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Guidance on UMIR Requirements Related to Short Selling and Failed Trades

Executive Summary

The Canadian Investment Regulatory Organization (**CIRO**) is publishing guidance on requirements related to short selling and failed trades under the Universal Market Integrity Rules (**UMIR**). This Guidance Note further clarifies how Participants and Access Persons should comply with these requirements in a series of frequently asked questions and responses.

In this Guidance Note, all rule references are to UMIR and the Investment Dealer and Partially Consolidated Rules (**IDPC Rules**) unless otherwise specified.

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Questions and Answers

1. What should a Participant or Access Person consider before entering an order for a short sale?¹

At a minimum, a Participant or Access Person should take the following into account before entering an order on a marketplace that upon execution would result in a short sale:

1.1 Short Sale Ineligible Security²

A Participant or Access Person must not enter an order to short sell a security that CIRI has designated as a Short Sale Ineligible Security.³

1.2 Pre-Borrow Security⁴

If the security has been designated by CIRI as a Pre-Borrow Security⁵, a Participant or Access Person must arrange to borrow the securities needed to settle any resulting trade before entering an order to sell short on a marketplace.⁶

1.3 Prior Extended Failed Trade

Certain requirements apply once there has been a failed trade that is reportable to CIRI under UMIR 7.10 (“**extended failed trade**”⁷), regardless of whether the Participant or Access Person actually reported the extended failed trade to CIRI (**EFTR**) as required.⁸

The considerations are different depending on whether the Participant or Access Person is acting as principal, or if the Participant is acting as agent for a client or non-client.

¹ See also Appendix A for a flowchart diagram that sets out some of the considerations before entering an order for a short sale on a marketplace.

² UMIR 3.2(1)(b) provides that a Participant or Access Person shall not enter an order to sell a security on a marketplace that on execution would be a short sale:

...

(b) if the security is a Short Sale Ineligible Security at the time of the entry of the order.

³ Notice [08-0143](#) – *Provisions Respecting Short Sales And Failed Trades* (October 15, 2008).

⁴ UMIR 1.1 defines a “Pre-Borrow Security” to mean a security that has been designated by a Market Regulator to be a security in respect of which an order, that on execution would be a short sale, may not be entered on a marketplace unless the Participant or Access Person has made arrangements to borrow the securities that would be necessary to settle the trade prior to the entry of the order. Prior to the Amendments in CIRI Notice XX-XXXX, UMIR 3.2(1)(c) was previously numbered as UMIR 6.1(5).

⁵ UMIR 1.1 defines a “Pre-Borrow Security” to mean a security that has been designated by a Market Regulator to be a security in respect of which an order, that on execution would be a short sale, may not be entered on a marketplace unless the Participant or Access Person has made arrangements to borrow the securities that would be necessary to settle the trade prior to the entry of the order. Prior to the Amendments in CIRI Notice XX-XXXX, UMIR 3.2(1)(c) was previously numbered as UMIR 6.1(5).

⁶ Notice [12-0078](#) – *Provisions Respecting Regulation of Short Sales and Failed Trades* (March 2, 2012).

⁷ See UMIR 3.4(1) and (2) (previously UMIR 6.1(4) and (6) prior to Amendments in CIRI Notice XX-XXXX), and UMIR 7.10.

⁸ See UMIR 3.4(1) and (2) (previously UMIR 6.1(4) and (6) prior to Amendments in CIRI Notice XX-XXXX), and UMIR 7.10.

When trading as principal in the same security as the extended failed trade:

Before entering an order that would result in a short sale, a Participant or Access Person must:

- arrange to borrow the securities needed to settle any resulting trade, or
- obtain CRO's consent for the entry of such order(s)⁹.

The above requirements only apply if the short sale order is for the same security as the one that was part of the extended failed trade.

While CRO's consideration to provide consent to a Participant or Access Person for future short sales without pre-borrowing would be case-specific, when determining whether such consent is appropriate, CRO would look at factors such as:

- reason for the initial failure
- reason as to why the Participant or Access Person is not able to arrange for a pre-borrow in the security, and
- rationale for the execution of the future short sale.

When acting as agent for the same client or non-client as the extended failed trade:

Before entering an order for the same client or non-client that would result in a short sale, a Participant must:

- make arrangements to borrow the securities needed to settle any resulting trade, or
- have made a reasonable inquiry and determined that the reason for the extended failed trade was not a result of any intentional or negligent act of the client or non-client¹⁰.

The above requirements apply to all short sale orders for the same client or non-client, and is not limited to the security that was part of the extended failed trade.

See also Q&A #3 below for further guidance.

