ASIC
Australian Securities & Investments Commission

CONSULTATION PAPER 299

Short selling: Naked short selling relief, position reporting amendments and sunsetting class orders

May 2018

About this paper

This consultation paper seeks feedback from short sellers on our proposals to:

- grant legislative relief from the naked short selling prohibition to market makers of certain exchange traded products (ETPs);
- grant legislative relief from the naked short selling prohibition in the context of corporate actions and initial public offering (IPO) sell-downs;
- change the relevant time short positions are calculated; and
- remake a number of class orders on short selling which are due to expire (sunset) under the *Legislation Act 2003* (Legislation Act).

We propose to consolidate the relief into a single instrument.

Note: The draft ASIC Corporations (Short Selling) Instrument 2018/XX (draft instrument) is available on the consultation papers page on our website under CP 299.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 14 May 2018 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Contents

The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the regulation of short selling. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section G, 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission, should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 20 June to:

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What will happen next?

Stage 1	14 May 2018	ASIC consultation paper released
Stage 2	20 June 2018	Comments due on the consultation paper
Stage 3	By 1 October 2018	Commencement of instrument which will remake, amend and/or include new relief
Stage 4	2019	Updated RG 196 released

A Background

Key points

This paper contains various proposals in relation to short selling.

Short selling is regulated by the *Corporations Act 2001* (Corporations Act) and the Corporations Regulations 2001 (Corporations Regulations).

The proposals set out in this paper are to:

- grant legislative relief to permit market makers of certain ETPs to make naked short sales;
- grant legislative relief from the naked short selling prohibition in the context of corporate actions and initial public offering (IPO) sell-downs;
- change the time with reference to which a short position report for a covered short sale is calculated;
- remake legislative instruments on short selling that are due to expire;
- extend the relief currently available under Class Order [CO 09/774] *Naked short selling relief for market makers* so that a market maker may make a naked short sale of units in the SPDR S&P/ASX 200 Fund (STW ETF) in order to hedge risks arising from making a market in listed options over the STW ETF;
- modify [CO 09/774] to confirm that the exemption in that legislative instrument does not extend to 'pre-emptive hedging'; and
- extend the relief currently available to market makers under Class Order [CO 10/288] *Covered short sale transaction reporting relief for market makers* to ETP market makers that engage in covered short sales of quoted managed funds on the ASX market.

Short selling in Australia

1 People sometimes sell (short sell) financial products they do not own with a view to repurchasing them later at a lower price.

2 Short selling is regulated by the Corporations Act and the Corporations Regulations.

3 Short sales may be either 'naked' short sales or 'covered' short sales. In general:

(a) a *covered short sale* is where a person executes a short sale and relies on an existing securities lending arrangement to have a 'presently exercisable and unconditional right to vest' the products in the buyer at the time of sale; and

(b) a *naked short sale* is the practice of short selling securities without a securities lending arrangement in place.

Note: See Regulatory Guide 196 *Short selling* (RG 196) for the difference between naked short sales and covered short sales.

4 In Australia, naked short sales are prohibited. However, we have power under s1020F to grant relief from this prohibition in some circumstances.

5 Covered short sales are permitted. If you make a short sale on a licensed market, you must comply with the short sale transaction reporting and short position reporting requirements. These obligations apply to covered short sales of section 1020B products made on a licensed market, whether or not the seller is in Australia.

6 RG 196 provides further details on the short selling provisions, including the exemptions available and how the reporting and disclosure requirements operate.

Regulation of short selling in Australia before September 2008

7 Before September 2008, the Corporations Act contained a number of exemptions to the prohibition on naked short selling. These included:

(a) odd lot transactions (previous s1020B(4)(a))—a short sale for an odd lot transaction by a financial services licensee who is:

(i) a participant of a licensed market; and

(ii) specialises in odd lot transactions;

(b) arbitrage transactions (previous s1020B(4)(b))—a short sale that is part of an arbitrage transaction as defined in s9 of the Corporations Act;

(c) prior purchase transactions (previous s1020B(4)(c))—a short sale by a person who:

(i) before the time of sale, has entered into a contract to buy those products; and

(ii) has a right to have those products vested in the person that is conditional on:

(A) the payment of consideration;

(B) receipt of the proper instrument of transfer; or

(C) receipt of title documents;

(d) prior borrowing arrangements (previous s1020B(4)(d))—a short sale by a person who is not an associate of the body corporate issuer and where arrangements have been made before the time of sale that will enable delivery of the products in time for settlement; and

(e) market operator approved short sale transactions (previous s1020B(4)(e))—a short sale by a person, who is not an associate of the body corporate issuer, of products in a class of products declared by the operator of a licensed market under the operating rules of that market.

8 The Corporations Regulations also contained the following exemptions from the naked short selling prohibition:

(a) giving or writing options (previous reg 7.9.79(1))—the sale of financial products which consists of giving or writing options registered with the specified clearing entities;

(b) short sale of unobtained financial products (previous reg 7.9.79(2))—the sale of unobtained shares where the seller held exchange traded options (ETOs) at the time of sale which, if exercised, would result in the seller holding at least the number of shares of the same class as those sold short; and

(c) certain bonds or debentures of a body corporate and government bonds (previous reg 7.9.80A)—the sale of certain bonds or debentures by persons as principals, in certain circumstances, and where the seller believes on reasonable grounds that arrangements can be put in place in time for settlement.

9 In September 2008, in response to the exceptional circumstances at that time, we implemented some interim short selling measures, including a temporary ban on short selling and the imposition of an interim reporting regime for covered short sales.

Note: See our website for an overview of the interim short selling announcements made at that time.

10 In December 2008, the Government passed the *Corporations Amendment (Short Selling) Act 2008* (Short Selling Amendment Act). This Act, together with Corporations Amendment Regulations 2009 (No.1), removed all but one of the exemptions to the naked short selling prohibition. The remaining exemption applied to prior purchase transactions (previous s1020B(4)(c)).

11 The Short Selling Amendment Act and Corporations Amendment Regulations 2009 (No.8) (the short selling amendments) amended the Corporations Act and Corporations Regulations to provide for the current short selling reporting and disclosure framework in Australia.

12 In addition to these amendments, the Government made it clear that ASIC had power to make declarations with respect to all aspects of short selling. We issued several class orders around that time to ensure the continued orderly operation of the market. These include the class orders discussed in Sections E and F.

Note: See the explanatory memorandum to the Corporations Amendment (Short Selling) Bill 2008 and the Regulation Impact Statement (RIS) to the Short Selling Disclosure Regime.

ASIC's power

13 We have the power to exempt persons from the short selling provisions of Pt 7.9 of the Corporations Act. The exemption may be subject to conditions.

14 We may also declare that short selling provisions, including those relating to the calculation of short positions, apply as if specific provisions were omitted, modified or varied.

15 We also have the power to execute instruments that apply to a class of persons. This avoids the need for applicants to apply for relief on an individual basis.

16 Generally, we will only give short selling relief to facilitate the orderly operation of markets: see RG 196.41.

'Sunsetting' legislative instruments

17 Under the Legislation Act, legislative instruments cease automatically ('sunset') after 10 years unless action is taken to exempt or preserve them. Section 50(1) of the Legislation Act repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the tenth anniversary of its registration on the Federal Register of Legislation. Repeal does not undo the past effect of the instrument.

18 To preserve its effect, a legislative instrument (such as a class order) must be remade before the sunset date. The purpose of sunsetting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose.

Our approach to remaking legislative instruments

19 If it is necessary to remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining our priorities of promoting investor and consumer trust and confidence and ensuring fair and efficient markets.

20 We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact, and are subject to sunsetting, to ensure:

(a) we are able to carefully consider the continuing regulatory and financial impact of the instrument; and

(b) the instrument retains its effectiveness in addressing an identified issue or problem.

21 Generally, a RIS is required for new and amended policy that has a significant regulatory impact: see the Australian Government Guide to Regulation. We will review all class orders that have a significant regulatory impact before the scheduled sunset date—our review will include public consultation. Where our review finds that a class order is not operating effectively and efficiently, we will prepare a RIS to assess any proposed changes to the class order that are not minor and machinery. Where the class order is operating effectively and efficiently, we will remake the instrument without substantive changes.

Purpose of this paper

22 This paper seeks feedback on a number of proposals on short selling. These proposals are only an indication of the approach we may take and are not our final policy.

23 Following consultation, we aim to consolidate all short selling relief into a single instrument, including relief that is to be remade as a result of sunsetting as well as any new or modified relief raised by the proposals.

24 As this paper seeks to consult on a broad range of new proposals and current policy related to short selling, it is possible that not all proposals will be relevant to your business. While we welcome all feedback on our proposals, we acknowledge that you may wish to respond only to those aspects of this consultation paper that are relevant to your business.

Legislative relief for certain ETP market makers

25 Section B of this paper seeks feedback on our proposal to grant legislative relief to permit market makers of certain ETPs to make naked short sales of those products. In RG 196, we referred to ‘certain ETF products’ and ‘ETF market makers’. For clarity, this paper refers to ‘ETPs’ and ‘ETP market makers’ to reflect its application to exchange traded funds (ETFs) and exchange traded managed funds (MFs). Note, however, that the attached draft instrument refers to the terms ‘ETF’, ‘managed funds’ and ‘ETF market makers’ separately.

26 Since 2008, we have issued individual no-action positions in appropriate circumstances to allow for such activity. Recently, we have seen a significant increase in the number of no-action position applications, which are time-consuming for applicants to prepare and for us to process. We are aware of the burden unnecessary red tape can impose on business and the potential impact of this on productivity.

Note: No-action letters are issued in accordance with our policy outlined in Regulatory Guide 108 *No action letters* (RG 108) and RG 196.

27 To address this, we propose to provide legislative relief instead. We now consider that it is an appropriate time to consult on legislative relief. Furthermore, we see our policy on this relief for ETP market makers as well settled.

28 The instrument of relief will include some additional conditions not previously included in our standard no-action letters. These additional conditions are intended to ensure that we can still achieve our regulatory outcomes where we no longer consider matters on a case-by-case basis.

Legislative relief for short selling relating to corporate actions and IPO sell-downs

29 Section C of this paper seeks feedback on the proposal to grant legislative relief to permit persons to make naked short sales of unissued section 1020B products to buyers on a licensed market during a deferred settlement trading period. The proposed relief applies to persons with an unconditional entitlement to be issued with the section 1020B products under a particular corporate action. It also applies to purchasers of unissued section 1020B products who make a further sale of those products.

