

March 15, 2023

VIA EMAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince
Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Superintendent of Securities, Nunavut
New Self-Regulatory Organization of Canada

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Email: comments@osc.gov.on.ca

Dear Sirs/Mesdames:

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

TMX Group Limited (“**TMX Group**” or “**we**”) welcomes the opportunity to comment on the Joint CSA and IIROC¹ Staff Notice 23-329 *Short Selling in Canada* (the “**Staff Notice**”) published by the Canadian Securities Administrators (“**CSA**”) and the Investment Industry Regulatory Organization of Canada (“**IIROC**”) on December 8, 2022, and applauds the CSA and IIROC on issuing the Staff Notice. Capitalized terms used in this letter and not specifically defined have the meaning given to them in the Staff Notice.

TMX Group

TMX Group’s key subsidiaries operate cash and derivatives markets for multiple asset classes, including equities and fixed income, and provide clearing facilities, data driven

¹ As of January 2023, IIROC and the Mutual Fund Dealers Association of Canada officially amalgamated to become the New Self-Regulatory Organization of Canada. For the purposes of this comment letter, we continue to use the term “**IIROC**” as the Staff Notice was released prior to the amalgamation.

solutions and other services to domestic and global financial and energy markets. Toronto Stock Exchange (“**TSX**”), TSX Venture Exchange (“**TSXV**”), TSX Alpha Exchange, the Canadian Depository for Securities (“**CDS**”), Montréal Exchange, Canadian Derivatives Clearing Corporation, TMX Datalinx, Shorcan Brokers Limited, and other companies within the TMX Group provide listing markets, trading markets, clearing facilities, data products and other services to the global financial community in the Canadian capital and financial markets.

Introduction

TMX Group, through our equities exchanges, clearing house and data services, plays an important role in the Canadian capital markets, giving us insight into the perspectives of a wide range of market participants and stakeholders relevant to the discussion of possible changes to the regulatory framework for short selling in Canada. TMX Group and all of these stakeholders share a common interest in the continued fairness, efficiency and competitiveness of the Canadian capital markets.

TMX Group believes that the practice of short selling has a role in the vibrancy of the Canadian capital markets by enhancing market liquidity, transparency and price discovery, however we are also aware that negative perceptions about short selling exist, and that certain stakeholders have observed that the regulatory framework for short selling in Canada is not as robust as in other jurisdictions, including the United States. Regardless of the view that one takes, the regulatory framework must address potential abusive practices while being appropriate for our market. We support amendments to the existing regulatory framework proposed by the CSA and IIROC that will increase investor confidence and ensure fairness to all participants in Canada’s capital markets without hampering legitimate short sale activities.

Our multifaceted role in the Canadian capital markets results in a broad stakeholder base. As a result, we are unable to voice a single perspective in our comments. Despite this, we believe it is important to express our support for the CSA and IIROC undertaking this initiative. In this comment letter, we have limited our comments to the following three topics raised in the Staff Notice: transparency of short selling positions; pre-borrow requirements; and mandatory close out requirements.

Transparency of Short Selling Positions

TMX Group supports more frequent publication of data regarding short selling activity in a manner that broadens its accessibility, but does not compromise individual position information. As noted in the Staff Notice, in Canada, short positions are published twice a month by IIROC free of charge. In our view, more frequent distribution of data relating to short selling would provide the market with more timely disclosure of short selling and provide greater transparency relating to the composition of the market.

In addition to the free bi-monthly short interest data provided by IIROC,² certain third party data distributors offer daily estimated short interest data to subscribers derived from the bi-monthly reports. Such subscriptions however are expensive and often only available to institutional short interest traders. In addition, certain vendors combine IIROC's data with US short interest data, and resell it through market data vendors to a limited group of professional market participants.

TMX Group believes that broader distribution of short interest data would be beneficial to the market. Enhanced transparency would respond to investor demand for more information on short selling activity in Canada as well as potentially addressing mistrust over perceived manipulative activity caused by short selling. It would also better equip all investors to make better informed investment decisions. However, some have expressed the concern that the disclosure of actual, anonymized short selling position information might nevertheless promote coordinated behavior by multiple market participants that could drive down an issuer's stock price, or that it would provide too much exposure to a market participant's confidential proprietary position information.

