

## Appendix C – Summary of comments received and CIRI’s responses

### Comments Received in Response to Bulletin 24-0003 Proposed Amendments Respecting the Reasonable Expectation to Settle a Short Sale and Bulletin 24-0004 Proposed Guidance on UMIR Requirements Related to Short Selling and Failed Trades

On January 11, 2024, the Canadian Investment Regulatory Organization (CIRI) published Bulletins [24-0003](#) and [24-0004](#) to add a new positive requirement for a reasonable expectation to settle and to provide additional clarity on the short selling regulatory framework in UMIR.

We received 17 comment letters from the following commenters:

Alternative Investment Management Association (**AIMA**)

Bockhold Investment Management (**BIM**)

Canadian Advocacy Council of CFA Societies Canada (**CAC**)

Canadian Independent Finance and Innovation Counsel (**CIFIC**)

Canadian Securities Exchange (**CSE**)

Foster & Associates (**Foster**)

Gabriel (**Gabriel**)

Investment Industry Association of Canada (**IIAC**)

McMillan LLP (**McMillan**)

National Bank Financial (**NBF**)

Prospectors & Developers Association of Canada (**PDAC**)

Save Canadian Mining (**SCM**)

Scotiabank Global Banking and Markets (**Scotiabank**)

Select Vantage Canada Inc. (**Select Vantage**)

TMX Group Limited (**TMX**)

Virtu Canada Corp. (Virtu)

Wildeboer Dellelce LLP (Wildeboer Dellelce)

Copies of these comments are publicly available on [CIRO's website](#). The following table provides a summary of the comments received:

Summary of Comments	Responses
<b>General Comments on the Proposed Amendments and Proposed Guidance</b>	
Seven commenters are supportive of the Proposed Amendments and Proposed Guidance. (AIMA, CAC, CSE, McMillan, NBF, PDAC, Scotia)	We would like to thank all those who submitted their comments. We acknowledge that there was no consensus among the commenters on the proposal.
Six commenters view the Proposed Amendments and/or Proposed Guidance as imposing new requirements that are not necessary at this time. (CIFIC, IIAC, Select Vantage, Virtu, Foster, TMX)	The only new requirement is the positive requirement for a reasonable expectation to settle, which would not be a net new obligation. The amendments in <a href="#">CIRO Bulletin 24-0349 (Amendments)</a> are intended to support the current requirements that prohibit the entry of an order without a reasonable expectation out in UMIR Policy 2.2.
Eight commenters indicate additional requirements are needed to bolster the current short selling regulatory framework, including but not limited to pre-borrow or locate requirements, mandatory buy-ins, re-introduction of the uptick rule, and/or increased disclosure requirements etc. (Wildeboer Dellelce, SCM, BIM, Gabriel, TMX, CSE, PDAC, McMillan)	As stated in CSA-CIRO Staff Notice 23-332, CIRO and the CSA have formed a joint staff working group ( <b>CSA-CIRO Working Group</b> ) to continue to explore other areas of short sale regulations where additional regulatory measures may be appropriate. Any additional requirements proposed by CIRO would be introduced separately and published by CIRO for comment as part of the policy development process.

## Proposed Amendments on a Reasonable Expectation to Settle

### General comments

The Proposed Amendments and Proposed Guidance provide needed clarification, foster a better understanding of the current short selling framework and contribute to greater compliance among Participants. (NBF, PDAC, AIMA, CSE, Scotia)

- By restating the requirements into an affirmative obligation, the Proposed Amendments resolves specific deficiencies within the existing rule. (NBF)
- It is reasonable and appropriate to restate the current expectation as an explicit rule requiring a reasonable expectation to settle as Canada's current short selling framework can be confusing to Participants who are not deeply familiar with the multi-layered requirements in UMIR. (Scotia)

We acknowledge the comments.

The Proposed Amendments are ambiguous, create uncertainty, and could lead to different interpretations among participants. (Wildeboer Dellelce, Virtu, McMillan, TMX)

- Lack of clarity may negatively impact how market participants view trading in the Canadian market, and thus may avoid trading in the Canadian market entirely. (TMX)

Similar to the current requirements in UMIR Policy 2.2, the positive requirement for a reasonable expectation to settle is a principles-based rule. Our view is that taking a prescriptive approach may adversely limit a dealer's ability to structure their compliance and supervision systems according to their type of business, client or order flow. However, we along with the CSA continue to examine whether a more prescriptive standard, such as locate or pre-borrow requirements, would be appropriate in the Canadian context.

