IIAC ACCVM
Investment Industry Association of Canada Association canadienne du commerce des valeurs mobilières

March 8, 2023

Alberta Securities Commission
Autorité des marches financiers
British Columbia Securities Commission
Financial and Consumer Services Commission, New Brunswick
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Ontario Securities Commission
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Investment Industry Regulatory Organization of Canada (The New SRO)

c/o The Secretary
Ontario Securities Commission
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comments@osc.gov.on.ca

Via email

Dear Sirs/Madams:

Re: Joint CSA and IIROC Staff Notice 23-329 Short Selling in Canada

The Investment Industry Association of Canada (the "IIAC" or "Association") appreciates the opportunity to comment on the proposals in the Joint CSA and IIROC Staff Notice 23-329 Short Selling in Canada.

The IIAC is the national association representing investment firms that provide products and services to Canadian retail and institutional investors. The IIAC represents financial services firms, and registration categories, of every size and type, operating in Canadian and global capital markets. The IIAC represents members that manufacture and distribute a variety of securities including mutual funds and other managed equity and fixed income funds and provide a diverse array of portfolio management, advisory and non-advisory services. Our members trade in debt and equity on all marketplaces, provide carrying broker services and underwrite issuers in public and private markets. They operate in Canadian and global capital markets.

Summary: There is a general consensus among the IIAC and its member firms that the practices of Canadian dealers already largely align with those of their U.S. counterparts. While there could be some minor adjustments to Canadian practices, the current regime is viewed as largely appropriately structured for the domestic marketplace.

Key Recommendations:

- The IIAC and its members do not believe that a material problem associated with short sales currently exists in Canada and a cost benefit of a mandatory close-out or buy-in requirement needs to be better articulated to be considered. The majority of IIAC members would need to be provided with a compelling case from regulators to support the introduction of this change.

- Canada's current short sales regulatory framework is harmonized with a number of U.S. practices while allowing some flexibility which supports activities in Canada's smaller and unique marketplace.

- The New SRO should leverage its expanded data collection to identify specific problems and take a targeted approach as opposed to the blanket approach being considered in this Notice.

General Comments

- There is a general consensus that the practices of Canadian dealers already largely align with those of their U.S. counterparts and that the current Canadian regime is sufficiently robust and well suited for the Canadian marketplace.

- The Notice does not clearly articulate what problem currently exists in Canada, and how having a mandatory close-out or buy-in requirement would improve market functioning. Members are reluctant to support introducing a mandatory close-out or buy-in without having been provided a compelling case including a cost benefit analysis.

- An analysis of member firm's Extended Failed Trade Reports to the New SRO reveals that "failed trades" (of 10 or more days) resulting from short sales are a very uncommon occurrence

- Canada's current regulatory framework surrounding short sales is harmonized in many respects with that of the U.S, while the Canadian regime does provide some added flexibility which is important for smaller markets such as Canada. Specifically, Canadian dealers can apply their own judgement as to whether a security may be difficult to borrow.

- In recent years the New SRO has significantly expanded its collection of trade, customer, and counterparty data. The New SRO should leverage this data to identify market participants who are acting inappropriately and take a targeted approach to addressing any issues. This data empowers the New SRO with a significant level of transparency to conduct its market oversight. Regulators should utilize this data to identify what the specific problem areas are related to short sales and pursue those market participants who are engaged in manipulative and deceptive activities using the existing tools that it has, which are sufficient.

- Mandating a pre-borrow requirement may also constrain the short sale process and potentially have adverse effects on legitimate price discovery and market functioning. As well, firms already take the appropriate steps to ensure timely settlement, including pre-borrowing a security when appropriate.

- Member firms are comfortable with the 10-day timeline and believe it is a reasonable amount of time to sort through administrative issues which represent a majority of failed trades. The New SRO already has the information to identify market participants who may be causing issues and the enforcement tools to address them.

- There may be merit to aligning with the SEC's Short Tender Rule: Exchange Act Rule 14e-4 which precludes persons from tendering more shares than they own, which are effectively undisclosed short sales.

- The New SRO should consider reviewing the existing Extended Failed Trade reporting framework. There is no clear guidance for dealers on the process for reporting extended fails,

the process in place in the industry is cumbersome and we feel it is not effective at identifying problems.

CSA QUESTIONS

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.

   The practices of Canadian dealers already align with those of their U.S. counterparts confirming that the current Canadian regulatory regime is adequate. For securities that dealers deem "difficult to borrow", the normal course of action is to take steps to ensure trade settlement including conducting a 'locate' or "pre-borrow" for the securities in question prior to executing a short-sale transaction.

   Mandating a "pre-borrow" requirement across all Canadian equity securities prior to executing a short-sale would be a significant change that would disrupt the ability for investors to "short" securities on a timely basis with resulting adverse effects on legitimate price discovery and market functioning. It would also impose large operational costs on Canadian dealers.

2. What would be the costs and benefits of implementing such requirements?

   Mandating a "pre-borrow" or "locate "requirement on **every** short-sale transactions would impose a significant financial cost on market participants to update systems, processes and procedures. As noted above, it would also impact the ability of investors to short sell which the Request for Comments notes plays an important role in the financial markets. We see limited benefits of implementing such requirements as the current requirements are sufficient.

3. Does the current definition of a "failed trade", as described in Part 1, above, appropriately describe a failed trade?

   We are of the view that the current definition of a "failed trade" is appropriate.

   The vast majority of failed trades at our member firms are caused by the counterparty not delivering. Service Level Agreements (SLAs) with counterparties and monitoring by our member firms mitigate against fails.

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?

We support the existing 10-day timeline and believe it is a reasonable amount of time to sort through operational and administrative issues which cause the majority of failed trades.

The New SRO already has the information to identify market participants who may be causing issues and the enforcement tools to address them.

Any proposed changes to the 10-day period must include comments by all market participants and shortening the period may have unintended consequences, including obscuring failed trades resulting from manipulative or deceptive activities from those that result from normal course settlement issues.

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.

   We are comfortable with the current bi-monthly short reporting. We believe that mandating additional disclosure, such as the identity of individual short sellers, would have unintended consequences including discouraging some participants from engaging in short selling for legitimate purposes such as hedging.

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.

   We are comfortable with the current level of regulatory reporting including the use of Canadian specific SME and LEI order markers. We believe that current reporting requirements provide regulators with the information required to discharge their mandate.

7. The New SRO'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.

   IIAC member firms experience is that settlement issues do not directly correlate to trades in junior securities and as such we do not believe greater transparency for junior issuers trading activity would be beneficial.

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.

As indicated above, the vast majority of fails trades at our member firms occur as a result of the counterparty failing to them and are administrative or operational in nature. Failed trades are escalated during the T+10 window and most trades are settled by T+10.

If mandatory close-out or buy-ins were imposed, it may lead to undue risk on the settlement process and unnecessary losses and may in fact trigger additional fails. Our member firms prefer having the discretion to deal with each client and situation individually as circumstances differ.

Several member firms noted that the Notice does not clearly articulate what problem currently exists in Canada, and how having a mandatory close-out or buy-in requirement would improve market functioning. Members are reluctant to support introducing a mandatory close-out or buy-in without having a greater understanding of the nature of the problem that needs to be solved from CSA and IIROC's perspective.

While not the majority view, some members stated that they believe the mandatory close-out/buy-in requirements such as those in the U.S. and EU are worth exploring towards providing a more consistent, transparent and universal approach with addressing extended failed trades.

Thank you for considering our comments. If you have any questions, please do not hesitate to contact me.

Yours sincerely,

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