30 Various corporate actions can result in the issue of products (including securities) to specified persons such as existing shareholders. Products issued under a corporate action may commence trading on a licensed market before they are issued. In such cases, trading occurs on a deferred settlement basis. The sale of unissued section 1020B products during a deferred settlement trading period by a person entitled to the products is arguably in breach of the naked short selling prohibition in s1020B(2) of the Corporations Act. This would also be the case where a purchaser of the unissued section 1020B products makes a further sale of the products.

31 In December 2017, we adopted a limited no-action position for trading in unissued section 1020B products during a deferred settlement trading period. We are now proposing to grant legislative relief in these circumstances.

32 This paper also seeks feedback on whether to grant legislative relief to permit persons to make naked short sales of unissued section 1020B products to buyers on a licensed market during a conditional and deferred settlement trading period.

33 Furthermore, the paper seeks feedback on our proposal to grant legislative relief from s1020B(2) for short selling that may occur in connection with IPO sell-downs (where existing shareholders sell some or all of their shares through a special purpose vehicle, conditional on the company conducting the IPO being listed on ASX).

Changing the time short positions are calculated

34 Section D of this paper seeks feedback on the proposal to change the time with respect to which a short position report is calculated under reg 7.9.100(1)(d), as modified by Class Order [CO 10/29] *Short selling position reporting regime*. This is in response to an application we have received to modify the Corporations Regulations so that short positions are calculated as at the end of the calendar date in the reporting entity's location. Our proposal recognises that global firms have entities with trading desks that operate in a number of different time zones.

35 We recognise that any change to the calculation of short positions must apply consistently across the industry to ensure the data continues to be useful. This paper provides industry with the opportunity to raise any concerns with the proposal.

Sunsetting class orders

36 Sections E and F of this paper seek feedback on our proposals to remake, without significant changes, the following class orders on short selling:

(a) Class Order [CO 08/764] *Short selling: Exercise of exchange traded options* which is due to expire on 1 October 2018;

(b) Class Order [CO 09/1051] *Short selling relief: Exchange traded options, unobtained financial products and certain bonds and debentures* which is due to expire on 1 April 2019;

(c) Class Order [CO 10/29] *Short selling position reporting regime* which is due to expire on 1 April 2020 (but is also subject to the changes proposed in Section D of this paper);

(d) Class Order [CO 10/111] *Short selling: Limited relief for deferred purchase agreement issuers from s1020B(2)* which is due to expire on 1 April 2020;

(e) Class Order [CO 10/135] *Relief for small short positions* which is due to expire on 1 October 2020; and

(f) Class Order [CO 10/288] *Covered short sale transaction reporting relief for market makers* which is due to expire on 1 October 2020 (but is also subject to the changes proposed in proposal F3 of this paper).

37 While the expiry dates of the class orders range from 1 October 2018 to 1 October 2020, we are reviewing the class orders concurrently so that the short selling regime can be considered as a whole.

38 We have formed the preliminary view that these class orders are operating effectively and efficiently, and continue to form a useful part of the legislative framework. This paper gives you the opportunity to raise any concerns with the proposals.

Changes to [CO 09/774]—STW ETF and pre-emptive hedging

39 Section E of this paper also seeks feedback on our proposal to remake Class Order [CO 09/774] *Naked short selling relief for market makers* which is due to expire on 1 October 2019.

40 In doing so, we propose to slightly extend the scope of the relief to apply to naked short sales of STW ETF made for the purpose of hedging in listed options over the STW ETF.

41 We also seek to clarify the operation of [CO 09/774] in relation to pre-emptive hedging. Our proposal to amend the wording is intended to make clear our position that [CO 09/774] does not permit naked short sales in the context of pre-emptive hedging.

42 We welcome any feedback you have on our proposals.

B Legislative relief for ETP market makers

Key points

We propose to grant legislative relief to ETP market makers to make naked short sales of certain ETPs. The relief will be subject to a number of conditions which aim to ensure we can still achieve our regulatory outcomes where we no longer consider matters on a case-by-case basis.

Background

43 Naked short sales are short sales that are made without holding a 'presently exercisable and unconditional right to vest' those products in the buyer. Naked short selling is prohibited: s1020B(2) of the Corporations Act.

44 In recognition of the important role that market makers play in promoting liquidity in the market for certain ETPs, we currently provide no-action letters, in appropriate circumstances, that permit naked short sales of units in those products. We issue these no-action letters (where appropriate) upon application.

> Note: Our current approach to naked short selling relief for market makers of exchange traded funds is set out in RG 196.64–RG 196.66.

45 In this paper, we have referred to exchange traded funds (ETFs) and exchanged traded managed funds (MFs) as 'exchange traded products' (ETPs). While some structured products may sometimes be referred to as 'exchange traded products', we do not intend to include these as part of the proposed relief.

46 Whether the 'unit' in the ETF is an interest in, or a 'security' of, an ETF will depend on the structure of the ETF. In this paper we use the word 'unit' as a generic term.

What does 'market making' in ETPs involve?

47 The relevant parties involved in trading ETPs are:

(a) the *issuer*—the person who creates and issues units in the ETP;

(b) the *authorised participant*—the person authorised to apply for the creation of new units in the ETP under the terms of a deed. Units are created when a 'basket' of specified reference assets are delivered to the issuer or, in some cases, the issuer receives cash; and

(c) the *market maker*—the person who has entered into an agreement, or is registered, with the operator of a licensed market to undertake market-making obligations. The market maker agrees to ensure a reasonable bid and offer price are available at timeframes as agreed as well as a minimum quantity of products for each bid and offer. The maximum spread and minimum volume are agreed with the market operator before the ETP is admitted on the licensed market. The market marker may or may not also be an authorised participant. Where it is not an authorised participant, the market maker will generally have entered into an arrangement with an authorised participant for the creation of new units. The market maker may or may not be a market participant. Where the market maker is not a market participant, relief will also be required by the market participant who is effecting the sale.

48 Typically, the market maker is an authorised participant and a market participant. In that scenario, when an investor purchases units in the ETP which are the subject of a short sale, the market maker will apply to the issuer to ensure that sufficient units are created to settle the transaction.

49 At the same time, the market maker may be required to deliver a basket of reference or underlying assets as directed by the issuer. For example, this may be 10 shares in Company A and 20 shares in Company B. Some funds are settled by cash instead of, or as an alternative to, the reference assets.

50 Once the issuer receives the reference assets or cash, it creates the ETP units and the market maker delivers these to the investor.

Our current policy position

51 Our current policy position is that we will consider issuing individual no-action positions to permit market makers of certain ETPs to make naked short sales of those products: see RG 196.64–RG 196.66.

52 Standard conditions apply to the no-action letters. A full list of conditions is set out in RG 196.64.

53 No-action letters are only issued under RG 196.64 to ETP market makers that have specific market-making agreements in place with the operator of a licensed market or the issuer of the ETP.

54 Our current policy position is a recognition of the important role that ETP market makers fulfil in providing liquidity to the market for ETPs.

55 We also considered that these naked short sales had a very low settlement risk because of the market maker's ability to apply for new units as required. Our experience over the past 10 years during which this policy position has been in place supports that view.

Proposal

B1 We propose to grant legislative relief to ETP market makers, rather than continue to issue individual no-action letters. At this stage of the consultation process, we have limited the relief to ETFs and MFs only. We have not proposed relief for exchange traded structured products. The instrument would be subject to the same conditions as currently provided in the standard no-action letters, but some additional conditions are proposed: see proposals B2–B3.

Your feedback

B1Q1 Should we grant legislative relief or continue to issue individual no-action letters on a case-by-case basis upon application? Please give detailed reasons in your response.

B1Q2 The relief is currently only applicable to ETFs and MFs (see definition of 'exchange traded fund' and 'managed fund' in the draft instrument at Attachment 1). Should we extend the relief to other exchange traded products, such as structured products? Please give detailed reasons in your response.

Rationale

56 We consider that the regulatory benefits of this proposed legislative relief (certainty and efficiency for market makers, and better use of resources) outweigh the risks of ASIC not undertaking a detailed review of each application. Further, we consider that any risks are largely mitigated by the proposed conditions of relief.

57 We have taken a cautious approach to the question of moving to legislative relief on this issue. In the 10 years during which our current policy position has been in place, we have monitored the number of applications for this relief and the circumstances in which they were sought. We have, on a number of occasions, considered whether to consult on legislative relief. However, on each occasion, we decided against doing so due to innovations or developments in the market at that time including, most recently, the move to a T+2 settlement period. We consider that it is now an appropriate time to grant this legislative relief.

58 Unnecessary red tape can impose a burden on business and we are aware of its potential impact on productivity. We acknowledge that applications for no-action letters under our current policy are time consuming to compile and involve a substantial number of documents. This is because, under our current policy, we ensure that we are satisfied on a case-by-case basis of various matters including the arrangements for the creation of new units. Review of the applications is also resource-intensive for ASIC. Where the market maker is not, itself, an authorised participant, we currently review the documentary arrangements between the relevant third-party authorised

participant and the issuer. The need to obtain these documents often results in delays to the application and the review of these documents is also resource-intensive for ASIC.

59 Furthermore, we have seen a significant increase in the number of no-action position applications and note the proposed introduction of trading in ETPs on licensed markets other than the ASX and ASX Quoted Assets (AQUA) markets.

60 There have been no recent instances in which we refused an application for a no-action letter under RG 196.64, although there have been instances where we imposed additional conditions to address specific concerns.

61 We consider that the resources expended on these applications, both by applicants and by ASIC are no longer justified by the regulatory risk posed by naked short sales by ETP market makers. Settlement risk remains low in circumstances where ETP market makers can apply for new ETP units to fulfil their settlement obligations in a timely manner. In addition, under our proposal the legislative instrument requires the market maker to fulfil its delivery obligations to avoid settlement failure.

62 Legislative relief provides certainty, whereas a no-action letter is only an expression of regulatory intent. In a no-action letter, we reserve the right to take action, and the letter does not preclude third parties from taking action for that conduct.

Note: RG 108 sets out our policy on no-action letters.

Conditions of relief

63 Many of the conditions that apply to our no-action letters (as set out in RG 196.64) will continue to apply under the legislative instrument. We also propose to add some new conditions.

Proposal

B2 We propose that the following conditions, which currently relate to the issuing of no-action positions, would continue to apply under legislative relief:

(a) the market maker and the market operator have entered into an agreement in relation to the market maker's obligations regarding the ETPs, or the market maker is registered with the relevant market operator, in relation to making a market for those units of the ETP. At this stage it is envisaged that the market operators will be ASX Limited (ASX) and Chi-X Australia Pty Limited (Chi-X);

(b) the units of the ETP are able to be traded on a financial market operated by ASX or Chi-X;

(c) the sale of units of the ETP are made in the course of performing a function as a market maker in ETPs;

(d) the market maker must, before making an offer to sell ETP units, record in written or electronic form that the proposed sale would be a short sale and preserve this record for five years; and

(e) as soon as possible after the short sale of ETP units by the ETP market maker has occurred, the market maker must acquire or apply for a sufficient number of ETP units to settle the short sale.

