CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

# CSA/CIRO Staff Notice 23-332
# *Summary of Comments and Responses to CSA/IIROC Staff Notice 23-329* Short Selling in Canada

November 16, 2023

On December 8, 2022, the Canadian Securities Administrators (**CSA**) and the Investment Industry Regulatory Organization of Canada (**IIROC**, a predecessor organization to the Canadian Investment Regulatory Organization (**CIRO**)) published Joint CSA / IIROC Staff Notice 23-329 Short Selling in Canada (**Staff Notice 23-329**) to provide an overview of the existing regulatory landscape surrounding short selling, give an update on current related initiatives and request public feedback on areas for regulatory consideration.

The CSA and CIRO received 23 comment letters from a wide range of stakeholders, including industry associations, exchanges, dealers, issuers and individuals.

Staff of the CSA and CIRO (**we**) thank all of the commenters for taking the time and effort to respond. Copies of these comments are publicly available on the websites of the Autorité des marchés financiers, the CIRO and the Ontario Securities Commission. Appendix A provides a summary of the comments received and responses prepared by CSA and CIRO staff.

There was no consensus on the appropriate regulatory regime for short selling. Some commenters believed the current rules governing short selling were adequate and needed only minor amendments, if any. Others believed that more substantial amendments were needed. Only one commenter believed short selling should not be allowed. Several commenters urged regulators to consider the impact of the move to a T+1 settlement cycle next year on any regulatory initiatives.[1]

We reiterate comments made in Staff Notice 23-329 that short selling plays an important role in the financial markets by promoting transparency and contributing to liquidity and price discovery, and thus contributing to market integrity and investor protection. Short selling can also be a legitimate investment management strategy used for mitigating portfolio risk by hedging short positions against long positions, so that losses are mitigated regardless of the direction of the market. As with many other trading-related activities, short selling may be a means to manipulate the market. For this reason, a balanced regulatory regime needs to address activity that harms issuers, investors and the capital markets generally (which is not limited to short selling). It also needs robust oversight

[1] *See* CSA Staff Notice 24-318 – Preparing for the Implementation of T+1 Settlement (https://lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/0-avis-acvm-staff/2022/2022fev03-24-318-avis-acvm-en.pdf)

so that harmful conduct is detected and addressed. As noted in some comment letters, an overly restrictive regime could inhibit legitimate short selling, with negative implications for liquidity and price discovery.

**Areas for Further Study**

The following areas were discussed in the comment letters as possible matters for further study and analysis:

***Pre-Borrow Requirements***

Some commenters believed that short sellers should have to make arrangements to borrow the securities sold prior to entering a short sell order on a marketplace. Others suggested that a less stringent "locate" rule be adopted, which would impose a duty on a dealer making or facilitating a short sale to have a reasonable belief that the shares are readily available for borrowing in time to deliver on the settlement date but would not necessarily require making arrangements to borrow in advance. Others cautioned that there is no evidence that settlement failures are a significant problem and regulators must be mindful of additional costs that any new requirements in this area would impose on market participants.

***Different Treatment of Junior Issuers***

There was relatively minimal support for a short sale regime that differentiates junior and senior issuers. Some commenters believed that more research and analysis is needed before any rules in this area are proposed.

***Shortening Timeline for Reporting Failed Trades***

There was no consensus that the current CIRO requirement to report failed trades that remain outstanding 10 days after the expected settlement date be shortened. Some commenters believed this should not be considered until the industry has adjusted to the move to T+1 settlement next year.

***Transparency***

There were a number of suggestions running the gamut from EU-style public short position reporting (at the short seller level) to prohibiting brokers making a short sale from using the "anonymous" broker number.[2] While many commenters believed more transparency of short sales,

[2] The anonymous option enables brokers to appear as a generic broker #001 on public order and trade records.

short positions and failed trades would be beneficial to the market, others cautioned that too much transparency could inhibit short selling, with negative implications for liquidity and price discovery.

