REPORT 608

Response to submissions on CP 299 Short selling: Naked short selling relief, position reporting amendments and sunsetting class orders

January 2019

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 299 *Short selling: Naked short selling relief, position reporting amendments and sunsetting class orders* (CP 299) and details our responses to those issues.

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.

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- 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).

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

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 196 *Short selling* (RG 196) and ASIC Corporations (Short Selling) Instrument 2018/745.

Contents

A Overview/Consultation process

1 In Consultation Paper 299 *Short selling: Naked short selling relief, position reporting amendments and sunsetting class orders* (CP 299), we consulted on various proposals related to short selling.

2 We consulted on the provision of legislative relief from the naked short selling prohibition in s1020B(2) of the *Corporations Act 2001* (Corporations Act) to permit:

(a) ETF market makers to make naked short sales of exchange traded funds (ETFs) and managed funds in the course of market making, subject to certain conditions (Proposal 1);

(b) naked short sales of unissued section 1020B products to buyers on a licensed market during an unconditional deferred settlement trading period (Proposal 2);

(c) naked short sales of unissued section 1020B products to buyers on a licensed market during a conditional and deferred settlement trading period (although we did not propose to grant this relief) (Proposal 3); and

(d) naked short sales by a saleco during standard IPO sell-downs (Proposal 4).

3 In addition, we consulted on remaking the following class orders related to short selling that were due to expire (sunsetting instruments) under the *Legislation Act 2003* (Legislation Act):

(a) Class Order [CO 09/774] *Naked short selling relief for market makers*;

(b) Class Order [CO 08/764] *Short selling—exercise of exchange traded options*;

(c) Class Order [CO 09/1051] *Short selling relief: Exchange traded options, unobtained financial products and certain bonds*;

(d) Class Order [CO 10/111] *Short selling: Limited relief for deferred purchase agreement issuers*;

(e) Class Order [CO 10/288] *Covered short sale transaction reporting relief for market makers*;

(f) Class Order [CO 10/135] *Relief for small short positions*; and

(g) Class Order [CO 10/29] *Short selling position reporting regime*.

4 We consulted on remaking these without significant changes as they are operating effectively and efficiently and continue to form a useful part of the legislative framework. We consulted on minor changes to the following class orders:

(a) [CO 09/774]—we consulted on clarifying our longstanding view that the relief was not intended for pre-emptive hedging. In addition, we

proposed to extend the relief to permit naked short sales of units in the SPRD S&P/ASX 200 Fund (STW) for the purposes of hedging market-making activities (Proposal 5); and

(b) [CO 10/288]—we consulted on extending the exemption from covered short sale transaction reporting to market makers of ASX-quoted managed funds (at the time it was only applicable to market makers of ETFs) (Proposal 6).

5 In addition, we consulted on our proposal that reported short positions would be calculated on the basis of a 'global calendar end time'. This would be implemented by modifying the relief in [CO 10/29]. At the time of consultation, [CO 10/29] required firms to calculate their short positions as at 7 pm, Sydney NSW time (Proposal 7).

6 Finally, for convenience of market users, we proposed to make all the short selling relief part of an omnibus short selling instrument. This has since been registered as the ASIC Corporations (Short Selling) Instrument 2018/745 (short selling instrument) which came into effect on 28 September 2018.

7 This report highlights the key issues that arose out of the submissions received on CP 299 and our responses to those issues.

8 It is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 299. We have limited this report to the key issues.

9 We received 10 confidential and five non-confidential responses to CP 299. As CP 299 dealt with a broad range of new proposals and existing policy related to short selling, most responses only dealt with aspects of these proposals relevant to their business. These were generally from market and trading participants (including market makers), market operators, responsible entities, share registries, industry associations and licensees. We are grateful to respondents for taking the time to send us their comments.

10 For a list of the non-confidential respondents to CP 299, see the appendix. Copies of these submissions are currently on the ASIC website under CP 299.

Responses to consultation

11 The responses we received were generally supportive of our proposals. Respondents also supported our intention to combine all short selling relief into one instrument.