Your feedback

B2Q1 What concerns (if any) do you have with the proposed circumstances and/or conditions imposed?

B2Q2 How will this change affect your business? Please include any benefits or costs (in dollar terms) associated with the proposed change (as a one-off benefit or cost and on an annual basis).

Proposal

B3 We also propose that these additional conditions would apply under the legislative instrument:

(a) notice of reliance—a market maker seeking to rely on the legislative instrument must notify ASIC that it intends to do so, and what ETP units it intends to short sell before engaging in the conduct;

(b) notice of suspension or termination—the market maker must notify ASIC if the relevant market operator has suspended or cancelled the market-making agreement within 28 days of receiving the notice from the market operator;

(c) settlement failure notice—the market maker must notify ASIC where more than 1% of the volume or value of the market maker's short sales in the previous 12-month period have failed to settle on time. The notice must be given within 28 days after the end of the reporting period. The proposed reporting period is 1 April to 31 March in the following year;

(d) notice of cessation—the market maker must notify ASIC when it no longer seeks to rely on relief provided by the instrument; and

(e) notice of exclusion—we retain the power to exclude a market maker from relying on the relief for one or more ETP by giving written notice.

Your feedback

B3Q1 What concerns (if any) do you have with any of the proposed additional conditions imposed?

B3Q2 What concerns (if any) do you have with the proposed 28-day timeframe for providing the notifications? If you think the timeframe should be longer or shorter, please provide reasons.

B3Q3 What concerns (if any) do you have with the proposed settlement failure reporting being based on a reporting period of 1 April to 31 March of the following year? Is there another reporting period that would be more appropriate? Please provide reasons.

B3Q4 What concerns (if any) do you have with the proposed settlement failure reporting threshold? Should this be higher or lower? Please provide reasons.

B3Q5 Are there any other conditions that should apply?

B3Q6 How will the additional conditions affect your business? Please include any benefits or costs (in dollar terms) associated with the proposed additional conditions (as a one-off benefit or cost and on an annual basis).

Rationale

Current conditions of relief should continue to apply

64 Our experience of issuing no-action letters with similar conditions is that they strike the appropriate balance to ensure that the relief furthers the policy objectives set out in RG 196. In particular, the relief is based on an acknowledgement of the systemic function of market makers and the need to minimise settlement failure.

Proposed additional conditions

65 The additional conditions are intended to ensure we achieve the same regulatory outcomes as the current arrangements in circumstances where we no longer consider applications on a case-by-case basis.

Notifying ASIC of reliance (and cessation) on legislative instrument

66 This condition would allow ASIC to identify each ETP market maker who relies on the relief at any given time, and the cumulative risk they pose. The identification of ETPs that are the subject of the relief will ensure that the relief continues to be appropriate and operates as intended.

67 The notice of cessation will also enable us to identify those market makers that no longer seek to rely on the relief provided.

Notifying ASIC of change in market-making status

68 The proposed modification to s1020B means that relief would apply only where the ETP market maker is performing the appointed function. We have included a requirement to notify ASIC of the suspension or cancellation of the market-making arrangements with the market operator so it is clear who is relying on this relief.

Notifying ASIC of settlement failures above a threshold

69 This condition would enable ASIC to monitor the biggest risk associated with naked short selling: the potential for settlement failure. If a particular market maker has a high settlement failure rate, we may reconsider the appropriateness of continuing to allow them to rely on the legislative instrument.

70 We currently consider the settlement failure history of the ETP market maker when assessing individual no-action letter applications to ensure that a no-action position remains appropriate. In specific matters, we have included an additional condition in no-action letters which requires settlement history reporting.

71 We also receive settlement performance data from market operators that enables us to monitor settlement failure trends.

ASIC's power to exclude persons from relying on the legislative instrument

72 We retain the power to exclude an ETP market maker from relying on the relief to ensure that relief is only available where it continues to meet the intended policy. For example, we may consider excluding a market maker from relying on the relief if its settlement performance fell below acceptable standards.

Short selling disclosure obligations

73 For the avoidance of doubt, we do not propose to change how the short selling disclosure obligations will apply. That is, ETP market makers that execute naked short sales when relying on this legislative instrument will not be subject to the transactional reporting requirements. In addition, ETP market makers that make covered short sales when making a market in ETPs are not required to make transactional reporting of these sales. However, ETP market makers must continue to comply with the disclosure obligations for short positions that are created.

> Note: See RG 196.66 for details on how the short selling disclosure obligations currently apply to ETP market makers.

C Relief for short selling relating to corporate actions and IPOs

Key points

We propose to grant legislative relief to permit persons to make naked short sales of unissued section 1020B products to buyers on a licensed market during a deferred settlement trading period.

We also seek views on whether to grant legislative relief in relation to naked short sales during a conditional and deferred settlement trading period.

We propose to grant legislative relief from s1020B(2) for IPO sell-downs where a saleco offers shares to IPO investors but does not have an unconditional right to those shares until ASX grants quotation.

Deferred settlement trading periods

74 Various corporate actions can result in the issue of products (including securities) to specified persons such as existing shareholders. These might include:

(a) an issue under a disclosure document or Product Disclosure Statement (PDS);

(b) a compromise or arrangement under Pt 5.1 of the Corporations Act;

(c) a rights issue;

(d) a dividend or distribution reinvestment plan; or

(e) a bonus issue.

75 Products that are issued under a corporate action may commence trading on a licensed market before they are issued. In such cases, trading occurs on a deferred settlement basis. This means that the obligation to settle any trades in the unissued products is deferred until a time set by the operator of the listing market. This is generally three business days after the issue date of the products.

76 Under s1020B(2) of the Corporations Act, a person can only sell section 1020B products if they have a presently exercisable and unconditional right to vest the products in the buyer at the time of sale. 'Section 1020B products' is defined under s1020B(1) of the Corporations Act, and it includes securities and managed investment products.

77 Arguably, a person who sells unissued section 1020B products during a deferred settlement trading period cannot have a presently exercisable and

unconditional right to vest the products in a buyer. This is because any rights that such a buyer has in the product cannot be 'presently exercisable' in circumstances where the product has not yet been issued. It follows that a person who sells unissued products in these circumstances may be in technical breach of the naked short selling prohibition. This may also be the case where a purchaser of the unissued section 1020B products makes a further sale of the products.

78 In December 2017, we adopted a limited no-action position for trading in unissued section 1020B products during deferred settlement trading periods: see paragraph 31. The no-action position is subject to the seller only selling unissued section 1020B products if they, or the person selling on their behalf, believe on reasonable grounds that the seller has an unconditional entitlement to the products.

79 We decided to adopt this position while we considered whether to grant a legislative instrument. Following further consideration, our view is that legislative relief should be granted.

Conditional and deferred settlement trading periods

80 In some circumstances, the operator of the listing market may declare a conditional market for trading in certain products. This usually only occurs for an IPO with an offer of at least $100 million.

81 A conditional market means that official quotation commences on a conditional and deferred settlement basis, pending the satisfaction of certain conditions set by the operator of the listing market, including the issue and/or transfer of securities. Those conditions may vary depending on the circumstances of the particular corporate action. If the conditions are not met, any trades executed during the conditional and deferred settlement period are cancelled.

82 Our preliminary view is that in such circumstances, individual relief on a case-by-case basis is more appropriate. We are seeking feedback on whether to also grant legislative relief to permit persons to make naked short sales of unissued section 1020B products to buyers on a licensed market during a conditional and deferred settlement trading period.

Proposal

C1 We propose to grant legislative relief to permit naked short sales of unissued section 1020B products during a deferred settlement trading period by a person with an unconditional entitlement to be issued with the products under a particular corporate action, and by a purchaser of unissued section 1020B products who makes a further sale of those products: see the draft instrument at Attachment 1.

Your feedback

C1Q1 What are your views on deferred settlement trading periods and conditional and deferred settlement trading periods in general? In particular:

(a) should deferred settlement trading periods and/or conditional and deferred settlement trading periods be permitted? Please give reasons for your view;

(b) do you think that deferred settlement trading periods and/or conditional and deferred settlement trading periods provide benefits to the market? If so, what are those benefits?

(c) should any changes be made to deferred settlement trading periods and/or conditional and deferred settlement trading periods (e.g. to the duration of the periods, or to the types of corporate actions that may include a period of deferred settlement trading or a period of conditional and deferred settlement trading)? If so, what changes should be made?

C1Q2 Do you agree with our proposal to grant legislative relief to permit naked short sales of unissued section 1020B products during a deferred settlement trading period? Please give reasons for your view.

C1Q3 Do you agree with the proposed drafting of the draft instrument at Attachment 1? Please give reasons for your view.

C1Q4 How will this proposal to grant legislative relief affect your business? Please include any benefits or costs (in dollar terms) associated with the proposal (as a one-off benefit or cost and on an annual basis).

C1Q5 Should we also grant legislative relief to permit naked short sales of unissued section 1020B products during a conditional and deferred settlement trading period, and if so:

(a) in what circumstances should the relief apply (e.g. what are the conditions, as declared by the operator of the listing market, which would need to be satisfied)?

(b) should that relief be subject to conditions and, if so, what conditions should apply?

Please give reasons for your view.

C1Q6 How would it affect your business if we did/did not grant the legislative relief referred to in C1Q5? Please include any benefits or costs (in dollar terms) associated with ASIC granting, or not granting, legislative relief (as a one-off benefit or cost and on an annual basis).

Rationale

83 Deferred settlement trading periods and/or conditional and deferred settlement trading periods may provide some benefits to the market, including efficient price discovery and allowing investors to manage their exposure to market risk. On the other hand, it may be argued that such periods should not be permitted in our market, or that changes should be made to improve and simplify the processes involved. This may include limiting the types of corporate actions where a deferred settlement trading period or a conditional and deferred settlement trading period occurs, or shortening and standardising the timeframes that are imposed.

84 Irrespective of whether deferred settlement trading periods and/or conditional and deferred settlement trading periods should be permitted, the sale of unissued section 1020B products during such periods is arguably in breach of the naked short selling prohibition. This creates uncertainty in the market. It also imposes an increased compliance burden on product issuers or other affected persons who may seek individual relief from ASIC to facilitate trading during these periods.

Deferred settlement trading periods

85 To address this, we propose to grant legislative relief which will apply in circumstances where, during a deferred settlement trading period:

(a) a person:

(i) has an unconditional entitlement to a specified quantity of unissued section 1020B products under a particular corporate action; and

(ii) sells on a licensed market a quantity of those products which is less than or equal to the specified quantity; or

(b) a person:

(i) has purchased unissued section 1020B products as a result of a transaction or transactions referred to in paragraph 85(a)(ii); and

(ii) sells those products on a licensed market.