In the meantime, we have modified Guidance Note [GN-URPart3-24-0002](#) to clarify that our guidance only provides examples and is not an exhaustive list of how a Participant or Access Person can have a reasonable expectation to settle.

### Easy-to-borrow (ETB) lists

<p>Some commenters did not agree with the use of ETB lists as:</p> <ul style="list-style-type: none"> <li>• ETB lists are onerous to create and may not be superior to hard-to-borrow lists. (IIAC, CIFIC)</li> <li>• being one of only two ways to demonstrate a reasonable expectation to settle, where the other option is to indicate the anticipated source of borrow on a per-order basis. (Scotia, Virtu)</li> </ul>	<p>The Amendments do not mandate the use of ETB lists. We acknowledge that the sole focus on ETB lists in the Proposed Guidance may be causing unnecessary confusion. As a result we have amended Guidance Note <a href="#">GN-URPart3-24-0002</a> to discuss “borrow lists” that include the concept of hard-to-borrow lists as well as ETB lists. Specifically, “borrow lists” may include securities that have been determined to be readily available or hard to borrow, depending on the practice of the Participant or Access Person. The use of borrow lists is one method for Participants and Access Persons to consider and the Guidance Note is not intended to provide an exhaustive list of methods of how a Participant or Access Person can have a reasonable expectation to settle. As such, borrow lists are one, but not the only, way that a Participant or Access Person can have a reasonable expectation to settle.</p> <p>The Amendments also do not require Participants and Access Persons to specify the anticipated source of borrow for every order to short sell that is sent to a marketplace. Consistent with a principles-based rule, Participants and Access Persons are able to use other methods as long as they have a reasonable expectation to settle on settlement date.</p>
<p><b>Reasonable Expectation to Settle vs. Pre-borrow requirements</b></p>	
<p>One commenter indicates that a majority of securities sold short will be captured under pre-borrow requirements, which will impose a significant new trading cost on the Canadian securities trading industry, particularly in ‘hard to borrow’ stocks. (Select Vantage)</p>	<p>The Amendments do not introduce any new pre-borrow requirements. Pursuant to the current short selling regulatory framework in UMIR, pre-borrowing prior to a short sale is only required in the following limited circumstances:</p> <ul style="list-style-type: none"> <li>• CIRO has designated a security as a “Pre-Borrow Security” under UMIR 1.1, or</li> <li>• there has been a prior extended failed trade that was: <ul style="list-style-type: none"> <li>○ a principal trade and the Participant wants to short sell in the same security, or</li> <li>○ a client trade, as a result of the client’s intentional or negligent act, and the same client wants to conduct future short sales in any security.</li> </ul> </li> </ul>
<p><b>Reasonable expectation to settle and impact on failed trades</b></p>	

<p>One commenter asks CRO to clarify that failure to settle is not necessarily evidence of absence of a reasonable expectation to settle. (IIAC)</p>	<p>A failed trade does not necessarily mean a Participant did not have a reasonable expectation to settle on the expected settlement date at the time of order entry. Conversely, the fact that a trade settles on settlement date does not necessarily demonstrate that the participant had a reasonable expectation to settle at the time of order entry. We acknowledge in Guidance Note <a href="#">GN-URPart3-24-0002</a> that trades may fail to settle due to administrative errors or delays that are outside of a Participant's control.</p>
<p><b>Having a Reasonable expectation to settle for direct electronic access clients</b></p>	
<p>One commenter indicates that requiring a reasonable expectation to settle will be concerning for direct electronic access clients, as this will increase execution times and/or require technological solutions which are not widely available in the Canadian marketplace, resulting in operational complexity and additional costs. (IIAC)</p>	<p>Having a reasonable expectation to settle is not a net new requirement. Pursuant to UMIR 2.2, Participants are already prohibited from trading for any client where there is no reasonable expectation to settle, including clients that access marketplaces using direct electronic access.</p>
<p><b>Executing and originating dealers</b></p>	

One commenter views the Proposed Amendments as placing sole reliance on the executing Participant to ensure a reasonable expectation to settle. The commenter encourages CRO to introduce a similar reliance provision on originating dealers (whether Participant or not) and on foreign dealers that are subject to an appropriate short-selling regime, such as Regulation SHO in the U.S. (Virtu)

Consistent with the existing requirement in UMIR Policy 2.2 and ensuring that no net new obligation would be imposed under the Amendments, the need for a reasonable expectation to settle remains on the executing Participant, unless they are trading for another Participant.