⁹ From Notice [12-0078](#): "If a Participant or Access Person has filed **previously at any time** a report of an Extended Failed Trade in respect of a principal trade by that Participant or Access Person in a particular security, the Participant or Access Person would not be able to enter an order that on execution would be a short sale without having made arrangements to borrow the securities necessary to settle any resulting trade unless IROC has consented to the entry of the principal order that is a short sale of that particular security." [emphasis added]

¹⁰ From Notice [12-0078](#) – "If an Extended Failed Trade report has been filed **previously at any time** by a Participant with IROC with respect to an Extended Failed Trade in the account of a client or non-client, that client or non-client would not be able to enter an order that on execution would be a short sale without having made arrangements to borrow the securities necessary to settle any resulting trade unless the Participant through which the order is to be entered on a marketplace is satisfied, after reasonable inquiry, that the reason for any prior failed trade was not as a result of any intentional or negligent act of the client or non-client." [emphasis added]

1.4 Is there a reasonable expectation to settle the trade on settlement date?

Participants and Access Persons must have, before entering an order to short sell on a marketplace, a reasonable expectation of settling the resulting trade on settlement date.¹¹ This requirement is found under both:

- UMIR 3.3, being a positive requirement for a reasonable expectation to settle, and
- paragraph (h) of Part 2 of UMIR Policy 2.2, being a prohibition to sell without a reasonable expectation to settle.

Both requirements focus on having a reasonable expectation to settle prior to, or at, the time of order entry, and the positive obligation under UMIR 3.3 does not represent a higher standard when compared to the prohibition under UMIR Policy 2.2. For example, a seller may own shares from a financing that are subject to statutory resale restrictions and want to use those shares to settle a short sale trade. To have a reasonable expectation to settle on settlement date, the statutory restriction must expire prior to the settlement date of the short sale trade.

See section 4 below for further details regarding the technical requirement for a reasonable expectation to settle under UMIR 3.3.

See also Appendix A for a flowchart diagram that sets out some of the considerations before entering an order for a short sale on a marketplace.

2. What should a Participant or Access Person consider at the Time of Order Entry?

At the time of order entry, the Participant or Access Person must include the appropriate designation and/or identifier as required under UMIR 6.2. We include examples of marking orders as long or short sales¹² below.

¹¹ See UMIR 3.3 and paragraph (h) of Part 2 of Policy 2.2. See also Guidance Note [22-0130 - Guidance on Participant Obligations to have Reasonable Expectation to Settle any Trade Resulting from the Entry of a Short Sale Order](#) (August 17, 2022).

¹² UMIR 1.1 defines a “short sale” to mean a sale of a security, other than a derivative instrument, which the seller does not own either directly or through an agent or trustee and, for this purpose, a seller shall be considered to own a security if the seller, directly or through an agent or trustee:

- (a) has purchased or has entered into an unconditional contract to purchase the security, but has not yet received delivery of the security;
- (b) owns another security that is convertible or exchangeable into that security and has tendered such other security for conversion or exchange or has issued irrevocable instructions to convert or exchange such other security;
- (c) has an option to purchase the security and has exercised the option;
- (d) has a right or warrant to subscribe for the security and has exercised the right or warrant; or
- (e) has entered into a contract to purchase a security that trades on a when issued basis and such contract is binding on both parties and subject only to the condition of issuance or distribution of the security, but a seller shall be considered not to own a security if:
- (f) the seller has borrowed the security to be delivered on the settlement of the trade and the seller is not otherwise considered to own the security in accordance with this definition;
- (g) the security held by the seller is subject to any restriction on sale imposed by applicable securities legislation or by an Exchange or QTRS as a condition of the listing or quoting of the security; or
- (h) the settlement date or issuance date pursuant to:

2.1 Where the seller has entered into an unconditional contract to purchase, or has tendered irrevocable instructions to convert or exchange another security into the security

In these circumstances, whether to mark the order as a long or short sale depends on the settlement date of the contract to purchase, convert or exchange the security into the security to be sold.

Where the settlement date for the contract to purchase, convert or exchange is on or before the settlement date of the short sale trade:

Participants and Access Persons should mark the order as a **long sale** on the marketplace, as this would not be considered a “short sale” under UMIR 1.1.

For example, if a client participates in a financing for freely tradable securities that closes on May 12 and later enters a sell order with a settlement date of May 14, then the order should be marked as a long sale. To have a reasonable expectation to settle the long sale, the seller should expect to receive the shares from the financing before the settlement date of the sell trade.

If after the trade has been executed on the marketplace as a long sale, there is an unexpected delay in the settlement of the contract to purchase, convert or exchange, there is no need to file a correction report through the Regulatory Marker Correction System¹³ (**RMCS**) to change the order marker from a long sale to a short sale.