86 We consider that in these circumstances the risk of settlement failure is no greater than would be the case if the section 1020B products had been issued and were trading on a normal settlement basis (i.e. two business days after the trade date, or T+2).

87 The limited no-action position adopted by ASIC for arguable breaches of s1020B of the Corporations Act (see paragraph 31) does not provide the same legal certainty given by legislative relief. A no-action position is only an expression of regulatory intent (e.g. see RG 108.12–RG 108.19).

88 We consider that the regulatory benefits of this proposed legislative relief, including certainty for product issuers and other affected persons and a reduced compliance burden, outweigh any potential detriment which may

result. An example of potential detriment is the risk that a person may inadvertently sell a quantity of unissued section 1020B products which is greater than their actual entitlement under the particular corporate action, increasing the risk of settlement failure.

Conditional and deferred settlement trading periods

89 We do not propose to grant legislative relief in circumstances where a person's entitlement under a corporate action to unissued section 1020B products is subject to conditions. In these transactions, conditions are set by the operator of the listing market. Those conditions may vary depending on the circumstances of the particular corporate action. Because we cannot predict the range of conditions that may apply, our preliminary view is that individual relief on a case-by-case basis is more appropriate.

Relief for short selling during IPO sell-downs

90 IPOs involve a company that is seeking listing (listing company) offering to issue new shares to the public. IPOs also often involve existing shareholders seeking to sell some or all of their shares. Usually the shareholders' sale offer is conducted through a special purpose company (saleco). The selling shareholders agree to transfer their shares to the saleco for the purposes of the IPO. The saleco will invite applications for the shares from public investors in a prospectus which the saleco and the listing company will lodge with ASIC under s718 of the Corporations Act.

91 The shareholders' agreement to transfer their shares to the saleco (or an IPO investor nominated by the saleco) will typically be conditional on ASX granting approval for the admission of the listing company to the official list and quotation of the listing company's shares. This condition ensures the shareholders do not have to transfer their shares if the IPO does not proceed. If ASX does not grant approval and quotation of the listing company's shares, then s723(3) of the Corporations Act operates to prevent the saleco from transferring the shares to applicants and the listing company from issuing shares.

92 Depending on the terms of the arrangements, it is arguable that the saleco's offer of shares in the prospectus contravenes s1020B(2) because:

(a) the saleco will not have a presently exercisable and unconditional right to vest the shares in IPO applicants if the saleco's right to obtain the shares from the existing shareholders is conditional on ASX granting quotation—which is not a condition permitted by s1020B(4); and

(b) the saleco may not be selling on behalf of the existing shareholders, particularly given that it is the saleco that makes the offer under the prospectus to IPO applicants.

Proposal

C2 We propose to grant relief from s1020B for IPO sell-downs conducted by a saleco under either a prospectus or a pathfinder document. Our proposed relief will only extend to offers of securities in connection with a listing on ASX where the listing company is also making an offer to issue securities under the prospectus. We will continue to consider case-by-case relief for more unusual IPO sell-downs, including where the shares have not yet been issued due to a group restructure that is conditional on the IPO.

Your feedback

C2Q1 Do you agree that the terms of our proposed relief will cover most IPO sell-downs? If not, please explain what types of common IPO sell-downs would not be covered.

C2Q2 The terms of our proposed relief require the listing company to make an offer of shares under the prospectus (i.e. there cannot just be an offer of shares by a saleco). Do you have any comment on this feature of the relief?

C2Q3 Our proposed legislative relief only applies where there is a company seeking listing on ASX and where the shares offered for sale by the saleco have been issued. Do you have any comment on this?

Rationale

93 An IPO sell-down by a saleco does not involve the type of settlement or market integrity risks that s1020B was intended to prevent. The risks relating to settlement of IPOs are adequately dealt with in Ch 6D, including s723, 724 and 737.

94 We are therefore willing to grant legislative relief from s1020B for the most common form of IPO sell-down, outlined in paragraphs 90–91 above. We are prepared to consider case-by-case relief from s1020B for more unusual IPO sell-downs. For example, we have granted individual relief from s1020B where the sale shares offered by the saleco have not been issued due to a corporate restructure of the business seeking listing.

95 We do not oppose the use of a saleco to make offers of shares as part of an IPO. Often these arrangements will be for convenience where there are large numbers of selling shareholders. In such circumstances, the listing company needs some certainty as to the number of shares to be sold, as this may affect the number of shares the listing company offers for issue (e.g. to meet ASX spread requirements).

96 We oppose the more novel use of a saleco structure in a manner that would avoid the statutory responsibility that the listing company and its directors would otherwise have for the prospectus. This can be the consequence where

the listing company does not make an offer under the listing prospectus and the only offer is made by a saleco.

97 The statutory responsibility that the Corporations Act imposes on the offeror and its directors is an incentive to complete due diligence inquiries for the purposes of the defence in s731, thereby improving the quality of disclosure. For this reason, it is a condition of our proposed relief for IPO sell-downs that the saleco is not solely responsible for the prospectus and that the listing company makes some offer, even if it is a nominal offer, of securities under the prospectus.

98 Accordingly, the prospectus should be prepared by the listing company or a controller and its directors (who have access to the information required under s710 of the Act) and the listing company should make an offer under the document. This will ensure that the listing company and its directors have potential liability for the disclosure under s729(1), items 1 and 2. The directors will also have a duty during the IPO to inform the listing company about deficiencies under s730(1).

> Note: It should be noted that we will oppose any IPO seeking listing on a financial market that does not include an offer by the listing company under a prospectus, whether or not there is an IPO sell-down.

D Changing the time short positions are calculated

Key points

We propose to change the time for which a short position is calculated under reg 7.9.100(1)(d), as modified by [CO 10/29].

Background

99 A short position arises where the quantity of the product that a person has is less than the quantity of the product they have an obligation to deliver: reg 7.9.99.

> Note: More detail on the definition of a short position is provided at RG 196.115–RG 196.119.

100 A person who holds a short position in section 1020B products which is above a specified threshold must provide details of this position to ASIC. Currently, the obligation applies to short positions held as at 7 pm (Sydney time).

> Note: In [CO 10/29], we modified reg 7.9.100(1)(d) of the Corporations Regulations so that the short position reporting obligation applies to short positions held as at 7 pm. Before this, short position reporting obligations applied to short positions at 'the close of business'.

101 Short position reports are submitted to ASIC by 9 am on the third reporting day after the short position is first created (i.e. 9 am, T+3). We publish the consolidated information on the fourth reporting day after the position is first created (i.e. T+4).

102 This consultation concerns the relevant time reflected in the report, not the time the report is due.

Proposal

D1 We propose to modify the definition of 'short position' so that the obligation applies to short positions held as at the end of the calendar date (Global Calendar End Time) in the location of the reporting entity that created the short position. For example, for a UK-based entity, short positions on Australian shares would be calculated based on UK time. We propose that this would be the case even if the entity operates globally using trading desks in multiple jurisdictions. Accordingly, the Global Calendar End Time for the UK entity would be based on UK time even where the relevant trading desk is located elsewhere. We propose modifying

this by amending the relief currently granted in [CO 10/29] (discussed in Section E as one of the proposed 'sunsetting' instruments to be remade).

Your feedback

D1Q1 Should we modify the definition of 'short position' to change the time used to calculate short position reports? If not, why not? In your submission, please help us to understand your role in the market, the jurisdictions that apply to your business and which of the short selling obligations apply to you in this jurisdiction and overseas (if relevant).

D1Q2 What concerns (if any) do you have about the proposed introduction of a Global Calendar End Time?

D1Q3 Should the short positions be calculated using some other timeframe? Please provide details and reasons for your view. For example, using the scenario in proposal D1, should the short position instead be calculated based on the location of the trading desk, even though the reporting entity is based in the United Kingdom? What are the operational reasons supporting your view?

D1Q4 How will this change affect your business? Please include any benefits or costs (in dollar terms) associated with the proposed change (as a one-off benefit or cost and on an annual basis).

D1Q5 If we decide to proceed with a Global Calendar End Time or other timeframe, how much time would you need to transition to the new calculation date?

Rationale

103 This proposed change is based on an application we received to calculate short positions as at the Global Calendar End Time in the reporting entity's location. We recognise that any change to the calculation of short positions must apply consistently across the industry to ensure the data continues to be useful and comparable.

104 Our proposal recognises that global firms operate in different time zones. It is intended to provide a more accurate picture of the entire short position held in a product on a particular date by the corporate group.

105 Using a Global Calendar End Time will reduce both the number of manual fixes required to generate the report and the associated risk of human error. This is because a calculation time that is fixed to 7 pm (Sydney time) may be intraday in another jurisdiction (e.g. for a UK entity, this will be 8 am). A Global Calendar End Time means that overseas reporting entities that hold short positions as part of a larger corporate group would not be subject to an arbitrary cut-off (e.g. 4 pm in Hong Kong or 3 am in New York).

106 The proposal will also allow for the inclusion of 'late' bookings (i.e. bookings made after 7 pm Sydney time) which would otherwise be carried over into the short position report for the following day.

107 We received data from the applicant, a firm that operates internationally, which compared short positions calculated using the current 7 pm deadline with short positions calculated using the proposed Global Calendar End Time. The comparison did not show a significant difference in the data reported. We therefore anticipate that the proposed change would reduce the cost of compliance with little regulatory detriment.

108 On the other hand, it may be argued that choosing to do business in a particular jurisdiction, such as Australia, means that entities should comply with requirements there, including the time at which obligations are calculated. Short positions in other overseas regulatory regimes, such as the United Kingdom and Hong Kong, are calculated based on the time in their respective jurisdictions. The obligation does not change depending on the location of the reporting entity.

109 As noted at RG 196.85, the Government has described positional reporting as providing an indication of the 'bearish' sentiment within a particular security at any point in time.

110 In addition, for investors, this information may indicate the level of risk involved in short selling the security. Short sellers engaging in covered short sales have 'borrowed' securities under a securities lending arrangement in order to settle the short sale. However, they will eventually need to re-purchase the securities in order to 'return' them in accordance with their obligation under the securities lending arrangement. Therefore, it may be risky for an investor to take a short position in a particular security if a significant proportion of that security has already been the subject of short selling. This is because there is a greater chance of being subject to a 'short squeeze' if market sentiment changes and the investor is required to close out its position quickly. A 'short squeeze' occurs when the level of short selling results in excessive demand for the relevant financial product in order to close out positions. The resulting price rises can cause short sellers to lose money as a result of the short sale.

