

Goodmans^{LLP} Update

Canadian Securities Administrators Seek Public Comment on Activist Short Selling

The Canadian Securities Administrators (CSA) recently issued a consultation paper (the “**Consultation Paper**”) seeking feedback on a broad range of issues related to “activist short selling”. Activist short sellers attempt to profit by taking a short position in a security and then publicly disclosing information expected to cause a decline in the security’s market price. The Consultation Paper compares and contrasts Canadian and international regulatory frameworks for short selling generally, summarizes stakeholder concerns about activist short selling, and sets out CSA Staff’s findings regarding the nature and extent of activist short selling in Canada. The CSA are accepting comments on the Consultation Paper until March 3, 2021.

Activist Short Selling in Canada

As part of its research, the CSA conducted an empirical analysis of 116 activist short seller campaigns targeting Canadian issuers between 2010 and September 2020, as well as a review of the academic literature. The CSA conclude:

- Between 2010 and September 2020, a total of 73 Canadian issuers were the target of 116 activist short seller campaigns, 16 of which remain active.
- Activist short seller activity has increased in Canada since 2015, on average.
- Annually, there have been no more than five Canadian targets for every 1,000 Canadian listed issuers. By comparison, in the U.S., there have been 21 targets annually for every 1,000 U.S. listed issuers.
- Activist short sellers in Canada have historically gravitated towards sectors where there is perceived overvaluation.
- Canadian campaigns have tended to focus on larger issuers, with the target issuers having a median market capitalization of \$867 million and average market capitalization of \$4.5 billion.
- Approximately 75% of the issuers subject to an activist short seller campaign experienced a negative price impact on the day of the first campaign announcement and up to one month after the first campaign announcement, although the extent of the short-term price impact varied across targets and over time.
- Approximately 40% of all campaigns studied involved allegations of some type of fraud at the issuer, the most common being allegations of a stock promotion scheme.

Canadian Regulatory Framework

In most Canadian jurisdictions, there is no specific regulation that addresses the activities of activist short sellers or the form or content of their public statements. Securities regulations prohibiting market manipulation, misleading statements and fraud apply to all market participants, including activist short sellers. In addition, the Investment Industry Regulatory Organization of Canada (IIROC) administers a regime that regulates short selling as a trading activity, including a prohibition on “naked” short selling (selling securities without access to the securities required to settle the trade) and a requirement for dealers to report their aggregate short positions twice a month.

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In contrast to certain foreign jurisdictions such as the European Union and Australia, Canadian securities regulation does not require the reporting or disclosure of the positions or identity of individual short sellers. Unlike in Canada, some foreign jurisdictions also provide a private right of action against those who contravene prohibitions on false or misleading statements, which could include activist short sellers.

In the Consultation Paper, the CSA acknowledge that questions have been raised about the effectiveness of existing enforcement tools for addressing potentially problematic activist short selling activities, given the limited number of regulatory proceedings in Canada arising from the conduct of activist short sellers.

Key Issues for Consultation

The CSA are soliciting feedback from stakeholders on a broad range of issues set out in the Consultation Paper, including:

- examples of conduct in activist short selling campaigns that may be problematic;
- whether Canadian issuers are more vulnerable to potentially problematic activist short-selling activities as compared to issuers in other jurisdictions (including in light of the size and types of issuers, industries, sectors, or other Canadian-specific market conditions);
- the ability of issuers to respond to allegations made in an activist short selling campaign;
- whether the existing Canadian regulatory framework is adequate to address the risks associated with problematic activist short selling;
- whether existing enforcement and remedial mechanisms adequately deter problematic activist short selling in Canada; and
- whether Canada should adopt relevant regulatory requirements sourced from other jurisdictions.

The CSA note there are competing views on many of these issues and no general consensus as to the path forward. At this stage, the CSA are focused on consulting with various market participants and stakeholders. The Consultation Paper does not advocate for any specific regulatory proposals or outcomes.

For further information about the Consultation Paper or activist short selling in Canada, please contact any member of our [Corporate Finance and Securities Group](#) or our [Shareholder Rights and Activism Group](#).

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