If the long sale described above fails to settle and becomes an extended failed trade, the Participant or Access Person must notify CIRI pursuant to UMIR 7.10.

Where the settlement date for the contract to purchase, convert or exchange is after the settlement date of the short sale trade:

Participants and Access Persons should mark the order as a **short sale** on the marketplace pursuant to the definition of a “short sale” under UMIR 1.1.

For example, if a client participates in a financing for freely tradable securities that closes on May 14, and enters a sell order with a settlement date of May 10, then the order should be marked a short sale.

To have a reasonable expectation to settle, the seller must rely on a source of available securities, other than those expected from the contract to purchase, convert or exchange, in order to settle the short sale on settlement date.¹⁴ If there is no other source of securities, and the trade became an extended failed

-
- (i) an unconditional contract to purchase,
 - (ii) a tender of a security for conversion or exchange,
 - (iii) an exercise of an option, or
 - (iv) an exercise of a right or warrant

would, in the ordinary course, be after the date for settlement of the sale.

¹³ Guidance Note [21-0122](#) – Marker Corrections and Use of the Regulatory Marker Correction System (July 12, 2021).

¹⁴ From Guidance Note [22-0130](#) - *Guidance on Participant Obligations to have Reasonable Expectation to Settle any Trade Resulting from the Entry of a Short Sale Order* (August 17, 2022): “For added clarity, where a client expects to receive securities after the settlement date of a short sale trade, the Participant is not permitted to rely on those securities to establish a “reasonable expectation” to settle because the securities would not be available to deliver on the settlement date of the short sale trade.”

trade, this failure to settle would be considered an intentional failure by the client or non-client under UMIR 3.4(2)(b).¹⁵ See also Q&A #3 below.

If the short sale described above failed to settle and becomes an extended failed trade, the Participant or Access Person must notify CIRI pursuant to UMIR 7.10.

3. After the Execution of the Trade

3.1 What constitutes a “failed trade” under UMIR?

UMIR defines a “failed trade” as a trade executed on a marketplace that did not settle on the expected settlement date when the trade was executed.¹⁶ Unless the trade on the marketplace was executed as a Special Terms Order¹⁷ using a different settlement date, all trades executed on a marketplace must currently settle by T+1¹⁸.

For further clarification, a trade is considered to be a “failed trade” when the seller does not deliver the securities as required on the expected settlement date, regardless of whether the trade ultimately settles through the netting and novation process by CDS Clearing and Depository Services Inc. (CDS).¹⁹

¹⁵ Prior to the Amendments in CIRI Notice [24-0003](#), UMIR 3.4(2)(b) was previously numbered as UMIR 6.1(6).

¹⁶ UMIR 1.1 defines a “failed trade” to mean a trade resulting from the execution of an order entered by a Participant or Access Person on a marketplace on behalf of an account and

- (a) in the case of a sale, other than a short sale, the account failed to make available securities in such number and form;
- (b) in the case of a short sale, the account failed to make:
 - (i) available securities in such number and form, or
 - (ii) arrangements with the Participant or Access Person to borrow securities in such number and form; and
- (c) in the case of a purchase, the account failed to make available monies in such amount, as to permit the settlement of the trade at the time on the date contemplated on the execution of the trade provided a trade shall be considered a “failed trade” irrespective of whether the trade has been settled in accordance with the rules or requirements of the clearing agency.

¹⁷ UMIR 1.1 defines a “Special Terms Order” to mean an order for the purchase or sale of a security:

- (a) for less than a standard trading unit;
- (b) the execution of which is subject to a condition other than as:
 - (i) to price,
 - (ii) to the date of settlement; or
 - (iii) imposed by the marketplace on which the order is entered as a condition for the entry or execution of the order; or
- (c) that on execution would be settled on a date other than:
 - (i) the second business day following the date of the trade, or
 - (ii) any settlement date specified in a special rule or direction referred to in subsection (2) of Rule 6.1 that is issued by an Exchange or a QTRS,but does not include an order that is a Basis Order, Call Market Order, Closing Price Order, Market-on-Close Order, Opening Order or Volume-Weighted Average Price Order.

¹⁸ CIRI Notice [23-0054](#) – Amendments to facilitate the investment industry’s move to T+1 settlement (April 20, 2023).

¹⁹ See Notice [08-0143](#) – *Provisions Respecting Short Sales and Failed Trades* (October 15, 2008).

The fact that a trade ultimately fails does not, in itself, mean that a Participant or Access Person did not have a reasonable expectation to settle on settlement date. See section 4 below for further details regarding the technical requirement for a reasonable expectation to settle under UMIR 3.3.

