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British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

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Dear Sirs/Mesdames,

RE: CSA Consultation Paper 25-403 – Activist Short Selling

Anson Advisors Inc. ("**AAI**") is a private asset management firm registered with the Ontario Securities Commission (the "**OSC**") as an exempt market dealer and portfolio manager. AAI is the adviser to several investment funds (the "**Anson Funds**"). Anson Funds Management LP ("**AFM**") is an OSC-registered investment fund manager and is the manager of the Anson Funds (AAI, AFM and the Anson Funds are collectively referred to herein as "**Anson**"). Anson is pleased to have the opportunity to provide comments on several of the consultation questions posed in connection with *CSA Consultation Paper 25-403 – Activist Short Selling* published December 3, 2020 (the "**CSA Consultation Paper**").

About Anson

Anson was founded in 2003 and utilizes multiple approaches to execute its investment program, which includes both long and short strategies as well as opportunistic investing. Anson's flagship fund, Anson Investments Master Fund LP, is a long-short hedge fund with an objective of generating consistent and superior returns over time while maintaining low volatility and approximately market-neutral positioning using long and short strategies agnostic to sector or geography. Anson's short-specific strategies include: (i) overvalued companies, based on fundamental analysis, (ii) frauds, fads, scams, (iii) reversals, (iv) arbitrage, and (v) thematic/industry bubbles. As of the date hereof, the AUM of the Anson Funds is $1.1bn USD.

General Comments and Observations

At the outset we wish to applaud the CSA for pursuing this consultation on these timely issues. There is a great deal of misinformation about the benefits and risks associated with short selling generally and the activities of activist short sellers in particular. We are concerned that the resulting lack of clarity will give rise to an imprecise regulatory response which will lead to unintentional harm to market efficiency, transparency and confidence in the markets generally. Anson believes that, contrary to what seems to be the widely held negative perception about short selling in Canada, short sellers play a critical part in promoting transparency, contributing to market liquidity and price discovery. These attributes significantly contribute to capital market integrity and the protection of investors and are therefore meaningfully aligned with the objectives of securities laws and regulators in Canada.

The more questions that are asked, and the more answers that are sought through consultation and dialogue, combined with examination of empirical evidence related to market impact, the more informed and appropriately targeted the regulatory response will be. So again, we thank you for this opportunity. While we appreciate that the CSA Consultation Paper acknowledges the risks and costs borne by short sellers, we believe the focus of concern should not be on short selling activity *per se*, but rather on addressing conduct associated with a variety of activities connected with market manipulation and deceptive practices. The lack of clear regulatory guidance regarding these types of practices makes it challenging for market participants to navigate the existing Canadian regulatory framework. We believe that the CSA ought to strive to ensure that any such supplemental guidance preserves and maintains the ability of short sellers to continue to provide the checks and balances on other market participants in support of regulators' mandates.

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

Short sellers (activist or otherwise) play a critical role in public markets. Two fundamental pillars of public markets are: (i) market efficiency through price discovery and transparency and (ii) strong corporate governance. Short selling functions to strengthen both pillars.

Short selling can incentivize participants to scrutinize public company disclosure, financial statements and company activity. This external governance mechanism serves to increase the depth of information publicly available, which maintains a consistent—and positive—pressure on companies to remain on-side in their conduct, and ultimately strengthens price discovery in public markets. Studies indicate a strong positive correlation between the threat of short selling and good

governance.[1] [2] Indeed, short sellers have exposed some of the most egregious instances of public company fraud in history. This is the capacity that defines good short selling actors.

Activist short selling can facilitate the exposure of information and shortcomings, falsities or misrepresentations touted by stock promoters. Short selling can be an effective check on misleading stock promotion and can be instrumental in supporting regulators' efforts in monitoring capital market participants. There are ample examples where information provided by short selling has led to regulatory action with positive outcomes benefitting the investing public.

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

Campaigns that are predicated on the manipulation of information or the manipulation of market activity are, of course, problematic. This is true of both speculative long campaigns and short campaigns.

