Stikeman Elliott

Stikeman Elliott LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON Canada M5L 1B9

Main: 416 869 5500
Fax: 416 947 0866
www.stikeman.com

March 8, 2023

Without Prejudice
By E-mail

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

We submit the following comments in response to the Staff Notice (the "**Notice**") published jointly by the Canadian Securities Administrators (the "**CSA**") and the Investment Industry Regulatory Organization of Canada ("**IIROC**") on December 8, 2022 with respect to the existing regulatory landscape surrounding short selling in Canada and potential areas for regulatory consideration.

We thank you for the opportunity to comment and note that 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.

Our comments principally address questions 5 and 6 as posed in the Notice. We leave it to other capital markets participants who may be better situated to comment on many of the other specific questions raised.

A. ADDITIONAL PUBLIC TRANSPARENCY REQUIREMENTS

Consistent with our comments provided in response to CSA Consultation Paper 25-403 *Activist Short Selling*, we acknowledge and agree that there is a legitimate place for activity that helps to improve the market's information, price discovery and efficiency through responsible research, disclosure and commentary about an issuer's business and operations. In our view, however, the absence of appropriate restrictions, disclosure obligations and/or enforcement leaves the regulatory regime without the tools necessary to address the risks associated with problematic short selling. With a lack of transparency and limited prospects of accountability, there are also significant financial incentives for persons to initiate "short and distort" campaigns coupled with short sales.

While Staff note that enforcement action may be taken against short sellers for problematic conduct within the scope of existing offences under securities legislation, there are, in our view, significant impediments to successful enforcement under the current regulatory regime, and greater transparency would promote accountability. These issues are not unique to the Canadian landscape as reflected in the international initiatives underway to enhance reporting and disclosure requirements with respect to short selling, including those outlined in Appendix B to the Notice. For example, on February 12, 2020, a group of twelve securities law professors submitted a rulemaking petition to the U.S. Securities and Exchange Commission (the "**SEC**") to enact two rules: (i) to impose an obligation on short sellers to update voluntary

short position disclosure which no longer reflects current holdings or trading intention; and (ii) to clarify that rapidly closing a short position after publishing or commissioning a report, without having specifically disclosed an intent to do so, may constitute fraudulent scalping in violation of Rule 10b-5.

In response, on February 25, 2022, the SEC announced Proposed Rule 13f-2 and Proposed Form SHO, which if enacted, would obligate certain market participants to report, on a monthly basis, certain specified short position and short activity data that meets prescribed disclosure thresholds using a new proposed form to the SEC. In explaining the purpose of the proposed rules, the SEC noted:

> In determining the proposed reporting requirements under Proposed Rule 13f-2 and Proposed Form SHO, the Commission is mindful of concerns that certain short selling activity can be carried out pursuant to potentially abusive or manipulative schemes. For instance, market manipulators may seek to spread false information about an issuer whose stock they sold short in order to profit from a resulting decline in the stock's price. The Commission has previously noted various other forms of manipulation that can be advanced by short sellers to illegally manipulate stock prices, such as "bear raids." As discussed below, greater transparency into the activities of Managers holding large short positions in a security could help regulators' oversight of short selling and deter these and other types of manipulative short selling campaigns potentially by alerting regulators to suspicious activity.[1]

In articulating the rationale underlying Proposed Rule 13f-2 and Proposed Form SHO, SEC Chair Gary Gensler described their purpose as follows: "This would provide the public and market participants with more visibility into the behavior of large short sellers. The raw data reported to the [SEC] on [Proposed Form SHO] would help [the SEC] to better oversee the markets and understand the role short selling may play in market events". We are similarly supportive of additional public transparency and reporting requirements with respect to short selling and/or short positions, modified as necessary to address unique aspects of the Canadian market.

B. ADDITIONAL REPORTING REQUIREMENTS

A disclosure regime would better inform market participants' consideration of the positions put forward by short sellers who make public statements and their financial incentives. Imposing obligations on such short sellers to disclose and update their positions, hold their positions for a minimum period of time and remain liable for inaccurate or misleading information would enhance accountability and the regulation of short selling.

We propose that the CSA consider requiring any person or company that takes a short position in a security of an issuer, and which intends to publicly disseminate certain prescribed material information respecting the issuer or its business or operations, to: (i) deliver a report to the regulators, with a copy to the issuer, declaring the short position in the issuer's securities, and any other security the market price of which would reasonably be expected to vary materially as a result of such information disseminated; (ii) include disclosure of the short position in the publicly disseminated materials; and (iii) be subject to a very brief mandatory trading moratorium thereafter.

Existing statutory frameworks and definitions of concepts such as "material fact" or "material information" may be relied upon to capture and prescribe the types of information that would trigger such requirements. Those disseminating such information would be required to refrain from any further trading activity for a very brief prescribed period of time (the "**moratorium period**") after the information is first publicly disseminated, thereby giving the issuer and other market participants, such as research analysts,

[1] US, Securities and Exchange Commission, *Short Position and Short Activity Reporting by Institutional Investment Managers* (Release No 34-94313) (Washington, DC: The Commission, 2022) at 11–12.

an opportunity to respond, should they choose to do so. Following the moratorium period, the short seller might close its position. To the extent that 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/or operations. This framework is, however, aimed at discouraging those who stand to profit from trading activity by disseminating premature or unsubstantiated information, and more directly at those who may be inclined to engage in short-and-distort strategies with a view to exploiting their ability to manipulate prices through disinformation before the market has an opportunity to assess and respond.

While it is true that the market would be able to continue to trade during the moratorium period, such a framework would reduce some of the pressure on investors who might otherwise sell to avoid perceived losses in the face of a 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 might help regulators enforce the moratorium period, without obligating them to review or regulate the information that short sellers disseminate.

In our view, this type of framework would avoid constraining legitimate short selling activity that might lead to better informational or price efficiency, as it would not burden legitimate market commentary through the imposition of potential liability for information published, beyond that currently imposed. It would also allow persons who do not intend to engage in activist short selling to take short positions without the burden of additional disclosure requirements.

This type of framework recognizes that material and accurate information about issuers assists in ensuring that market prices reflect the fundamental value of an issuer's securities, as well as the empirical research that supports the notion that activist short sellers are more likely to improve the market's informational or price efficiency by identifying actual problems with an issuer's business or operations than by engaging in short-and-distort strategies. Such a framework would help regulators target those who take short positions solely to capitalize on their ability to manipulate information and market prices.

* * * * *

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

Yours truly,

Frank W. Selke

on my own behalf and on behalf of

Simon A. Romano

Jonah Mann

Ramandeep K. Grewal

Halyna Chumak