3.2 When is a failed trade reportable to CIRI?

Participants and Access Persons must notify CIRI after a trade on a marketplace fails to settle for 10 trading days past settlement date, which is currently T+11 unless the trade was executed as a Special Terms Order with a different settlement date, regardless of whether the trade has been settled in accordance with the rules or requirements of the clearing agency.²⁰

Therefore, unless executed as a Special Terms Order with a different settlement date, the reporting timeline of T+11 under UMIR 7.10 **begins on trade date** (i.e. the date on which the trade was executed on a marketplace), regardless of whether an accumulation or average price account is being used to facilitate the trade. For further clarification, where a Participant uses an accumulation or average price account to trade, the reporting timeline under UMIR 7.10 still begins on trade date (i.e. the date on which the trade was executed on a marketplace and not the date the trade is ultimately booked to the client account).

3.3 Reasonable Inquiry in relation to an Extended Failed Trade

When a Participant acts as agent for a client and executes a trade that becomes an extended failed trade, a Participant must:²¹

- prior to the entry of an order that would result in a short sale, arrange to borrow securities to settle any resulting trade, or

²⁰ With respect to the reporting of an extended failed trade that was a short sale, UMIR 7.10(1)(b) provides:
(1) If within ten trading days following the date for settlement contemplated on the execution of a failed trade, the account:

[...]

(b) in the case of a short sale, that failed to make:

(i) available securities in such number and form, or

(ii) arrangements with the Participant or Access Person to borrow securities in such number and form;

as to permit the settlement of the trade at the time on the date contemplated on the execution of the trade has not made available such securities or monies or has not made arrangements for the borrowing of the securities, as the case may be, the Participant or Access Person that entered the order on a marketplace shall give notice to the Market Regulator at such time and in such form and manner and containing such information as may be required by the Market Regulator.

²¹ **UMIR 3.4 Short Selling after a Reportable Extended Failed Trade**

(2) A Participant acting as agent shall not enter a client order or a non-client order on a marketplace that on execution would be a short sale if the client or non-client has previously executed a sale of **any listed security** that became a failed trade in respect of which notice to the Market Regulator was required pursuant to Rule 7.10 unless:

(a) the Participant has made arrangements for the borrowing of the securities necessary to settle any resulting trade prior to the entry of the order; or

(b) the Participant is satisfied, after reasonable inquiry, that the reason for any prior failed trade was not as a result of any **intentional or negligent act** of the client or non-client. [emphasis added]

- be satisfied, after making a reasonable inquiry under UMIR 3.4(2)(b)²², that the reason for the prior failed trade was not the result of any intentional or negligent act of the client or non-client.

The following sections break down the elements of the rule requirement under UMIR 3.4(2)(b), and provide examples of considerations under each element.

What is a “reasonable inquiry”?

A reasonable inquiry would include:

- contacting the client or non-client directly and asking about the reason for the failed trade at issue
- obtaining sufficient information from the client or non-client to determine if the prior failed trade was due to an intentional or negligent act by the client or non-client.

A Participant is expected to document the inquiry, including the Participant’s evaluation of whether the prior failed trade was the result of an intentional or negligent act of the client or non-client.

What might be considered an “intentional act”?

Intentional acts are those that are performed **knowingly** by the client or non-client. A malicious intent is not required. An administrative error or delay (such as delayed processing times by a transfer agent or custodian) would not generally be considered an intentional act of the client or non-client to not settle on settlement date.²³

Examples of failed trades arising from an intentional act of the client include:

- ***Example 1:*** A client participates in a financing for securities that would be freely tradable upon close. The client intends to use shares purchased from the financing to settle a short sale, despite knowing that the closing date for the financing will occur after the settlement of the short sale trade. However, the client does not make other arrangements to ensure available securities, and the trade becomes an extended failed trade reportable to CIRO under UMIR 7.10.

In this case, CIRO would consider the failed trade to be the result of an intentional act of the client, and the Participant would need to arrange to borrow securities in order to act for the same client in future short sales in any security.

- ***Example 2:*** A client wants to short sell a security knowing that the security has been deemed hard-to-borrow and provides attestations to the executing Participant regarding its ability to access available securities. Despite this, the client does not make arrangements to ensure securities are available to settle the resulting trade on settlement date, and the trade becomes an extended failed trade reportable to CIRO under UMIR 7.10.

²² Prior to the Amendments in CIRO Notice XX-XXXX, UMIR 3.4(2)(b) was previously numbered as UMIR 6.1(6).

²³ Notice [12-0078](#) - *Provisions Respecting Regulation of Short Sales and Failed Trades* (March 2, 2012).

In this case, CRO would consider the failed trade to be the result of an intentional act of the client, and the Participant would need to arrange to borrow securities in order to act for the same client in future short sales in any security.