We are not sure how often problematic short selling Campaigns occur in practice. When Anson deploys a short selling strategy, we conduct extremely thorough levels of due diligence. Anson believes that other Canadian short sellers apply similar approaches to due diligence prior to implementing any short sell strategy. Market experience in Canada and the United States demonstrates that short selling investment strategies are generally only successful when the investor has high conviction based on meticulous research developed over many months.

In addition, and particularly in Canada, the heightened scrutiny on short selling and the negative perception of short sellers results in short sellers seeming to be held to a higher standard than long investors/promoters. Anson therefore takes an extremely disciplined and rigorous approach to due diligence of publicly available information in support of our short positions which we believe exceeds that of many long investors/promoters.

Anson is not aware of any data supporting the proposition that most short selling Campaigns are themselves problematic or conducted for improper purposes. Anson believes that this thesis has been propagated by issuers seeking to protect their stock prices from the downward pressure of short sellers. This is not to say that short sellers cannot be wrong in their view, just like long sellers are sometimes incorrect. However, so long as short sellers ground their strategies in substantive diligence findings based on publicly available information, there is nothing inherently manipulative or deceptive about short selling. Perhaps the focus should be on how the regulatory framework ensures that compliant and useful short seller activism is preserved and supported, as opposed to thwarting problematic activism, given the latter has not been shown to be prevalent and the former can be immensely helpful to regulators.

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[1] Caby, Jerome, "The Impact of Short Selling on Firms: An Empirical Literature Review," *JBAPF*, March 31, 2020 accessed at https://jbafp.jams.pub/article/2/3/64

[2] Arabi, Ibrahim Jamie, "Short Sale Transactions in Canada: Striking a Balance Between Investor Protection and Market Efficiency," December 27, 2018. Available at SSRN.

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?

While the phrase "short and distort" is a commonly used term, it is more often than not an imprecise one. Shorting in and of itself is not a distortive mechanism, but rather a mechanism for price discovery. Despite this, the activities of short sellers are very frequently paired with this terminology, regardless of the underlying merits of a Campaign or associated findings. This is not the case on the long side, where the phrase "pump and dump" is used selectively, with promoters given more deference because of their position in promoting issuers and their securities as opposed to challenging those issuers.

If meant to convey inappropriate use of short selling and associated tactics, the phrase "short *to* distort" is more apt, as it more appropriately highlights what is actually problematic, which is the intentional spreading of misinformation to manipulate the markets. This is not the vast majority of short sellers. The term "short and distort" takes a misinformed broad-brush approach to understanding what it is that short sellers actually do.

Many activist short sellers have opted to keep their identities anonymous given the aggressive and abusive tactics that can be used by those on the long side when the short sellers' identities are known. Additionally, anonymous short sellers want to avoid costly litigation that is commenced as an intimidation tactic. Pseudonymous short sellers may therefore be protecting themselves from such attacks in order to avoid such backlash and to ensure that the focus of their short reports and research is on the underlying company, as opposed to the public war that is likely to unfold over social media or other channels.

Given this understandable need to preserve anonymity, it should be the content of short sellers' findings that are the focal point of a Campaign, as opposed to the author or source(s). Any attempt to identify market harm should be based on empirical and measurable evidence and the contemplated regulatory response should be thoroughly assessed to ensure it surgically targets the identified harm and mitigates the risk of unintended consequences.

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.

There are a number of factors that could lead to an increase. It is likely that the rise of newer sector entrants, such as cryptocurrency and cannabis stocks in 2017-2018 encouraged and attracted a lot of stock promoter activity and perceived information gaps. These type of "bubble" characteristics have not existed in a specific sector from the end of 2018 through 2020 and thus the lower number of activist cases seem sensible. However, early activity in 2021 has shown indicia that we may be entering a new phase. United States capital markets have effectively been closed to new issuances of cryptocurrency and cannabis stocks and therefore, new entrants in these industries use the Canadian markets. Combined with the fact that stock promoters are typically attracted to these types of sectors that appeal to retail investors, we expect short selling reports to rise in the near future.

It would seem that there may be a correlation between heightened short interest in certain rising and possibly bubble-prone sectors, in which access to tested information is perceived to be limited or in connection with heavily promoted stocks in which fundamental analysis does not form part of an investor's decision to take a long position.