12 The key feedback we received for Proposal 1 related to:

(a) clarifying that the ETF market-making relief would be applicable to market makers appointed by the issuer of the ETF or managed fund products to meet market-making requirements;

(b) certain elements in relation to the conditions that ETF market makers will need to meet to rely on the naked short selling relief; and

(c) extending the relief to additional products.

13 The key feedback we received for Proposal 2 supported the proposed legislative relief for deferred settlement trading periods. Respondents to Proposal 3 also supported the extension of legislative relief to conditional markets.

14 There was limited feedback on Proposal 4, which may reflect the non-contentious nature of the proposed relief.

15 The key feedback we received for Proposal 5 was mixed, but mostly supportive of clarifying the position in relation to pre-emptive hedging. The key feedback was that ASIC should ensure that our proposed wording permitted legitimate market-making activities.

16 The key feedback we received for Proposal 7 was largely supportive of our proposal, though suggestions were made in relation to the definition of 'global calendar end time'. Some responses supported a scenario where calculation on the basis of a 'global calendar end time' was permitted but not required.

17 Respondents were largely supportive of remaking the sunsetting instruments, with key feedback suggesting that some of this relief should be broadened.

B Legislative relief for ETF market makers

Key points

This section outlines the key feedback we received in relation to our proposal to provide conditional relief for ETF market makers to make naked short sales of ETFs and managed funds during the course of their market making.

Respondents to CP 299 were largely supportive of the proposed relief.

Key issues raised from CP 299 relate to:

- the conditions we proposed for the relief;
- clarification about who the relief applies to; and
- broadening the relief.

Continuing no-action relief

18 In our previously published Regulatory Guide 196 *Short selling* (RG 196), it was our policy to provide no-action letters, in appropriate circumstances, that permit naked short sales of units in ETFs and, later, managed funds to appointed ETF market makers. We issued those no-action letters (where appropriate) upon application by the ETF market maker. We consulted on providing this as class relief as we believed that our policy was well settled and that settlement risks from these short sales were low.

19 We received 12 responses on this proposal. All respondents except one supported our general proposal to provide this relief in a class instrument.

20 One respondent (in a confidential submission) argued that ASIC should continue to issue individual no-action letters on a case-by-case basis. The respondent submitted that in the last seven years Australian markets have experienced low and decreasing volatility. During this period, investor application for ETFs have increased (from $5 billion in April 2011 to $36.3 billion as at March 2018). The respondent further argued that ETFs are pro-cyclical in nature. According to this respondent, there will be increasing investor applications for ETFs when the market is trending higher and increased volatility and reduced liquidity when the market is falling.

ASIC's response

We note that the proposed relief is unlikely to be activated when 'everyone is headed for the exit' as the relief is only applicable during the course of market making by the applicable market maker. Further, we note that this relief is provided on the basis that short sales will be settled through creation of new units rather than the borrowing of financial products.

In addition, our own internal analysis has indicated that ETFs (at least in the Australian market) are not necessarily pro-cyclical in nature. We acknowledge, though, that this analysis was based on available historical data for ETF trading, which did not include data from a period of sustained high volatility.

While we have carefully considered the points raised in this submission, we are still of the view that legislative relief should be granted.

Definition of 'ETF market maker'

21 In CP 299, we consulted on a draft instrument which defined ETF market maker (in relation to specified products) as a person who:

(a) holds an Australian financial services licence that covers making a market in the interests or securities or is exempt from the requirement to hold such a licence for providing that financial service;

(b) has entered into an agreement, or is registered, with the relevant market operator to make a market for those interests or securities.

22 Relevant submissions expressed some confusion as to what was meant by a person being 'registered with' the relevant market operator. There were queries as to whether this would include a situation where the ETF market maker is appointed by the issuer of the ETF or managed fund.

ASIC's response

We agree that the relief should be applicable to an ETF market maker who has been appointed by an issuer to make a market in order to maintain sufficient liquidity in the ETF or managed fund.

We have amended the definition to now expressly stipulate that an ETF market maker includes a person who has 'demonstrated to the relevant market operator that it has been appointed by the operator of the scheme or foreign company, to make a market for those interests or securities': see section 5, paragraph (4D) of the short selling instrument.