***Mandatory Close-Outs/Buy-Ins of Short Positions***

A number of commenters supported introducing mandatory buy-ins[3] or close-outs[4] of short positions, similar to rules in place in the U.S. and adopted but not yet in force in the European Union.

***Next Steps***

While no specific changes to regulatory provisions are being proposed at this time, staff will further review whether any changes may be appropriate in the Canadian context. Any policy proposal that results from this work would be published for public comment in the normal course.

CIRO is actively considering ways to clarify and support its existing requirement to have a reasonable expectation to settle a short sale trade on the settlement date. Subject to CIRO Board approval, it is expected that proposals will be published for comment in early 2024. These proposals by CIRO do not preclude additional work in this area.

In addition, the CSA and CIRO are expected to form in early 2024 a staff working group to more broadly examine short selling issues in the Canadian market context, beginning with an analysis of potential mandatory close-out or buy-in requirements. Any proposed CSA or CIRO rule changes that result from the working group's recommendations or otherwise, including regulatory responses to international developments, would be published for public comment in the normal course. Any proposals will take into account the impact of the move to T+1 settlement cycle implementation.

***Questions***

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

---

[3] A buy-in is initiated by a buyer who has not received the securities purchased on the date for settlement. The buyer purchases securities in the market to cover the delivery failure, and the seller who failed to deliver is responsible for any increase in price between the failed trade and the buy-in trade(s). The European Union Central Securities Depositories Regulation (**CSDR**) and associated regulatory technical standards require a buy-in to be initiated within a prescribed period. These provisions have been enacted but the date of entry into force has been delayed multiple times. They are now scheduled to enter into force on November 2, 2025, but the entire CSDR is under review.

[4] Close-out requirements apply to a dealer that has failed to deliver securities sold on the date for settlement (whether in connection with a long sale or short sale). The dealer must close out the fail position by borrowing securities or purchasing them in the open market. This is the approach in SEC Rules 203 and 204, which set out timeframes by which the close out must occur.

| | |
|---|---|
| **Serge Boisvert**<br>Analyste expert à la réglementation<br>Direction de l'encadrement des activités de négociation<br>Autorité des marchés financiers<br>Serge.Boisvert@lautorite.qc.ca | **Catherine Lefebvre**<br>Analyste experte aux OAR<br>Direction de l'encadrement des activités de négociation<br>Autorité des marchés financiers<br>Catherine.Lefebvre@lautorite.qc.ca |
| **Roland Geiling**<br>Analyste en produits dérivés<br>Direction de l'encadrement des activités de négociation<br>Autorité des marchés financiers<br>Roland.Geiling@lautorite.qc.ca | **Tim Baikie**<br>Senior Legal Counsel, Market Regulation<br>Ontario Securities Commission<br>tbaikie@osc.gov.on.ca |
| **Yuliya Khraplyva**<br>Legal Counsel, Market Regulation<br>Ontario Securities Commission<br>ykhraplyva@osc.gov.on.ca | **Kevin Yang**<br>Manager, Regulatory Strategy & Research<br>Ontario Securities Commission<br>kyang@osc.gov.on.ca |
| **Jesse Ahlan**<br>Senior Regulatory Analyst, Market Structure<br>Alberta Securities Commission<br>jesse.ahlan@asc.ca | **Sasha Cekerevac**<br>Manager, Market Oversight<br>Alberta Securities Commission<br>Sasha.cekerevac@asc.ca |
| **Michael Grecoff**<br>Securities Market Specialist<br>British Columbia Securities Commission<br>MGrecoff@bcsc.bc.ca | **Theodora Lam**<br>Acting Director, Market Policy<br>Canadian Investment Regulatory Organization<br>tlam@iiroc.ca |
| **Amélie McDonald**<br>Legal Counsel, Securities<br>Financial and Consumer Services Commission (New Brunswick)<br>amelie.mcdonald@fcnb.ca | **Tyler Ritchie**<br>Market Surveillance – Investigator<br>Manitoba Securities Commission<br>tyler.ritchie@gov.mb.ca |

