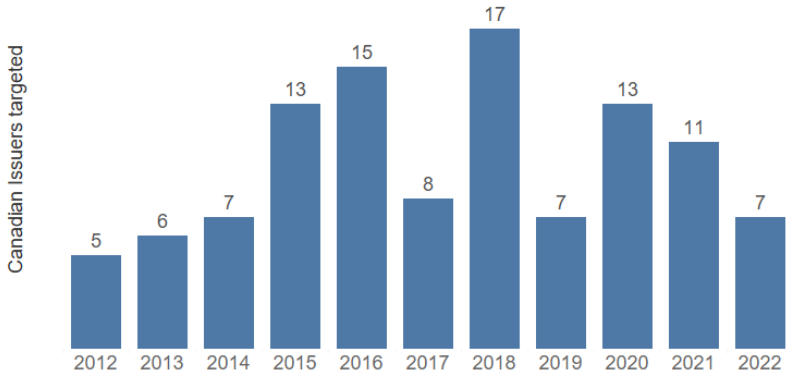
a. IIROC's Failed Trades Study

As highlighted in its public priorities,[1] IIROC conducted a failed trades study which analyzed data provided by the Canadian Depository for Securities (**CDS**) to take an in-depth look at the settlement process and the handling of fails to identify whether any systemic issues exist. IIROC last studied settlement fails in 2007, but this was done using limited data. IIROC updated this study with recent data covering a five-year period, in part to reassess the results of their previous study and to determine whether there is a connection between failed trades and short selling or other administrative causes. Joint CSA-IIROC Staff Notice 23-329 includes a high-level overview of the findings from this study. IIROC Notice 22-0190, also published today, provides additional detail.

b. Recent Activist Short Selling Activity

Figure 1 below shows the annual number of Canadian issuers that have been targeted by prominent activist short sellers between 2012 and 2021.[2] As of October 7th, 2022, seven Canadian issuers have been the target of activist short seller campaigns since the start of the year. Over the same period, 50 US issuers have also been targeted by activist short sellers.

Figure 1 – Annual Number of Canadian Issuers targeted by Activist Short Sellers (Note: the count for 2022 is as of October 7, 2022)



Contrasting these statistics with the total number of listed issuers in Canada, we observe that annually, less than 1% of all Canadian issuers have been the target of activist short selling campaigns.[3] In

[1] https://www.iiroc.ca/news-and-publications/notices-and-guidance/iiroc-priorities-2021
[2] Data sourced from Activist Insight and issuers identified based on their headquarter location.
[3] CSA analysis of activist short seller targets from Activist Insight and annual listed issuer counts from the World Federation of Exchanges for the period 2010 to 2021.

comparison, 3% of all U.S issuers and less than 0.5% of Australian issuers have been the target of similar activist short selling campaigns.

Part 4. Themes from the Consultation Paper

a. Commenters

We received 23 comment letters on the Consultation Paper from stakeholders that included:

- Seven issuers;[4]
- Four full-service business law firms;
- Seven industry groups;
- One exchange;
- One asset management company;
- One investment dealer;
- One financial advisory firm; and
- One individual.

We attached the summary of comments and the CSA's responses at Appendix A. We did not receive, through the public comment process or through outreach to retail investor groups, feedback from retail investor representatives.[5] Similarly, we did not receive comments from activist short sellers, although the asset management company that commented indicated that it had, in the past, participated in activist short selling campaigns.

b. Themes from comments received

The Consultation Paper focused on issues identified through CSA staff's research and solicited feedback from stakeholders, supported by evidence, whenever possible, on specific questions. The purpose was to further inform our analysis of the issues and to ensure that the CSA had all the relevant information before determining whether regulatory intervention is required. The topics in the Consultation Paper included:

- the nature and extent of activist short selling activity in Canada;
- the Canadian and international regulatory framework; and
- issues related to enforcement and other potential remedial actions.

Several themes emerged from the comments on the Consultation Paper:

(i) use of social media;
(ii) perception versus evidence;
(iii) the short selling regulatory regime; and
(iv) need for regulatory change.

[4] The British Columbia Securities Commission is the principal regulator for four of the issuers, with the Alberta Securities Commission, the Ontario Securities Commission and the Manitoba Securities Commission each being principal regulator for the others.

[5] We note that, while it was published for comment, the Consultation Paper was also distributed to the OSC's Investor Advisory Panel at their meeting in January 2021, shortly after the publication of the Consultation Paper, but no comments were made.

Each of these themes will be further discussed below.

(i) Use of Social Media

While the Consultation Paper did not specifically focus on the impact of social media or other shared information platforms on capital markets, commenters raised many concerns related to the use of social media.

We acknowledge that social media has created an environment for investors, companies, dealers, advisers and other intermediaries to have access to an unprecedented amount of information and disinformation. The speed at which this information is conveyed and responded to, as well as questions about the accuracy and reliability of the information, are of significant concern. The CSA recognizes that social media can present challenges when used for sharing information with the market[6] and has cautioned investors to consider the source of information and advice when making investments decisions.[7]

These concerns were reiterated by commenters, particularly with respect to the speed of today's communication technologies which can cause damage to an issuer's reputation and valuation before the issuer has an opportunity to respond. Some commenters also focussed on the need for laws to ensure social media platforms preserve evidence for review and identification, particularly where the activist short seller relies on a pseudonym.[8] It should also be noted that commenters who had a negative perception towards activist short sellers did not distinguish the actions of anonymous activists as being more problematic than named ones.

We acknowledge that social media platforms are a significant data source in today's markets. We also note that there are current challenges with accessing data from some platforms and with parsing unstructured social media data to clearly identify activist short sellers from other users that may only be expressing a negative opinion. We see that industry participants are planning to monitor online platforms more closely, including for risk management and investor relation purposes. Off-the-shelf and custom-built surveillance tools are in development that would parse through social media. Issuers are starting to actively monitor social media platforms for comments, including those made by activist short sellers, and may respond to negative statements.[9] IIROC has also indicated that their surveillance alert

---

[6] See CSA Staff Notice 51-348 *Staff's Review of Social Media Used by Reporting Issuers* and CSA Staff Notice 51-356 *Problematic promotional activities by issuers*.

[7] See Joint CSA - IIROC statement on recent market volatility dated February 1, 2021: "We caution investors to consider the source of information and advice they are relying on to make investment decisions. Online chat rooms are unregulated and may contain information that is inaccurate or inappropriate for some investors. Investors should always check the registration of any person or business trying to sell them an investment or give them investment advice. To do this, investors can visit https://aretheyregistered.ca or IIROC's database of advisors working for IIROC regulated firms."