What might be considered a negligent act?

A negligent act from a client could include an action that may not have resulted from the intention of the client, but from the failure to take the steps that a reasonable person would take to ensure the settlement of the trade on settlement date. While bad faith is not required, a negligent act is one that could have been avoided with reasonable diligence. An administrative error or delay (such as delayed processing times by a transfer agent or custodian) would not generally be considered a negligent act of the client or non-client to not settle on settlement date.²⁴

Examples of failed trades arising from a negligent act of the client include:

- **Example 1:** A client trades using multiple trading accounts across different Participants, and provides attestations to several executing Participants that they have securities available to settle the resulting trades. However, the client fails to keep track of their open short positions and some of these trades become extended failed trades reportable to CRO under UMIR 7.10.

In this case, CRO would consider the failed trades to be the result of a negligent act of the client, and each Participant where an account of the client had such an extended failed trade must make arrangements to borrow securities in order to act for the same client in future short sales in any security.

- **Example 2:** A client wants to short sell a security, and provides attestations to the executing Participant that they have access to the relevant security. However, the client's attestations are based on an outdated borrow list, and the client does not pay attention to the changed status of the security at the time of order entry. The resulting trade becomes an extended failed trade reportable to CRO under UMIR 7.10.

In this case, CRO would consider the failed trade to be the result of a negligent act of the client, and the Participant must arrange to borrow securities in order to act for the same client in future short sales in any security.

3.4 Applicability of pre-borrow requirements for extended failed trades involving an executing Participant and an originating dealer

If an extended failed trade was due to an intentional or negligent act of the client of an originating dealer, the executing Participant need only apply pre-borrow requirements for future short sales to that particular client of the originating dealer, rather than to the entire originating dealer as a whole.

²⁴ Notice [12-0078](#) - Provisions Respecting Regulation of Short Sales and Failed Trades (March 2, 2012).

As a best practice, the originating dealer should provide sufficient information to the executing Participant so that pre-borrow requirements can be appropriately targeted on orders from the specific client, and not the originating dealer as a whole.

3.5 Do pre-borrow requirements²⁵ continue to apply even after an extended failed trade has been successfully settled?

Where a prior extended failed trade was:

- a principal trade, the Participant or Access Person would need to pre-borrow before shorting in a principal account the same security in the future, unless consent was obtained from CIRI²⁶. If no consent from CIRI was obtained, the pre-borrow requirements would apply to **all future principal short sales in the same security**, regardless of whether the prior extended failed trade was subsequently settled.
- a client or non-client trade, and the Participant determined the prior failed trade was due to an intentional or negligent act of the client or non-client, the Participant would need to pre-borrow **all future short sales in all securities for the same client or non-client**, regardless of whether the prior extended failed trade was eventually settled.

4. Additional Guidance Regarding the Positive Requirement for a Reasonable Expectation to Settle under UMIR 3.3

UMIR 3.3 requires a seller to have a reasonable expectation to settle any resulting trade on settlement date before entering an order for a short sale on a marketplace. We break down the various aspects of this requirement below.

4.1 What are the elements of the technical provision in UMIR 3.3?

Prior to order entry

UMIR 3.3 requires a Participant or Access Person to have a reasonable expectation to settle before entering an order that would result in a short sale on a marketplace. Documenting how the Participant or Access Person has a reasonable expectation to settle prior to order entry would help achieve compliance with this positive obligation.²⁷

For added clarity, whether there is a reasonable expectation to settle at the time of order entry remains separate and distinct from whether the resulting trade ultimately settles. The fact that a trade did not ultimately fail would not in itself be sufficient evidence to show that the seller had a reasonable expectation to settle prior to order entry.

²⁵ See UMIR 3.4(1)(a) or (2)(a). Prior to the Amendments in CIRI Notice XX-XXXX, UMIR 3.4(1)(a) or (2)(a) were previously numbered as UMIR 6.1(4) or (6).

²⁶ See UMIR 3.4(1)(a). Prior to the Amendments in CIRI Notice XX-XXXX, UMIR 3.4(1)(a) was previously numbered as UMIR 6.1(4)(a).

²⁷ See also IDPC Rules 3803 and 3804 on requirements to document compliance and the maintenance of those records.

Conversely, if a Participant or Access Person has a reasonable expectation to settle prior to order entry, that does not mean that the resulting trade cannot ultimately fail due to reasons outside of the control of the Participant or Access Person.