## Appendix A

### Summary of Comments and Responses to Joint CSA / IIROC Staff Notice 23-329 – *Short Selling in Canada*

**List of Commenters**

1. Alève Mine
2. Alternative Investment Management Association
3. Canadian Advocacy Council of CFA Societies Canada
4. Canadian Investor Relations Institute
5. Canadian Securities Exchange
6. Canadian Security Traders Association, Inc
7. Cboe Global Markets, Inc., Neo Exchange Inc. and MATCHNow
8. Christian Levine Law Group
9. Cybin Inc.
10. Grant Sawiak
11. Investment Industry Association of Canada
12. John Tyler
13. McMillan LLP
14. PI Financial Corp
15. Portfolio Management Association of Canada
16. RBC Capital Markets
17. Saputo Inc.
18. Save Canadian Mining
19. Scotiabank Global Banking and Markets
20. Stikeman Elliott LLP
21. TD Securities Inc
22. TILT Holdings Inc.
23. TMX Group Limited

| Summary of Comments | Responses |
|---|---|
| **General Comments** | |
| • A majority of the commenters were of the view that short selling is a legitimate trading practice critical for our capital markets as it improves liquidity, facilitates price discovery and market efficiency. Only one commenter thought short selling should be prohibited.<br>• Many commenters view Canada's regulatory regime regarding short selling as fundamentally sound, striking an appropriate balance between risk management and efficiency. Some commenters viewed the Canadian regime as less stringent than in Europe, Australia or US and called for more regimented guidelines/rules around short selling.<br>• Short selling is concerning to some commenters as it has a risk of becoming abusive and is associated with the risk of dissemination of false and misleading statements. Others noted that manipulative and deceptive acts can be undertaken in the marketplaces with or without borrowing securities. | • We would like to thank all those who submitted their comments.<br>• As stated in the Staff Notice 23-329, our view is that short selling is a legitimate trading practice that helps market participants manage risk, contributes to market liquidity and price discovery by including negative views in pricing. We believe the regulatory regime should address activity that increases risks to investors and makes markets less efficient.<br>• Overall, we recognize the negative effects of abusive short selling practices and encourage anyone that have evidence of short seller misconduct to contact the securities regulator in their jurisdiction. Also, CIRO continues to monitor for abusive trading strategies including those that involve short selling. In particular, through real-time market surveillance CIRO actively monitors and reviews instances of potential price manipulation in trading on a marketplace, including all long, short, and Short-Marking Exempt trades in equities.<br>• With respect to dissemination of false and misleading statements, it is a well-established offence under the Canadian securities regime.[5] Short sellers disseminating such information would be liable under that regime. |
| • A commenter claimed the Canadian settlement system is susceptible to abuses and lacks regulation and enforcement. | • Canada has a well-developed securities regulatory regime that includes prohibitions on manipulative and deceptive activities coupled with robust oversight of trading and settlement fails by CIRO and the provincial regulators. Anyone with specific evidence of misconduct, including misconduct concerning short selling or |

[5] s. 92(4.1) of the *Securities Act* (Alberta); s. 50 of the *Securities Act* (British Columbia); s. 112.3 of the *Securities Act* (Manitoba); s. 181 of the *Securities Act* (New Brunswick); s. 122(1)(b) of the *Securities Act* (Newfoundland and Labrador); s. 146(1) of the *Securities Act* (Northwest Territories); s. 132B(1) of the *Securities Act* (Nova Scotia); s. 146(1) of the *Securities Act* (Nunavut); s. 126.2 of the *Securities Act* (Ontario); s. 55.11 of the *Securities Act* (Saskatchewan); ss. 196, 197 of the *Securities Ac*t (Quebec); s. 146(1) of the *Securities Act* (Prince Edward Island); s. 146(1) of the *Securities Act* (Yukon); Rule 2.2 of the Universal Market Integrity Rules (**UMIR**)

