

August 30, 2024

Submitted via Email

Attention:

Canadian Investment Regulatory Organization
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Dear CIRO:

Re: COMMENTS WITH RESPECT TO THE CANADIAN INVESTMENT REGULATORY ORGANIZATION (“CIRO”) NOTICE 24-0003, PROPOSED AMENDMENTS RESPECTING THE REASONABLE EXPECTATION TO SETTLE A SHORT SALE PUBLISHED ON JANUARY 11, 2024 (THE “PROPOSED AMENDMENTS”) AND NOTICE 24-0004-PROPOSED GUIDANCE ON UMIR REQUIREMENTS RELATED TO SHORT SELLING AND FAILED TRADES PUBLISHED ON JANUARY 11, 2024 (THE “PROPOSED GUIDANCE”).

We write further to our letter dated April 12, 2024, (the IIAC’s “**Initial Comments**”) and the subsequent meeting held between CIRO and IIAC on July 3, 2024, concerning the Proposed Amendments and Proposed Guidance. The IIAC and its members appreciate CIRO’s review and consideration of our Initial Comments and CIRO’s efforts to engaged with the IIAC and its members on these significant amendments.

We have carefully considered the information provided by CIRO and, the reasons set out in our Initial Comments and subsequent meeting – request that the Proposed Guidance be revised to reflect the below amendments. These revisions will address our concerns while providing additional clarity on the scope and application of the Proposed Amendments.

1. **The Proposed Guidance, section 2.1.2:** In the chart comparing the existing prohibition found at paragraph (2)(h) of UMIR Policy 2.2, and the proposed requirement in UMIR Policy 3.3(1), the Proposed Guidance states:
 - a. **Existing requirement in Policy 2.2, paragraph (2)(h):** “Prohibition - Prevents Participants and Access Persons from entering an order for a sale of a security (both long and short) on a marketplace without having, at the time of order entry, a reasonable expectation of settling any resulting trade on settlement date.”
 - b. **Proposed requirement in UMIR Policy 3.3(1):** “Affirmative obligation - Requires Participants and Access Persons to have, prior to order entry on a marketplace, a reasonable expectation to settle the resulting short sale trade on settlement date.”

The existing requirement is framed as a prohibition whereas the proposed requirement is framed

as a positive obligation. However, both policies nonetheless contemplate that Participants and Access persons must have a reasonable expectation to settle at the time of order entry. As a matter of clarity, the IIAC and its members request that the paragraph following the comparison chart in s. 2.1.2 of the Proposed Guidance be revised to include the following underlined text:

The proposed requirement in UMIR Policy 3.3(1) is not intended to create a new requirement or different standard of conduct from the existing paragraph 2(h) of Policy 2.2. “We note that the current requirement in Policy 2.2 Manipulative and Deceptive Activities may be difficult for certain dealers to discern when this prohibition is in effect given that the provision is situated in a section that applies to manipulative and deceptive trading.⁶ The proposed technical requirement in UMIR 3.3 is intended to clearly impose an obligation to have a reasonable expectation to settle on settlement date before entering an order that would result in a short sale and would not entail any consideration of manipulative or deceptive behavior in order to apply. We expect that the positive obligation together with the clear understanding that no analysis of the presence of manipulative and deceptive trading is required would assist dealers in complying with this proposed provision.”

- 2. The Proposed Guidance, section 2.1.1 and 2.1.8:** From our meeting with CIRO, we understand that the Proposed Amendments are not intended to impose any new or different obligations with respect to documenting the existence of a reasonable expectation to settle (as compared to the requirements that already exist in relation to the prohibition at paragraph 2(h) of Policy 2.2). For clarity, the IIAC and its members request that ss. 2.1.1 and 2.1.8 of the Proposed Guidance be revised to include the following text: “The proposed provision is not intended to create any new obligations on Participants and Access Persons to document the reasonable expectation to settle as compared to the requirements that already exist with respect to paragraph 2(h) of Policy 2.2.”

- 3. The Proposed Guidance, section 4.1:** The Proposed Guidance states:

“[...] Whether a trade ultimately settles would not support the claim that a reasonable expectation to settle the trade existed before the time of order entry. Therefore, the fact that a trade did not ultimately fail would not in itself be sufficient evidence to show that the seller had a reasonable expectation to settle prior to order entry.”

As set out in our Initial Comments, the IIAC and its members do not believe that the above text is either necessary or helpful to interpreting UMIR 3.3. If CIRO is not amenable to deleting this language in its entirety, IIAC and its members request that the s. 4.1 of the Proposed Guidance be revised to include the following underlined text:

“[...] Whether a trade ultimately settles would not support the claim that a reasonable expectation to settle the trade existed before the time of order entry. Therefore, the fact that a trade did not ultimately fail would not in itself be sufficient evidence to show that the seller had a reasonable expectation to settle prior to order entry. Conversely, the fact that a trade failed would not in itself be supportive or sufficient evidence to show that the seller did not have a reasonable expectation to settle prior to order entry.”

- 4. The Proposed Guidance, section 4.4:** The Proposed Guidance states: “One way to demonstrate a reasonable expectation to settle under UMIR 3.3, is to rely on easy-to-borrow lists of securities, provided that such lists only include securities that are readily available.”

As set out in our Initial Comments, the IIAC and its members are opposed to any requirement to adopt “easy-to-borrow lists” due in part to the considerable costs associated with implementing and updating such lists. However, we understand from CIRO that the references made to easy-to-borrow lists in s. 4.4 of the Proposed Guidance are simply intended to provide an example of how a Participant or Access Person could demonstrate a reasonable expectation to settle. As a matter of clarity, IIAC and its members request that the Proposed Guidance be revised to include the following underlined text:

“One way to demonstrate a reasonable expectation to settle under UMIR 3.3, is to rely on easy-to-borrow lists of securities, provided that such lists only include securities that are readily available. However, reliance on an easy-to-borrow list is not a prerequisite to demonstrating a reasonable expectation to settle under UMIR 3.3. For clarity, Participants and Access Persons are not required to adopt easy-to-borrow lists and this guidance is not intended to suggest that easy-to-borrow lists ought to be adopted as a matter of best practice.”

Below we have set out some considerations on how Participants and Access Persons can compile, monitor and use easy-to-borrow lists should they, at their own discretion, choose to adopt the use of easy-to-borrow lists: [...]”

5. The Proposed Guidance, section 4.5: The Proposed Guidance states:

“As a best practice, Participants that trade inter-listed securities may consider expanding the use of technological solutions that are already in use for compliance with other rules, such as Regulation SHO by the Securities and Exchange Commission (SEC) in the United States or the EU Short Selling Regulation (SSR)”.

As previously noted by the IIAC and its members, the above text is neither necessary nor helpful to interpreting the Proposed Amendments. We note that the technological solutions that have been implemented in other jurisdictions by some IIAC members were developed to meet the specific requirements in other jurisdictions. The costs of implementing the same solutions in Canada would be substantial, especially but not exclusively for those firms that do not have affiliates in other jurisdictions. The IIAC and its members request that the above text be deleted from the Proposed Guidelines.

Respectfully submitted,

Investment Industry Association of Canada