[8] One commenter went as far as recommending that activist short sellers should be strictly restricted in terms of their ability to promote their cause to the public via media/communications outlets (for example, short sellers should not be allowed to go on TV with their story).

[9] For example, see *How to deal with rumors on social media* at https://content.irmagazine.com/story/ir-magazine-summer-2021/page/19.

workflow includes basic social media scans, including in circumstances when there is no relevant news to explain any unusual market activity.[10]

The problematic conduct observed in connection with the use of social media or other online platforms is not unique to activist short selling, but rather it can be seen as part of a broader trend in the market. Issuers, investors and activists (both long and short) increasingly rely on online platforms to promote their views. Unlike issuers and certain shareholders who are subject to specific securities law requirements on the long side, activist short sellers are not subject to any specific regulatory framework. The regulatory requirements applicable to activist short selling are limited to the general provisions applicable to all market participants, including prohibitions against fraud and market manipulation, the dissemination of false and misleading statements, and trading with knowledge of undisclosed material information. We acknowledge that this may create a perception of imbalance from a regulatory framework perspective. We note, however, that the purpose of regulation of public disclosure by issuers is to address the information asymmetry that may exist between an issuer's insiders and the market and to help price securities accurately. Activist short sellers do not generally have access to non-public information.

That said, there are initiatives such as the recent B.C. *Securities Act* amendments and proposed section 94(1) *False or misleading statements, information about reporting issuers* of the proposed *Capital Markets Act* (Ontario) which could help address the risk of dissemination of false and misleading statements and would capture those made through social media and would apply to statements made by activist short sellers. These are discussed in more detail below.

(ii) Perception versus Evidence

In the Consultation Paper, we published the results of CSA staff's research on activist short selling. We did not identify widespread market abuse related to activist short selling through our research and requested that commenters provide new sources of information or data that we could consider in determining whether there is evidence of systemic abusive related to activist short selling activities.

Based on the comments received, we are of the view that we considered all relevant sources of information when conducting our research. However, the comments highlighted that stakeholders such as issuers, law firms and related industry groups continued to see activist short selling in a negative light, with many believing that problematic conduct permeates this type of activity and that additional regulatory measures are necessary. Other market participants, however, noted the beneficial aspects of activist short selling. This latter group recognized that activist short sellers can play an important check and balance on the higher propensity for promotional information that exists in the market and may be the only voice expressing a "sell" recommendation where their research warrants. These stakeholders cited the lack of evidence of problematic activity as a reason against the introduction of regulatory measures and cautioned that new measures could potentially curtail or deter legitimate activity and negatively impact markets.

[10] IIROC reviews social media indicators such as buzz and sentiment analysis provided by third-party data vendors (Eikon and Bloomberg) but does not have full confidence in the effectiveness of these tools to date. The surveillance team also relies on manual search methods on well known websites such as stockhouse.com, AKN (for mining), StockTwits and Seeking Alpha.

We agree that, to the extent any regulatory measures are considered, such measures should be tied to evidence of problematic conduct with activist short selling and consideration be given to potential impacts on the activity, including any unintended consequences on market efficiency and the price discovery process. The CSA have access to information regarding activist short selling campaigns. Should we see evidence that regulatory changes are needed, they would be considered.

(iii) The Short Selling Regulatory Regime

Many of the comment letters focussed on the short selling regime in general and raised some concerns that were not specific to the activist short selling issues raised in the Consultation Paper.[11] The views expressed by commenters included:

- concerns with perceived "naked" short selling and the need to impose pre-borrow requirements;
- potential harm caused by short selling in connection with prospectus offerings and private placements;
- a perceived negative impact that resulted from the removal of the tick test[12] in 2012 and a recommendation to consider adopting a regulation similar to the modified uptick rule of the Securities and Exchange Commission (**SEC**); [13] and
- inadequate frequency and disclosure of short selling positions and identities (unlike the European Union or Australia).

We acknowledge the concerns raised. As we noted above, the CSA and IIROC are publishing the Joint CSA-IIROC Staff Notice 23-329 to seek feedback on broader short selling issues and the existing regulatory regime. Any regulatory proposals that may emerge, either from IIROC or from the CSA, would be subject to the regular public comment and approval processes.

(iv) Need for Regulatory Change

The comments on the Consultation Paper provided a range of views on whether regulatory change was necessary. Some advocated for sweeping reforms to short selling regulation (as discussed above), while others were of the view that incremental and targeted changes are more appropriate when supported

---

[11] Several commenters also provided their views on recommendations from Ontario's Capital Markets Modernization Taskforce (**Taskforce**) report related to short selling, available at https://www.ontario.ca/document/capital-markets-modernization-taskforce-final-report-january-2021, regarding pre-borrow requirements (the recommendation was for IIROC to revise the Universal Market Integrity Rules (**UMIR**) to require an investment dealer to confirm the ability to borrow securities prior to accepting a short sale order); mandatory buy-in (the recommendation that short sellers be subject to a mandatory buy-in for short sales that failed to settle, triggered at settlement date + two days); limits on short selling in connection with prospectus offerings and private placements (the recommendation is for OSC to adopt a rule prohibiting market participants and investors who previously sold short securities from acquiring them under prospectus or private placements).

[12] The tick test referred to a previous requirement in UMIR that a short sale not be made at a price which is less than the last sale price of the security.

[13] SEC Rule 201 generally requires marketplaces to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent the execution or display of a short sale at an impermissible price when a stock has triggered a circuit breaker by experiencing a price decline of at least 10 percent in one day (based on the prior day's closing price). Once the circuit breaker in Rule 201 has been triggered, the price test restriction will apply to short sale orders in that security for the remainder of the day and the following day, unless an exception applies.

by evidence. Some commenters were of the view that no change was necessary at all. We found that certain market participants (mainly issuers, related industry associations and some law firms) were more supportive of regulatory change. The suggested changes are described below.

In the Consultation Paper, we asked whether:

- there are market developments that warrant revisiting the regulatory framework;
- there is a connection between failed trades and activist short selling; and
- there are relevant regulatory requirements in other jurisdictions that should be considered.

On the issue of market developments, the influence of social media figured prominently in responses received. We acknowledge the need to monitor the impact of social media on the capital markets.