*When trading for another Participant:*

Where the executing Participant is trading for another Participant, the executing Participant may rely on the trading Participant for compliance with the requirement to have a reasonable expectation to settle on settlement date. This reliance is reasonable because all Participants are subject to the same requirements under UMIR.

*When trading for a foreign dealer equivalent that is subject to a similar or higher standard:*

The requirements for a reasonable expectation to settle will also be met where a Participant relies on a foreign client equivalent's documented compliance, for example, to locate requirements under Regulation SHO in the U.S.

*When trading for a CRO dealer that is not a Participant:*

Conversely, where the executing Participant is trading for another CRO dealer that is not a Participant – the requirement to have a reasonable expectation to settle would remain on the executing Participant. This is because a non-trading CRO dealer that is not a Participant is not subject to a similar requirement to have a reasonable expectation to settle a trade on the expected settlement date.

While the executing Participant may rely on assurances from a non-Participant CRO dealer that they have a reasonable expectation to settle on settlement date, the executing Participant must have a reasonable belief that the securities will be available for delivery on the date delivery is due. As noted in Guidance Note [GN-URPart3-24-0002](#), relevant factors impacting this belief would include client history and the presence of prior failed trades.

**Documenting compliance**

<p>One commenter views the need to document evidence to show a reasonable expectation to settle to be a substantial new burden. (IIAC)</p> <p>Another commenter indicates the proposal did not mandate documentation (beyond the general requirement contained in UMIR to document compliance with such rules), and encourages CIRO to require specific documentation reflecting compliance. (McMillan)</p>	<p>The requirement to document compliance in IDPC Rule 3804 currently applies to all CIRO requirements (including the existing prohibition to trade without a reasonable expectation to settle in UMIR Policy 2.2), therefore we do not expect there to be a higher burden for those that are in compliance with existing requirements.</p>
<p><b>Supervision requirements</b></p>	
<p>One commenter views the Proposed Amendments as introducing a new regular review requirement in UMIR Policy 7.1 and states that it would be challenging to conduct effective monitoring for certain clients, such as institutional DAP/RAP accounts. (Virtu)</p>	<p>The Amendments do not introduce a new review requirement for a reasonable expectation to settle, as this should already be part of a Participant’s supervision system pursuant to Part 3 of UMIR Policy 7.1 to review for compliance with requirements under UMIR 2.2.</p>
<p><b>Requests for Exemptions</b></p>	
<p>One commenter indicates that the selling of the underlying security of a warrant or option to pay for its exercise before receiving the security in the account should not be considered a short sale and should be carved out of the Proposed Amendments. (CIFIC)</p>	<p>We have not made any changes to the UMIR definition of a “short sale”, which specifies that owning a stock option or warrant does not equate to ownership of the underlying securities unless certain conditions have been complied with. For example, where a seller has tendered irrevocable instructions to exercise an option or warrant, the sale will still be considered a “short sale” if the settlement date for the option or warrant exercise would be <u>after</u> the settlement date of the trade.</p>
<p>One commenter asks for an exemption for firms that conduct proprietary trading that involve selling securities against long positions in warrants and options. The proposed requirement to have a reasonable expectation to settle, along with the accompanying supervisory and gatekeeper requirements, could significantly burden a client’s operations and hinder their ability to manage their portfolio effectively. (Foster)</p>	<p>The Amendments apply to investment dealers that are Participants and Access Persons under UMIR. Firms that are not Participants would not be subject to UMIR, and therefore would not be subject to the supervisory and gatekeeper requirements in UMIR.</p> <p>To rely on a long position in warrants and options as a way to have a reasonable expectation to settle, a client would need to exercise those warrants or options and expect to receive the shares in time to settle the sale on the expected settlement date.</p> <p>Participants also can request exemptive relief for consideration by CIRO Market Policy staff under UMIR 11.1(1) for a specific transaction as needed.</p>