| | |
|---|---|
| | settlement, should bring it to the attention of the applicable regulatory authorities. |
| **Question 1: Should the existing regulatory regime around pre-borrowing in certain circumstances be strengthened? What requirements would be appropriate? Specifically, should there be "pre-borrow" requirements similar to those in the U.S., as described above? Please provide supporting rationale and data.** | |
| • Commenters were split on this question.<br>A number of commenters supported the implementation of pre-borrow or locate requirements similar to US and/or EU.<br>• Some commenters noted that the Ontario Capital Markets Modernization Taskforce (**Ontario Taskforce**) in its final report concluded that Ontario short selling regime is not stringent enough and recommended that IIROC revise UMIR to require a dealer to confirm the ability to borrow securities prior to accepting a short sale order.<br>• Some commenters oppose the imposition of pre-borrow or locate requirements for the following reasons:<br>o high cost for the industry;<br>o insufficient evidence to support the requirement;<br>o Further research and analysis would be useful given the conflicting results from IIROC's Failed Trade Study (which reflected an increase in failed trades in Canada, particularly junior securities, compared to IIROC's previously published studies);<br>o dealers' practices already align with US counterparts. UMIR requirement to have a reasonable expectation to settle on settlement date is not substantially different from the locate requirement under U.S. Reg SHO, which requires a broker-dealer have "reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due" before accepting a short sale;<br>o Many institutional investors already have set processes in place to confirm borrow availability prior to short selling;<br>o adverse effects on price discovery; | • We acknowledge that the commenters did not have a unified position on this question and appreciate the commentary providing both pros and cons to locate and pre-borrow requirements.<br>• CIRO is actively considering ways to strengthen and clarify its requirement to have a reasonable expectation to settle a short sale trade on a settlement date. Subject to CIRO Board approval, it is expected that relevant proposals will be published for comment in early 2024. These proposals by CIRO do not preclude additional work in this area.<br>• We note that mandatory pre-borrow requirements may have a more adverse effect on certain types of dealers and their clients, who may not have access to the same pools of securities available to be borrowed as other dealers. This could create an unlevel playing field. |

| | |
|---|---|
| ○ disadvantageous for junior markets, dealers as well as retail and small institutional investors.<br>• A commenter recommended short sellers adopt the best practice of confirming that securities are available or are likely to be available to be borrowed. | |
| **Pre-borrow vs. locate requirements**<br>• A few commenters distinguished between the locate and pre-borrow requirements noting that the U.S. has a locate requirement.<br>• A commenter recommended a locate requirement before shorting, but not necessarily a pre-borrow. | • We thank all those who responded for their comments. |
| **Question 2: What would be the costs and benefits of implementing such requirements?** | |
| **Costs**<br>• Several commenters think that the costs and regulatory burden to market participants to implement pre-borrow requirements will be significant and should be carefully considered.<br>• Additional requirements might make certain securities harder to short and thus, negatively affect price discovery and market functioning.<br>• A commenter acknowledged that implementing a pre-borrow requirement will increase costs but believes these costs will be passed through to short sellers and will contribute to more discipline by short sellers.<br>• Some commenters noted that the cost would be minimal as most prime brokers are already subject to such requirements in other global markets.<br>• A commenter believes that that costs to implement either pre-borrow or locate requirements would be comparable to the Client Identifiers project that became effective in 2021. | • We thank commenters for sharing their views on costs and benefits of implementing the pre-borrow requirements. To the extent that any further policy analysis on this issue is conducted, comments received will be considered. |
| **Benefits**<br>The benefits of implementing pre-borrow requirements would be: | |