TMX Group believes that daily disclosure of short interest positions in the form of estimated, derived short interest data strikes the correct balance between these competing views.³ For this reason, we recommend daily disclosure of short interest data, based on estimated, derived data at a cost, making the information reasonably available to all market participants. Such data would provide much needed timely information to market participants, improve investor confidence, provide all investors with the ability to make informed investor decisions, and enhance market integrity without exposing individual market positions. For this reason, TMX Group would support a more frequent publication of estimated, derived short interest selling data, if and when there is an agreement amongst CSA, IIROC and market participants.

Pre-Borrow Requirements

Canadian securities law and UMIR prohibit short selling activities that are manipulative and/or deceptive. UMIR specifies that entering an order to sell a security without having a reasonable expectation of settling the trade on the settlement date amounts to a false or misleading appearance of trading activity and is, therefore, a manipulative and deceptive activity. IIROC recently provided guidance that the "reasonable expectation to settle" generally means two days after the trade date.⁴ Some observers oppose any pre-borrow requirements on the basis that such requirements are not an effective deterrent to those who may seek to engage in naked short selling.

² Bi-monthly aggregate short interest data is available from a number of exchanges in the United States for a fee. In addition, daily aggregate short interest data is available from both NASDAQ and the New York Stock Exchange, for a fee.

³ In the same form as the data currently available for a fee and currently used by institutional short interest traders.

⁴ IIROC Notice 22-0130 – [Guidance on Participant Obligations to have Reasonable Expectation to Settle any Trade Resulting from the Entry of a Short Sale Order](#)

If determined appropriate by the CSA and IIROC, we would support requirements that bolster confidence in the Canadian capital markets, without hampering the benefits of short selling. However, such a determination may require further analysis given the conflicting results of the most recent study and IIROC's previous analysis on short sales and failed trades (i.e., IIROC recently published the Failed Trade Study, which reflects an increase in failed trades in the short sale market in Canada (particularly junior securities) during the timeframe analyzed, as opposed to IIROC's previously published studies).

Buy-In Requirements

As noted in the Staff Notice, unlike in the United States and the European Union, Canada does not have requirements that, in the event a short sale fails to settle, the short seller is subject to a mandatory buy-in.⁵ We understand that mandatory buy-in requirements, if imposed, could increase investor confidence in the short-selling market in Canada and bring it into closer alignment with the practice in global markets. However, we also believe that implementation of any mandatory buy-in requirements should only be made after the market has adjusted to the shortened T+1 settlement cycle which will be implemented as of May 28, 2024.

As noted in CSA Notice and Request for Comment Proposed Amendments to National Instrument 24-101 *Institutional Trade Matching and Settlement* and Proposed Changes to Companion Policy 24-101 *Institutional Trade Matching and Settlement*, the Canadian securities industry is preparing to migrate to a standard T+1 settlement cycle, in parallel with the United States. The Securities and Exchange Commission recently adopted rule changes which require the compliance date for T+1 migration as May 28, 2024. This migration will create a significant change to current clearing and settlement practices. As the industry adjusts to this change, we are aware that efficiencies will be required to support market behavior, for example we are preparing to see changes in market behavior regarding failed trades. It is our opinion that consideration of mandatory buy-in requirements should take place only after the migration of the T+1 settlement cycle has been completed and the market has adjusted. Imposing a mandatory buy-in requirement in advance of this significant process change could have unintended negative consequences on the Canadian capital markets.

⁵ For example, triggered at settlement date +2 days.

TMX Group appreciates the opportunity to provide its comments on the Staff Notice. We look forward to working collaboratively with the CSA and IIROC to address issues related to short selling in the Canadian capital markets. Please do not hesitate to contact us if you have any questions regarding our comments.

Respectfully submitted,

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& Global Head, Capital Formation

“Rizwan Awan”

President, Equities Trading and
Head of TMX Markets

“Kevin Sampson”

President
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