

## Appendix D - Comments Received in Response to Bulletin 25-0001 Proposed Amendments Respecting Mandatory Close-Out Requirements

On January 9, 2025, the Canadian Investment Regulatory Organization (CIRI) published Bulletin [25-0001](#) to require applicable Dealer Members to, among other things, close out a fail-to-deliver position in the event of a settlement failure in a listed security at the recognized clearing agency by specified timelines by buying or borrowing shares.

We received 22 comment letters from the following commenters:

BMO Nesbitt Burns Inc. (**BMO**)

Bob Shewchuk (**Mr. Shewchuk**)

Canaccord Genuity Wealth Management – Watson Strategic Investments (**CGWM-WSI**)

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

Canadian Bankers Association (**CBA**)

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

Canadian Securities Exchange (**CSE**)

Canadian Security Traders Association, Inc. (**CSTA**)

CIBC World Markets Inc. (**CIBC**)

Fidelity Clearing Canada ULC (**Fidelity**)

Fiore Management & Advisory Corp. (**Fiore**)

Generation Mining Ltd. (**Generation Mining**)

Investment Industry Association of Canada and the Canadian Securities Lending Association (**IIAC & CASLA**)

Interactive Brokers Canada Inc. (**Interactive Brokers**)

McMillan LLP (**McMillan**)

National Bank Financial (**NBF**)  
Prospectors & Developers Association of Canada (**PDAC**)  
Save Canadian Mining (**SCM**)<sup>1</sup>  
Scotia Capital Inc. (**Scotia**)  
TD Securities Inc. (**TD**)  
TMX Group Limited (**TMX**)  
Virtu Canada Corp. (**Virtu**)

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

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<sup>1</sup> The following 67 individuals indicated their support for the SCM comment letter: Shondell Sabad of Acapella Holdings Ltd., P. Drozinika, Richard Grafton of Westgate Energy Inc., Robert Cross of Standard Lithium Ltd., Roger Rosmus of Goliath Resources Limited, Terry Wasylak, Dave Lauer of Urvin Finance and We The Investors, Jeff Kennedy of 2176423 Ontario Ltd., Mitchell Smith of Global Energy Metals Corporation, Greg Sauer, Jean-Daniel Joly of SRQ Resources Inc. & Falcon Energy Materials plc, Dan Wilton of First Mining Gold Corp., Nicole Brewster of Renforth, Malcolm Shaw of MSC Corp, Zeeshan Saeed of Quantum BioPharma, Peter Lyngstad, Sean Adam Kingsley of Gold Hunter Resources Inc./Investor Events, Sherman A Garner, Brandon Bonifacio of NevGold Corp., Larry Acton, Ron Thiessen of Hunter Dickinson Inc., Eugene Toffolo, Spiros Kletas, Steve Regoci of Garibaldi Resources Corp., Tom English, Thomas Ronk of Buyins, Inc., H Vance White of Nobel Mineral Exploration Inc, Warren Robinson, Zayn Kalyan of Scorpio Gold Corporation, George Tsiolis of Agoracom, Alain Desrochers, Anne Waters, Mark NJ Ashcroft of Aurelius Minerals Inc., Brad White, J. Garry Clark of the Ontario Prospectors Association, Conor O'Brien of 2176423 Ontario Ltd., Craig Steincce of Reconnaissance Energy, Danny Guy of Harrington Global Limited, David Sears of DS Market Solutions Inc., David Wenger of Shareintel, Denis Clement, Edward J Borkowski, Eric Sprott of 2176423 Ontario Ltd., Glenn J. Mullan of Val-D'or Mining Corporation, Jean-Francois Meilleur, John W Welborn of Welborn Economics LLC, Knox Henderson of Strikepoint Gold, Lewis Bateman of Spirit Blockchain Capital Inc., Loren S. Greenspoon of Instadose Pharma Corp., Malcolm Smith of West Harbour Capital, Marc Lustig, Mark Peters of Northern Dynasty Minerals Ltd., Michelle Suzuki, Richard Hall, Sylvain Laberge of 1844 Resources Inc., Frank Wilson of BIM Committee, Michael Behrens, Laura Young, Donald (Bob) Heimler, Robert Pollock of Primary Capital Inc., Mark Trendell-Jensen of Endeavor Trust Corporation, J Christian, Lorne Pringle of BIM Committee, Hugh Balkam of Eskay Mining Corp., Dale Neill, Howard Doucette, Dennis Peterson.