Many commenters were also of the view that a comprehensive study on failed trades should be conducted but did not indicate that there was a connection between failed trades and problematic activist short selling activity. As we noted in Part 3 a above, IIROC conducted a new study of failed trades and the findings are outlined in the Joint CSA-IIROC Staff Notice 23-329 and in IIROC Notice 22-0190, published today.

We set out below the proposals that were put forward or addressed in the comment letters received on the Consultation Paper related to activist short selling concerns and we also identify some challenges or areas for further consideration.

c. Guidelines

Some commenters, including some who view activist short selling favourably, suggested that guidelines or best practices would benefit the market with respect to what may be considered problematic activity. This is similar to the approach taken by the Australian Securities and Investment Commission (**ASIC**), which published INFO 255 *Activist short selling campaigns in Australia*, an information sheet which, among others, described the existing Australian regulatory framework for short selling and recommended "better practices" for activist short sellers.[14]

With respect to issuing guidance regarding activist short selling, we note that typically guidelines are tied to a regulation or rule and we do not presently have any rules which govern the conduct of activist short sellers (as noted above, there is no regulatory requirement specifically targeting activist short sellers). Should any regulatory requirements implemented in the future, we would consider what additional guidance is needed to complement such requirements.

d. Reporting and Disclosure Requirements

Comments received on this topic varied. For example:

- some commenters supported regulatory changes requiring that activist short sellers disclose their opening, changes in and closing positions, as well as their identity either to the regulator, the public, or both;[15]

[14] Available at https://asic.gov.au/regulatory-resources/markets/short-selling/activist-short-selling-campaigns-in-australia/.

[15] This is related to the reference in the Consultation of a group of U.S. academics who petitioned the SEC to impose a "duty to update" a short position when there has been a voluntary disclosure of that short position.

- some noted that requiring additional disclosure should only be done once there has been focus on studying the Canadian liquidity environment, underlying data and the potential impact of new disclosure obligations;
- some cautioned that introducing public disclosure requirements could potentially lead to Reddit-type message board traders inciting short squeezes;
- it was noted that public disclosure and reporting, especially by activist short sellers could also have the unintended consequence of promoting herd behavior to further drive down the target's stock price;[16] and
- some commenters raised the issue of whether there should be symmetry for reporting obligations between activists on the long and short side.

Regulators in some foreign jurisdictions already impose reporting and disclosure requirements on short sellers with short positions above certain thresholds. International regulatory developments in this area are discussed in Joint CSA-IIROC Staff Notice 23-329. We are monitoring these developments and will consider whether additional disclosure of short selling activities, which may include those of activist short sellers, is needed. As noted above, however, imposing disclosure requirements on activist short sellers would first require defining who the activist short sellers are, creating a regulatory framework over them and determining whether that framework should include reporting of synthetic short positions. The creation of such a framework would likely require a change in securities legislation.

e. Implementation of a Hold Period

Some commenters proposed imposing a brief trading moratorium or minimum holding period on any stock promoter or short seller who opens a large position and disseminates market-moving information, irrespective of the medium.[17] The rationale is that a holding period could provide the market with an opportunity to evaluate the quality and credibility of the information. We are not aware of any securities regulators who have implemented such a measure at this time.

While we agree that the introduction of a hold period may give more time for the market to absorb information disseminated from an activist short seller's report, we note that it could also disincentivize activist short sellers from publishing short reports, resulting in less informationally efficient markets. Moreover, any hold period would need to be implemented equally on both the short and long sides of trades to be fair and would also need to consider synthetically held positions. A hold period could further raise practical challenges, such as identifying the duration of this hold period and imposing them on non-regulated entities.

The impact of such measures would have to be carefully studied and examined to determine whether the potential benefit outweighs the risks this measure introduces.

---

[16] For example, on May 17, 2019, Muddy Waters disclosed a 0.5% short position on Solutions 30 SE as required under European securities regulations. Following this disclosure and prior to the release of any short report, Solutions 30 SE's stock price dropped by 20% on May 21st, 2019. See "Muddy and 5 other HFs shorting Solutions 30," Breakout Point blog, August 2, 2019 and Michelle Celarier, "Shares of Solutions 30, a Muddy Waters Short, Tank After Auditor Raises Concerns," Institutional Investor, May 24, 2021.

[17] The Consultation Paper referenced a proposal for a 10-day minimum holding period that was mentioned in a news article. See Mark Cohodes, "Pump-and-dump stock trading needs new rules for the digital age", FT Online, April 26, 2020 at https://www.ft.com/content/01b765c2-854e-11ea-b6e9-a94cffd1d9bf.

f. Advance Notice to Issuers

The proposal was for a requirement that the activist short seller provide their report to the issuer in advance of publishing. This would give the issuer an opportunity to review the report, identify factual errors and have the means to provide their own rebuttal before it is released into the public. The proposal recognizes that issuers may face practical impediments, such as the fact that they are constrained by disclosure rules and that there are practical difficulties in responding quickly to sometimes broad allegations in a timely manner to avoid or minimize the negative price impact of a short seller's report.

We acknowledge that issuers may find it difficult to respond on a timely basis to activist short seller campaigns spread through social media or other online platforms. Even if issuers are given advance notice, they may not be able to respond because existing insider trading rules would generally preclude the target from engaging with the activist short seller on an open access basis. Specifically, the targeted issuer would likely find itself constrained in its reply if the reply to the activist short-seller allegations would involve disclosing material facts. The same issue would arise if, for example, an unfavourable report is published in the media, or allegations arise from other parties not connected to short sellers. Further, imposing requirements on activist short sellers who are not market participants or otherwise registered also poses jurisdictional challenges for regulators. There are also challenges with determining an appropriate length for the advance notice to the issuer. The longer the duration, the higher the risk of information leaking into the market and impacting the issuer's stock price before the issuer has an opportunity to respond.

We also recognize the importance of timely dissemination of material undisclosed information to the market by bona fide short selling reports that improves price discovery.

g. Impose Disclosure of Interest Requirement or Standards

This proposal was to require that any person publishing a statement concerning an issuer's public disclosures and either (i) has either a long or short position in the securities of the issuer to which the statement relates, or (ii) is in any arrangement that may result in financial gain to the person as a result of, or in connection with the publication of the statement, adhere to standards of professionalism and objectivity such as those required by the CFA Institute of its members.