111 Our proposal will not significantly affect transparency to the market because short positions are not publicly available until we publish the information at T+4. We also reiterate our earlier observation that a comparison of the data for the current 7 pm deadline and the proposed Global Calendar End Time did not show a significant difference in the data reported: see paragraph 107.

Impact for domestic firms

112 The proposal should not have a significant impact on the operations of reporting entities that solely operate domestically, except that it will allow for 'late' bookings: see paragraph 106.

E Remaking instruments which permit naked short selling in specific circumstances

Remaking [CO 08/764]

Background

113 This legislative instrument permits naked short selling resulting from the exercise of ETOs. It was originally made to address the unintended consequences of actions taken by ASX to restrict naked short selling during the global financial crisis.

114 Before September 2008, the Corporations Act contained a number of exemptions to the prohibition of naked short selling (discussed at paragraphs 7–11 of this paper). This included an exception for transactions made under a declaration from the operator of a licensed market under the operating rules of the market (previous s1020B(4)(e)).

115 On 21 September 2008, we took steps to temporarily restrict covered short selling in the Australian market. At that time, the ASX also removed all the securities that were included in its approved product list for naked short sales. The removal of the ASX's approved product list meant that the exemption under previous s1020B(4)(e) was no longer available. As a result, a person could no longer exercise ETOs that would result in a short sale.

> Note: See Report 302 *Short selling: Post-implementation review* (REP 302) for more details on the impact of the regulatory measures concerning short selling which we implemented in September 2008.

116 [CO 08/764] was initially made to permit naked short selling in the context of exercising ETOs in the following cases:

(a) a person buys and later elects to exercise a put option (which gives the buyer the right to sell the underlying share to another person at a specified price) and does not have a presently exercisable and unconditional right to vest the underlying product at the time the option is exercised; and

(b) a person sells a call option (which gives the buyer the right to buy the underlying share from the seller at a specified price) which is later exercised and the person does not have a presently exercisable and unconditional right to vest the underlying product at the time the option is exercised.

117 When we made [CO 08/764], we considered that relief was consistent with established market practices in options markets internationally. Relief was

needed to avoid a significant and adverse impact on the liquidity of the ETO market.

118 In December 2008, the exemption under s1020B(4)(e) was permanently removed by the short selling amendments. [CO 08/764] remained, effectively preserving the status quo in the context of the exercise of ETOs. This instrument continues to have that effect.

Proposal

E1 We propose to continue the relief provided in [CO 08/764] beyond the expiry of that instrument on 1 October 2018. See the current instrument: [CO 08/764]. We propose to incorporate the relief currently given by [CO 08/764] into a new consolidated legislative instrument: see section 9 of the draft instrument at Attachment 1.

The only changes proposed to the relief are to:

(a) consolidate this and related relief into one instrument;

(b) reflect current drafting practice and update the format of the current document;

(c) simplify the drafting to give greater clarity;

(d) update legislative references and definitions; and

(e) correct any minor drafting errors.

Your feedback

E1Q1 Do you agree that the relief under [CO 08/764] should continue? Please give detailed reasons for your view.

Rationale

119 We remain of the view that [CO 08/764] is necessary to maintain the orderly operation of the ETO market in keeping with international norms. We have reached the preliminary view that [CO 08/764] is operating effectively and efficiently, and continues to form a useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

Remaking [CO 09/1051]

Background

120 This legislative instrument provides relief from the prohibition against naked short selling in the following circumstances (previously provided for in the Corporations Regulations):

(a) giving or writing certain ETOs (previous reg 7.9.79(1));

(b) the sale of unobtained financial products in circumstances where the seller is able to obtain sufficient financial products to settle the sale by the execution of ETOs (previously applied to unobtained shares only under reg 7.9.79(2)); and

(c) in specified circumstances, the sale of (previous reg 7.9.80A):

(i) government bonds; or

(ii) bonds or debentures of a body corporate where the total amount of such bonds or debentures on issue is valued at over $100 million.

Note: These exemptions are described in more detail at paragraph 8.

121 The exemptions in the Corporations Regulations were removed by the short selling amendments. In making the short selling amendments, the government reaffirmed ASIC's power to grant exemptions from the naked short selling prohibition to allow certain forms of naked short selling to ensure the ordinary operation of the market.

122 We made [CO 09/1051] because we considered:

(a) the ability to issue ETOs ensures a degree of liquidity in the options market. Issuing these options would not pose a settlement risk until the options are exercised;

(b) the risk of settlement failure in relation to unobtained financial products is not significant if, at the time of sale, the person is able to obtain at least the number of financial products of the same class by exercising the ETO; and

(c) the $100 million issued value threshold for corporate bonds and debentures helps to ensure sufficient liquidity as more bonds or debentures on issue would be expected to reduce the likelihood of a failure to deliver.

Proposal

E2 We propose to continue the relief provided in [CO 09/1051] beyond the expiry of that instrument on 1 April 2019. See the current instrument: [CO 09/1051]. We propose to incorporate the relief currently given by [CO 09/1051] into a new consolidated legislative instrument: see sections 10 and 11 of the draft instrument at Attachment 1.

The only changes proposed to the relief are to:

(a) consolidate this and related relief into one instrument and update the instrument's name;

(b) reflect current drafting practice and update the format of the current document;

(c) simplify the drafting to give greater clarity;

(d) update legislative references and definitions; and

(e) correct any minor drafting errors.

Your feedback

E2Q1 Do you agree that the relief under [CO 09/1051] should continue? Please give detailed reasons for your view.

E2Q2 Do you consider that there have been changes to market practice and the risk of settlement failure relating to the options market since [CO 09/1051] which make [CO 09/1051] ineffective? If so, please provide details of the changes and how this impacts on the proposal.

E2Q3 Should the $100 million issued value threshold for corporate bonds and debentures remain? Should another threshold apply? Please provide reasons in support of your proposal.

Rationale

123 We remain of the view that:

(a) giving or writing an option does not, in itself, pose an unacceptable settlement risk;

(b) the settlement risk of a short sale remains low in circumstances where the seller can obtain sufficient financial products to settle the sale through the exercise of ETOs; and

(c) the settlement risk of short sales of government bonds and corporate bonds and debentures with a total issued value of more than $100 million is low due to the liquidity of the market for these products.

124 We have reached the preliminary view that [CO 09/1051] is operating effectively and efficiently, and continues to form a useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order. We are not currently aware of any reason to change the current threshold that applies to corporate and government bonds and debentures.

Remaking [CO 09/774]

Background

125 This legislative instrument permits a market maker to hedge the risk of a long exposure by naked short selling the underlying product (shorted product). The shorted product must be a constituent of the S&P/ASX 300.

126 A market maker regularly states prices at which it proposes to buy or sell financial products on its own behalf. Market makers perform an important

role in promoting liquidity, price efficiency and transparency in financial markets.

127 If a market maker enters a transaction with a counterparty that creates a 'long' exposure to an underlying product, the market maker may want to hedge the risk of this exposure by short selling the underlying product so that it has no overall exposure in the product (also known as a 'delta neutral' position). Market makers often use automated systems to immediately hedge positions established in the course of making a market.

128 Prior to the short selling amendments, market makers relied on exemptions under the previous s1020B(4)(d) and (e) to hedge their long exposures. The short selling amendments repealed these exemptions (see paragraph 10 of this paper).

129 We provided this relief in recognition of the important role of market makers and because the settlement risk is low due to the high liquidity of the products the relief applies to.

130 We also recognise the practical difficulties that market makers would experience in the absence of the relief. Without this relief, a market maker would be required to ensure that it entered into covered short sales only. It would therefore need an agreement to borrow the relevant financial products under a securities lending arrangement before the time of sale. This presents practical difficulties for a market maker because, at the start of each trading day, the market maker is unable to anticipate the volume of products it will require to cover possible future positions. Consequently, the market maker will incur borrowing and administrative costs, regardless of whether the borrowed products are actually used.

131 Alternatively, the market maker would need to maintain an inventory of long or borrowed products. Maintaining an inventory may affect the spreads (cost) at which market makers can price bids and offers in the markets.

132 [CO 09/774] contains a number of conditions to mitigate the risk of settlement failure that arises from naked short selling and to ensure that the financial product can be unconditionally vested in the purchaser at the time of delivery.

Pre-emptive hedging

133 Pre-emptive hedging refers to the hedging of an anticipated risk based on an expected long exposure. A market maker may wish to engage in pre-emptive hedging in the expectation that during the course of a trading day its market-making activities will result in a net long position.

134 We have received market intelligence that some market makers may consider that [CO 09/774] permits naked short sales in the context of pre-

emptive hedging. We understand that this may be based on the argument that pre-emptive hedging may satisfy the test under paragraph 4(d) of [CO 09/774] which requires that:

> the sale of the shorted product is a bona fide transaction to manage, avoid, or limit the financial consequences of the person issuing, acquiring or disposing of the hedged product in the course of making a market in the hedged product.

135 Our longstanding view is that a mere 'expectation' of a future long position does not satisfy the test under paragraph 4(d) of [CO 09/774].

136 We propose to amend the wording of this relief to make clearer our position in relation to pre-emptive hedging.

Extending the relief to the STW ETF

137 We propose to extend the relief currently provided in [CO 09/774] to apply to naked short sales of the STW ETF. The relief will apply to short sales of the ETF for hedging purposes by market makers in listed options over the STW ETF.

138 In September 2017, ASX began listing options over the STW ETF. ASX appointed two market makers to make a market in these options.

139 Relief under [CO 09/774] applies where the shorted products are securities or managed investment products that are a constituent of the S&P/ASX 300 Index. The STW ETF is not a constituent of the S&P/ASX 300 Index. As such, [CO 09/774] does not currently apply to short sales of the STW ETF.

140 We have provided an entity which makes a market in listed options over the STW ETF with a no-action letter on similar terms to [CO 09/774]. In considering the request for that no-action position, we examined the policy rationale for allowing a market maker to make short sales of a constituent of the S&P/ASX 300 Index under [CO 09/774] (see paragraphs 125 and 126 of this paper). We formed the view that this rationale applied equally to the naked short selling of STW ETF units. Like the constituents of the S&P/ASX 300 Index, the STW ETF is highly liquid. Naked short sales of units in the STW ETF pose a very low settlement risk since market makers should not encounter difficulties in settling the short sale by borrowing or purchasing the STW ETF. Furthermore, market makers may be able to apply for new units in the STW ETF to be created in time to settle the short sale.

Proposal

E3 We propose to continue the relief provided in [CO 09/774] beyond the expiry of that instrument on 1 October 2019. See the current instrument: [CO 09/774]. We propose to incorporate the relief currently given by

[CO 09/774] into a new consolidated legislative instrument: see section 8 of the draft instrument at Attachment 1.

