

February 2024 | Bulletin

## Extra Day, Extra Insights Edition

Before we delve into February's regulatory compliance complexities, let us pause and consider the relatively unique occurrence of an entire extra day this month. "Modern" leap years can be traced all the way back to 45 BCE, when Julius Caesar tried to align the calendar year with the solar year - later revised by Pope Gregory the XIII to reflect that it takes the Earth 365.2425 days to complete one orbit around the sun. Did you know that all leap years are divisible by four, but not by 100, unless the year is also divisible by 400? Feel free to evaluate that on your commute home. February 29 reminds us of the intricacies and (occasional) irregularities within our regulatory frameworks. As this leap year adjusts the calendar to sync with the Earth's orbit around the sun, our updates will help guide you through seemingly circular regulatory needs and challenges.



### In this bulletin:

1. OSC Releases Digital Engagement Report – Finding Stability Amidst Change
2. Making Adjustments More than Once Every Four Years: Updating and Maintaining SEDAR+ Profiles
3. CIRO Leaps Forward with New Proposed Borrowing Rules

**In Brief:** Keeping Pace in 2024: CIRO's Ransomware Response Playbook ■ CSA Systemic Risk Report: Exploring Rare Occurrences

**Important Reminders:** Offering Memoranda Compliance – Turning the Page

### BLG Resource Corner

## 1. OSC Releases Digital Engagement Report – Finding Stability Amidst Change

In its latest draft Statement of Priorities, the Ontario Securities Commission (**OSC**) indicated some concerns with advice being provided by order execution only firms, and stated that information shared online may be incomplete, or misleading. In a potentially related move, the OSC recently released the results of a study [Digital Engagement Practices: Dark Patterns in Retail Investing](#), which looked at the use of digital engagement practices, such as dark patterns, in the investment context used by self-directed investors. The OSC partnered with the Behavioural Insights Team (BIT) for the study. In the report, a "dark pattern" is

described as a practice that uses online interfaces to coerce, steer, and/or deceive users into making decisions that benefit a business but may not align with an investor's best interests.

Examples given for dark patterns include the use of prompts, where visual or auditory stimuli are used to get a user's attention and encourage specific behaviours or choices, as well as scarcity claims that a product or service will not be available for long. The report also reviews other techniques in use, including dark nudging, sludging and targeted advertising, "dark nudging" being tactics that make it easy for consumers to make choices that decrease their welfare, such as removing confirmation buttons. Sludging refers to the use of elements within a user interface that actively impede activities in the consumer's best interests, such as overly complex language. In the study, targeted advertising refers to digital marketing practices that use data about individuals to select and display specific commercial content.

According to the report, a defining characteristic of dark patterns, dark nudges, and sludges is that they undermine investor welfare, interests, and/or preferences. The study states that some techniques hide the cost of investing, gather personal information without informed consent, and make it more difficult to withdraw funds, close an account, or end a premium subscription service.

The regulatory responses in each of Canada, the U.S. and the European Union are then described in detail. While much of the current regulation relates to privacy and consumer protection, it is noted that regulatory bodies in the U.S. and the EU are amending the current frameworks and adding new legislation to control unfair and deceptive practices, including recent efforts by the Federal Trade Commission to identify dark patterns and propose new rules (e.g., a "click to cancel" rule). The Competition Bureau of Canada's relatively new prohibition on drip pricing is also mentioned. The report ends with a note indicating that there appears to be additional room for more enforcement and regulation in Canada when compared to the two other jurisdictions.

## 2. Making Adjustments More than Once Every Four Years: Updating and Maintaining SEDAR+ Profiles

The System for Electronic Document Analysis and Retrieval (**SEDAR+**), is the web-based system that is now used to file, disclose, and search for information regarding firms in Canada's capital markets. SEDAR+ includes extended search capabilities, access to historical data, and more efficient document retrieval processes. Therefore, ensuring that SEDAR+ profiles are accurately updated by firms is crucial for maintaining transparency and compliance with regulatory obligations.

One of the primary reasons for updating SEDAR+ profiles is to ensure compliance with [National Instrument 13-103 System for Electronic Data Analysis and Retrieval+ \(SEDAR+\)](#). Updates to SEDAR+ profiles must be made by issuers and investment fund managers:

- a. the next time the person or company transmits a document through SEDAR+ after the date on which they knew or reasonably should have known that the information contained in the profile is inaccurate; or

- b. 10 days after the date on which the person or company knew or reasonably should have known that the information contained in the profile is inaccurate (whichever comes first).

Moreover, keeping SEDAR+ profiles up to date ensures that regulators have the right information needed to perform effective oversight, while also avoiding issues such as incorrect fee calculations.

As you may know, SEDAR+ profiles have a significant amount of information, and all such information is required to be kept up to date. We have listed some key elements of such profiles, and the particular importance of their accuracy, below.