## Summary of Comments

### Comments on the Close-out Proposal

#### General Comments

Nine commenters were not supportive of the close-out proposal. (NBF, CSTA, Fidelity, IIAC & CASLA, CIFIC, Virtu, Scotia, Interactive Brokers, CIBC)

Four commenters were supportive of the close-out proposal. (CSE, PDAC, CAC, TD)

Four commenters were supportive of certain aspects of the close-out proposal. (TMX, BMO, SCM, CGWM-WSI)

#### Regulatory Arbitrage or Uneven Playing Field

Nine commenters raise concerns that applying close-out requirements only to CIRO dealers could create possibilities for regulatory arbitrage and/or an uneven playing field. They ask CIRO to coordinate with CDS Clearing and Depository Services Inc. (CDS) and the Canadian Securities Administrators (CSA) so requirements apply uniformly to all CDS participants, addressing differences in settlement practices and infrastructure to prevent a two-tier system. This would avoid competitive disadvantages and unintended market shifts. (CIBC, CSE, CSTA, Virtu, Scotia, IIAC & CASLA, CBA, NBF, TMX)

One commenter confirms that continuous net settlements (CNS) cannot be cleared by a CDS Participant that is not an investment dealer. A marketplace cannot give up its trades for clearing to a CDS Participant unless that CDS Participant is an investment dealer. (TMX)

#### Disproportionate cost-benefit analysis

##### High Implementation Costs and Unintended Consequences

Ten commenters raise concerns about high implementation costs (ranging from \$3–22 million), significant technology and staffing requirements, as well as potential unintended consequences. Commenters indicate the close-out proposal could lead to increased costs for investors through pre-borrow requirements and wider spreads, and note close-out proposal would disproportionately burden smaller dealers and those with low failure rates, as all firms would need major system upgrades regardless of historical performance. Commenters also raise concerns about unintended consequences, that the close-out proposal could reduce liquidity, especially for junior and

We would like to thank all those who submitted their comments. In light of the concerns raised by commenters, we have decided to withdraw the close-out proposal. Any future proposals on this issue will take into account the comments received.

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| <p>illiquid securities, harm market making and ETF activity, and disrupt securities lending. They stress these unintended consequences could increase volatility and create systemic liquidity challenges. (Scotia, NBF, CSTA, Fidelity, CIFIC, IIAC &amp; CASLA, CIBC, TMX, Virtu, BMO)</p> <p><b>Lack of sufficient evidence of failed trades</b></p> <p>Eight commenters indicate there is a lack of evidence that short selling or fail rates pose a significant problem; call for data before introducing costly changes. (NBF, Fidelity, CIFIC, CSTA, Virtu, IIAC &amp; CASLA, Scotia, CIBC)</p> <p>One commenter indicates that CIRO’s 2022 Failed Trade Study showed higher fail rates on certain venues, raising concerns on impact on smaller issuers. (SCM)</p> <p><b>Rely on existing regulations</b></p> <p>Nine commenters ask CIRO to assess the impact of recently implemented “reasonable expectation to settle” requirements before introducing close-out rules. They state that existing regulations already address settlement failures and short-selling concerns, and better enforcement would be preferable to adding duplicative, costly, and operationally complex requirements. (NBF, CSTA, Fidelity, IIAC &amp; CASLA, CIFIC, Virtu, Scotia, Interactive Brokers, CIBC)</p> |  |
| <p><b>Technical and Operational Challenges</b></p>   |  |
| <p>Seven commenters highlight major operational challenges with the close-out proposal, including difficulty identifying and allocating failed trades due to CNS netting, lack of integrated systems and compressed timelines. Significant infrastructure upgrades, automation, and enhanced reporting from CDS would be required, along with coordination among brokers, vendors, and regulators to implement new processes accurately and efficiently. (NBF, CSTA, Scotia, Fidelity, CIFIC, CIBC, CBA)</p>   |  |
| <p><b>Modeling Canadian requirements after U.S. Regulation SHO</b></p>   |  |