We further propose to amend the relief currently provided in [CO 09/774] to:

(a) clarify that relief does not extend to pre-emptive hedging; and

(b) extend relief to short sales in the STW ETF to hedge the risks arising from making a market in listed options over the STW ETF.

The only additional changes proposed to the relief are to:

(a) consolidate this and related relief into one instrument and update the instrument's name;

(b) reflect current drafting practice and update the format of the current document;

(c) simplify the drafting to give greater clarity;

(d) update legislative references and definitions; and

(e) correct any minor drafting errors.

Your feedback

E3Q1 Do you agree that the relief under [CO 09/774] should continue? Please give detailed reasons for your view.

E3Q2 Do you consider that the relief should apply to pre-emptive hedging by market makers? What are the reasons for your view?

E3Q3 Do you agree with our proposal to extend the relief to apply to naked short sales of STW ETF units for the purposes of hedging market-making activities in options over the STW ETF? Please provide reasons.

E3Q4 Should relief also extend to short sales by market makers of options over other ETFs? What are the reasons for your view?

E3Q5 Should relief to market makers of options instead be given on a case-by-case basis?

Rationale

141 We consider that this relief:

(a) promotes liquidity and price discovery by facilitating efficient hedging by market makers; and

(b) maintains confidence in Australia's markets by addressing risks associated with naked short selling (such as the risk of settlement failure) through the inclusion of appropriate conditions. A reduction in market-making costs will in turn reduce the cost to investors.

142 While we have reached the preliminary view that [CO 09/774] continues to form a useful part of the legislative framework, we propose some minor amendments to clarify the operation of the class order.

143 We propose clarifying the wording in [CO 09/774] to make it clear that the relief does not extend to pre-emptive hedging. In our view naked short sales should only be made for the purposes of hedging current (not future) market-making exposures.

144 We propose the extension of the relief to short sales in STW ETF units because we consider that the policy rationale for [CO 09/774] applies equally in this context. Like the constituents of the S&P/ASX 300 Index, the STW ETF is highly liquid. Naked short sales of STW ETF units will therefore pose a low settlement risk. Market makers should not encounter difficulties in settling the short sale by either borrowing or purchasing the STW ETF or by applying for new units in the STW ETF to be created in time to settle the short sale. We consider that, given the low settlement risk for STW ETF units, the relief under [CO 09/774] should be extended to permit naked short selling of STW ETF units for the purposes of hedging any risks from market making in listed options over the STW ETF.

Remaking [CO 10/111]

Background

145 This legislative instrument permits naked short selling of a security or managed investment product able to be traded on the ASX where the sale arises under a deferred purchase agreement (DPA). The relief only applies in circumstances designed to reduce the risk of delivery failure or other adverse market impact.

146 A DPA is a structured product by which an investor agrees to purchase nominated ‘delivery products’ from the issuer (DPA issuer) of the DPA.

147 Under a DPA, the investor pays the purchase price to acquire the delivery products at the time they enter the DPA but the delivery products are not delivered until a later date (maturity), typically at least 12 months after the date the investor entered into the DPA. At maturity, to meet its obligations under the DPA, the issuer acquires sufficient delivery products to deliver to the investor.

148 The number and value of delivery products is ultimately determined or derived from the value or amount of a ‘reference’ (being another financial product, an asset, a rate, an index or a commodity).

149 The DPA issuer is taken to sell delivery products to an investor at the time the DPA is agreed (because of the operation of s1020B(7)) even though the products are not to be delivered until after the maturity of the DPA.

150 The relief applies where:

(a) the maturity date of the DPA is at least 12 months after the date the investor entered into the DPA;

(b) the reference is not the delivery product itself, nor is it a derivative that relates to the delivery product; and

(c) the DPA issuer has the right, in circumstances specified under the DPA, to deliver other securities or managed investment products in substitution for the delivery product (thereby addressing the risk of the delivery failure).

151 The relief does not apply to an issuer who makes a naked short sale to hedge their exposure to the 'reference' of a DPA.

152 Without the relief, DPA issuers would need to hold an inventory of delivery products at the time of sale. These requirements would make DPAs impractical and commercially unviable because:

(a) DPA investments generally have a term of over 12 months;

(b) the exact number of delivery products required to be delivered to the investor cannot be calculated until maturity of the arrangement; and

(c) the cost of holding an inventory of delivery products at the time of sale where the deferred delivery date of the DPA is more than 12 months would be prohibitive.

Proposal

E4 We propose to continue the relief provided in [CO 10/111] beyond the expiry of that instrument on 1 April 2020. See the current instrument: [CO 10/111]. We propose to incorporate the relief currently given by [CO 10/111] into a new consolidated legislative instrument: see section 12 of the draft instrument at Attachment 1.

The only changes proposed are to:

(a) consolidate this and related relief into one instrument and update the instrument's name;

(b) reflect current drafting practice and update the format of the current document;

(c) simplify the drafting to give greater clarity;

(d) update legislative references and definitions; and

(e) correct any minor drafting errors.

Your feedback

E4Q1 Do you agree that the relief under [CO 10/111] should continue? Please give detailed reasons for your view.

E4Q2 Do you believe that the restrictions on the DPAs to which the relief applies strike an appropriate regulatory balance? Please give reasons for your views.

Rationale

153 We remain of the view that DPAs do not pose a settlement risk in circumstances where delivery is deferred for at least 12 months and where other products may potentially be substituted for the delivery product.

154 We have reached the preliminary view that [CO 10/111] is operating effectively and efficiently, and continues to form a useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

F Remaking instruments providing short sale reporting relief

Background

155 We issued [CO 10/29], [CO 10/135] and [CO 10/288] to resolve several issues associated with the staggered commencement dates of the various disclosure and reporting requirements in the Corporations Act.

156 These legislative instruments also make a number of other modifications to facilitate the efficiency of the disclosure and reporting regime.

Operational amendments to [CO 10/29]

157 This instrument:

(a) postponed the commencement of the short position reporting and disclosure obligations to June 2010, instead of April 2010;

(b) amends the definition of 'reporting day' in reg 7.9.99(1) of the Corporations Regulations to mean 'a day that a licensed market that has admitted to quotation the s1020B product is open for trading';

(c) amends the methodology for calculating a short position:

(i) to reflect circumstances where a person holds s1020B financial products in more than one capacity;

(ii) to require a person (such as the responsible entity for a managed investment scheme) who holds a product on behalf of another person (except where that other person has the sole discretion to decide whether the product will be sold) to include the product in calculating its short position; and

(iii) to clarify that if another person (such as a bare trustee) is holding a product on a person's behalf (and the person has the sole discretion to decide whether the product will be sold) the person must include the product in calculating its short position;

(d) amends the timing of the short position reporting obligations so that the term 'the close of business' in reg 7.9.100(1)(d) of the Corporations Regulations is replaced with '7 pm';

(e) extends the short position reporting obligations to positions arising from naked short sales entered into with the benefit of an exemption from the prohibition against naked short selling;

(f) extends the application of the short selling reporting and disclosure regime to short sales of 'CGS depository interests'; and

(g) clarifies the application of the short position reporting obligations in circumstances where a securities lending arrangement is contingent upon the lender recalling the product.

Proposal

F1 We propose to continue, in its current form, the relief provided in [CO 10/29] beyond the expiry of that instrument on 1 April 2020 with the exception of:

(a) the transitional arrangements set out in paragraph 157(a) above which are no longer required; and

(b) the clarification of the timing of short position reporting set out in paragraph 157(d) which we have proposed to amend in proposal D1 above.

See the current instrument: [CO 10/29]. We propose to incorporate the continuing relief into a new consolidated legislative instrument: see sections 17, 18 and 19 of the draft instrument at Attachment 1.

The only additional changes proposed to this relief are to:

(a) consolidate this and related relief into one instrument and update the instrument's name;

(b) reflect current drafting practice and update the format of the current document;

(c) simplify the drafting to give greater clarity;

(d) update legislative references and definitions; and

(e) correct any minor drafting errors.

Your feedback

F1Q1 Do you agree that the relief under [CO 10/29] should continue? Please give detailed reasons for your view. Please include any submissions relating to the time with respect to which short positions should be calculated in your response to proposal D1.

Rationale

158 Paragraph 4(d) of [CO 10/29] postpones the commencement of the short selling reporting and disclosure regime. The short selling reporting and disclosure regime commenced in June 2010. We propose to allow this relief to lapse because transitional relief is no longer necessary.

159 [CO 10/29] primarily operates to clarify a range of matters and provide greater certainty for the operation of the short selling reporting and disclosure regime. We remain of the view that this clarification facilitates the effectiveness of the regime.

160 We have reached the preliminary view that, in all other respects, [CO 10/29] is operating effectively and efficiently, and continues to form a useful part of the legislative framework.

Remaking [CO 10/135]

Background

161 This legislative instrument exempts short sellers from having to report 'small' short positions (i.e. where the short position is the lesser of the value limit ($100,000) or the volume limit (0.01% of the total quantity of the products in the class for that day)).

162 The disclosure of minimal short positions is not required for the short position disclosure framework to be effective. Since the introduction of the short position framework, it has been accepted that small positions would be exempted from the disclosure requirements.

Note: See the explanatory statement accompanying the draft Corporations Amendment Regulations 2009 (No.8).

Proposal

F2 We propose to continue the relief provided in [CO 10/135] beyond the expiry of that instrument on 1 October 2020. See the current instrument: [CO 10/135]. We propose to incorporate the relief currently given by [CO 10/135] into a new consolidated legislative instrument: see sections 17 and 18 of the draft instrument at Attachment 1.

The only changes proposed to this relief are to:

(a) consolidate this and related relief into one instrument and update the instrument's name;

(b) reflect current drafting practice and update the format of the current document;

(c) simplify the drafting to give greater clarity;

(d) update legislative references and definitions; and

(e) correct any minor drafting errors.

Your feedback

F2Q1 Do you agree that the relief under [CO 10/111] should continue? Please give detailed reasons for your view.

F2Q2 Do you agree that the overall quality of public information on short positions is unaffected by the exclusion of small positions from the reporting framework?

Rationale

163 We remain of the view that the effectiveness of the short selling reporting framework does not require the reporting of small positions.

164 We have reached the preliminary view that, in all other respects, [CO 10/135] is operating effectively and efficiently, and continues to form a useful part of the legislative framework.

Remaking [CO 10/288]

Background

165 This legislative instrument exempts a market maker from having to report a covered short sale transaction as required under s1020AB(3) of the Corporations Act. The relief applies where the covered short sale is made in the course of:

(a) hedging risks arising from its market-making activities; or

(b) performing its function as an eligible market maker of an ETF.

