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VIA EMAIL

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Dear Sirs/Mesdames:

Re: Proposed Amendments Respecting the Reasonable Expectation to Settle a Short Sale

TMX Group Limited (“**TMX**” or “**we**”) welcomes the opportunity to comment on the Proposed Amendments Respecting the Reasonable Expectation to Settle a Short Sale (the “**Request for Comment**”) published by the Canadian Investment Regulatory Organization (“**CIRO**”) on January 11, 2024. Capitalized terms used in this letter and not specifically defined have the meaning given to them in the Request for Comment.

TMX

TMX is an integrated, multi-asset class exchange group. TMX’s key subsidiaries operate cash and derivatives markets for multiple asset classes, including equities and fixed income, and

provide clearing facilities, data driven solutions and other services to domestic and global financial and energy markets. Toronto Stock Exchange, TSX Venture Exchange, Alpha Exchange, The Canadian Depository for Securities, Montreal Exchange, Canadian Derivatives Clearing Corporation, Shorcan Brokers Limited and other TMX companies provide securities listing markets, trading markets, clearing facilities, data products and other services to the global financial community and play a central role in Canadian capital and financial markets.

Request for Comment

CIRO has published the Request for Comment and is proposing to amend the short selling framework under the Universal Market Integrity Rules (“**UMIR**”) by (i) adding a new positive requirement in UMIR 3.3 to have prior to order entry, a reasonable expectation to settle on settlement date any order that upon execution would be a short sale (the “**New Positive Requirement**”); (ii) adding supervisory and gatekeeper requirements pertaining to the proposed requirement in UMIR 3.3 (the “**Gatekeeper Requirements**”, and together with the New Positive Requirement, the “**Proposed Short Selling Amendments**”); and (iii) consolidating current provisions related to short selling to a common location within UMIR.

While TMX is supportive of requirements that bolster confidence in the Canadian capital markets as they relate to short selling, TMX is of the view that the Proposed Short Selling Amendments do not necessarily address the issue of fail trades as described in the Request for Comment, and may have a detrimental effect on market participants and issuers in Canada.

Our comments address the Proposed Short Selling Amendments.

The Proposed Short Selling Amendments

TMX believes that the practice of short selling has a role in the Canadian capital markets by enhancing market liquidity, transparency and price discovery. However, we are also aware that concerns around short selling exist. In particular, TMX acknowledges that there is a widely-held perception that some market participants may, solely as a means to drive down the price of an issuer’s securities, engage in short selling where they enter short sale orders without an intention to settle the resulting trades on the settlement date. These participants anticipate settling the trade when the securities can be bought at a later date in the open market at a price that is profitable to the seller. While TMX understands these concerns, we are of the view that the Proposed Short Selling Amendments may limit trading activity, and negatively impact issuers, in Canada. Instead, TMX believes that the concerns raised in the Request for Comment can be adequately addressed, and that this type of trading activity can be deterred, by using the existing short selling regulatory framework in Canada, and by exploring other ways to strengthen the short selling regulatory regime relating to failed trades.

(i) Impact on Market Participants and Issuers in Canada

While TMX is supportive of addressing concerns regarding a reasonable expectation to settle a trade, we are of the view that the Proposed Short Selling Amendments may have a negative impact on market participants, and ultimately issuers in Canada.

While the New Positive Requirement appears to share the same policy objective as UMIR Policy 2.2¹, the proposed requirements go a step further and impose a *positive* obligation on market participants, and includes the new Gatekeeper Requirements. TMX is of the view that the New Positive Requirement creates ambiguity and uncertainty as to what is actually required of participants. While the proposed guidance² relating to the Proposed Short Selling Requirements (the “**Proposed Guidance**”) attempts to clarify what factors affect the ability to demonstrate a reasonable expectation to settle, and how a participant can demonstrate a reasonable expectation to settle, uncertainty remains. For example, it is unclear, besides the suggested compilation of an easy-to-borrow list, what a market participant is required to do in order to comply with the proposed requirements. Would a participant be required to create a new tag when entering an order indicating it has a reasonable expectation to settle the trade? Would the participant need to indicate why it has a reasonable expectation to settle? What additional “positive” acts or behaviour are required by participants in order to demonstrate its reasonable expectation to settle a trade? How is this different from the current expectations under UMIR Policy 2.2? Would the presence of one failed trade negatively impact whether a participant could demonstrate a reasonable expectation to settle future short sales for the same client? TMX is concerned that the uncertainty of the answers to the above noted questions and the lack of clarity in the new proposed requirements may negatively impact how market participants view trading in the Canadian market, and thus may avoid trading in the Canadian market entirely.