Four commenters do not support aligning Canadian requirements with U.S. Regulation SHO, citing operational complexity, regulatory uncertainty and differences in market structure. (NBF, Interactive Brokers, SCM, IIAC & CASLA)

One commenter note that Canada lacks U.S.-style infrastructure that facilitates compliance with Regulation SHO, such as NSCC's securities borrowing program for settlement completion. (TMX)

One commenter supports aligning close-out requirements with the U.S. approach due to market interconnectedness and Canadian dealers' familiarity with U.S. requirements and settlement processes. (CAC)

#### **Regulatory consequences for failure to close out on time**

Commenters were divided on the appropriate regulatory consequence for failing to close out on time:

- Scope of Pre-Borrow Requirement
  - One commenter indicates the pre-borrow requirement should apply only to the dealer responsible for the failure, not all introducing brokers under the same carrying broker. (Virtu)
  - One commenter states the pre-borrow requirement should not apply to immaterial failures if the firm has the capacity to resolve them. (IIAC & CASLA)
- Restrict Short Selling
  - Seven commenters do not support restricting short selling where there is a failure to close out, citing risks to liquidity, price discovery, and market efficiency. Rather they view requiring pre-borrow for future short sales to be sufficient. (TMX, NBF, Fidelity, CIFIC, CSTA, Scotia, CIBC)
  - One commenter supports restricting short selling where there is a failure to close out in a timely manner. (PDAC)
- Data Analysis and Monitoring
  - One commenter asks CIRO to analyze short selling and fail-to-deliver data annually in order to determine regulatory consequences for fail-to-deliver positions. If failures are frequent or disruptive, stricter measures (such as temporary short-selling restrictions) may be needed. (McMillan)

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| <p><b>Closing out fail-to-deliver positions</b></p>   |  |
| <p>Commenters provide the following views on closing out fail-to-deliver positions:</p> <ul style="list-style-type: none"> <li>• Eleven commenters had mixed views on whether trades to close out a fail-to-deliver position should be conducted on or off-marketplace. <ul style="list-style-type: none"> <li>○ Six commenters support on-marketplace executions for close-outs for transparency and liquidity. (TMX, Fidelity, CSTA, Virtu, Scotia, CBA)</li> <li>○ Six commenters support allowing off-marketplace trades for illiquid or inter-listed securities to minimize disruption, but raise concerns about potential abuse and complexity. Suggests off-marketplace executions to be used only as rare exceptions in the rule or to be granted pursuant to CIRO-approved exemptions. (NBF, CIFIC, Virtu, IIAC &amp; CASLA, McMillan, CIBC)</li> </ul> </li> <li>• Eight commenters oppose using a new marker to tag close-out trades citing significant operational burden; raising concerns on cost, complexity, and attribution challenges. (NBF, Fidelity, CIFIC, Virtu, Scotia, CIBC, CBA, IIAC &amp; CASLA)</li> <li>• Two commenters support setting a cap on premiums over market price to prevent misuse and ensure commercially reasonable terms. (McMillan, CBA)</li> <li>• Two commenters asked for further clarification on the process to close out, including timing and communication of fail-to-deliver lists from CDS to dealers, and whether there would be harmonization with U.S. Regulation SHO for operational efficiency. (CBA, Virtu)</li> </ul> |  |
| <p><b>Close-out Timelines</b></p>   |  |
| <p>Eight commenters had mixed views on the general close-out timeline of S+1. Some commenters support this timeline for efficiency, while others cite operational risks and request flexibility, especially for illiquid securities. Some commenters suggest a differentiated approach based on liquidity profiles to avoid market disruption. (SCM, IIAC &amp; CASLA, Scotia, CIBC, CBA, NBF, Mr. Shewchuk, Generation Mining)</p> <p>Eleven commenters request additional consideration and/or guidance for certain scenarios, including ETFs and structured products, short-marking</p>  |  |