166 We made [CO 10/288] because we considered that:

(a) the cost to collect the reporting information in relation to these sales outweighs the benefit to the market; and

(b) the relief promotes liquidity and confidence in Australian financial markets by helping market makers to efficiently hedge particular financial products.

167 [CO 10/288] currently applies only to market makers operating on the ASX market. In regard to ETP market makers, the relief only applies to ETFs quoted on the ASX market. In 2015, ASIC and Chi-X consulted on the extension of the relief under [CO 10/288] to market makers performing their market-making function in relation to ETFs quoted on the Chi-X market. Following those consultations, we have decided that, if [CO 10/288] is to be remade, we will extend the scope of the relief to include market makers in ETFs quoted on the Chi-X market.

> Note: The details of the consultation are contained in Consultation Paper 235 *Proposed amendments to the ASIC market integrity rules and instruments for the Chi-X investment product market* (CP 235) and Chi-X Consultation Paper 1/2015: *Chi-X Multi-Asset Platform and the launch of the Chi-X market maker regime* (2.11 MB). The feedback and our response to CP 235 are contained in Report 453 *Response to submissions on CP 235 Proposed amendments to ASIC market integrity rules for the Chi-X investment product market* (REP 453).

168 In line with our proposal for short selling relief for ETP market makers outlined in Section B of this paper, [CO 10/288] will also apply to ETP market makers who make a covered short sale of units of an ASX-managed

fund in the course of making a market in those units. Managed funds are not available on the Chi-X market at this time.

Proposal

F3 We propose to continue the relief provided in [CO 10/288] beyond the expiry of that instrument on 1 October 2020. See the current instrument: [CO 10/288]. We propose to incorporate the relief currently given by [CO 10/288] into a new consolidated legislative instrument: see sections 15 and 16 of the draft instrument at Attachment 1.

We propose to extend the relief in [CO 10/288] so that it is also applicable to ETP market makers who make a covered short sale of units of a quoted ASX-managed fund, in the course of making a market in those units.

Note: If this instrument is remade the scope will be extended to include market makers in ETFs quoted on the Chi-X market only (as MFs are not available on Chi-X at this time). This extension in scope has already been the subject of public consultation. See paragraph 167 above.

The only additional changes proposed to this relief are to:

(a) consolidate this and related relief into one instrument and update the instrument's name;

(b) refine the wording so that the instrument is more market neutral;

(c) update the format of the current document;

(d) simplify the drafting to give greater clarity;

(e) update legislative references and definitions; and

(f) correct any minor drafting errors.

Your feedback

F3Q1 Do you agree that the relief under [CO 10/288] should continue? Please give detailed reasons for your view.

F3Q2 Do you agree that relief under [CO 10/288] should extend to ETP market makers who make a covered short sale of units in an ASX-managed fund? Please give detailed reasons for your view.

Rationale

169 We remain of the view that the relief in [CO 10/288] is appropriate in facilitating market-making activities which promote liquidity and confidence in Australian financial markets. We think that providing relief from reporting short sale transactions is unlikely to impact on the integrity of the disclosure regime.

170 We have reached the preliminary view that [CO 10/288] is operating effectively and efficiently, and continues to form a useful part of the legislative framework. Aside from refining the instrument so that it is more market neutral, we are not aware of significant issues with the current operation of this class order.

G Regulatory and financial impact

171 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think that our proposal for ETF market-making relief in Section B will strike an appropriate balance between:

(a) the legitimate need of ETF market makers for certainty and efficiency; and

(b) appropriately regulating short selling and managing the risks it poses to the market, including excessive failures in settlement of trades.

172 In Section C we propose to grant legislative relief for naked short selling of unissued section 1020B products during a deferred settlement trading period and for naked short selling by a saleco during an IPO sell-down. We think that, based on the information currently available to us, our proposal strikes the appropriate balance between:

(a) reducing uncertainty for the market and the potential compliance burden (e.g. in determining whether individual relief may be required); and

(b) appropriately regulating short selling and ensuring that the risks it poses (e.g. settlement failures) are not increased as a result of granting the proposed legislative relief.

173 Based on the information currently available to us, we think that our proposal for short position reporting in Section D strikes the appropriate balance between:

(a) reducing the compliance burden for firms that operate on a global basis; and

(b) safeguarding the transparency and usability of short position reporting.

174 As to the sunsetting class orders in Sections E and F, we think that, based on the information currently available to us, our proposals strike the appropriate balance between:

(a) managing the risks to market integrity posed by naked short selling (particularly settlement risks) and other important considerations such as:

(i) the continuance of legitimate market practices (including in relation to the operation of the markets in ETOs and DPAs);

(ii) the desirability of facilitating market-making activities in light of the benefits that they provide through the promotion of liquidity and price discovery; and

(iii) recognition that, in the context of short sales in highly liquid products, the settlement risk is particularly low;

(b) the publication of accurate and useful data relating to short selling on licensed Australian markets and ensuring that reporting obligations are clear and practical;

(c) facilitating the orderly operation and transparency of markets and ensuring that regulatory compliance is not impracticable or disproportionately burdensome; and

(d) not compromising intended investor protections.

175 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

(a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;

(b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and

(c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

176 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, we are unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

177 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

(a) the likely compliance costs;

(b) the likely effect on competition; and

(c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
AFS licensee	A person who holds an Australian financial services licence under s913B Note: This is a definition contained in s761A.
AQUA	ASX Quoted Assets
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited or the exchange market operated by ASX Limited
Chi-X	Chi-X Australia Pty Limited or the exchange market operated by Chi-X
[CO 10/29] (for example)	An ASIC class order (in this example numbered 10/29)
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
covered short sale	A sale of section 1020B products where, at the time of sale, the person selling the products has a presently exercisable and unconditional right to vest the products in the buyer because of a securities lending arrangement entered into before that time
DPA	A deferred purchase agreement
draft instrument	ASIC Corporations (Short Selling) Instrument 2018/XX
ETF	As defined in the draft instrument
ETO	Exchange traded options
ETP	Exchange traded product
Global Calendar End Time	In relation to a person's short position, 11.59 pm on the trading day in the location of the person that created the short position
IPO	An initial public offering
Legislation Act	*Legislation Act 2003*
market maker	Has the meaning in s766D of the Corporations Act
market operator	Means ASX Limited (ACN 008 624 691) and Chi-X Australia Pty Ltd (ACN 129 584 667)

Term	Meaning in this document
MF	Exchange traded managed fund as defined in the attached draft instrument
naked short sale	A sale of section 1020B products where, at the time of sale, the person selling the products does not have a presently exercisable and unconditional right to vest the products in the buyer
PDS	A Product Disclosure Statement—a document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
Pt 7.9 (for example)	A part of the Corporations Act (in this example, numbered 7.9)
reg 7.9.100 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.9.100)
reporting day	In relation to a short position, a day that a licensed market that has admitted to quotation the section 1020B product is open for trading Note: See [CO 10/29].
reporting threshold	The size of a short position (by value as well as volume) below which ASIC has announced that it will grant relief from the short position reporting obligations Note: See [CO 10/135] and Information Sheet 98 *Short selling reporting: Short position reporting* (INFO 98).
RG 196	An ASIC regulatory guide (in this example numbered 196)
RIS	Regulation Impact Statement
s1020B (for example)	A section of the Corporations Act (in this example numbered 1020B)
saleco	A company incorporated for the purpose of managing the sale of shares held by existing shareholders of a company seeking listing
section 1020B products	Has the same meaning as in s1020B(1) of the Corporations Act
Short Selling Amendment Act	*Corporations Amendment (Short Selling) Act 2008*
short selling amendments	Short Selling Amendment Act and Corporations Amendment Regulations 2009 (No.8)
STW ETF	SPDR S&P/ASX 200 Fund (ASX Code: STW) (ARSN 097 712 377)

Term	Meaning in this document
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect
units	In the context of an ETF, means an interest in, or securities of, an ETF

List of proposals and questions

Proposal	Your feedback
B1 We propose to grant legislative relief to ETP market makers, rather than continue to issue individual no-action letters. At this stage of the consultation process, we have limited the relief to ETFs and MFs only. We have not proposed relief for exchange traded structured products. The instrument would be subject to the same conditions as currently provided in the standard no-action letters, but some additional conditions are proposed: see proposals B2–B3.	B1Q1 Should we grant legislative relief or continue to issue individual no-action letters on a case-by-case basis upon application? Please give detailed reasons in your response. B1Q2 The relief is currently only applicable to ETFs and MFs (see definition of 'exchange traded fund' and 'managed fund' in the draft instrument at Attachment 1). Should we extend the relief to other exchange traded products, such as structured products? Please give detailed reasons in your response.
B2 We propose that the following conditions, which currently relate to the issuing of no-action positions, would continue to apply under legislative relief: (a) the market maker and the market operator have entered into an agreement in relation to the market maker's obligations regarding the ETPs, or the market maker is registered with the relevant market operator, in relation to making a market for those units of the ETP. At this stage it is envisaged that the market operators will be ASX Limited (ASX) and Chi-X Australia Pty Limited (Chi-X); (b) the units of the ETP are able to be traded on a financial market operated by ASX or Chi-X; (c) the sale of units of the ETP are made in the course of performing a function as a market maker in ETPs; (d) the market maker must, before making an offer to sell ETP units, record in written or electronic form that the proposed sale would be a short sale and preserve this record for five years; and (e) as soon as possible after the short sale of ETP units by the ETP market maker has occurred, the market maker must acquire or apply for a sufficient number of ETP units to settle the short sale.	B2Q1 What concerns (if any) do you have with the proposed circumstances and/or conditions imposed? B2Q2 How will this change affect your business? Please include any benefits or costs (in dollar terms) associated with the proposed change (as a one-off benefit or cost and on an annual basis).

Proposal	Your feedback
B3 We also propose that these additional conditions would apply under the legislative instrument: (a) notice of reliance—a market maker seeking to rely on the legislative instrument must notify ASIC that it intends to do so, and what ETP units it intends to short sell before engaging in the conduct; (b) notice of suspension or termination—the market maker must notify ASIC if the relevant market operator has suspended or cancelled the market-making agreement within 28 days of receiving the notice from the market operator; (c) settlement failure notice—the market maker must notify ASIC where more than 1% of the volume or value of the market maker's short sales in the previous 12-month period have failed to settle on time. The notice must be given within 28 days after the end of the reporting period. The proposed reporting period is 1 April to 31 March in the following year; (d) notice of cessation—the market maker must notify ASIC when it no longer seeks to rely on relief provided by the instrument; and (e) notice of exclusion—we retain the power to exclude a market maker from relying on the relief for one or more ETP by giving written notice.	B3Q1 What concerns (if any) do you have with any of the proposed additional conditions imposed? B3Q2 What concerns (if any) do you have with the proposed 28-day timeframe for providing the notifications? If you think the timeframe should be longer or shorter, please provide reasons. B3Q3 What concerns (if any) do you have with the proposed settlement failure reporting being based on a reporting period of 1 April to 31 March of the following year? Is there another reporting period that would be more appropriate? Please provide reasons. B3Q4 What concerns (if any) do you have with the proposed settlement failure reporting threshold? Should this be higher or lower? Please provide reasons. B3Q5 Are there any other conditions that should apply? B3Q6 How will the additional conditions affect your business? Please include any benefits or costs (in dollar terms) associated with the proposed additional conditions (as a one-off benefit or cost and on an annual basis).