The conditions imposed on the relief

23 When consultation began, our published policy under RG 196 indicated that we would consider issuing individual no-action positions to permit market makers of certain ETFs and managed funds to make naked short sales of interests in those funds. These no-action letters were subject to conditions.

24 We proposed that the legislative relief on a class basis would replicate these conditions. We also consulted on imposing a number of additional conditions. Key responses received related to the following conditions:

(a) requiring the ETF market maker to notify ASIC when it intends to rely on the relief or ceases to rely on the relief (reliance/cessation condition)—some respondents were not supportive of the condition. Those that opposed it indicated that ASIC could retrieve this information from the market operator's website;

(b) recording short sales for five years (record requirement)—three respondents objected to this condition on the grounds that it is onerous; and

(c) settlement failure notification—responses were mixed. This condition requires market makers to notify ASIC where more than 1% of the volume or value of the market maker's short sales in the previous 12 months had failed to settle on time. Some respondents argued that this condition was unnecessary due to existing mechanisms within the ASX Settlement Rules to handle late settlements. It was suggested that the proposed condition was unduly burdensome. However, other respondents supporting the condition noted that it was a suitable means of identifying any systemic settlement failure issues. In particular, one respondent also considered that this condition was an appropriate incentive for market makers to ensure settlement failure remains at an absolute minimum.

ASIC's response

The reliance/cessation condition provides ASIC with real-time information about who is relying on this relief for our monitoring purposes. This will help us to ensure that the relief is not abused and remains fit for purpose. The process required to advise ASIC that an ETF market maker is seeking to rely on the relief will also provide a useful cross-check that the ETF market maker can meet the relevant conditions. Our view is that ETF market makers should notify ASIC of their reliance and also when they cease relying on the relief.

The record requirement is intended to replicate the condition previously included in the no-action letters provided by ASIC in these circumstances. We may require ETF market makers to provide this information as part of our monitoring to ensure appropriate use of the relief. However, we have reconsidered the duration of the period in which records must be kept, and have determined that 12 months should be sufficient for this purpose.

The settlement failure condition is proposed because we consider that the settlement risk in the relevant circumstances is low. This condition is intended to provide us with timely information about any increased settlement failure. Our view is that this condition is a critical mechanism for monitoring the appropriateness of this relief.

Scope of the relief

25 The class relief is intended to replicate the relief provided to ETF market makers in no-action letters issued under the policy formerly specified in RG 196.

26 Some respondents submitted that the relief should be broadened to include other circumstances and products, such as client facilitation services and chess depositary interests (CDIs), structured products and transferable custody receipts (TraCRs).

ASIC's response

Our view is that this legislative relief should currently be limited to ETF market makers who make naked short sales of units in ETFs or managed funds during the course of market making in those funds. This is well-settled policy, and the risk of settlement failure is low and of clear benefit to the market. Other types of products will be considered on a case-by-case basis.

C Relief for short selling relating to corporate actions and IPOs

Key points

This section outlines the key feedback we received in relation to our proposals in CP 299 to grant legislative relief from the naked short selling prohibition in the context of corporate actions and initial public offering (IPO) sell-downs.

Respondents generally supported our proposals to grant legislative relief.

27 In CP 299, we consulted on proposals to grant legislative relief from the naked short selling prohibition in s1020B(2) of the Corporations Act in order to permit:

(a) naked short sales of unissued section 1020B products to buyers on a licensed market during an unconditional deferred settlement trading period;

(b) naked short sales of unissued section 1020B products to buyers on a licensed market during a conditional and deferred settlement trading period (although at the time we did not propose to grant this relief); and

(c) naked short sales by a saleco during standard IPO sell-downs.

28 Respondents to CP 299 generally supported granting legislative relief in each of these circumstances. In response, we have decided to grant legislative relief, which is set out in Part 3 of the short selling instrument.

Deferred settlement trading periods

29 In the case of some corporate actions, section 1020B products may commence trading on a licensed market before they are issued. Trading will then occur on a deferred settlement basis. This means that the obligation to settle any trades 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.

30 Arguably, a person who sells unissued section 1020B products during a deferred settlement trading period 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.