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| <p>exempt orders, persons with Marketplace Trading Obligations, trading in inter-listed securities and administrative fails. (NBF, Scotia, BMO, CIBC, CSTA, Virtu, CBA, CSE, TMX, Fidelity, IIAC &amp; CASLA)</p>   |  |
| <p><b>Notification and Reporting Requirements</b></p>   |  |
| <p>Five commenters ask for restrictions on future short sales to apply only to the originating dealer, not through notifications to other brokers. They raise concerns on significant operational and technical challenges regarding proposed notification and reporting requirements, such as tight T+1 timelines and the need for major system upgrades and real-time reporting. Some commenters oppose allocation reporting to CIRO, noting that CDS already holds fail-to-deliver data and additional reporting would be duplicative and inconsistent with U.S. rules. (Virtu, IIAC &amp; CASLA, NBF, CIBC, CBA)</p>  |  |
| <p><b>Implementation Timeline</b></p>   |  |
| <p>Eight commenters were divided on the proposed implementation timeline: some support six months, while most request 12–24 months to allow CDS system development, dealer compliance builds, and industry consultations. Some commenters suggest tiered implementation for smaller or lower-risk firms. (McMillan, TMX, NBF, CIFIC, IIAC &amp; CASLA, CIBC, Scotia, CBA)</p>   |  |
| <p><b>Other policy options in place of, or in addition to, the close-out proposal</b></p>   | <p>We thank commenters for sharing their views on alternative policy options to replace or supplement the close-out proposal. Any future policy analysis undertaken will consider the comments received.</p> |
| <p>Eleven commenters suggest other policy options including having CDS administer mandatory close-outs rather than CIRO. Some commenters recommend cash penalties for failures to deliver, or requiring dealers to strengthen internal policies for DVP settlements and securities borrowing. One commenter supports enhanced data reporting by marketplaces and CDS, coupled with post-trade surveillance by CIRO. Some commenters ask CIRO to reinstate the uptick rule, or consider the Alternative Uptick Rule. Some commenters call for stricter rules for junior markets, such as separate short-selling regimes or short selling bans for issuers under \$1B market cap. One commenter urges CIRO to suspend repeat offenders from market access. Some commenters call for more transparency in short selling, including disclosure of short sellers' positions, adopting EU-level standards (including daily fail-to-deliver reporting to regulators, bi-weekly public disclosures on fail-to-deliver amounts with remediation and counterparty details), publication of monthly reports on failed trades that are not closed out by S+3, greater transparency on buy-ins, and increased frequency for short position and short sale transaction reports. One commenter asks for all trading to be limited to two</p> |  |

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| <p>exchanges (TSXV and TSX), or alternatively for other exchanges to be regulated by CIRO under the same rules as the TSX and TSXV. Some commenters recommend prohibiting brokerage firms from collecting fees for lending shares to short sellers, or requiring dealers to obtain informed client consent with an opt-out option for share lending practices. (Scotia, IIAC &amp; CASLA, Virtu, CSE, PDAC, CGWM-WSI, Mr. Shewchuk, Generation Mining, SCM, Interactive Brokers, McMillan)</p>  |  |
| <p><b>Comments on Extending the Requirement for a Reasonable Expectation to Settle to Investment Dealers that are not UMIR Participants</b></p>   |  |
| <p>Two commenters support extending the reasonable expectation to settle requirement to investment dealers that are not Participants (<b>non-Participant dealers</b>). Non-Participant dealers are in a much better position than their executing Participants to determine whether a given order has a reasonable expectation to settle on settlement date. (Virtu, CIBC)</p>  | <p>We thank commenters for their comments. Extending this requirement to non-Participant dealers would promote a consistent understanding of the need to have a reasonable expectation to settle across all investment dealers.</p>  |
| <p><b>Comments on Introduction of a ‘Deemed to Own’ Exception</b></p>   |  |
| <p>Six commenters support the T+35 timeline for ‘deemed to own’ securities (Fidelity, CIFIC, IIAC &amp; CASLA, Fiore, Virtu, CIBC)</p> <ul style="list-style-type: none"> <li>• One commenter note that failing dealers would still be subject to financial risk from a buy-in effected by trading counterparty, regardless of the proposed T+35 timeframe. (Fidelity)</li> <li>• One commenter states there should be a mechanism for additional extensions in complex situations. (CIBC)</li> </ul>   | <p>We thank all those that responded for their comments.</p> <p>We agree that a seller’s reliance on the ‘deemed to own’ exception would not prevent buyers from initiating a buy-in under CDS rules, as the exception applies only to a CIRO requirement.</p> <p>Dealers that require additional time beyond thirty-five days past trade date may seek a regulatory exemption. CIRO would consider providing exemptive relief on a case-by-case basis.</p>  |
| <p>Two commenters do not support the T+35 timeline for ‘deemed to own’ securities (Scotia, SCM)</p> <ul style="list-style-type: none"> <li>• One commenter raises concerns about potential abuse of the ‘deemed to own’ exemption. The T+35 timeline was modeled after Regulation SHO in the U.S., which has been shown to be ineffective and unenforceable due to its subjective terms and loopholes. (SCM)</li> <li>• One commenter recommends that subjecting each case to an approval process at CIRO for determination on an individual basis, rather than a blanket T+35 timeline for ‘deemed to own’ securities. (Scotia)</li> </ul> | <p>We thank those who provided their comments. To prevent potential misuse of this exception, we would require dealers to maintain records that demonstrate compliance with the ‘deemed to own’ condition being relied upon (e.g. exercise of option or warrant, or legend removal for a specific security, etc.), and these records would be subject to regulatory inspection as part of CIRO’s ongoing dealer compliance reviews. This would achieve the same policy objective of preventing potential abuse of the new exception without creating a new regulatory process that would require dealers to make an application to CIRO to</p> |