### Investment Fund Profiles:

Name of Issuer Profile Field	Functionality
Full legal investment fund name in English and/or French	Name is displayed on the reporting issuer list.
Financial year end	Used to calculate deadlines and late fees.
Category and Type of investment fund	Used to calculate deadlines and fees.
Contact details	Correct contact details are crucial to ensure the CSA and its members can communicate with issuers.
Listed on an exchange or other marketplace	Used to calculate fees.

### Company Profiles:

Name of Issuer Profile Field	Functionality
Full legal name in English and/or French	Name is displayed on the reporting issuer list.
Financial year end	Used to calculate deadlines and late fees.
Contact details	Correct contact details are crucial to ensure the CSA and its members can communicate with issuers.
Profile details	Correct profile details are crucial to ensure the CSA and its members can communicate with issuers.
Listed on an exchange or other marketplace	Used to calculate fees.
North American Industry Classification System ( <b>NAICS</b> )	This information is used by regulators for data analysis.

Exchangeable Security or Credit Support issuer	This information is used to calculate fees.
--	---

If you would like to know if your profiles on SEDAR+ are current and up to date, please [contact us](#), and we will be happy to assist.

### 3. CIRO Leaps Forward with New Proposed Borrowing Rules

In mid-February, the Canadian Investment Regulatory Organization (**CIRO**) released [proposed amendments](#) to the Investment Dealer and Partially Consolidated (**IDPC**) Rules and IDPC Form 1 with respect to fully paid securities lending and financing arrangements. These amendments are intended in part to enhance the framework regarding retail fully paid securities lending. CIRO also published draft revised Guidance on Fully Paid Securities Lending to replace existing guidance. The following summary of the proposed changes deals with fully paid securities lending, as the proposed changes to the rules respecting financing arrangements are generally intended to fix existing overlaps and inconsistencies.

Fully paid securities lending occurs when a dealer member borrows a client’s fully paid or excess margin securities as principal and then uses such securities to meet their in-house demand or lend them out to a third party. Collateral is then provided to the client - directly or through a collateral agent to secure the loan. The notice describing the proposed amendments indicates that currently, eight dealers are permitted to utilize these lending programs but that additional dealers have expressed an interest in doing so, and that 165,000 clients have been enrolled in approved programs, the majority of whom are retail clients.

The proposed amendments would introduce a new Part B.2 of IDPC Rule 4600, to set out specific requirements for dealers when borrowing. These requirements would be mandatory when borrowing involves retail clients but would only apply to borrowing activity involving institutional clients if the client opts to be treated as a retail client for lending purposes. The requirements will apply to all dealer fully paid lending arrangements with retail clients even if it is not done through a structured lending program.

Under the proposed amendments, a dealer will only be permitted to borrow client securities upon prior consent and, where applicable, the determination that the lending services are suitable for the client. Specific information will need to be included in the securities loan agreement which is aligned with current rule requirements and market practices. A proposed new section of the rule will set out the specific requirements for disclosure, including the loan arrangement’s structure, benefits, risks, and Investor Protection Fund coverage limitations, together with a client acknowledgement of understanding these disclosures. The minimum criteria for adequate collateral will also be set out. Collateral will generally be restricted to cash (or certain debt securities when permitted by CIRO), at a minimum of 102% of the market value of the borrowed securities for cash collateral and 105% for securities collateral and held in a form permitted by CIRO.

Other provisions include restrictions on the reuse of securities loaned and the assets provided as collateral, to mitigate risks such as dealer default and systemic contagion risks, and requirements for specific communications to lending clients with respect to the loan arrangement. With respect to securities that will

be eligible for borrowing, dealers will continue to only be permitted to borrow securities held in non-registered accounts, and CIRO will prescribe from time to time any restrictions on securities a dealer can borrow when it deems it to be in the interest of the clients and the public and will publish such restrictions on its website. Currently, there is a restriction that only equity securities listed on an exchange can be borrowed by a dealer. The proposed securities eligibility criteria are included as an appendix to the notice.

The draft revised guidance discusses these changes and the potential conflicts of interests facing dealers who borrow client securities. The guidance also describes CIRO's expectations that when borrowing from clients of introducing brokers and portfolio managers, whose accounts a dealer carries, the dealer is expected to get a confirmation that (i) each introducing broker has received a non-objection letter from CIRO before fully paid securities of their clients are borrowed, and (ii) each portfolio manager has notified applicable CSA members before fully paid securities of their clients are borrowed.

Comments on the proposal are due by **April 15, 2024**.

## In Brief

### Keeping Pace in 2024: CIRO's Ransomware Response Playbook

Regulators are often warning firms about the importance of cyber security readiness and the obligations of registrants to ensure that there is a documented incident response plan to address cyber security incidents. The Canadian Investment Regulatory Organization (**CIRO**) has released a "playbook" resulting from its 2023 cybersecurity table-top exercises for small and medium sized CIRO member firms. During these studies, participants discussed crisis responses and shared information related to responding to both a ransomware attack and an insider threat event. CIRO's published [Ransomware Response Playbook \(the Playbook\)](#), authored by Juno Risk Solutions at CIRO's request, has been created as a guide when dealing with a ransomware attack, where malware is placed on a target's computer system to lock out those systems for ransom in exchange for a key and/or a promise not to release stolen data.