| | |
|---|---|
| • enhanced investor confidence and market efficiency and reduced systemic risk,<br>• increased participation of foreign investors in Canadian bought deals, and<br>• improved perception of individual market participants of the Canadian Capital Markets. | • We thank all those who responded for their comments. To the extent that any further policy analysis on this issue is conducted, comments received will be considered. |
| **Question 3: Does the current definition of a "failed trade" appropriately describe a failed trade?** | |
| • The vast majority of commenters believe that the current definition of a "failed trade" does not need to be changed.<br>• A commenter supported changing the current definition of "failed trade" to define it as any short sale that fails to deliver securities within a reasonable timeframe. | • Thank you for confirming that, overall, the current definition of a "failed trade" remains appropriate.<br>• CIRO's definition of a "failed trade" in UMIR section 1.1 for a trade resulting from a short sale means "a trade on behalf of an account that has failed to make securities available or make arrangements to borrow securities to settle the trade on the date fixed for settlement of the trade *irrespective of whether the trade has been settled in accordance with the rules or requirements of a clearing agency*." [emphasis added] |
| **Question 4: Should a timeline shorter than ten days following the expected settlement date be considered? What would be an appropriate timeline? Please provide rationale and supporting data.** | |
| • Commenters were split on this question. Several commenters support or recommend considering shortening the reporting timelines to under 10 days following the expected settlement date.<br>• Some commenters suggested that the appropriate timing should be two or three days after T+2 settlement cycle but might have to be reduced once T+1 is implemented. A couple of commenters also suggested aligning with the close-out requirements in the U.S.<br>• Several other commenters opposed the change, noting that it is likely to result in an additional compliance burden and costs for market participants. Additional analysis might be warranted after the industry has adapted to T+1 settlement cycle. | • Thank you for sharing your views with respect to the timing of failed trade reporting. To the extent that any further policy analysis on this issue is conducted, we will consider the comments received. |

| **Question 5: Should additional public transparency requirements of short selling activities or short positions be considered? Please indicate what such requirements should be and the frequency of any disclosure. Please also provide a rationale and empirical data to support your suggestions or to support why changes are not needed.** | |
|---|---|
| **Additional disclosure and frequency**<br>• Many commenters considered current transparency requirements appropriate.<br>• Some commenters supported additional transparency requirements in the form of increased frequency of disclosure of short selling activity and/or short positions. | • We note that CIRO publishes short sale trading statistics and reports twice monthly on its website.<br>• Thank you for sharing your views with respect to the timing of failed trade reporting. To the extent that any further policy analysis on this issue is conducted, we will consider the comments received. |
| **Other types of disclosure**<br>• A commenter suggested disclosure of estimated, derived short interest data on a daily basis at a cost that makes it reasonably available to all market participants.<br>• A commenter suggested including short sale markers in real-time on public market data feeds, and brokers should be prohibited from using the "anonymous" marker for short sell orders. | • To the extent that any further policy analysis will be conducted, we will consider the comments received. |
| **Publication of individual short positions**<br>• Several commenters believe that short sellers should be required to publicly disclose their short positions on a regular basis.<br>• Others believed that such disclosure should be more nuanced and had the following suggestions:<br>  ○ publication should only occur after a short seller has closed the position,<br>  ○ publication of individual short positions should only apply to short sellers that disseminate market-moving information about an issuer,<br>  ○ disclosure of identity of those individual accounts who engage in systematic short sales, but not all short sales / short positions, | • We note that several stakeholders support disclosure of individual short position on a regular basis. We thank the commenters for providing specific comments with respect to disclosure of individual short positions.<br>• To the extent that any further policy analysis is conducted on transparency requirements, disclosure of individual short positions, we will consider the comments received. |