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.

There may be a number of reasons why Canadian markets attract activist short selling, although, as shown by the findings in the CSA Consultation Paper, Campaigns were not more prevalent in Canada than south of the border or in foreign jurisdictions. However, the rules around long stock promotion are less strict in Canada. For example, payments don't have to be disclosed where a campaign is characterized as "raising awareness" about a company, and even if paid promotion is disclosed, the amount doesn't have to be specified.[3] In Canada, there have been numerous egregious examples on the long side of overvalued securities, particularly in those industries referenced in our response to question 5 above (but in others as well) and in connection with transactions involving reverse takeover transactions which are more easily undertaken in Canada, where, in either case, activist short sellers have identified a clear need to publish reports in order to correct misinformation impacting stock prices. Because there are less activist short selling campaigns in Canada than in other countries, it is generally easier for overvalued and overhyped stocks to subsist at these inflated levels. However, we do not view activist short selling as a "vulnerability" that the Canadian markets are susceptible to. Rather, it is a tool to assist regulators in fulfilling their enforcement and policy objectives and a mechanism to promote price discovery and the other corrective benefits that are discussed herein.

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?

We do not see that issuers have particularly challenging limitations in terms of their ability to respond to such allegations. If the issuer can provide information to refute the content of the Campaign, it can and should do so. Simply referring to the short seller as one undertaking "short and distort" tactics, however, is not a real response. Similarly, an issuer stating that the short seller must be biased given that the short seller will profit from a drop in the issuer's stock price is also an empty rebuttal, if it does not speak to the position advanced in a report. An issuer can also choose not to respond to an activist short seller at all.

Significant price decreases connected with short reports should not occur if the short report is based on false or misleading information and it is shown to be such. To our knowledge, the short reports that are most impactful on stock prices are well researched, the product of extensive due diligence, and therefore, materially accurate. Issuers and long investors need not worry about false or misleading reports, as over time the authors of these reports, or the forums where such reports are posted (in the case of those reports that are published anonymously), will not be taken into

[3] McGee, Niall, "How the COVID-19 Pandemic Fuelled a Boom in Canadian Stock Promotion Scams," *The Globe and Mail*, December 30, 2020.

consideration by the markets, and the impact on the underlying stock price will be minimal, if any. There are multiple examples of stock prices not reacting at all in response to published short reports in cases where the market does not deem such reports to be relevant and reliable.

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

Issuers may be reluctant to approach the regulators due to concerns regarding the costly and time-consuming nature of an investigation, along with the threat of increased scrutiny. We can only speculate on this. Further, the current climate of hostility toward short sellers suggests that issuers may be approaching regulators as a retaliatory tactic, rather than out of genuine concern, or as a way to camouflage and distract from the underlying business issues and operational failures that are the subject of activist short seller Campaigns. In such cases, we would hope that a regulator would require the issuer to provide information, if any, which disqualifies any inaccuracies in the alleged unfair campaign. Whistleblower programs in jurisdictions may also facilitate a less costly avenue to convey a complaint.

Regardless of whether an issuer approaches a regulator with respect to any alleged targeting by a short seller, regulators should take an unbiased approach in reviewing the content of the Campaign and associated findings in order to determine whether proactive investigation of the issuer is warranted. Such findings can be a helpful tool for regulators, often including an in-depth investigation on potential bad actors already having been undertaken by the short seller.

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.

We believe that the current regulatory framework is sufficiently equipped with tools to address the actions of bad actors in capital markets in respect of these matters. Both sections 126.1 and 126.2 of the *Securities Act* regarding market manipulation and misleading and untrue statements, are effective in protecting against intentionally distortive short selling. These provisions address the main issue with such instances of activist short selling, which is the manipulative intent, and not the act of short selling itself. Additionally, the Universal Market Integrity Rules ("**UMIR**") provide significant protection against activist short selling that is abusive. UMIR rule 3.2, for example, provides the Investment Industry Regulatory Organization of Canada (IIROC) with the power to deem any security ineligible for short selling. Dealers are also required to report their short positions and must report any failed trades. This allows for effective regulation without restricting the market's ability to function.