We note that activist short selling reports generally include disclosure that the short seller has a position in the securities of the issuer they cover and that they may stand to realize gains due to price changes.[18]

h. Expanded Offence for Misleading Information

Recent B.C. *Securities Act* amendments that came into force introduced an additional prohibition for making misleading statements for those engaged in "promotional activities". Under this prohibition, a person engaged in a promotional activity must not make a statement or provide information that is false or misleading in circumstances where a reasonable investor/person would consider that statement or information important when making an investment decision. [19] Unlike other securities law prohibitions

[18] For example, see the terms of use for Muddy Waters' research reports and the legal disclaimer for Hindenburg's research reports.

[19] *Securities Act* (British Columbia), RSBC 1996, c 418, 50 (1). A similar amendment was also proposed by the Taskforce.

against making a misrepresentation, this prohibition does not require that the statement or the information:

- be "materially" misleading or untrue; or
- be reasonably expected to have a significant effect on the market price or value of a security.

Similarly, in Ontario, section 94(1) *False or misleading statements, information about reporting issuers, etc.* of the proposed *Capital Market Act*[20] which, if adopted, would replace the *Securities Act* (Ontario) and the *Commodity Futures Act* (Ontario), would prohibit a person engaged in a promotional activity from making a statement or providing information about a reporting issuer or an issuer whose securities are publicly traded that the person knows or reasonably ought to know is false or misleading and would be considered to be important by a reasonable investor in determining whether to purchase or trade a security of the issuer or related financial instrument. Proposed section 94(2) prohibits attempts to make these statements and proposed section 94(3) allows the OSC to prescribe exceptions from this prohibition. These proposals are intended to implement Recommendation 57 of the Taskforce report[21] to create a prohibition to effectively deter and prosecute misleading or untrue statements about public companies and attempts to make such statements. The comment period for the proposed *Capital Markets Act* ended on February 18, 2022.

An activist short seller's attempt to depress an issuer's stock price by knowingly spreading material misinformation is already prohibited conduct under securities legislation. However, there are views that the thresholds for proving this contravention are too high and a reasonable investor standard may be a good balanced approach to improving public disclosure without adding excessive burden to market participants. A few commenters, however, indicated that the elimination of a market impact assessment and materiality threshold can be expected to have a significant chilling effect on short selling and that any benefit to these changes will outweigh the cost. Concerns were also raised that activist short sellers (and other market participants without access to non-public information on an issuer) should not be held to any standard resembling that of company insiders.

The changes to the BC *Securities Act* with respect to making misleading statements in the course of promotional activities in BC and the proposed section 94 in the Capital Markets Act in Ontario may introduce an additional deterrent to problematic conduct through potential enforcement action. It is too early to conclude whether they will be an effective tool as it relates to activists, or whether they will lead to a potential increase in prosecutable cases against potentially problematic activist short sellers or reduce the number of problematic campaigns against reporting issuers. The CSA will monitor their impact.

i. Civil Liability for Misleading Information

Currently, there is no mechanism under securities law to seek damages against activist short sellers conducting short and distort campaigns. Commenters noted that an issuer targeted by an abusive short selling campaign, as well as the issuer's security holders that are induced to sell their securities on the basis of misinformation, are often forced to wait and see whether the regulator will commence regulatory proceedings. Some foreign jurisdictions provide a private right of action for the making or

[20] Available at https://www.ontariocanada.com/registry/view.do?postingId=38527&language=en
[21] Ibid. footnote 11.

dissemination of false or misleading information.[22] A private right of action could provide recourse for targets of "short and distort" campaigns while also providing a complementary deterrent to problematic activities associated with activist short selling. One commenter was of the view that a private right of action must be based on a short seller's deliberate and calculated conduct and not mere negligence or a good faith mistake, nor should such a provision become a form of insurance against losses that are actually caused by other forces such as investment risk.

At this point, we have not found evidence of systemic abuse related to activist short selling campaigns that would support regulatory changes such as the introduction of a private right of action against activist short sellers. However, as noted in our Consultation Paper, there are existing common and civil law remedies that could apply to problematic activist short selling campaigns, but those have not typically been used by issuers or favoured by the Courts given the freedom of expression issues they introduce.

Part 5. Questions

Please refer your questions to any of the following CSA staff:

Serge Boisvert
Senior Policy Advisor
Autorité des marchés financiers
Serge.boisvert@lautorite.qc.ca

Roland Geiling
Derivatives Analyst
Autorité des marchés financiers
Roland.geiling@lautorite.qc.ca

Ruxandra Smith
Senior Accountant, Market Regulation
Ontario Securities Commission
ruxsmith@osc.gov.on.ca

Timothy Baikie
Senior Legal Counsel, Market Regulation
Ontario Securities Commission
tbaikie@osc.gov.on.ca

Kevin Yang
Manager, Regulatory Strategy and Research
Ontario Securities Commission
kyang@osc.gov.on.ca

Jesse Ahlan
Regulatory Analyst, Market Structure
Alberta Securities Commission
Jesse.ahlan@asc.ca

Jan Bagh
Senior Legal Counsel
Alberta Securities Commission
Jan.bagh@asc.ca

Kathryn Anthistle
Senior Legal Counsel, Legal Services
Capital Markets Regulation Division
British Columbia Securities Commission
kanthistle@bcsc.bc.ca

Michael Grecoff
Securities Market Specialist
British Columbia Securities Commission
mgrecoff@bcsc.bc.ca

[22] See, for example, *Australia Corporations Act 2001* (Cth), sections 1041E and 1041I.

Eric Pau
Senior Legal Counsel, Legal Services
Corporate Finance
British Columbia Securities Commission
epau@bcsc.bc.ca

Tyler Ritchie
Investigator
Manitoba Securities Commission
Tyler.Ritchie@gov.mb.ca

Jennifer Whately
Manager, Litigation, Enforcement
British Columbia Securities Commission
jwhately@bcsc.bc.ca

APPENDIX A

Summary of Comments on CSA Consultation Paper 25-403 *Activist Short Selling*

List of Commenters

	Commenter	Abbreviation
1.	**Anson Advisors Inc.**	Anson
2.	**McMillan LLP**	McMillan
3.	**Global Principles for Sustainable Securities Lending**	GPSSL
4.	**Alternative Investment Management Association**	AIMA
5.	**Save Canadian Mining**	SCM
6.	**Northern Dynasty Minerals Ltd.**	NDM
7.	**NEO Exchange Inc.**	NEO
8.	**Davies Ward Phillips & Vineberg**	DWPV
9.	**Norton Rose Fulbright Canada LLP**	NRF
10	**Corus Entertainment Inc.**	CEI
11	**Finning International Inc.**	FII
12	**NOVAGOLD Resources Inc.**	NRI
13	**Badger Daylighting Ltd.**	BDI
14	**Exchange Income Corporation**	EIC
15	**Standard Uranium**	SU
16	**Canadian Investor Relations Institute**	CIRI
17	**Peter Brown**	PB
18	**Fiore Management & Advisory Corp**	FMAC
19	**Prospectors & Developers Association of Canada**	PDAC
20	**Portfolio Management Association of Canada**	PMAC
21	**Canadian Advocacy Council of CFA Societies Canada**	CAC
22	**Stikeman Elliott LLP**	SE
23	**RBC DS**	RBC DS