By settlement date

UMIR 3.3 requires a seller to have a reasonable expectation to settle a trade on the date contemplated on the execution of the trade. Unless a trade on the marketplace was executed as a Special Terms Order²⁸ using a different settlement date, all trades executed on a marketplace must currently settle by T+1.²⁹

A trade that does not settle by the date contemplated on the execution of the trade will be considered a “failed trade”³⁰. In order to settle a short sale under the UMIR 1.1 definition of a “failed trade”, the Participant or Access Person must make:

- available securities in such number and form, or
- arrangements to borrow securities in such number and form,

to permit settlement, regardless of whether the trade has been settled in accordance with the rules or requirements of the clearing agency.³¹ This means that a trade will still be considered a failed trade if the seller failed to deliver the securities as required, regardless of whether the trade settled through netting and novation by CDS.

²⁸ UMIR 1.1 defines a “Special Terms Order” to mean an order for the purchase or sale of a security:

- (a) for less than a standard trading unit;
- (b) the execution of which is subject to a condition other than as:
 - (i) to price,
 - (ii) to the date of settlement; or
 - (iii) imposed by the marketplace on which the order is entered as a condition for the entry or execution of the order; or
- (c) that on execution would be settled on a date other than:
 - (i) the second business day following the date of the trade, or
 - (ii) any settlement date specified in a special rule or direction referred to in subsection (2) of Rule 6.1 that is issued by an Exchange or a QTRS,but does not include an order that is a Basis Order, Call Market Order, Closing Price Order, Market-on-Close Order, Opening Order or Volume-Weighted Average Price Order.

²⁹ CIRO Notice [23-0054](#) – *Amendments to facilitate the investment industry’s move to T+1 settlement* (April 20, 2023).

³⁰ UMIR 1.1 defines a “failed trade” to mean a trade resulting from the execution of an order entered by a Participant or Access Person on a marketplace on behalf of an account and

- (a) in the case of a sale, other than a short sale, the account failed to make available securities in such number and form;
- (b) in the case of a short sale, the account failed to make:
 - (i) available securities in such number and form, or
 - (ii) arrangements with the Participant or Access Person to borrow securities in such number and form; and
- (c) in the case of a purchase, the account failed to make available monies in such amount, as to permit the settlement of the trade at the time on the date contemplated on the execution of the trade provided a trade shall be considered a “failed trade” irrespective of whether the trade has been settled in accordance with the rules or requirements of the clearing agency.

³¹ See Notice [08-0143](#) – *Provisions Respecting Short Sales and Failed Trades* (October 15, 2008).

4.2 What are some factors that would affect the ability to have a Reasonable Expectation to Settle?

The following sections set out some factors that would affect the ability of Participants and Access Persons to show a reasonable expectation to settle a short sale under UMIR 3.3.

Client History – Presence of Prior Failed Trades

A prior failed trade may negatively impact whether a Participant can have a reasonable expectation to settle future short sales for the same client in certain circumstances. This would include any prior failed trades that may not have persisted beyond ten trading days past settlement date to trigger an extended failed trade report to CRO under UMIR 7.10. Ascertaining the reason for the previously failed trade with the client can help the Participant determine if there is an impact on a reasonable expectation to settle future short sales from that client.

When assessing client history where a Participant is executing trades for an originating dealer that is not a Participant³², the executing Participant may focus their determination on a particular client of the originating dealer, rather than the entire originating dealer as a whole, provided that:

- the originating dealer provides sufficient information regarding settlement history for the client at issue, such that the executing Participant is able to make a reasonable determination for the purpose of having a reasonable expectation to settle a future short sale.

For example, if a Participant learns that the reason for the previous failed trade was due to an administrative error, this may not have a negative impact on a reasonable expectation to settle future short sales from that client.

However, if a Participant relied on a client's attestation on having access to the necessary securities and that trade resulted in a failed trade under UMIR 1.1 due to the client's negligence or false claim, it may not be reasonable to readily rely on such attestations from that client in relation to future potential short sales.

Whether a Security has been Determined to be “Hard-to-Borrow”³³

Before entering an order for a hard-to-borrow security that upon execution would result in a short sale, Participants or Access Persons may need to make additional arrangements to have a reasonable expectation to settle the resulting trade on settlement date. This may include pre-borrowing a sufficient number of securities to settle the trade where appropriate.

4.3 What if there is No Reasonable Expectation to Settle?

If a Participant or Access Person does not have a reasonable expectation to settle the resulting trade on the expected settlement date, the entry of a sell order on a marketplace that on execution would result in a short sale is prohibited.

³² For example, where a Participant is trading for a CRO investment dealer that is not a Participant or for a foreign dealer equivalent.

³³ A “hard-to-borrow” security is one that has been determined to be difficult to borrow or unavailable for borrowing.

