Proposed Amendments to OSC Rule 48-501 Trading During Distributions, Formal Bids and Share Exchange Transactions and Proposed Changes to Companion Policy 48-501

September 17, 2025

Submission to the Ontario Securities Commission (**OSC**)

ASSOCIATION DES BANQUIERS CANADIENS
CANADIAN BANKERS ASSOCIATION

The Canadian Bankers Association (**CBA**)[1] appreciates the opportunity to provide input on the *Proposed Amendments to OSC Rule 48-501 Trading During Distributions, Formal Bids and Share Exchange Transactions and Proposed Changes to Companion Policy 48-501 Trading During Distributions, Formal Bids and Share Exchange Transactions – Notice of Request for Comment* (**Proposed Amendments**).

Specific OSC Questions

1. Will the Proposed Amendments address concerns with short selling making pricing and completion of offerings more difficult?

Our overarching concern is that the blanket restrictions contemplated by the Proposed Amendments do not effectively address the core issue (manipulation and intent thereof) and may instead introduce additional regulatory burden and cost. Moreover, as acknowledged in the Notice accompanying the Proposed Amendments (**Notice**), the proposed restrictions may impact the capital formation component of the OSC's mandate.

To avoid the risk of introducing additional regulatory burden, cost and barriers to capital formation in Ontario, the concerns raised in the Notice should, to the greatest extent possible and absent further study, be addressed with existing tools.

Further study should include obtaining relevant supporting data and evidence in furtherance of a unified, national approach to addressing any concerns with the short selling regime in a manner that avoids unintended consequences.

(i) Application to Bought Deals

The proposed restrictions should not apply to bought deals. The vast majority of follow-on offerings in Canada are bought deals where the public dissemination of the pricing and launch of the offering are at the same time. Market participants would therefore not be aware of a bought deal equity

[1] The Canadian Bankers Association is the voice of more than 60 domestic and foreign banks that help drive Canada's economic growth and prosperity. The CBA advocates for public policies that contribute to a sound, thriving banking system to ensure Canadians can succeed in their financial goals.

offering prior to launch or, if widely expected by the market (i.e., an issuer has publicly stated a financing need), investors would not have specific insight on timing, price, or execution style (bought vs. marketed).

The proposed restrictions will have unintended consequences in potentially limiting the number of investors which could participate in an offering, which would negatively impact offering execution. For risk trades (i.e., bought deals) the added risk needs to be reflected via larger pricing discounts, decreased offering sizes, and/or decreased underwriters' willingness to undertake bought deals.

Unlike in a marketed offering where the underwriters would be able to see the impact of demand restrictions prior to pricing and sizing the offering, on a bought deal the underwriters would only be aware of the impact of these short selling restrictions after pricing. The restrictions would unfairly penalize bought deal execution, which is a unique advantage of the Canadian capital markets.[2]

2. Will the Proposed Amendments have any unintended consequences, such as (i) making it more difficult for certain reporting issuers to raise capital or (ii) requiring a greater price discount on offerings

In our view and as further specified in our submission, the Proposed Amendments have the potential to introduce a number of unintended consequences. This includes decreased investor appetite for new issue offerings and private placements in Canada as the changes may limit the institutional buyer pool by restricting participation in new issues, especially from multi-strategy institutional investors, but also from pension funds and other institutional investors who may participate in short selling as part of regular hedging, liquidity, or portfolio rebalancing activities. Multi-strategy investors have become a higher proportion of institutional demand for equity deals, in both Canada and the U.S. and would likely be most negatively impacted by the Proposed Amendments (i.e., potentially resulting in lower participation in equity offerings).

We note the Canadian markets are significantly smaller than U.S. markets and have much less investor depth, therefore, any reductions in investor demand would be especially detrimental. Our members' experience in the U.S. suggests that some investors may simply not actively trade an

[2] The Canadian Advantage | Lexpert

issuer in anticipation of an offering to avoid Rule 105 restrictions.[3] Given the lower relative liquidity, their absence would be more noticeable in Canadian markets. Further, a reduced investor pool would likely favour investors who do not engage in short selling, which may result in less pricing tension on offerings and more concentrated allocations, resulting in less diversified shareholder bases.

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The Proposed Amendments' apparent introduction of a strict liability framework, eliminating the need to prove intent or knowledge, means that investors and dealers could face liability for inadvertent breaches or factors beyond their control, leading to arbitrary and disproportionate enforcement, especially for smaller market participants. This risk may deter participation in offerings or prompt market participants to adopt blanket short-selling restrictions, undermining market efficiency.