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|  | demonstrate each use of the exception on an individual basis.  |
| <b>Cashless exercise of warrants and options</b>   |  |
| <p>One commenter supports the ability of an investor to short sell the underlying security on a marketplace before exercising the related option or warrant. They raise concerns about the current short sale rules, where dealers require sellers, at the time when the shares are sold, to provide the issuer with a notice of the intent to exercise and request the Share Registry/transfer agent to deliver the share on a rush basis. This subjects the investor to risk where the value of the shares could decline prior to being able to sell them, and investors would also need to pay taxes on an unrealized benefit as taxes are collected on exercise day for options. (Fiore)</p> <p>One commenter supports the extended T+35 timeline for cashless exercise of warrants and options. (CIFIC)</p>   | <p>We thank those who responded for their comments. The ‘deemed to own’ exception would apply to cashless exercise of warrants or options provided that, at the time of order entry for the short sale, there is a clear audit trail demonstrating client instructions to exercise specific warrants or options to cover the sale. There should also be accompanying documentation of the actions taken to effect the warrant or option exercise on a post-trade basis.</p>  |
| <b>Other</b>   |  |
| <p><b>Concerns for Market Manipulation / Abusive Short Selling</b></p> <ul style="list-style-type: none"> <li>• One commenter raises concerns about the persistent presence of naked, market exempt, high-frequency and undisclosed short selling. (CGWM-WSI)</li> <li>• One commenter note that Canadian markets are particularly vulnerable to predatory short selling and share price manipulation, given that one-third of issuers on key Canadian exchanges are mineral industry companies that are mostly small to medium-sized exploration firms that do not generate revenue and rely heavily on public equity financing to fund their operations. (PDAC)</li> <li>• One commenter asks CIRO to investigate potential market manipulation on junior exchanges, where illiquid securities are being targeted by short sellers to artificially depress prices. They question how large-scale short selling can occur in hard-to-borrow stocks under T+1 settlement rules. They identify a key issue involving participants holding long warrants with strike prices that exceed the market price of the underlying security. When these participants initiate or increase short positions in the underlying stock, they do not intend to exercise the warrants but are short selling to profit from declining prices. (CIFIC)</li> </ul> | <p>We thank those that provided their comments. CIRO continues to monitor abusive trading strategies, including those involving short selling, and actively conducts real-time market surveillance to detect and review potential price manipulation on marketplaces. Reported instances of potential market misconduct are also investigated as part of our ongoing regulatory processes, as outlined in <a href="#">What CIRO does with Market Conduct Complaints</a>.</p> |