| | |
|---|---|
| ○ consider reporting for large short positions by investment managers, as proposed by the U.S. Securities and Exchange Commission in 2022.<br>• Several commenters opposed the publication of individual short positions citing the following reasons:<br>○ reduction of firms' willingness to enter into short sales,<br>○ discouraging short selling for legitimate purposes such as hedging, and<br>○ negative impact on liquidity and price discovery.<br>• A commenter indicated that the requirement for long position disclosure is based on shareowners' ability to vote and exert control over an enterprise, which does not apply to short sellers. Additional transparency measures have the potential to unfairly punish those contributing to price discovery. | |
| **Publication of failed trade data**<br>• A few commenters supported the publication of failed trade data, pointing to the similar requirements in the U.S., Australia and EU. | • We thank all those who responded for their comments. To the extent that any further policy analysis will be conducted, we will consider the comments received. |
| **Question 6: Should additional reporting requirements regarding short selling activities be considered by the securities regulatory authorities? Please indicate what such requirements should be and the frequency of any disclosure. Please also provide a rationale and empirical data to support your suggestions or to support why changes are not needed.** | |
| • Most of the commenters who responded to this question did not see the need to introduce additional reporting requirements and were satisfied with the current regulatory reporting.<br>• A commenter encouraged the regulators to assess how more stringent short selling reporting is working in other jurisdictions and whether it might have resulted in fewer "short and distort" campaigns.<br>• A few commenters did support additional reporting noting that current bi-weekly reporting to CIRO is not sufficient for the markets and regulators to properly identify and address predatory short selling. It | • We appreciate that most of the commenters do not support additional reporting requirements. We thank the stakeholders who offered specific suggestions regarding additional reporting. To the extent that any further policy analysis is conducted, we will consider the comments received. |

| | |
|---|---|
| was noted that reporting by global custodians and international dealers is lacking.<br>• A commenter suggested to consider a new requirement for institutional investment managers to report short positions on a monthly basis and then make aggregate short data publicly available.<br>• A commenter recommended reviewing the existing Extended Failed Trade reporting framework, which it considered to be cumbersome and ineffective at identifying problems, and issuing clear guidance on the reporting process. | |
| **Question 7: As noted above, IIROC's study of failed trades showed that correlations between short sales and settlement issues in junior securities were more significant, and that junior securities experience more settlement issues compared to other securities. Should specific reporting, transparency or other requirements be considered for junior issuers? Please provide additional relevant details to support your response.** | |
| • The vast majority of commenters believed that the requirements should be the same for both junior and senior issuers.<br>• Only a few commenters suggested that it would be appropriate for the junior segment to have more frequent public disclosure of short positions, more prescriptive buy-in requirements and align transparency requirements with the U.S. Reg SHO.<br>• Several commenters suggested further research and analysis in this area. | • We appreciate the majority of commenters reporting that transparency and other requirements should be applied equally to both senior and junior issuers. To the extent any further policy analysis is conducted in this area, we will consider the comments received. |
| **Question 8: Would mandatory close-out or buy-in requirements similar to those in the U.S. and the European Union be beneficial for the Canadian capital markets? Please provide rationale and data substantiating the costs and benefits of such requirements on market participants.** | |
| • The commenters were split on this question.<br>• Many commenters generally supported mandatory buy-in requirements citing the following reasons:<br>  ○ Canada's regulations are inadequate compared to the requirements in other jurisdictions (US, EU and Australia),<br>  ○ the most recent 2022 Failed Trade Study demonstrates that failed trades are of predominant concern in Canada. In addition, International Organization of Securities Commissions | • We appreciate that commenters are split on this issue and provided arguments both for and against implementing mandatory close-out / buy-in requirements.<br>• The International Monetary Fund's 2014 Financial Sector Assessment Program - IOSCO Objectives and Principles of Securities Regulation found the Canadian regulatory regime compliant with IOSCO principles. |