Summary of Comments

Summary of comments	Responses
General comments	
Activist short selling • While many commenters acknowledged the benefits of short selling to the market, including noting the improvement to liquidity, some held the view that activist campaigns served to negatively impact shareholder value and investor confidence. **Short selling regulatory regime** • There was a range of views on the need for regulatory change by the commenters. Some advocated for sweeping reforms to short selling regulation in general. It was noted that gaps in the current short selling regime must be considered to address short selling issues; others were of the view that incremental changes are more appropriate while others recommended to not make any immediate changes. • There were also views expressed that what is required is further research, consultation and education because there is insufficient evidence of abusive activist short selling campaigns to support changes. • Some commenters raised concerns about the regulatory focus being on activist activity rather than deceptive practices, and were of the view that further regulation of activist short selling activity, or short selling activity more generally, could have negative consequences for market efficiency, including impeding price discovery and curtailing legitimate investing activity.	• We would like to thank all those who submitted comments. • Staff acknowledge the important role that short selling, including activist short selling plays in the market. • We are monitoring international regulatory developments regarding short selling with a view to determine what, if any, may be appropriate for the domestic regulatory framework. • As mentioned in the Staff Notice, we are also publishing Joint CSA-IIROC Staff Notice 23-329 to describe the results of IIROC's failed trades study and possible regulatory next steps.
Question 1: What is your perception about activist short sellers? Please describe the basis of that perception.	
• The majority of commenters were of the view that short sellers play an important role in the financial markets by promoting transparency, contributing to liquidity and price discovery, and thus contributing to market integrity and investor protection; it was noted that it is important to hold issuers accountable and activist short selling encourages investors to scrutinize public company disclosure and activities; other benefits of short selling included: o it can help identify market bubbles; o It can contribute to the discovery of fraud; • Several commenters expressed a negative view towards all activist short sellers. Two of these commenters were the target of an activist short seller campaign that they claim represented the hallmarks of short and distort campaigns (rapid distribution of a purportedly false and misleading	• We acknowledge the negative perception some participants have about activist short selling, which has often been associated with short and distort campaigns, and the concerns raised that issuers encounter challenges responding to activist short selling statements.

Summary of comments	Responses
research report on multiple social media channels and undisclosed short positions). Concerns regarding activist short selling raised included: ○ activist short sellers have the ability to issue a short report that could have a material impact on a company without any regulatory oversight, detailed regulatory requirements and recourse; and ○ issuers and their auditors may be unable to respond to information in activist short selling reports because short sellers do not engage with issuers prior to issuing their reports; • A couple of commenters thought that activist short sellers are destructive as they operate for their own profits and make false claims. • A few commenters acknowledged that there may be a negative perception of short selling, including by issuers; one commenter noted that the activities of short selling are often associated with manipulative activities such as "short and distort" strategies, but noted that this perception does not appear to occur on the long side, despite "pump and dump" strategies, with more deference being given to promoters because of their position in promoting, rather than challenging, the issuers.	
Question 2: Can you give examples of conduct in activist short selling Campaigns that you view as problematic?	
• Many comments raised the different regulatory treatment of issuers versus activist short sellers. • Commenters provided the following examples of problematic conduct in activist short selling: ○ campaigns predicated on the manipulation of information or market activity; ○ use of media by short sellers given restrictions on issuers on what they can publicly disclose; ○ use of employees to access confidential business information; ○ the publication of information about an issuer by a source who knows, ought reasonably to know or fails in exercising any diligence in determining that the information is false, misleading or exaggerated; ○ publicly posing strategic questions to management during times when management may not be in a position to fully respond to the inquiry; ○ making statements intended to cast aspersions on an issuer or particular officers or directors that are inherently very difficult to disprove (e.g. governance matters); ○ failing to meet or speak with the issuer before launching a campaign; • One commenter expressed their view that the fact that an activist short seller could publish their views in the absence of any regulatory process was itself problematic and stands in contrast to the disclosure regime imposed on issuers. Similarly, another commenter thought there was a	• With respect to the comments regarding the different regulatory treatment of issuers versus activist short sellers, we note that, while there is regulation of issuers' public disclosure, this is in part to address the information asymmetry that exists between the issuer and the market and to help price securities accurately. These same considerations do not apply to activist short sellers, who are not typically market participants under securities legislation and have no regulatory obligations tied to information and opinions they disseminate. • That said, Staff note that enforcement action (e.g. for making materially misleading statements that have market impact) may be taken against activist short sellers and many of the examples of problematic conduct provided could theoretically fall within the scope of existing offences under securities legislation. Staff note the challenges

Summary of comments	Responses
difference between the regulatory scrutiny that an issuer faces in comparison to the activist short seller. • Commenters also thought that a campaign based on diligence of publicly available information is not problematic, but one commenter noted that it should be accompanied by a disclaimer. • Some commenters were of the view that the types of problematic activity listed in the Consultation Paper are not limited to short positions but rather can be equally harmful when used in a campaign advocating a long perspective.	around enforcement action that many commenters articulated. • Staff agree that some of the types of problematic activity that may be observed in connection with an activist short selling campaign could equally occur in the context of promotional activities as well. Please refer to the response to Question 15, where we discussed the recent amendments to the B.C. *Securities Act* that introduced a new prohibition for making misleading statements for those engaged in promotional activities, and our commitment to monitor the outcomes of these legislative changes.
Question 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?	
• Two commenters indicated that short and distort campaigns can originate from any activist short seller. One commenter recommended further research and regulatory oversight into the issue and considered anonymous or pseudonymous short sellers as potentially problematic. • Several commenters suggested that short selling reporting requirements need to be more extensive to identify anonymous or pseudonymous activist short sellers. • One commenter indicated that aggressive and abusive tactics and costly litigation against activist short sellers have resulted in many choosing to hide behind a pseudonym and to ensure their campaigns are focused on the content of their short reports and not a public battle with the target company. • Several commenters expressed a difficulty with identifying less prominent activist short sellers and especially those engaging in short and distort campaigns. One commenter indicated that such an assessment can only be done through time-intensive investigative efforts and cooperation across jurisdictions. • Two commenters suggested reviewing and preserving information posted on social media sites to identify activist short sellers and problematic conduct. • Several commenters suggested that a review of securities lending and failed trades data combined with increased disclosure requirements on short sellers (including their identities) would enable regulators to identify all activist short sellers. • Commenters did not provide additional evidence to support claims that less prominent activist short sellers were engaged in short and distort campaigns.	• Most commenters did not express any strong views regarding less prominent or pseudonymous activist short sellers as being more problematic. They perceived all activist short sellers to be equally capable of short and distort campaigns and recommended further research and monitoring on this issue. • Staff acknowledge the comments of issuers directly affected by an activist short seller campaign. We encourage issuers that have specific evidence of activist short seller misconduct to contact the securities regulator in their jurisdiction. • Staff agree that identifying short sellers, other than the prominent, known short sellers that may be involved in short and distort campaigns will be challenging, especially for anonymous or pseudonymous activist short sellers and would require an enforcement type assessment often spanning multiple jurisdictions and acknowledge the challenges around enforcement action noted by some commenters.