The OSC's public interest jurisdiction can be useful in addressing activities that may fall short of strictly contravening law but are contrary to articulated guidelines and regulatory expectations to which market players are meant to follow.

We do note that new regulations aimed at targeting promotional activities, specifically the British Columbia *Securities Act,* fail to adequately address the current issues by removing the material requirement for statements to be "misleading or untrue" and the requirement that statements have a significant effect on the market price of a security in order to invite scrutiny. This invites the opportunity for complaints that may not have merit. A high volume of spurious or immaterial

complaints could over burden the regulator, which could allow manipulation to occur undetected. Additionally, promoters of the security on the long side would use this opportunity to engage with the regulators as a tactic to perhaps try to distract from "pump and dump"-type activity. It also becomes more difficult to assess what rises to the level of market manipulation when the materiality threshold is removed. We believe it would be beneficial for the regulators to issue detailed guidance about which practices are acceptable or unacceptable. This would assist in targeting manipulative and distortive short selling practices and in identifying frivolous complaints.

Rather than imposing a new set of mandates in the form of statutory amendments or rules, and in light of a quickly evolving capital markets, we believe that it would be more effective to form a working group to establish guidelines. Anson would be pleased and enthusiastic to participate in such a group.

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?

We believe that the current disclosure regime is adequate and any shift in favor of increased disclosure may have a negative impact on capital markets. Primarily, public disclosure opens up short sellers to retaliation from target companies and even significant financial losses. Public disclosure may also invite regulatory scrutiny that is not warranted, which in turn could lead to a waste of time and resources on an investigation that proves fruitless. Additionally, a number of studies have demonstrated that mandatory disclosures lead to a decrease in short selling—and the concomitant decrease in the quality of public company governance. Essentially, we believe that imposing greater disclosure obligations is an overbroad method of addressing bad actors that may lead to unintended negative consequences.

The best example is to look at our neighbors in the United States where there is no short position disclosure requirement. Despite this, short selling, activist or otherwise, is much better understood and accepted in the United States. The chilling effect of requiring such disclosure in Canada, combined with the already hostile perception of short selling that is widespread here, would have a disproportionate effect on short selling activity, including its critical market benefits of price discovery, being a check on governance and the promotion of transparency. Additionally, short selling disclosure could potentially incite Robinhood and "Reddit"/message board traders to try to initiate further short squeezes, similar to what we have already seen in early 2021. Some of these retail traders would utilize such disclosure to try to force losses upon those that hold the short positions.

12. In your view, do the existing enforcement mechanisms adequately deter problematic activist short selling? If so, why? If not, why not?

As discussed, we believe that the regulators are already equipped to address and deter manipulative or abusive practices in the marketplace. We have already cited a number of provisions that the regulators can utilize to address issuers and activist short sellers that are actively attempting to manipulate the market. We would however support further guidance from the regulator to clearly articulate the type of behavior that is unacceptable from both long and short market participants, and those which will be met with enforcement. We believe that further clarity on this matter would help issuers, promoters, and short sellers to align with regulatory expectations. We also think strong guidance from the regulator would assist in identifying those firms that are offside of acceptable practices.

15. Is it important that a statement have actual market impact to trigger enforcement action by securities regulators?

Actual market impact should be a crucial element to have established but if improper intent motivating activities is clear, regulators should have tools to proactively intervene if appropriate to protect the market and investors (rather than to punish after the fact).

However, regulators should also consider the opposite side of the spectrum, that is, how to further protect and enhance protection for the short sellers. The fear of public backlash, the cost of litigation, abuse tactics and bullying from long investors, is impacting short sellers' decision as to whether undertake their activities within Canada. This could ultimately lead to a loss of a layer of protection for retail investors and the loss of an invaluable investigative tool for regulators, both of which should be worrisome from the regulatory perspective.

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We would be pleased to discuss any of our foregoing comments with you further, at your convenience. If you have any questions regarding our submission, please do not hesitate to contact Laura Salvatori at GeneralCounsel@ansonfunds.com.

Yours Truly,

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