4.4 How a Participant or Access Person can have a Reasonable Expectation to Settle

There may be a number of ways that a Participant or Access Person can have a reasonable expectation to settle under UMIR 3.3. One example of how a Participant or Access Person can have a reasonable expectation to settle is to rely on “borrow lists” that may include the concept of easy-to-borrow lists or hard-to-borrow lists (**borrow lists**).³⁴ We include the use of a borrow list as one method to consider, but this approach does not constitute the only way that a Participant or Access Person can have a reasonable expectation to settle under UMIR 3.3.

Below we have set out some considerations on how Participants and Access Persons can compile, monitor and use borrow lists:

How to Compile a Borrow List?

Participants and Access Persons may consider the following factors when determining the securities to include on a borrow list:

- liquidity parameters, such as those used to define highly-liquid securities³⁵ in UMIR 1.1
- whether the security has a known history of delivery failures
- price thresholds that have been determined by the Participant’s or Access Person’s prime broker or custodian, and
- lack of any other condition(s) that would limit its availability.

How to Monitor a Borrow List?

In order for a Participant or Access Person to reasonably rely on a borrow list to comply with UMIR 3.3, such lists must be monitored and updated on a regular basis.

How to Use a Borrow List?

We expect that Participants and Access Persons would only rely on borrow lists that they have compiled or from dealers with whom they have established a formal relationship regarding clearing or settlement, as such dealers usually provide assurances to their clients on whether securities included on these lists may be readily available or hard to borrow.

For example, if a Participant or Access Person obtained a borrow list from a dealer which indicates certain securities are readily available, but it does not trade or clear through that dealer and the dealer has not agreed to make those securities available to the Participant or Access Person – the Participant

³⁴ For example, an easy-to-borrow list would only include securities that are readily available to the Participant or Access Person. This can be compared to a “hard-to-borrow” list, which would include securities that have been determined to be difficult to borrow or unavailable for borrowing.

³⁵ UMIR 1.1 defines a “highly-liquid security” to mean a listed security or quoted security that:

- (a) has traded, in total, on one or more marketplaces as reported on a consolidated market display during a 60-day period ending not earlier than 10 days prior to the commencement of the restricted period:
 - (i) an average of at least 100 times per trading day, and
 - (ii) with an average trading value of at least \$1,000,000 per trading day; or
- (b) is subject to Regulation M under the 1934 Act and is considered to be an “actively-traded security” under that regulation.

or Access Person would not have a reasonable expectation to access those securities and in turn not have a reasonable expectation to settle the trade on settlement date. As a result, it would not be reasonable for the Participant or Access Person to rely on that list.

4.5 Do Self-Directed Orders (direct electronic access, routing arrangements, order execution only accounts) need to have a Reasonable Expectation to Settle?

Yes, before sending a self-directed order from a client to a marketplace that upon execution would result in a short sale, Participants must have a reasonable expectation to settle any resulting trade on the expected settlement date.

Participants or Access Persons that trade inter-listed securities may consider expanding the use of technological solutions that are already in use for compliance with other rules, such as Regulation SHO³⁶ by the Securities and Exchange Commission (SEC) in the United States or the EU Short Selling Regulation (SSR)³⁷.

³⁶ Rule 203(b)(1) of [Regulation SHO](#) provides:

A broker or dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has:

- (i) Borrowed the security, or entered into a bona-fide arrangement to borrow the security; or
- (ii) Reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and
- (iii) Documented compliance with this paragraph (b)(1).

³⁷ Article 12(1) of the [EU SSR](#) provides:

1. A natural or legal person may enter into a short sale of a share admitted to trading on a trading venue only where one of the following conditions is fulfilled:
 - (a) the natural or legal person has borrowed the share or has made alternative provisions resulting in a similar legal effect;
 - (b) the natural or legal person has entered into an agreement to borrow the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;
 - (c) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have a reasonable expectation that settlement can be effected when it is due.

4.6 How could Persons with Marketplace Trading Obligations or those using the short-marking exempt order marker have a Reasonable Expectation to Settle?

Proper use of the short-marking exempt order³⁸ marker, including by entities with Marketplace Trading Obligations³⁹ trading in their securities of responsibility, would indicate there is 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.

Participants and Access Persons should refer to Notices [16-0028](#) and [16-0029](#) for further details on the proper use of the short-marking exempt order marker.