Summary of comments	Responses
Question 4: What empirical data sources related to Campaigns should we consider?	
• Some commenters suggested reviewing and preserving information posted on social media sites to identify activist short sellers and problematic conduct. • Several commenters suggested that a review of securities lending and failed trades data combined with increased and more frequent disclosure requirements on short sellers (including their identities and associated short positions) would enable regulators to identify activist short sellers. • Some commenters recommended live monitoring of short selling activity and any sudden drop in stock prices or increase in volumes. • Some commenters suggested examining activist short sellers' allegations against an issuer's disclosure record. • One commenter recommended reviewing activist short seller campaigns conducted prior to the target's financing event to assess their potential impact.	• Most of the existing data sources recommended were related to trading related activity such as data on securities lending, failed trades and short position reporting. • With respect to live monitoring of short selling activity, as indicated in our consultation paper, IIROC employs algorithms to monitor for unusual levels of short selling activity and price movements which they combine with external data from social media platforms and chatrooms to identify potentially manipulative activities. IIROC also continually monitors international developments around short selling regulations. • In response to comments that recommended a review of failed trades data, IIROC completed an in-depth study of settlement processes in Canadian equities using five-year data from the CDS. The results of this study are outlined in Joint CSA-IIROC Staff Notice 23-329 and IIROC Notice 22-0190, published today. • Staff acknowledge that social media platforms are a key data source but note the current challenges with accessing data from some platforms and with parsing unstructured social media data to clearly identify activist short sellers from other users, such as clients, employees or shareholders, that may only be expressing a negative opinion. The social media's effect on trading in capital markets is a current concern. At the same time, we are seeing the emergence of technology tools to process data feeds, including those from social media. The CSA and IIROC continue to monitor the developments in the area.

Summary of comments	Responses
Question 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	
• Most commenters indicated that over-heated or overvalued sectors/markets tend to attract short selling activity including those by activist short sellers. • One commenter suggested that issuers in bubble-prone sectors (e.g. cannabis and cryptocurrency) with perceived information gaps and heavy stock promotion activity may attract increased activist short selling activity. • Some commenters also pointed to other factors that may lead to an increase in activist short selling activities: o greater focus on pandemic and Environmental, Social, Governance (**ESG**) related disclosures; o growing use of social media combined with increased retail trading; and o when there is increased scrutiny by US regulators causing US activist short sellers to shift their focus on Canadian markets.	• Staff acknowledge that there has been growth in new listings on Canadian exchanges especially in bubble-prone sectors (cannabis and cryptocurrency), which may be targeted by activist short sellers because of perceived information gaps and heavy stock promotion activity. • We also acknowledge comments regarding the additional factors (social media and retail trading, ESG and pandemic disclosure) highlighted by one commenter as potential factors that may lead to an increase in activist short selling activity. • We continue to monitor closely US regulatory developments.
Question 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.	
• Some commenters gave examples of how Canadian markets may be more susceptible to activist short selling. These included: o small size of, and lack of liquidity in the Canadian market makes Canadian issuers easier targets for activist short selling campaigns; o the concentration of commodity and mineral sector issuers in the Canadian capital markets, where valuations are based on complex technical information; o a lack of a pre-borrow and mandatory buy-in requirements; o lack of or inadequate short position reporting requirements; o perception of lax regulation; o media (especially BNN) provide a platform for activist short sellers; and o market participants' increasing awareness of environmental, social and governance issues gives activist short sellers an opportunity to tell a story. • Other commenters disagreed and one commenter noted that there is no evidence of specific vulnerability of Canadian markets to activist short selling. It was noted that:	• Staff acknowledge that there are aspects of the Canadian markets that differentiate them from many foreign markets, such as the high concentration of resource issuers and lower liquidity and that may make them more vulnerable to activist short sellers. Our research, however, as noted in the Consultation Paper, showed that the activist short selling campaigns were focused on larger issuers, which was consistent with findings of U.S. academic studies. • We acknowledge the comments regarding the regulatory regime for short selling in general and refer the commenters to our previous responses indicating ongoing initiatives to review the continued appropriateness of the regulatory regime.

Summary of comments	Responses
○ the small size and lack of liquidity makes short selling more difficult; ○ rules governing long stock promotions are less strict in Canada; ○ reverse take-over transactions often result in dissemination of misinformation inflating stock prices; and ○ the lack of activist campaigns allows overpriced and overhyped stocks to subsist at inflated price levels.	
Question 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?	
• Most commenters who responded to this question were of the view that target issuers are constrained by disclosure rules and the practical difficulties in responding quickly to sometimes broad allegations. For example, reference was made to the cost and time required to conduct independent internal investigations to provide the foundation for a full public response. • A few commenters did not believe that there were restraints on issuers to provide information to refute the contents of a campaign. • Some commenters raised the exacerbating effect of social media in terms of spreading the information in a campaign before an issuer has an opportunity to respond. • A number of commenters also pointed to the threat of potential litigation as a constraint on providing a response.	• On the issue of engagement with the issuer prior to a campaign, we agree that such engagement may help mitigate the risk of potential informational gaps or that misleading information would be made public, however, note that there are possible impediments, as outlined in the Staff Notice.
Question 8: Are issuers reluctant to approach securities regulators when they believe that they are being unfairly targeted by an activist short seller? If so, why? If not, why not?	
• All responses to this question provided some basis for the reluctance an issuer might have in approaching regulators when they believe they are being unfairly targeted by an activist short seller. These included: ○ inviting increased scrutiny by the regulator of the issuer and its public disclosure record; ○ concern about it being seen as a retaliatory tactic by the issuer rather than genuine concern that it was unfairly targeted; ○ challenges in demonstrating market price impact resulting from the campaign; and ○ perceived lack of authority on part of regulators to deal with the issue; • One commenter suggested that whistleblower programs could be leveraged to address some of the concerns.	• The CSA do have authority to investigate problematic activist campaigns and enforce regulatory requirements but acknowledge the potential reluctance to approach regulators for the reasons enumerated in the responses. • Staff note that some Commissions (and IIROC) have whistleblower programs in place that can be used to raise these concerns. On October 1, 2020, the OSC and IIROC published Joint OSC/IIROC Whistleblower Guidance encouraging the public to submit tips on potential abusive trading in securities

