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GLOBAL BANKING AND MARKETS

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Via Email

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

Scotiabank appreciates the opportunity to comment on CIRO's proposed amendments to UMIR clarifying the expectation on Participants to hold a reasonable expectation to settle a short sale.

General Remarks

We believe that the current regime governing short selling in Canada is appropriate. The expectations set out on UMIR Policy 2.2 paragraph (2)(h) establish that engaging in sales with no expectation of settlements constitutes a prohibited manipulative practice. We believe dealers generally adhere to this

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principle in their policies & procedures and engage in efforts to prevent sales which are not intended to settle.

We nonetheless agree with the occasional sentiment that Canada's regime in this area can be confusing or unclear, particularly to participants who are not deeply familiar with multi-layered requirements in UMIR. For this reason, we believe it is reasonable and appropriate to restate the current expectation as an explicit rule requiring a reasonable expectation to settle, as set out in the proposal.

We are, however, concerned that the draft guidance presented may leave some readers with the impression that the *only* way to demonstrate a reasonable expectation to settle is through preparing easy-to-borrow lists, or otherwise indicating the anticipated source of borrow. This interpretation of guidance (rather than the letter of the proposed UMIR 3.3 rule) would become a de-facto introduction of a "locate" requirement similar to what is set out in Reg SHO. We believe that such order-by-order requirements are inappropriate, costly to industry and likely beyond the intent of the proposal as written.

We therefore request that CIRO revise the guidance to explicitly indicate other means of documenting expectations of settlement. This could include current industry practices from dealers seen as compliant with UMIR 2.2 requirements, including dealers who meet their settlement expectation requirements through post-trade review and the active monitoring of their clients' behaviour patterns. Alternatively, some dealers may choose to introduce "hard to borrow" lists to supplement client-level monitoring, rather than rely on "easy to borrow" inclusion. We believe dealers should be free to develop compliance protocols which meet the spirit and letter of UMIR in a manner that is also suitable for their particular business mix.

CIRO is uniquely positioned to provide a range of guidance of currently-acceptable practice. The periodic examination of various dealers' policies and procedures as part of trading conduct compliance reviews gives CIRO visibility into existing practices. This insight should allow for additional clarifying examples of currently acceptable means of compliance with Policy 2.2, which is functionally equivalent to the proposed UMIR 3.3(1).

Finally, we wish to note our agreement and support of the presumption of compliance associated with the proper use of the short-marking exempt order designation. The absence of this relief would jeopardize liquidity provision in many Canadian listed securities, including many Canadian ETFs, where settlement is sometimes unavoidably delayed for structural reasons. We believe that the smooth functioning of the secondary market for such securities is of paramount importance, and support CIRO's efforts to prevent unintended negative consequences from the introduction of clarifying amendments to UMIR. We therefore recommend that the expectation set out in section 2.1.7 of the proposed guidance be codified explicitly in UMIR.

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Answers to Specific Questions

(a) Have we identified all the material impacts on clients, issuers, Participants, Access Persons, marketplaces or CIRO as a result of the Proposed Amendments? If not, please list any other impacts that you believe will materially impact one or more parties and why.

We believe CIRO's impact analysis is lacking in one specific area: the ETF market.

Certain ETF securities impose timing restrictions on the entry of primary market creation orders by authorized participants. These limitations are essential for protecting the integrity of the ETF itself, and protecting investors who are current holders of the ETF. However, these restrictions may leave the dealers engaging in ETF intermediation in the position of being unable to create shares to satisfy a sale made in the secondary market until the next business day, simply because the sale to a new investor was made after the relevant cut-off time. In this situation, authorized participants' next-day creations will result in a one-day settlement lag on some purchases in the secondary market. We note that this phenomenon is particularly common in ETFs holding international securities, where creation orders are typically required on the day prior to their designated creation date.

The structural limitations of some ETFs may leave dealers in technical non-compliance with proposed UMIR 3.3, unable to make sales to the secondary market (because of the inability to create shares on the same trade date), and otherwise result in market disruption. We believe this outcome would be damaging to ETF market integrity beyond any benefits provided by the introduction of UMIR 3.3.

We highlight, as noted above, that this potential outcome is substantially addressed through section 2.1.7 of the proposed guidance, as ETF market-making activities by authorized participants are expected to be performed as short-marking exempt. We recommend that this very important interpretation of SME activity be explicitly addressed either directly in UMIR or through clear and unambiguous guidance.

(b) Overall, do you agree with CIRO's qualitative assessment that the benefits of the Proposed Amendments are proportionate to their costs? Please provide reasons for your stance.

Yes. We believe that the restatement Policy 2.2 requirements into a separate component of UMIR leaves the overall expectations on participant behaviour unchanged, and therefore the costs of implementation should be low.

We appreciate the opportunity to comment.

Respectfully,

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