31 In December 2017, we adopted a limited no-action period for trading in unissued section 1020B products during unconditional deferred settlement trading periods. In CP 299, we proposed granting legislative relief in these circumstances.

32 Respondents to CP 299 submitted that deferred settlement trading periods provided several benefits to the market, including greater liquidity, more efficient price discovery and allowing for the completion of certain administrative processes. One respondent submitted that deferred settlement trading periods should be limited to a maximum of five days.

33 We received six responses to our proposal to grant legislative relief for naked short sales of unissued section 1020B products during unconditional deferred settlement trading periods. All respondents supported this proposal. Some respondents also commented on the drafting of the proposed relief. For example, one respondent submitted that the proposed relief should apply to other types of corporate actions where deferred settlement trading occurs, such as conversions of convertible notes or securities, or conversions of shares.

ASIC's response

We have decided to grant legislative relief to permit naked short sales during a deferred settlement trading period. Section 11 of the short selling instrument inserts s1020B(7G)–(7J) into the Corporations Act. Section 1020B(7H) permits the naked short sale of unissued section 1020B products on a licensed market during a deferred settlement trading period by a person who has an entitlement to be issued with the section 1020B products under or in connection with a 'corporate action'.

'Corporate action' means a proposed issue of section 1020B products under or in connection with:

- a compromise or arrangement under Pt 5.1 of the Corporations Act;
- a rights issue;
- a dividend or distribution reinvestment plan;
- a bonus issue;
- a conversion of convertible notes or convertible securities; or
- a conversion of shares under s254H of the Corporations Act.

This relief extends to a person who has entered into a contract to buy the unissued section 1020B products during the deferred settlement trading period and before the time of the short sale.

In the CHESS replacement consultation paper (April 2018), ASX indicated that it will review deferred settlement trading processes. In light of potential changes arising from this project, the relief granted by ASIC will expire at the end of 30 September 2021.

Conditional and deferred settlement trading periods

34 Public offers often have a period of deferred settlement trading. Under ASX Operating Rule 3330, ASX may also impose conditions on post-IPO deferred settlement trading. These conditions generally correspond with the conditions that the listing body has imposed on the IPO itself. The sale of section 1020B products during periods of conditional and deferred settlement trade may arguably be a technical breach of the naked short selling provision.

35 In CP 299, we sought feedback on whether we should also grant legislative relief to permit naked short sales of unissued products during a conditional and deferred settlement period. Our preliminary view in CP 299 was that individual relief on a case-by-case basis is more appropriate in such circumstances.

36 Five respondents supported granting legislative relief in these circumstances. Respondents submitted that the policy reasons for distinguishing between deferred settlement trading and conditional and deferred settlement trading are unclear. One respondent submitted that the requirement to obtain individual relief detracts from market efficiency and would add regulatory cost with no benefit to investors. Further, if legislative relief is not granted, respondents submitted that the onus should be on ASX or the issuer to seek individual relief

ASIC's response

We accept that it is appropriate to extend the proposed legislative relief so that it applies during deferred settlement periods where trading is subject to certain standard conditions.

We have modified s1020B to facilitate deferred settlement trading that follows a public offer of section 1020B products in relation to a proposed listing of an entity on ASX or a secondary offer of section 1020B products by a listed corporation.

Section 11 of the short selling instrument inserts s1020B(7A), which provides that s1020B(7B)–(7F) apply to a sale of section 1020B products during a deferred settlement trading period in relation to a public offer. Section 1020B(7B) is drafted in similar terms to s1020B(2) but, rather than requiring the seller to have a presently exercisable and unconditional right to the products, it refers to the seller having an *entitlement* to be issued or sold products in connection with a public offer. Section 1020B(7C) and (7D) then set out the relevant test of *entitlement*. These include a situation where the entitlement is conditional on specified events disclosed in the offer document, such as completion of an underwriting agreement, completion of a corporate restructure or transaction, or the decision of the entity to issue or transfer the products to investors.

This relief extends to a person who has entered into a contract to buy the unissued section 1020B products during the deferred settlement trading period and before the time of the short sale.

This relief will expire at the end of 30 September 2021. We expect that ASX's CHESS replacement project will have concluded by this time.