As stated in our response to Question 1 above, we believe that the proposed blanket restrictions do not effectively address the core issue. In our view, there is a clear distinction between short selling while in possession of material non-public information (**MNPI**), and short selling without knowledge of this information. Short selling while in the possession of MNPI is already prohibited, however broad restrictions that capture legitimate short selling activity risks over-reaching and limiting participation of investors who engage in short selling as part of their normal course strategies. Selling short ahead of a deal, in the absence of inside information, involves significant risk as to the ultimate clearing price at which the deal might be priced, and the specific timing of the offering.

Further, it is our view that the provisions are not appropriate for retail investors and as noted above, applying this requirement broadly will do more to prevent retail investors, only a minority of whom sell short, from considering investments in these types of offerings in general in order to avoid triggering the restrictions. We also note that retail investors often represent a meaningful allocation on many Canadian offerings, especially for bought offerings, and recommend the OSC conduct further assessment to determine the potential detrimental impact on retail investors.

Finally, it is not clear whether investment funds (including pooled funds), or managed accounts

[3] U.S. Securities and Exchange Commission (**SEC**)'s Rule 105 of Regulation M: *Short Selling in Connection with a Public Offering* (**Rule 105**)

managed by the same investment fund manager or portfolio manager would be subject to the Rule as it applies to a "person or company". We believe that including these funds, or managed accounts would have a negative effect on the capital markets, decrease competition, be unfair to investors and represent a disproportionate regulatory compliance burden on asset managers and we recommend excluding them from this Rule. If the Rule is enacted and funds are part of the rule, we recommend that affiliated investment funds (including pooled funds), or managed accounts should qualify as "separate accounts" under the Rule 48-501 exemptions.

3. Is the definition of "short sale" in the Proposed Amendments adequate for achieving the purposes of the Proposed Amendments?

In our view, the definition of "short sale" in the Proposed Amendments is too broad as compared to the definition set out in the Universal Market Integrity Rules (**UMIR**), which address indirect ownership through agents or trustees. Moreover, the proposed definition is too uncertain by virtue of the fact that how a short sale settles is not known in advance. For consistency, we recommend that the OSC adopts the definition of "short sale" currently defined in UMIR as this definition is already in place, familiar to the industry and would reduce the risk of confusion.

In addition, we note that the proposed definition would have the impact of capturing sales settled with borrowed securities even if the seller otherwise has a long position in the security. We question the policy rationale for capturing these trades where the seller has a net long position in the underlying security, especially where the short sales do not involve market manipulation or insider trading.

Finally, we are concerned that despite the OSC proposing to limit the more expansive definition to Rule 48-501, this alternative definition may be relied upon in other contexts going forward. Also, while we understand the proposed definition is specific to this Rule, having two different definitions for the same term could create operational and compliance challenges and even confusion in terms of knowing which term is in scope, when and what requirements to apply. We encourage the OSC to consider industry alignment to remove the risk of confusion.

4. Should the Proposed Amendments apply to distributions of securities of a broader or narrower group of issuers? If so, what criteria should be used to define this population?

We note that the Proposed Amendments only apply to issuers who are reporting issuers in Ontario, and we are concerned that the creation of an Ontario specific rule restricting short selling may create undue complexity for market participants and opportunity for regulatory arbitrage. It would be preferable for any rule on this issue to be addressed on a uniform basis across all jurisdictions of Canada through the Canadian Securities Administrators.[4]

If the OSC were to move ahead with the Proposed Amendments, larger, more liquid issuers should be excluded from these restrictions. The OSC could consider doing so by incorporating a "highly liquid" concept, similar to what is used by CIRO to determine underwriter trading restrictions in the context of public offerings, to determine whether or not to apply a short selling restriction. We believe that issuers with large floats and high trading volumes are less susceptible to market manipulation from short sellers. These issuers are also more likely to pursue larger equity offerings which would require the broadest investor participation and which, in turn, might suffer the most from reduced participation of investors who may have shorted the issuer for unrelated reasons, but would otherwise want to participate in the offering.

We also recommend the OSC clarify whether and the extent to which the Rule may apply to dual listed issuers. For example, in the case of an issuer listed on both the TSX and NASDAQ where the short sale was executed on a foreign exchange, but the distribution was conducted in Ontario, or vice versa, would the Rule apply?

5. Are the securities covered by the Proposed Amendments correctly scoped?

We are supportive of exempting cash sales of exchange-traded funds from the Proposed Amendments.

Private placements of securities and non-underwritten offerings should be excluded from the Proposed Amendments. We believe that extending the Proposed Amendments to private placements of securities, or non-underwritten offerings, unlike the restrictions applicable under Rule

[4] For example, the Proposed Amendments would apply to all reporting issuers in Ontario, however issuers that are listed on the TSX Venture Exchange and who have not become reporting issuers in Ontario do not appear to be in scope.