Since the publication of the Proposed Short Selling Requirements by CIRO, TMX has received unsolicited feedback from numerous market participants asking for clarification on the new proposed requirements, and many have expressed confusion and concern regarding the lack of clarity on the requirements and the impacts the new requirements would have on them. Many have stated that the Proposed Short Selling Requirements are unique to Canada and may impose a significant financial and administrative burden on them. Market participants may be required to expend resources to update and implement the required systems, processes and procedures to comply with the new requirements. In particular, there may be significant challenges to, and reluctance from, the international buy side, who benefit from more clearly defined requirements in other jurisdictions (like the U.S.), to make the necessary changes to comply with ambiguous requirements in Canada. Consequently, these international traders, whose Canadian portfolio is already de minimis, may choose to not trade (whether as short selling or not) in the Canadian markets in order to avoid the cost, confusion and burden associated with complying with the Proposed Short Selling Requirements, thereby having a chilling effect on issuers in Canada.

¹ See Part 2 – False or Misleading Appearance of Trading Activity or Artificial Price of UMIR Policy 2.2 Manipulative and Deceptive Activities (“**UMIR Policy 2.2**”).

² Proposed Guidance on UMIR Requirements Related to Short Selling and Failed Trades dated January 11, 2024.

As such, TMX disagrees with the impact assessments set out in the Request for Comment regarding the Proposed Short Selling Amendments, and in particular, the New Positive Requirement, for market participants (neutral to net positive impact) and issuers (neutral impact). TMX is of the view that the ambiguity and additional burden that the Proposed Short Selling Requirements impose on market participants may have the chilling effect of deterring trading activity in Canada from the international buy side as a whole (rather than targeting those engaged in failed trades), ultimately negatively impacting issuers in Canada.

(ii) Existing Legislation/Policies to Address Concerns Raised in the Request for Comment and Other Considerations

While TMX understands that the intention of the Proposed Short Selling Requirements may be to further strengthen existing UMIR policies prohibiting this trading activity where there is no reasonable expectation to settle a trade, we believe that the existing short selling regulatory regime is sufficient and can be used to achieve the same policy rationale as the proposed requirements.

Existing securities legislation³, National Instrument 23-101 *Trading Rules*⁴ and UMIR policies⁵ prohibits activities that are manipulative and/or deceptive, which could occur in the context of short selling. More specifically, UMIR Policy 2.2 expressly prohibits the entering of an order to sell a security without having a reasonable expectation of settling the resulting trade on settlement date, and considers this to be a false or misleading appearance of trading activity, and is therefore not permitted. The guidance⁶ issued by CIRO in 2020 (IIROC at the time) confirms and clarifies the existing obligation of a participant to have a reasonable expectation to settle a resulting trade on the settlement date. As such, TMX is of the view that, for example, the existing UMIR Policy 2.2, coupled with increased or strengthened monitoring, compliance oversight and enforcement efforts (i.e. imposition of increased fines, and increased incidence of imposing fines) by CIRO, could help deter participants from entering orders to sell a security without a reasonable expectation to settle. We believe that targeting those individuals engaging in unlawful trading activities as currently prohibited under UMIR Policy 2.2, rather than imposing blanket requirements on all market participants, and utilizing the current short selling compliance and enforcement framework in Canada, would achieve the desired outcome that the Proposed Short Selling Requirements aims to achieve.

Further to utilizing existing regulation to address the issue of failed trades, TMX urges CIRO (and the Canadian Securities Administrators (the “CSA”)) to continue analyzing other ways in which the short selling regulatory regime surrounding failed trades could be strengthened, including, for example, strengthening failed trade reporting requirements and/or introducing mandatory buy-in

³ For example, see Securities Act (Ontario), RSO 1990, c S.5, subsections 126.1 (Fraud and Market Manipulation) and 126.2 (Attempts).

⁴ See section 3.1 (Manipulation and Fraud) of NI 23-101.

⁵ See Part 2 – False or Misleading Appearance of Trading Activity or Artificial Price of UMIR Policy 2.2.

⁶ See [CIRO Notice - 22-0130](#) - Guidance on Participant Obligations to have Reasonable Expectation to Settle any Trade Resulting from the Entry of a Short Sale Order.

requirements. For instance, we note that Canada, unlike the United States and the European Union, does not have a mandatory-buy requirement in cases where a short sale fails to settle. However, 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. As such, we urge CIRO and the CSA to continue its efforts analyzing other potential amendments to the existing regulatory regime, while taking into consideration any potential benefits and impacts such requirements could have on market participants, including issuers.

Conclusion

While TMX believes that the regulatory framework in Canada must address potential short selling abusive practices, it must be appropriate for our market. We support amendments to the existing regulatory framework proposed that will increase investor confidence and ensure fairness to all participants in Canada's capital markets without hampering legitimate short sale activities. While TMX agrees that there ought to be better controls on failed trades, we urge CIRO to reconsider the impacts of the Proposed Short Selling Requirements on market participants and issuers, and consider whether the objectives of the Proposed Short Selling Requirements could be met in other ways, including utilizing the existing regulatory regime in Canada, and exploring other ways to strengthen the short selling regulatory regime relating to failed trades.

We appreciate the opportunity to respond to the Request for Comment. We look forward to working collaboratively with CIRO to address issues related to short selling in the Canadian capital markets. We would be pleased to discuss in more detail at your convenience.

Sincerely,

"Rizwan Awan"

Head of TMX Markets, Products and Services and President, Equities Trading
TMX Group Limited