The Playbook runs through the risks of a cyber incident, as well as suggested immediate responses such as the creation of a cyber incident response team (to conduct initial incident triage) and escalation to the business continuity and executive teams as appropriate. The Playbook also emphasizes the importance of evaluating the possibility of legal action and whether the incident should be subject to legal privilege. Notification to a firm's cyber insurance provider or insurance broker is also discussed, as is stakeholder management and a high-level risk-based impact assessment framework. It is suggested that the framework can help the executive team prioritize response efforts, consider the range of impact to the business, and help decide whether to pay the ransom.

In addition, the Playbook contains a helpful table of risk impact considerations including financial, operational, and regulatory factors to help those impacted make decisions with respect to the ransom demand. The importance of post-crisis analysis is emphasized, indicating that investigating the cause of the crisis, acting on any wider cultural problems and looking for opportunities to change may provide both a competitive advantage and improve firm resilience.

## CSA Systemic Risk Report: Exploring Rare Occurrences

The Systemic Risk Committee (**SRC**) of the Canadian Securities Administrators (**CSA**) allows staff to review and monitor systemic and emerging risks in the Canadian capital markets. The SRC recently released its [report](#) for the first time, identifying their views of certain trends and key vulnerabilities. Identified vulnerabilities are wide-ranging, and include high inflation and interest rates, the crypto asset market, consequences of a potential failure of any large dealers, and the private securitization market. Of particular interest to readers may be comments made with respect to private investment funds.

While it was noted that overall, fund liquidity risks were well managed and ETFs demonstrated resilience during recent financial stress, exempt funds that invest in private assets such as private debt and real estate reported liquidity mismatches, which may increase if economic conditions deteriorate. The SRC indicated that the risk from investor outflows might be greater for funds that invest in private assets and that rely on institutional investors who may withdraw large amounts quickly, although the ability to utilize tools such as longer redemption notice periods can help funds align redemptions with a fund's liquidity profile. Private equity, private debt, or real estate funds are called out as potentially needing to suspend or restrict redemptions to ensure orderly fulfillment of redemption payments. While it is noted that public funds have a relatively low liquidity risk, the risk does need to be managed appropriately, and the SRC will continue to monitor the liquidity profile of mutual funds.

The views of the SRC do not necessarily reflect the views of CSA members, and it will be interesting to follow whether any further action is taken based on some of the key vulnerabilities mentioned in the report.

### Important Reminders

#### Offering Memoranda Compliance – Turning the Page

One way to spend your time during February's extra day is considering whether your offering memoranda continue to comply with regulatory requirements. As noted in our bulletin entitled [Don't Stay Away too Long - Revised Guidance Published for Issuers Relying on the Offering Memorandum Prospectus Exemption](#), an offering memorandum that is used in connection with the offering memorandum exemption must comply with all specified requirements (including the requisite updated financial statements) when it is prepared, delivered to prospective purchasers and when the issuer accepts an agreement to purchase securities. Updating an offering memorandum usually involves reviewing the entire document, with particular attention being given as applicable to the disclosure in **Schedule 1** (Additional Disclosure Requirements for an Issuer Engaged in Real Estate Activities), and/or **Schedule 2** (Additional Disclosure Requirements for an Issuer that is a Collective Investment Vehicle). Other sections that frequently require updating include Item 2.3 – Development of Business, Item 3.1 – Compensation and Securities Held, Item 5 – Securities Offered, Item 8 – Income Tax Consequences and RRSP Eligibility, and Item 10 – Risk Factors (amongst others), as well as potentially a new date and certificate for the document. Please [contact us](#) if you have any questions.

## BLG Resource Corner

Our colleagues at BLG have provided the following insights we thought might interest our readers:

- [Do Canada's modern slavery reporting requirements impact investment managers?](#)
- [CBCA transparency register goes public](#)
- [It's time: CIRO tackles incorporated advisors](#)
- [CSA seeks comments on proposed amendments to public crypto asset fund rules](#)
- [Findings and tips from Canada's first survey of fund managers on ESG](#)
- [Employee ownership trusts: Business succession alternative for private businesses in Canada](#)

For more information, please visit the BLG [website](#).

---

### ***Practical advice. Efficient service. Fixed-Fee plans. Singular focus.***

AUM Law focuses on serving the investment management sector with legal and consultancy services related to regulatory compliance. AUM Law provides its registrant clients with annual fixed-fee regulatory compliance support plans and related offerings. It provides registrants with an efficient, innovative approach to help manage their legal and regulatory compliance obligations.

This bulletin is an overview only and it does not constitute legal advice. It is not intended to be a complete statement of the law or an opinion on any matter. No one should act upon the information in this bulletin without a thorough examination of the law as applied to the facts of a specific situation.

Copyright © 2024 AUM Law Professional Corporation. All rights reserved.