105, may create unforeseen and unintended consequences. We note private placements and agency offerings are often highly negotiated with individual investors over a longer period than a traditional underwritten prospectus offering. Consequently, it would be impractical to try to fit a set restriction window to cover this variability in timing and approach to negotiation. Furthermore, purchasers under a private placement would be subject to a 4-month hold and an investor who had sold short before an offering would still face meaningful market risk on their net position as they waited for the hold period to elapse.

6. Is the prohibition on buying and selling short a security "of the same class" too narrow?

We are supportive of restricting the prohibition to the same class of securities sold short. Although subscription receipts are economically similar to the underlying common shares into which they are exchangeable, we do not believe shorting common shares ahead of an offering of subscription receipts should be captured by the proposed restrictions, especially in the context of a bought deal. Subscription receipts are typically used in the context of material M&A transactions, and we believe it is extremely unlikely that investors would have any awareness of the offering ahead of announcement.

7. Is the exemption under section 4.1.2(b) of the Proposed Amendments appropriate?

We note that there is no section 4.1.2(b) of the Proposed Amendments. Assuming that the above Question 7 was meant to refer to the exemption for open-market purchases set out in section 4.1.2(3)(b), we support this exemption.

8. Are there other types of distributions or securities that should be exempted from the Proposed Amendments?

Exemptions for additional scenarios where the identified concerns behind the Proposed Amendments would not arise should be considered, including:

- Where a purchaser of a new issue can demonstrate that their short position will be settled using shares other than those from the new issue.

- Where a short sale was executed in anticipation of a warrant exercise, reorganization or corporate action.

- Private placements of securities and non-underwritten offerings. This includes private placements executed pursuant to the Listed Issuer Financing Exemption (**LIFE**), as the rules for LIFE offerings expressly prohibit pre-marketing ahead of these transactions, making the proposed restrictions unnecessary.

9. **The 5-day period is based on Rule 105 and is intended to ensure that, in a marketed offering, a short seller intending to participate in the offering would not have an opportunity to adversely affect the market price of the offering through short sales immediately before pricing of the offering, as any activity from before that period should no longer be reflected in the market price of the offered securities. Is this assumption correct?**

We question the basis for this assumption, especially for highly liquid securities. By definition, short sellers are speculating on downward movements in price, rather than being the drivers of that movement. Furthermore, the 5-day period is an arbitrary timeframe and immaterial to this speculation and downward movement.

We also note that marketed offerings typically have less than 5 days between the time the offering is announced and the time the offering is priced (with those events occurring contemporaneously for a bought deal). We suggest that the restricted period should only apply following the public announcement of an offering.

We note that Rule 105 allows the 5-day restriction to be shortened where the marketing period is shorter. Specifically, when a new shelf registration statement is filed, the restricted window aligns with the shorter marketing period. In Canada, bought deals are launched and priced concurrently, with no marketing period between launch and pricing. For consistency, as previously stated, bought deals should be excluded from the restrictions, as Canadian capital markets would otherwise be disadvantaged in comparison with U.S. capital markets.

We also note that Rule 105 would be more applicable to the U.S. market, where the vast majority of

offerings are marketed. Marketed transactions represent the minority of equity offerings in Canada.[5]

10. Should the restricted period be extended for a period of time following pricing?

We do not support extending the proposed restricted period for any period following pricing, given that any perceived concern with impacting pricing of the offering would no longer be relevant, and the restriction would make it more difficult for existing short positions to close out at an acceptable price notwithstanding that no underlying policy concern continues to exist.

11. Does your answer to Question 9 depend on whether the issuer made a press release announcing the offering and when the press release was issued?

Our answer does not depend on the timing of a press release when considering when the proposed restricted period should end. The relevant end point for the proposed restricted period is at pricing. Press releases issued before pricing, which are seen only in marketed offerings, do not disclose terms, and press releases issued at pricing communicate the price that has already been set, and are therefore not relevant to the analysis. As noted in our response to Question 9, disclosure is relevant to when the proposed restricted period begins, however our response to Question 11 focuses on the end point of the restricted period.

12. Is the assumption that the separate account exemption will be sufficient for underwriters and market makers correct? If not, please provide specific examples of how the Proposed Amendments would adversely affect their activities.

Ensuring that the scope of the "separate account" exemption set out in Section 4.1.2(4) is clear and practically/operationally actionable is key to ensuring that the Proposed Amendments do not unintentionally restrict otherwise permitted ordinary course activities undertaken on a daily basis by completely distinct businesses of market participants (sometimes in overlapping legal entities). At a minimum, it would be helpful for the OSC to provide further guidance on what may constitute "coordination" or "cooperation" between accounts, and what does not.

