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Without Prejudice
By E-mail

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Dear Sirs/Mesdames:

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

We submit the following comments in response to CSA Consultation Paper 25-403 – Activist Short Selling (the "**Consultation Paper**") published by the Canadian Securities Administrators on December 3, 2020.

Thank you for the opportunity to comment on the Consultation Paper. This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

We leave it to other capital markets participants who may be better situated to comment on many of the other the specific questions raised in the Consultation Paper.

We acknowledge and agree with many of the concerns outlined in the Consultation Paper. There is a legitimate place for activity that helps to improve the market's informational/price efficiency through responsible research, disclosure and commentary about an issuer's business and operations. Our comments are directed at what the Consultation Paper refers to as "short and distort" strategies where there is a manipulative intent to spread falsehood or to distort prices, but also at those who may stand to gain from trading activity on the basis of premature or unsubstantiated information that has not been verified through appropriate diligence.

In our view, the current framework does not adequately address the risks associated with such problematic short selling activity; in part due to the lack of specific restrictions or requirements that would

apply directly to such activity, but largely due to the practical and evidentiary challenges associated with existing statutory remedies as well as common law or civil code remedies.

We further agree with the concerns raised in the Consultation Paper that under the new market reality, these problems have the potential to be exacerbated by the fact that social media provides an opportunity to amplify the short and distort impact through further and easier dissemination of misleading information and the potential to distort share prices.

The response to a short seller campaign premised on false and misleading information would be to provide countervailing information that leads to further or better informational/price efficiency. However, issuers face a number of practical impediments to responding in a timely and thorough manner to a short and distort campaign, particularly in doing so in a timely manner to avoid or minimize the impact of an initial sell-off triggered by a short and distort campaign.

First, issuers must determine whether information disseminated by a short seller warrants a response having regard to, among other things, the source, nature and venue of the information (for example, a credible commentator publishing on a public venue vs. publication under a pseudonym on the dark web). With the rapid pace at which information can be shared through social media, a response to even patently unfounded and intentionally misleading information can have the unintended consequence of amplifying its reach and be misinterpreted as acknowledgement at some level of the veracity of a short seller's allegations.

Where a response may be warranted, issuers must expend time and resources to do so, even in the face of patently unfounded allegations. This includes a thorough internal investigation relating to any allegations, legitimate or not, to allow the issuer to provide a meaningful, accurate and balanced response. While there may be strong desire to disseminate an immediate rebuttal or defense to evidently misleading information, issuers are directly subject to various disclosure constraints that may restrict their ability to do so. These include both the potential for statutory and civil liability and their fiduciary obligations to shareholders, which all require that issuers undertake thorough and proper processes before responding. Issuers must also comply with internal processes designed to ensure the review and approval of material information that is disseminated to the market, including processes such as disclosure committee and board review and approval as well as adherence to blackout policies; processes that can also be key to providing appropriate defences to liability claims. Further, issuers and their insiders and others are subject to insider trading and other prohibitions that restrict their ability to support the issuer's share price, even in the face a clearly manipulative and illegitimate short seller campaign. These include issuer bid restrictions and the prevailing securities regulatory guidance that requires a moratorium of two full trading days (after material information is disseminated) before any trading activity can be undertaken by insiders.

We acknowledge that there are limitations to regulating the actual dissemination of information by private individual market actors, as well as enforcement through existing avenues. There are also potential negative consequences to mandatory disclosure of short positions below the current Canadian statutory disclosure thresholds that apply to early warning reporting and insider reporting, including that such disclosure may inadvertently capture a significant amount of legitimate short-selling activity while causing actual "short and distort" sellers to remain below disclosure thresholds, thereby providing no better meaningful information to the market. We note that the regulators undertook an extensive review in connection with potentially reducing Canadian disclosure thresholds for early warning reporting from 10% to 5%, and ultimately determined to retain the status quo.

We propose the CSA should consider requiring any market actor who takes a short position in a security and publicly disseminates certain prescribed types of material information respecting an issuer or its business and operations to: (a) make a report to the regulators declaring their short position in the securities of the issuer (and any other security, the market price of which would reasonably be expected to vary materially as a result of the information disseminated); (ii) deliver such information to the

regulators; and (ii) be subject to a brief mandatory trading moratorium. Existing statutory frameworks and definitions of concepts such as “material fact” or “material information” can be relied upon to capture and prescribe the types of information that would trigger the mandatory reporting and moratorium. Those disseminating the prescribed types of information would be required to refrain from any further trading activity for a prescribed brief period of time (the “**moratorium period**”) after the information is first disseminated, with the effect that the brief moratorium period would give the issuer an opportunity to respond, should it chose to do so. Following the moratorium period the short seller could close out its short position,. To the extent the short seller exposes credible and meaningful information, they would still be able to profit from the increased price efficiency initiated by their research where they have identified actual material problems with an issuer’s business and operations. This framework is however aimed at discouraging those who stand to profit from trading activity where they disseminate premature or unsubstantiated information (by attempting to remove the potential benefit of doing so), and more directly at those who engage in “short and distort” strategies with a view to exploiting their ability to manipulate prices through disinformation. While it is true that the market generally would be able to continue to trade during the moratorium period, we believe this type of framework would help to reduce some of the pressure on investors who might sell to try and avoid losses in the face of a manipulative short and distort campaign. We also believe that the brevity of the moratorium period would counteract any chilling effect on those who disclose credible information. The mandatory reporting requirement could aid regulators in enforcement of the moratorium period, although ultimately not obligating regulators to review or regulate the information that that the short sellers disseminate.

In our view, this type of a framework would avoid constraining legitimate short selling activity that can lead to better informational/price efficiency in that it would not burden legitimate market commentary through the imposition of potential liability for the information that is published (beyond what is currently imposed). Furthermore, it would allow for those engaged in legitimate commentary to take short positions without having to expose their positions other than as currently required, and avoid further burdening them with additional disclosure requirements.

We believe this type of framework also recognizes that fact that material and accurate information about issuers assists in ensuring market prices reflect the fundamental value of an issuer’s securities and the empirical research that supports the notion that activist short sellers are more likely to improve the market’s informational/price efficiency by identifying actual problems with an issuer’s business and operations, than they are to engage in “short and distort” strategies. However, we do believe it could allow regulators to target those that take positions in issuer securities with a view solely to capitalize on their ability to distort information and manipulate market prices to their advantage.

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Thank you for the opportunity to comment on the Consultation Paper. Please do not hesitate to contact any of the undersigned if you have any questions in this regard.

Yours truly,

Jeffrey M. Singer

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Ramandeep K. Grewal

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