| | |
|---|---|
| (**IOSCO**) 2009 Regulation of Short Selling Report recommends imposing a strict settlement (such as mandatory buy-ins) of failed trades as a minimum requirement,<br>o implementing such measures would increase investor confidence and market efficiency and align Canada's regulations more closely to the practice in global markets,<br>o the benefits of reducing predatory short selling and protecting investors and companies outweigh the costs such as additional compliance costs for broker dealers.<br>• Some of commenters indicated mandatory buy-in may not be required if there were sufficient locate or pre-borrow requirements.<br>• A commenter noted that mandatory buy-ins should only be considered after the market has adjusted to T+1 settlement.<br>• A commenter noted that the administrative delays, causing a delivery failure related to transfer agents in connection with long sales, should be considered if implementing mandatory buy-ins. | |
| • Some commenters were indifferent or support further analysis on mandatory buy-ins. | • We thank all those who responded for their comments |
| • Several commenters opposed the implementation of mandatory buy-ins citing the following reasons:<br>o there is insufficient evidence or data supporting such measures,<br>o buy-ins should be voluntary. A mandatory regime would create inefficiency in securities settlement, act as a barrier to entry, and impact market liquidity negatively,<br>o the vast majority of failed trades is administrative or operational. Mandatory close-out or buy-ins would lead to undue risk on the settlement process and unnecessary losses and trigger additional fails. A purchase resulting from a mandatory buy-in to cover a short would be likely to fail, since | • We thank all those who responded for their comments. To the extent that any further policy analysis will be conducted, we will consider the comments received. |

| | |
|---|---|
| such buy-ins would likely face intermediaries seeking to earn an arbitrage profit and would be selling short, and<br>○ a mandatory buy-in requirement is not in the best interest of market participants, investors, issuers or the Canadian capital markets. It would impact both short sales and long sales that do not settle on settlement data. It could also hurt capital raising in the junior markets through perceived reduction in value of offerings and associated warrants.<br>• A commenter indicated that if required, buy-in requirements should only be in the form of policies and procedures for carrying dealers to reasonably avoid extended failed trades among their clients.<br>• A commenter noted that, while there is insufficient evidence to require mandatory buy-ins, in terms of costs, focusing on buy-ins (rather than pre-borrow or locate) would be a tailored response on the perceived problem and the responsible parties. | |
| **Other comments** | |
| **IIROC's Failed Trade Study (2022)**<br>• Some commented on IIROC's 2007 and 2022 Failed Trade Studies noting that it was difficult to draw meaningful comparisons between the two studies and thus, to assess whether IIROC's conclusions from the 2007 Failed Trade Study were correct, or remain correct, and thus form an appropriate basis for the current regime. | • The 2022 Study was not intended to be a refresh of the 2007 Study and was not designed to be directly compared to the 2007 Study. CIRO was able to use CDS data and new capabilities in the 2022 Study with a broader scale and depth of analysis. |
| **CSA Activist Short Selling Update (2022)**<br>• A commenter believed there was a discrepancy in data used in 2022 CSA Activist Short Selling Update: instead of using issuers targeted by campaigns, the data used reflects the number of campaigns launched. Commenter's analysis of the same data was contrary to the CSA's findings that a higher proportion of US based issuers are targeted by activist short sellers than Canadian based issuers. | • The commenter's claims were based on an incorrect interpretation of activist short seller data, prepared by Insightia, the same data source used by the CSA. The CSA's analysis shows the number of issuers targeted and not the number of campaigns. Most issuers had only one campaign launched by one activist, therefore the difference between campaign and issuer counts was insignificant.<br>• The CSA's comparison with US markets was based on an average estimate over multiple years using data from the World Federation |