This may also be the case where clients perform this action across distinct but affiliated businesses

[5] See footnote 2 above.

or across different account types within the same firm. It would not be possible for an investment dealer to monitor short selling activities across multiple firms. Clarification on the intended scope of the "separate account exemption" in these cases would be useful. Clarity is also needed regarding any gatekeeping obligations that apply to dealers with respect to identifying "separate accounts".

The separate account exemption should reflect that, in most dealers, the same trading desks handle both underwriter and facilitation accounts, though subject to distinct decision-making processes and controls. Dealers already implement strong internal controls, including wall-crossing measures and compliance policies.

We would urge the OSC to include a distinct exemption explicitly for underwriting and market making activities, in addition to the "separate account" exemption, given that the Proposed Amendments are not intended to restrict these activities. In their capacity as market makers, Canadian banks are regularly long or short securities of multiple issuers. Furthermore, there are appropriate compliance barriers in place to preserve the independence of the trading desk's public-side market-making activity and the private-side securities underwriting activity.

13. Are there any additional foreseeable costs if the Proposed Amendments are adopted? Can these costs be mitigated?

We are concerned about the extent to which the Proposed Amendments might require dealers to create new processes and procedures to monitor and supervise the activities of clients to ensure that the dealer is not facilitating a breach of the proposed restrictions. This obligation would create additional costs for the dealer and may be challenging as clients often transact with multiple firms concurrently. For example, if a client sells a security short with dealer "A" on a marketplace, then pursues a purchase in connection with an offering with Dealer "B", Dealer "B" may not be aware of the short sale, which, under the Proposed Amendments, would become problematic.

It would also be impractical for broker-dealers to confirm investors' compliance in a timely manner before allocation of an offering. Requesting certifications on a deal-by-deal basis would result in delays in allocation and impede the way offerings are executed. Allocating offerings to investors quickly is essential to the ability to execute offerings. Imposing this added requirement on broker-dealers would not only add a substantial new compliance burden, but it would also prejudice their

ability to execute deals. That notwithstanding, underwriters can facilitate regulators' audits following an offering, which is consistent with the approach U.S. underwriters take on Rule 105 compliance.

We therefore believe that the Proposed Amendments should clarify that the party who entered into the short sale should be solely responsible for ensuring compliance with the proposed restrictions. It will be important to ensure investors have clear rules, exemptions and guidance, which will help investors' compliance teams to determine whether or not they are eligible to participate in an offering. We expect there would be added compliance costs and steep learning curves for investors. This compliance burden may be especially difficult for retail investors. Noting the logistical challenges of understanding compliance before an offering, or discovering ineligibility in an offering after it has been allocated and/or closed, we do not believe that broker-dealers should be held liable for investors who are found to be ineligible subsequent to allocation and/or closing of an offering.

We also note that achieving the desired level of compliance will be difficult because responsibility for enforcement as between the OSC and CIRO is not clear. Implementing controls to monitor and enforce the 5-day restriction period will require significant technology development, including surveillance tools, vendor engagement, and new business rules. We recommend the OSC ensure sufficient lead time for industry to implement these changes effectively.

Additional Comments

The Notice states that the proposed amendments address two concerns:

- “The first is that a person or company learns of an upcoming financing by an issuer that has not been publicly announced and makes short sales in advance of the announcement intending to close out the short position by buying back securities in the financing, which will almost always be priced at a discount to the current market price, thus locking in a profit…”

- “The second is that the short selling itself may depress the market price, in turn lowering the price at which securities are sold in the financing.”

In our view, rather than imposing blanket restrictions as contemplated under the Proposed Amendments, a better approach to address the first concern would be to deem knowledge of any pending offering as a material fact, which would prohibit trading activity until that fact is publicly disclosed. To avoid unintended consequences on the issuer side, this deemed knowledge would only apply in the context of this specific rule.

With respect to the impact of short selling on the market price of securities to be sold in a financing, the OSC acknowledges elsewhere in the Notice that short selling activity does not necessarily impact market price: "… short selling activity may not set an artificial price for the security; it may not change the market price at all." This is a direct challenge to the OSC's second problem statement. We submit that it is not all short selling activity that should be of concern here. Rather, the focus should be limited to short selling activity which rises to the level of market manipulation.

Furthermore, we note any amendments that are more restrictive than Reg M / Rule 105 will unnecessarily prejudice the Canadian capital markets, in particular, with respect to the ability to execute bought deals.

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We thank you for taking the time to consider our views regarding the Proposed Amendments and would be pleased to discuss the Proposed Amendments further at your convenience.