Proposal	Your feedback
C1 We propose to grant legislative relief to permit naked short sales of unissued section 1020B products during a deferred settlement trading period by a person with an unconditional entitlement to be issued with the products under a particular corporate action, and by a purchaser of unissued section 1020B products who makes a further sale of those products: see the draft instrument at Attachment 1.	C1Q1 What are your views on deferred settlement trading periods and conditional and deferred settlement trading periods in general? In particular: (a) should deferred settlement trading periods and/or conditional and deferred settlement trading periods be permitted? Please give reasons for your view; (b) do you think that deferred settlement trading periods and/or conditional and deferred settlement trading periods provide benefits to the market? If so, what are those benefits? (c) should any changes be made to deferred settlement trading periods and/or conditional and deferred settlement trading periods (e.g. to the duration of the periods, or to the types of corporate actions that may include a period of deferred settlement trading or a period of conditional and deferred settlement trading)? If so, what changes should be made? C1Q2 Do you agree with our proposal to grant legislative relief to permit naked short sales of unissued section 1020B products during a deferred settlement trading period? Please give reasons for your view. C1Q3 Do you agree with the proposed drafting of the draft instrument at Attachment 1? Please give reasons for your view. C1Q4 How will this proposal to grant legislative relief affect your business? Please include any benefits or costs (in dollar terms) associated with the proposal (as a one-off benefit or cost and on an annual basis). C1Q5 Should we also grant legislative relief to permit naked short sales of unissued section 1020B products during a conditional and deferred settlement trading period, and if so: (a) in what circumstances should the relief apply (e.g. what are the conditions, as declared by the operator of the listing market, which would need to be satisfied)? (b) should that relief be subject to conditions and, if so, what conditions should apply? Please give reasons for your view. C1Q6 How would it affect your business if we did/did not grant the legislative relief referred to in C1Q5? Please include any benefits or costs (in dollar terms) associated with ASIC granting, or not granting, legislative relief (as a one-off benefit or cost and on an annual basis).

Proposal		Your feedback	
C2	We propose to grant relief from s1020B for IPO sell-downs conducted by a saleco under either a prospectus or a pathfinder document. Our proposed relief will only extend to offers of securities in connection with a listing on ASX where the listing company is also making an offer to issue securities under the prospectus. We will continue to consider case-by-case relief for more unusual IPO sell-downs, including where the shares have not yet been issued due to a group restructure that is conditional on the IPO.	C2Q1	Do you agree that the terms of our proposed relief will cover most IPO sell-downs? If not, please explain what types of common IPO sell-downs would not be covered.
		C2Q2	The terms of our proposed relief require the listing company to make an offer of shares under the prospectus (i.e. there cannot just be an offer of shares by a saleco). Do you have any comment on this feature of the relief?
		C2Q3	Our proposed legislative relief only applies where there is a company seeking listing on ASX and where the shares offered for sale by the saleco have been issued. Do you have any comment on this?
D1	We propose to modify the definition of 'short position' so that the obligation applies to short positions held as at the end of the calendar date (Global Calendar End Time) in the location of the reporting entity that created the short position. For example, for a UK-based entity, short positions on Australian shares would be calculated based on UK time. We propose that this would be the case even if the entity operates globally using trading desks in multiple jurisdictions. Accordingly, the Global Calendar End Time for the UK entity would be based on UK time even where the relevant trading desk is located elsewhere. We propose modifying this by amending the relief currently granted in [CO 10/29] (discussed in Section E as one of the proposed 'sunsetting' instruments to be remade).	D1Q1	Should we modify the definition of 'short position' to change the time used to calculate short position reports? If not, why not? In your submission, please help us to understand your role in the market, the jurisdictions that apply to your business and which of the short selling obligations apply to you in this jurisdiction and overseas (if relevant).
		D1Q2	What concerns (if any) do you have about the proposed introduction of a Global Calendar End Time?
		D1Q3	Should the short positions be calculated using some other timeframe? Please provide details and reasons for your view. For example, using the scenario in proposal D1, should the short position instead be calculated based on the location of the trading desk, even though the reporting entity is based in the United Kingdom? What are the operational reasons supporting your view?
		D1Q4	How will this change affect your business? Please include any benefits or costs (in dollar terms) associated with the proposed change (as a one-off benefit or cost and on an annual basis).
		D1Q5	If we decide to proceed with a Global Calendar End Time or other timeframe, how much time would you need to transition to the new calculation date?

Proposal	Your feedback
E1 We propose to continue the relief provided in [CO 08/764] beyond the expiry of that instrument on 1 October 2018. See the current instrument: [CO 08/764]. We propose to incorporate the relief currently given by [CO 08/764] into a new consolidated legislative instrument: see section 9 of the draft instrument at Attachment 1. The only changes proposed to the relief are to: (a) consolidate this and related relief into one instrument; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (e) correct any minor drafting errors.	E1Q1 Do you agree that the relief under [CO 08/764] should continue? Please give detailed reasons for your view.
E2 We propose to continue the relief provided in [CO 09/1051] beyond the expiry of that instrument on 1 April 2019. See the current instrument: [CO 09/1051]. We propose to incorporate the relief currently given by [CO 09/1051] into a new consolidated legislative instrument: see sections 10 and 11 of the draft instrument at Attachment 1. The only changes proposed to the relief are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (e) correct any minor drafting errors.	E2Q1 Do you agree that the relief under [CO 09/1051] should continue? Please give detailed reasons for your view. E2Q2 Do you consider that there have been changes to market practice and the risk of settlement failure relating to the options market since [CO 09/1051] which make [CO 09/1051] ineffective? If so, please provide details of the changes and how this impacts on the proposal. E2Q3 Should the $100 million issued value threshold for corporate bonds and debentures remain? Should another threshold apply? Please provide reasons in support of your proposal.

Proposal	Your feedback
E3 We propose to continue the relief provided in [CO 09/774] beyond the expiry of that instrument on 1 October 2019. See the current instrument: [CO 09/774]. We propose to incorporate the relief currently given by [CO 09/774] into a new consolidated legislative instrument: see section 8 of the draft instrument at Attachment 1. We further propose to amend the relief currently provided in [CO 09/774] to: (a) clarify that relief does not extend to pre-emptive hedging; and (b) extend relief to short sales in the STW ETF to hedge the risks arising from making a market in listed options over the STW ETF. The only additional changes proposed to the relief are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (e) correct any minor drafting errors.	E3Q1 Do you agree that the relief under [CO 09/774] should continue? Please give detailed reasons for your view. E3Q2 Do you consider that the relief should apply to pre-emptive hedging by market makers? What are the reasons for your view? E3Q3 Do you agree with our proposal to extend the relief to apply to naked short sales of STW ETF units for the purposes of hedging market-making activities in options over the STW ETF? Please provide reasons. E3Q4 Should relief also extend to short sales by market makers of options over other ETFs? What are the reasons for your view? E3Q5 Should relief to market makers of options instead be given on a case-by-case basis?
E4 We propose to continue the relief provided in [CO 10/111] beyond the expiry of that instrument on 1 April 2020. See the current instrument: [CO 10/111]. We propose to incorporate the relief currently given by [CO 10/111] into a new consolidated legislative instrument: see section 12 of the draft instrument at Attachment 1. The only changes proposed are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (e) correct any minor drafting errors.	E4Q1 Do you agree that the relief under [CO 10/111] should continue? Please give detailed reasons for your view. E4Q2 Do you believe that the restrictions on the DPAs to which the relief applies strike an appropriate regulatory balance? Please give reasons for your views.

Proposal	Your feedback
F1 We propose to continue, in its current form, the relief provided in [CO 10/29] beyond the expiry of that instrument on 1 April 2020 with the exception of: (a) the transitional arrangements set out in paragraph 157(a) above which are no longer required; and (b) the clarification of the timing of short position reporting set out in paragraph157(d) which we have proposed to amend in proposal D1 above. See the current instrument: [CO 10/29]. We propose to incorporate the continuing relief into a new consolidated legislative instrument: see sections 17, 18 and 19 of the draft instrument at Attachment 1. The only additional changes proposed to this relief are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (a) correct any minor drafting errors.	F1Q1 Do you agree that the relief under [CO 10/29] should continue? Please give detailed reasons for your view. Please include any submissions relating to the time with respect to which short positions should be calculated in your response to proposal D1.
F2 We propose to continue the relief provided in [CO 10/135] beyond the expiry of that instrument on 1 October 2020. See the current instrument: [CO 10/135]. We propose to incorporate the relief currently given by [CO 10/135] into a new consolidated legislative instrument: see sections 17 and 18 of the draft instrument at Attachment 1. The only changes proposed to this relief are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (e) correct any minor drafting errors.	F2Q1 Do you agree that the relief under [CO 10/111] should continue? Please give detailed reasons for your view. F2Q2 Do you agree that the overall quality of public information on short positions is unaffected by the exclusion of small positions from the reporting framework?

Proposal	Your feedback
F3 We propose to continue the relief provided in [CO 10/288] beyond the expiry of that instrument on 1 October 2020. See the current instrument: [CO 10/288]. We propose to incorporate the relief currently given by [CO 10/288] into a new consolidated legislative instrument: see sections 15 and 16 of the draft instrument at Attachment 1. We propose to extend the relief in [CO 10/288] so that it is also applicable to ETP market makers who make a covered short sale of units of a quoted ASX-managed fund, in the course of making a market in those units. Note: If this instrument is remade the scope will be extended to include market makers in ETFs quoted on the Chi-X market only (as MFs are not available on Chi-X at this time). This extension in scope has already been the subject of public consultation. See paragraph 167 above. The only additional changes proposed to this relief are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) refine the wording so that the instrument is more market neutral; (c) update the format of the current document; (d) simplify the drafting to give greater clarity; (e) update legislative references and definitions; and (f) correct any minor drafting errors.	F3Q1 Do you agree that the relief under [CO 10/288] should continue? Please give detailed reasons for your view. F3Q2 Do you agree that relief under [CO 10/288] should extend to ETP market makers who make a covered short sale of units in an ASX-managed fund? Please give detailed reasons for your view.