<p>One commenter states that a reasonable expectation to settle should be considered to be met where a Participant has an internal policy that expresses a corporate intention to net to zero on or before settlement. The commenter also asks for a permissible threshold for failed trades and only if a Participant exceeds this threshold, should the Participant be required to comply with certain parts of the Proposed Guidance, such as the use of an ETB list. (Select Vantage)</p>	<p>Participants whose expectation to settle on settlement date relies solely on an ability to buy back the shares on marketplace in time for settlement – would mean that the purchases must occur on the same day as the sales in order to avoid a failed trade under UMIR. Therefore, unless a Participant intends to net to zero by the end of each trading day, that Participant will not be able to settle on the expected settlement date.</p> <p>Depending on the security, where it may not be feasible to buy back the shares on the same day, the Participant may need to make other arrangements (such as entering into a borrowing arrangement) so that they would be able to settle the short sales on the expected settlement date.</p>
<p><b>Short-marking exempt orders (SME)</b></p>	
<p>One commenter supports a presumption of compliance associated with the proper use of the short-marking exempt order designation, in particular ETF market-making activities by authorized participants. Recommends CIRO codify as part of UMIR, the expectation set out in section 2.1.7 of the Proposed Amendments.<sup>1</sup> (Scotia)</p>	<p>The Amendments do not make any changes to the UMIR definition of a “short-marking exempt order”.</p> <p>As long as the Participant with Marketplace Trading Obligations for the ETF is engaging in fully hedged transactions with the ETF and its underlying securities, and the account does not have, at the end of each trading day, more than a minimal exposed risk, the Participant would be able to use the short-marking exempt order designation. Provided that the requirement for ongoing assessment of the correct use of the SME marker is complied with, this may be considered a reasonable expectation to settle. To the extent that trading activity no longer satisfied the SME definition then we would expect the Participant to take additional steps in order to have a reasonable expectation to settle the trade on settlement date.</p>
<p>One commenter supports maintaining the existing rules on the use of short-marking exempt orders by entities with marketplace trading</p>	<p>The Amendments do not make any changes to the UMIR definition of a “short-marking exempt order”, which currently includes</p>

<sup>1</sup> Section 2.1.7 of Bulletin [24-0003](#) states that the “(p)roper use of the short-marking exempt order marker, including by entities with Marketplace Trading Obligations trading in their securities of responsibility, would generally enter orders with a reasonable expectation to settle. This is because entities with Marketplace Trading Obligations would not, in the ordinary course, have more than a nominal position at the end of a trading day, whether long or short, in any particular security.”

obligations and other activity that qualifies for the use of the marker. (Virtu)	trading by persons pursuant to their Marketplace Trading Obligations.
Two commenters indicate there should be a ban on all short marking exempt high frequency trading algorithms using baiting, wash trades or spoofing techniques. (SCM and BIM)	We have confirmed in Notices <a href="#">13-0053</a> and <a href="#">2002-010</a> that the use of certain trading strategies commonly known as spoofing, layering <sup>2</sup> or wash trades on a marketplace are considered manipulative and deceptive trading practices for the purpose of UMIR. While these strategies may be associated with the use of automated order systems, these strategies are prohibited whether they are conducted manually or electronically.
<b>Proposed Guidance</b>	
<b>Pre-borrow requirements in UMIR 6.1 (4) and (6)(or proposed UMIR 3.4(2))</b>	
<p>Two commenters indicate that pre-borrow requirements for certain clients where there has been a reportable extended failed trade could be unduly punitive:</p> <ul style="list-style-type: none"> <li>• as it may be difficult to apply concepts such as an “intentional” or “negligent” act because of potential ambiguity on the ultimate responsibility for a settlement fail (AIMA), and</li> <li>• asked for flexibility to allow a client to conduct future short sales without pre-borrowing if the client can demonstrate revised procedures to ensure a reasonable expectation of settlement on short sales. (Virtu)</li> </ul> <p>One commenter asks for clarification on when CIRO would provide consent to a Participant for future short sales in the same security without pre-borrowing when there has been a reportable extended failed trade in that security. (PDAC)</p>	<p>We acknowledge these comments. While the Amendments do not introduce any changes to the pre-borrow requirements under UMIR 6.1(4) and (6), we will consider the comments received for any further policy work on this issue.</p> <p>CIRO has not provided such consent to date. However, when there has been a reportable extended failed trade in a security, any consideration by CIRO to provide consent to a Participant for future short sales in the same security without the Participant or Access Person pre-borrowing that security would be case specific. When determining whether such consent is appropriate, we would look at factors such as: the reason for the initial failure, the reason as to why the Participant or Access Person is not able to arrange for a</p>