Summary of comments	Responses
	of Ontario reporting issuers, including abusive short selling.[1]
Question 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.	
• Many commenters that replied to this question were of the view that the regulatory framework in Canada as it relates to short selling was inadequate; one commenter was of the view that it does not meet the principles of IOSCO on short selling in general. Comments included: o naked shorting is too easy due to existing settlement cycle and buy-in requirements; o lack of enforcement; o lack of disclosure by short activists; o reporting, data analytics and oversight of short activity is limited to data from Canadian dealers; o extra jurisdictional challenges; o lack of rules that govern short selling campaigns; o there should be more coordination between SEC and CSA. • A number of commenters advocated that any potential regulatory solution should address activities on both the long and short side. • One commenter indicated support for the Task Force recommendations and new rules for disclosure of short positions to regulators, prohibitions of naked shorting and misleading statements. • A few commenters expressed views towards increasing transparency of share lending arrangements and short positions, in particular, in-line with existing requirements in the EU (i.e. SFTR and net short position reporting requirements). • Some commenters recommend a regulatory regime that would require activist short sellers to: (i) provide their report to the issuer in advance of publishing, (ii) disclose and update their position in their target; (iii) pre-borrow the security, (iv) hold their position for a minimum of 10-days, and (vi) be liable for inaccurate or misleading information. • Other commenters were of the view that a comprehensive study on failed trades should be conducted. • Several commenters recommended the CSA should review the impact that the removal of the tick test has had on the market.	• As noted in the Consultation Paper, CSA's view is that Canada's regulatory regime governing short sales is generally consistent with the IOSCO four principles for the effective regulation of short selling.[2] • We acknowledge the concerns raised and note that they are discussed in more detail in Joint CSA-IIROC Staff Notice 23-329, published today. This notice also solicits comment on a number of areas where the existing regulatory framework for short selling could be enhanced.

[1] https://www.osc.ca/sites/default/files/2021-02/joint-osc-iiroc-whistleblower-guidance.pdf.
[2] Please also see Request for Comment : CSA/IIROC Joint Notice 23-312 : Transparency of Short Selling and Failed Trades at https://lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/0-avis-acvm-staff/2012/2012mars02-23-312-avis-acvm-cons-en.pdf.

Summary of comments	Responses
Question 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.	
• A number of commenters identified the substantial rise of social media as a major market development since 2012 that would warrant revisiting the existing regulatory framework. • Some commenters expressed the potential for problematic short selling activity to be exacerbated by social media and that regulators should consider whether they have the necessary tools to address various types of fraud aimed at investors over social media. • In particular, commenters noted that the increased role of social media in disseminating information has brought in substantially more players, which has made it more difficult for a targeted issuer to respond effectively to allegations made against it. • One commenter recommended developing a disclosure regime that addresses social media and which would be focused on both promoters and activist short sellers in order to level the playing field.	• We acknowledge the prominence of social media in disseminating information. • We agree that the rise of social media has increased the number of sources from which information pertaining to a particular issuer can be widely shared and that, as noted in the comments received, such information can be positive or negative. • As indicated in the answers to Question 3 and 4 above, social media platforms are a key data source, but we note the challenges with accessing data and with parsing unstructured social media data to clearly identify activist short sellers. The CSA and IIROC are continuing to monitor the developments in the area. • We refer to CSA Staff Notice 51-348 *Staff's Review of Social Media Used by Reporting Issuers* (**SN 51-348**),[3] which reported on a review of disclosures made by certain reporting issuers through social media and identified issues in connection therewith. As noted in the SN 51-348, staff will continue to monitor this area in our review program activities but note that activist short sellers are not market participants, and a similar review would not be possible for short sellers. • We also refer to the *Joint Statement from the Canadian Securities Administrators and the Investment Industry Regulatory Organization of Canada on the Recent Market Volatility* issued

[3] https://lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/0-avis-acvm-staff/2017/2017mars09-51-348-avis-acvm-en.pdf.

Summary of comments	Responses
	Feb 1, 2021,[4] which cautioned investors to consider the source of information and advice they are relying on to make investment decisions, noted that online chat rooms are unregulated and may contain information that is inaccurate or inappropriate for some investors and advised investors to always check the registration of any person or business trying to sell them an investment or give them investment advice.
Question 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?	
• Some commenters thought that the existing disclosure regime is inadequate. They recommended adding disclosure requirements, such as the short seller's identity as well as the opening, change in and closing positions. • Other commenters believed that, when an activist short seller has publicly disclosed its short position, it may be appropriate to also require the short seller to disclose the fact that it has closed its position. • Some commenters thought that additional disclosure by activist short sellers could lead to regulatory scrutiny that is not warranted and could even be detrimental. • Some commenters indicated that it may be difficult to require additional disclosure without first studying the Canadian liquidity environment, underlying data and the potential impact of new disclosure obligations. • Commenters also were of the view that the CSA should assess whether the tools used to regulate short selling activities in other jurisdictions achieved their intended outcomes, and whether they resulted in fewer "short and distort" campaigns. They expect that any regulatory proposal on this matter would consider these points when making any proposal. • One commenter thought that the lack of transparency surrounding the identity and financial stake of activist short sellers is problematic.	• We acknowledge the proposals for additional disclosure and the concerns; and will continue to review whether additional disclosure is needed and whether the costs of compliance with additional requirements are justified by the benefits. • In the course of its work, the CSA will continue to consider and follow developments in other jurisdictions and, in particular, in the U.S. • We note that there are jurisdictional challenges as activist short sellers are not a category of market participant and most of the time they are not Canadian. Similarly, IIROC only has jurisdiction over registrants and therefore will not have jurisdiction over unregistered parties who participate in activist short selling.