³⁸ UMIR 1.1 defines a “short-marking exempt order” to mean an order for the purchase or sale of a security from an account that is:

- (a) an arbitrage account;
- (b) the account of a person with Marketplace Trading Obligations in respect of a security for which that person has obligations;
- (c) a client account, non-client account or principal account:
 - (i) for which order generation and entry is fully-automated, and
 - (ii) which, in the ordinary course, does not have, at the end of each trading day, more than a nominal position, whether short or long, in a particular security;
- (d) a principal account that has acquired during a trading day a position in a particular security in a transaction with a client that is unwound during the balance of the trading day such that, in the ordinary course, the account does not have, at the end of each trading day, more than a nominal position, whether short or long, in a particular security; or
- (e) a principal account for a Participant that has:
 - (i) Marketplace Trading Obligations in respect of an exempt Exchange-traded Fund, or
 - (ii) entered into an agreement for the continuous distribution of an Exempt Exchange-traded Fund;
 if the order is for the Exempt Exchange-traded Fund security or one of its underlying securities to hedge a pre-existing position in the Exempt Exchange-traded Fund security or one of its underlying securities and in the normal course, the account does not have, at the end of each trading day, more than a minimal exposed risk.

³⁹ UMIR 1.1 defines “Marketplace Trading Obligations” to mean obligations imposed by:

- (a) Marketplace Rules on a member or user or a person employed by a member or user to guarantee:
 - (i) a two-sided market for a particular listed security or a listed derivative on a continuous or reasonably continuous basis, or
 - (ii) the execution of orders for the purchase or sale of a particular security which are less than a minimum number of units of the security as designated by the marketplace; or
- (b) contract between a marketplace and a member, user or subscriber to guarantee the execution of orders for the purchase or sale of a particular security which are less than a minimum number of units of the security as stipulated by the terms of the contract provided such number is less than one standard trading unit and the orders for the member, user or subscriber are automatically generated by the trading system of the marketplace.

4.7 Where a Participant receives an order to short sell a security from an originating dealer, what are the obligations on the executing Participant with respect to a reasonable expectation to settle?

If the Participant is trading for another dealer that is:

- another Participant, then the executing Participant may rely on the intermediary Participant to comply with UMIR requirements including having a reasonable expectation to settle on settlement date. This reliance is reasonable because all Participants are subject to the same requirements under UMIR.
- a CIRI investment dealer but not a Participant, then the executing Participant must generally treat the CIRI dealer as a client for the purpose of UMIR 3.3. However, as mentioned in the earlier sections, when determining client history (section 4.2 of this Guidance Note) or applying pre-borrow requirements (section 3.4 of this Guidance Note), the executing Participant may focus on a particular client of the originating CIRI dealer where appropriate.
- a foreign dealer equivalent that is subject to a similar or higher standard in their resident jurisdiction, then the executing Participant may rely on the foreign dealer equivalent's documented compliance, for example, to the locate requirements under Regulation SHO in the United States.

5. Documentation requirement

Participants or Access Persons must document compliance for the CIRI rule requirements discussed above.⁴⁰ These records should be maintained in durable and accessible form, for a minimum of seven years from the date the record is created.⁴¹

6. Applicable Rules

UMIR and IDPC Rules this Guidance Note relates to:

- UMIR 1.1, UMIR 2.2, UMIR 3.2, UMIR 3.3, UMIR 3.4 (previously UMIR 6.1(4)-(6)), UMIR 6.2, UMIR 7.1, UMIR 7.10, UMIR 10.16
- IDPC Rules 3803 and 3804.

⁴⁰ IDPC Rule 3804. General requirements to maintain records
(1) A Dealer Member must maintain current records that:

[...]

(ii) demonstrate the Dealer Member's compliance with securities laws and Corporation requirements.

⁴¹ IDPC Rule 3803. General requirements for record retention periods

(1) A Dealer Member must retain copies of all records in a safe location required under Corporation requirements, in durable and accessible form, for a minimum of seven years from the date the record is created unless Corporation requirements or securities laws relating to the specific type of record require a different retention period.

7. Previous Guidance Note

This Guidance Note replaces the following:

- Guidance Note [22-0130](#) – *Guidance on Participant Obligations to have Reasonable Expectation to Settle any Trade Resulting from the Entry of a Short Sale Order* (August 17, 2022).

8. Related Documents

This Guidance Note is related to the following Guidance Note:

- Guidance Note [21-0122](#) – *Marker Corrections and Use of the Regulatory Marker Correction System* (July 12, 2021).

This Guidance Note is related to the following Bulletins:

- IIROC Notice [08-0143](#) – *Provisions Respecting Short Sales and Failed Trades* (October 15, 2008).
- IIROC Notice [12-0078](#) – *Provisions Respecting Regulation of Short Sales and Failed Trades* (March 2, 2012).
- CIRO Notice [23-0054](#) – *Amendments to facilitate the investment industry's move to T+1 settlement* (April 20, 2023).
- CIRO Notice [24-0349](#) – *Amendments Respecting the Reasonable Expectation to Settle a Short Sale* (December 5, 2024).