<sup>2</sup> CIRO Bulletin 13-0053 describes “layering” as a type of manipulative and deceptive trading activity where someone places a bona fide order on one side of the market while simultaneously “layering” orders in the consolidated market display on the other side of the market without intention to trade. The purpose of the “layering” is to “bait” other market participants to react and trade with the bona fide order on the other side of the market at an artificial price.

	pre-borrow in that security, and the rationale as to why the future short sale must be executed.
<b>Enforcement on current rules in short selling framework</b>	
Two commenters emphasize the need for regulatory enforcement of unlawful trading activities under the short selling regulatory framework. (PDAC, TMX)	We are committed to promoting healthy capital markets by regulating fairly and effectively to ensure the protection of investors. As part of this commitment, those who breach CIRO Requirements will be subject to investigation and disciplinary proceedings where appropriate.
Two commenters indicate that regulators need an automated system to detect, and block, baiting and spoofing orders. (SCM and BIM)	We monitor equity trading on Canadian marketplaces in real time using state-of-the-art technology, <b>SMARTS</b> . Using SMARTS, CIRO's Market Surveillance teams are able to quickly detect trading anomalies across multiple products, individual traders and firms, and identify and respond to emerging trends in an efficient manner.
<b>Consolidation of existing requirements</b>	
One commenter indicates that dealers appreciate the consolidation of the UMIR provisions regarding short selling in one place. (IIAC)	We acknowledge the comment.
<b>Impact Assessment</b>	
Four commenters indicate that the impacts/costs of the Proposed Amendments are proportionate to the expected benefits. (Scotia, CAC, NBF, AIMA)	We acknowledge the comments.
Three commenters indicate that the impacts/costs of the Proposed Amendments are greater than the expected benefits (IIAC, TMX, Select Vantage). In particular: <ul style="list-style-type: none"> <li>• one commenter disagrees with CIRO's impact assessment that Participants should already have processes and systems in place to prevent trading without a reasonable expectation to settle (IIAC)</li> <li>• one commenter suggests the ambiguity in the Proposed Amendments would have a chilling effect of deterring trading activity in Canada and negatively impact issuers (TMX).</li> </ul>	<p>The Amendments support existing requirements and in CIRO's view do not introduce any net new requirements. As a result, the Amendments should not have a big impact on those that are already complying with the existing short selling framework under UMIR. However, those that may be trading without a reasonable expectation to settle would still fall short of existing requirements under UMIR 2.2, regardless of the Amendments.</p> <p>In order to reduce ambiguity in what remains a principles-based rule, we have added further clarification on what it means to have a reasonable expectation to settle in Guidance Note <a href="#">GN-URPart3-24-0002</a>.</p>