| | |
|---|---|
| | of Exchanges, which the CSA acknowledges does not include junior exchange issuers. However, including these issuers would not significantly change the CSA's conclusions that a far greater proportion of U.S. issuers are targeted compared to Canadian issuers. |
| **IOSCO Principles**<br>• Several stakeholders commented on the compliance with IOSCO Principles on the Regulation of Short Selling (**IOSCO Principles**).<br>• Some commenters believed that the current regulatory framework for short selling in Canada is generally consistent with the with IOSCO Principles.<br>• Some commenters thought that it may not be consistent with the first two IOSCO Principles.[6] | • As noted above, the International Monetary Fund's 2014 Financial Sector Assessment Program - IOSCO Objectives and Principles of Securities Regulation found the Canadian regulatory regime compliant with IOSCO Principles. |
| **Other regulatory initiatives**<br>• Some commenters strongly urged that any changes should wait until after the industry has adapted to the move to T+1. | • We appreciate that other regulatory initiatives might need to be considered prior to or in parallel with any proposals in relation to the short selling regime. In particular, we are mindful of the upcoming transition to a T+1 settlement cycle. |
| **Guidance on reasonable expectation to settle**<br>• Some commenters viewed CIRO Notice 22-0130[7] as implementing a change in standard.<br>• A commenter viewed this notice as requiring a new higher standard for "reasonable certainty" that a participant can access sufficient securities to settle any resulting trade by settlement date.<br>• A commenter indicated that while the reasons for and impact of this change was not explained in the notice, it would be difficult for a short seller to engage in repeated "naked" shorts under the existing UMIR regime, since continuing to trade after repeated failed trades would force the dealer to cease accepting the short sell orders | • No new interpretation was provided in CIRO Notice 22-0130. The guidance only clarified the existing UMIR Policy 2.2 requirement. CIRO is actively considering ways to strengthen and clarify its requirement to have a reasonable expectation to settle a short sale trade on a settlement date. |
| **Uptick rule**<br>• Some commenters asked for the re-introduction of the uptick rule. | |

[6] IOSCO Report on the Regulation of Short Selling sets out the following Four Principles for the effective regulation of short selling:
a) Short selling should be subject to appropriate controls to reduce or minimize the potential risks that could affect the orderly and efficient functioning and stability of financial markets;
b) Short selling should be subject to a reporting regime that provides timely information to the market or to market authorities;
c) Short selling should be subject to an effective compliance and enforcement system;
d) Short selling regulation should allow appropriate exceptions for certain types of transactions for efficient market functioning and development.

[7] Notice 22-0130 – Rules Notice – Guidance Note – ***Guidance on Participant Obligations to have Reasonable Expectation to Settle any Trade Resulting from the Entry of a Short Sale Order*** (August 17, 2022).

| | |
|---|---|
| | • To the extent that any further policy analysis on this issue is conducted, we will consider the comments received. |
| **U.S. rules and proposals**<br>• **SEC Rule 13f-2**<br>Some commenters asked regulators to consider requirements similar to the recently-adopted SEC Rule 13f-2, which will require, among other things, certain investment managers to report large short positions on a monthly basis.<br>• **SEC Rule 14e-4**<br>A commenter suggested aligning with SEC's Short Tender Rule 14e-4 which precludes persons to tender more shares than they own.<br>• **SEC's circuit breaker rule**<br>Some commenters asked regulators to consider a requirement similar to SEC's circuit breaker rule (Rule 201 of Reg SHO). One commenter indicated this requirement should only be implemented for issuers on a non-venture exchange. | • To the extent that any further policy analysis on this issue is conducted, we will consider the comments received with respect to SEC rules. |
| **Prospectus offerings and Private Placements**<br>• Some commenters asked regulators to restrict short selling in connection with prospectus offerings and private placements. | • To the extent that any further policy analysis on this issue is conducted, we will consider the recommendations by the taskforce. |
| **Statutory private right of action**<br>• A commenter recommended a statutory private right of action for target issuers and their shareholders with respect to short campaigns. | • We note that implementation of this suggestion will require amendments to securities legislation. |
| **Ontario Capital Markets Modernization Taskforce (Ontario Taskforce)**<br>• Several commenters suggested that recommendations from the Ontario Taskforce should be considered. | • To the extent that any further policy analysis on this issue is conducted, we will consider the recommendations by the taskforce. |