[4] At https://lautorite.qc.ca/en/general-public/media-centre/news/fiche-dactualites/joint-statement-from-the-canadian-securities-administrators-and-the-investment-industry-regulatory-organization-of-canada-on-the-recent-market-volatility.

Summary of comments	Responses
Question 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?	
• Comments were mixed. Some commenters thought that current enforcement mechanisms are adequate. • Others indicated that it is hard to tell whether enforcement mechanisms are adequate because so few cases are prosecuted; the lack of prosecutions harm deterrence efforts. • It was also noted that enforcement mechanisms exist, but the legal threshold is too high to capture this activity or makes it too hard to prosecute.	• We acknowledge the commenters who are of the view that enforcement mechanisms are either lacking, or the legal threshold for proving materiality is too high. A significant hurdle to successful enforcement of problematic activist short sellers is the lack of complaints provided to the CSA and the corresponding lack of supporting facts provided by issuers to determine the strength of the claim. • We note that the amendments to the *Securities Act* (British Columbia) including BC's new definition of "promotional activities" and revised section 50 [representations prohibited], which were brought into force in 2020 may speak to this concern. In Ontario, as discussed in the Staff Notice, there are similar requirements included in the proposed Capital Markets Act. It is too early to discuss discernable impacts to enforcement activities, but this will be monitored by the CSA. • We acknowledge the commenters seeking a private right of action for disseminating false or misleading information.
Question 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?	
• Some commenters indicated that the CSA currently has tools to address problematic conduct and new provisions may have chilling effect on legitimate short selling activity. • A few commenters suggested additional requirements, as described below. **Pre-borrow requirements** • A few commenters expressed concerns that there are no pre-borrow requirements and recommended greater regulatory controls to prevent "naked" short selling. • Some of these commenters supported the Taskforce recommendation that IIROC adopt pre-borrow requirements and mandatory buy-in and close-out requirements.	• While the focus of the Consultation Paper was on activist short selling activities, we acknowledge the comments raised about the short selling regulatory regime in general. • We note that the CSA and IIROC continue to monitor the regulatory regime applicable to short selling and refer the commenters Joint CSA-IIROC Staff Notice 23-329, also published today, which provides additional discussion of these broader issues.

Summary of comments	Responses
• Some, however, noted that there is no evidence that "naked" short selling is a problem. • One of these commenters thought that instituting pre-borrowing requirements similar to the US may introduce an additional regulatory burden, and that focusing on buy-ins may be a better approach. • One commenter indicated that there is no connection between the number of failed trades and activist short selling, however, IIROC's rules regarding short selling should be more stringent **Short selling in connection with prospectus offerings and private placements / Taskforce Recommendation 26** • A few commenters provided their views on a recent proposal by the Ontario Modernization Taskforce that short selling in connection with prospectus offerings and private placements should be prohibited. • These commenters were concerned about the potentially harmful impact of this activity on issuers and investors and supported the taskforce's proposal to adopt a rule prohibiting market participants and investors who previously sold short securities form acquiring them under prospectus or private placements. • One commenter expressed an alternative view and indicated that there are legitimate reasons why such transactions would occur, and they are not necessarily an indication of market manipulation. **Other recommendations** • Three commenters recommended that regulators reinstate the uptick rule; one commenter suggested that there is data to help inform whether there is value in reinstating this rule. • Some commenters suggested that CSA could consider statutory civil liability for misleading or untrue statement. • Some commenters indicated that a minimum holding period should be applicable to a short seller. Other commenters indicated that they do not support a proposal for a 10-day holding period because "it would tacitly amount to a ban on all activist short selling." • Other commenters noted that activists should be required to adhere to the same standards of professionalism and objectivity as required by the CFA Institute of its members. • Other commenters noted that any person publishing a statement concerning the veracity of an issuer's public disclosures should disclose that person's position. • Some commenters also noted that a regulatory review should be undertaken on naked short selling, failed trades, and the impact of removal of the tick test.	• To the extent that there is data available to support adopting an uptick or modified uptick rule in Canada, we would encourage that this be shared with the CSA and IIROC. • On the issue of the applying the CFA Institute standards, staff note that this raises the issue of defining which group who would fall within the definition of activist short sellers and what type of framework would apply to impose standards and govern activist short sellers.

Summary of comments	Responses
Question 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?	

• Examples provided by commenters of problematic conduct that may not fall within the scope of existing offences include:
  ○ using false or misleading information or inflammatory rhetoric that negatively impacts market price but may not have a material impact;
  ○ making statements with anonymity or intentionally obfuscating the identity of the person releasing the statements;
  ○ casting non-specific or open-ended accusations against an issuer or management that are difficult to defend against or disprove;
  ○ making statements with manipulative intent, such as when a contingent or closing order is already placed in market when the information is disseminated; and
  ○ targeting an issuer when the issuer cannot respond such as during a quiet period or when the statement is related to a pending material change announcement such as an M&A transaction that cannot be publicly disclosed.
• One commenter noted that existing securities regulation or offences could be modified to explicitly capture the above activities without the need for new regulation or offences that could stifle and deter short selling activity generally.
• Two commenters noted that the lack of registration or formal oversight by a professional body of activist short sellers created potential jurisdictional issues to addressing problematic conduct that did not fall within the scope of existing securities offences.
	• Staff acknowledge that there may be problematic conduct or tactics employed during a campaign which does not fall within existing securities offences. This conduct may not, however, necessarily rise to the threshold of requiring an outright prohibition under securities legislation. Staff acknowledge that the use of such tactics has the potential to impair confidence in the capital markets.
	• We also acknowledge that demonstrating market impact of statements is a requirement for market manipulation and misleading statement offences in most CSA jurisdictions.
	• With respect to the lack or registration, as noted above, this raises the issue of defining which group who would fall within the definition of activist short sellers and what type of framework would apply to impose standards and govern activist short sellers.

Question 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?	
• Numerous comments indicated that an elimination of market impact assessment and materiality threshold can be expected to have a significant chilling effect on short selling. Some commenters suggested that any benefit to these changes will be outweighed by the costs and that actual market impact should be a crucial element to establish. • Several comments indicated a reasonable investor standard may be a good balanced approach to improving public disclosure without adding excessive burden to market participants.	• We thank the commenters for sharing their views.