<p>Two commenters indicate that the Proposed Amendments have no impacts/costs and are only a distraction that looks like CIRO is doing something when in fact, the core issues are left completely as is. (SCM and BIM)</p>	<p>As noted earlier, we view the Amendments and Guidance Note <a href="#">GN-URPart3-24-0002</a> as an important first step in supporting existing requirements. CIRO, along with the CSA, continue to examine other policy options related to short selling as part of the CSA-CIRO Working Group.</p>
<p><b>Implementation Period and Move to T+1 Settlement</b></p>	
<p>One commenter indicates there may be more failed trades following the move to T+1 settlement. (CIFIC) Another commenter asked for an assessment of whether the current proposals may still be needed given the impact of the shortened settlement cycle on failed trades. (IIAC)</p>	<p>As stated in CSA-CIRO Staff Notice 23-332 and CIRO Bulletin 24-0004, we have committed to being mindful of the impact of the move to T+1 settlement cycle implementation on any proposal. Therefore, we did not impose an effective date for the Amendments that would be less than six months from May 27, 2024, being the date when the T+1 settlement cycle was implemented in Canada.</p>
<p><b>Additional requirements still needed</b></p>	
<p><b>Mandatory Buy-Ins or Close-outs</b></p>	
<p>Five commenters ask CIRO to implement mandatory buy-in or close-out requirements similar to those in the United States or European Union. (TMX, CSE, McMillan, SCM, BIM)</p>	<p>The Amendments and Guidance Note <a href="#">GN-URPart3-24-0002</a> clarify and support existing requirements in the short selling regulatory framework under UMIR as an important first step. These Amendments do not preclude further work by CIRO or the CSA in this area.</p>
<p><b>Locate and/or Pre-borrow</b></p>	
<p>Three commenters recommend the implementation of pre-borrow or locate requirements on all short sales in Canada. (SCM, BIM, Wildeboer Dellelce)</p>	<p>As indicated in CSA-CIRO Staff Notice 23-332, the CSA-CIRO Working Group was formed in January 2024 to examine short selling issues, starting with an analysis of whether mandatory close-out requirements would be appropriate for Canada.</p>
<p><b>Strengthening failed trade reporting requirements</b></p>	
<p>One commenter urges CIRO and CSA to continue analyzing other ways to strengthen the short selling regulatory framework surrounding failed trades, including strengthening the failed trade reporting requirements. (TMX)</p>	<p>Any rule changes proposed by CIRO that result from the CSA-CIRO Working Group's recommendations would be published by CIRO for public comment as part of the policy development process.</p>
<p><b>Uptick Rule</b></p>	
<p>Four commenters ask for the reinstatement of the uptick rule. (SCM, BIM, Wildeboer Dellelce, Gabriel)</p> <p>One commenter recommends the implementation of the <a href="#">Alternative Uptick Rule</a> which, in certain circumstances, prevents the execution or</p>	

<p>display of a short sale at a price that is less than or equal to the current national best bid. (PDAC)</p>	
<p><b>Increased disclosure requirements</b></p>	
<p>Four commenters support additional disclosure requirements, including:</p> <ul style="list-style-type: none"> <li>• requiring short sellers to disclose their positions (PDAC, SCM, BIM)</li> <li>• requiring activist short sellers to disclose methodology/sources used to support any estimates or valuation (PDAC)</li> <li>• requirements similar to Form SHO reporting requirements on institutional investment managers in the U.S. (McMillan)</li> <li>• daily publications of total short sale volume and all failed trades by broker (SCM and BIM)</li> <li>• short position disclosure regime modeled after the United Kingdom (SCM and BIM).</li> </ul>	
<p><b>Restrictions on lending of shares in cash accounts</b></p>	
<p>Three commenters support restrictions on the lending of shares in cash accounts:</p> <ul style="list-style-type: none"> <li>• one commenter asks CIRO to require brokers to disclose any potential use of client share holdings for short selling and provide clients with the option to opt out of share lending practices (PDAC)</li> <li>• two commenters indicate cash account shares should never be allowed to be borrowed in any manner (SCM and BIM)</li> </ul>	
<p><b>Limit on number of market makers</b></p>	
<p>Two commenters support limiting the number of market makers to one or two for the company and a corresponding number to be appointed by the home exchange. (SCM and BIM)</p>	
<p><b>Settlement and failed trades</b></p>	
<p>Two commenters recommend policy options related to settlement and failed trades:</p> <ul style="list-style-type: none"> <li>• Canada should implement market oversight that is modeled after Regulation SHO to track failed trades (SCM and BIM)</li> </ul>	

- the Securities Transfer Association of Canada should be regulated to ensure FTD's are properly reported (SCM and BIM).

**Listing on an exchange**

Two commenters indicate that only companies should be allowed to authorize the listing of its shares on an exchange. Brokers should be banned from doing this on behalf of companies in jurisdictions that allow FTDs. (SCM and BIM).