Relief for short selling during IPO sell-down

37 IPO sell-downs usually involve a saleco (or 'special purpose company') that is created solely to enable existing shareholders of IPOs to offer to sell some or all of their shares through it, conditional on the company being admitted to ASX. If the saleco is not making the offer on behalf of the selling shareholders, the offer may contravene s1020B(2).

38 In CP 299, we sought feedback on whether we should grant legislative relief from s1020B(2) for common IPO sell-downs. We received one submission on this proposal, which was in favour of it. This may reflect the non-contentious nature of the proposed relief.

ASIC's response

Section 12 of the short selling instrument provides an exemption from s1020B(2) for IPO sell-downs. It is a condition of this exemption that the company seeking listing on ASX makes an offer in the prospectus to issue shares in the same class as the shares offered by the saleco.

D Changing the time short positions are calculated

Key points

This section sets out the key feedback we received in relation to our proposal to modify the time for which a short position is calculated under reg 7.9.100 (1)(d), as previously modified by former [CO 10/29].

39 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. When we released CP 299, the obligation applied to short positions held as at 7 pm (Sydney time).

40 In CP 299, we consulted on changing the 7 pm time to a 'global calendar end time' (now referred to as the 'global end calendar time'). Under that proposal, the global calendar end time was to be the end of the trading day in the location of the reporting entity.

41 We received four responses which were generally supportive of a global calendar end time, noting that global systems generally run on an end of calendar day basis. However, two of the respondents submitted that:

(a) calculating the short position on the basis of the global calendar end time should be optional for global firms that wish to adopt this approach. The respondents argued that firms who have already invested in infrastructure to efficiently meet the 7 pm reporting time should be permitted to continue their calculations on this basis;

(b) the global calendar end time should be determined at the location where the relevant trade is 'booked' as opposed to where the reporting entity is located.

ASIC's response

We agree with the above feedback.

Our testing suggests that changing the time that positions are calculated will not have a significant effect on our published data, even during a period of volatility. We therefore consider that the published data will not be significantly affected if there is a slight variation in the time of calculation among reporting entities. Importantly, no transaction will go unaccounted for as a result of providing an option for firms to calculate their data as at a global end calendar time.

Firms that wish to rely on the global end calendar time will need to notify ASIC of their intention to 'opt-out' of the 7 pm reporting time and provide at least 30 days' notice. If a firm wishes to revert to the 7 pm time, they will need to notify ASIC of this and give 30 days' notice.

We have amended the definition of 'global end calendar time' so that it means, 'in relation to a person's short position, means 11.59 pm on the trading day in the location of the person (or another person within the same corporate group) to whom the transaction giving rise to the short position is accounted for in the balance sheet of the person (or the other person)': see section 16 of the short selling instrument.

E Remaking instruments due to sunset

Key points

In CP 299, we consulted on remaking the following instruments which were due to sunset:

- [CO 09/774]—market makers: bona fide hedging;
- [CO 10/288]—ETF market makers: short selling reporting;
- [CO 08/764]—sales effected by exercising options;
- [CO 09/1051]—exchange traded options: other scenarios;
- [CO 10/111]—deferred purchase agreements;
- [CO 10/29]—short position reporting and short sale transaction reporting; and
- [CO 10/135]—low volume and low value short positions.

Most of these class orders were remade without significant amendments.

In the case of [CO 09/774], we proposed to extend the scope of the relief and amend it to clarify that it does not apply to pre-emptive hedging.

In the case of [CO 10/29], we proposed modifications due to our global calendar end time proposal—see Section D.

In the case of [CO 10/288], we proposed minor amendments to account for ETF market makers who make a market in managed funds.

Subject to those proposals, we reached the preliminary view that these class orders were operating effectively and efficiently and continued to form a useful part of the legislative framework.

This section sets out key feedback in relation to some of these class orders.

Remaking and clarifying [CO 09/774]—market makers: bona fide hedging

42 [CO 09/774] permitted a market maker to hedge the risk of a long exposure by making naked short sales of a specified product (shorted product). The shorted product was limited to constituents of the S&P/300.

43 We consulted on extending the relief to naked short sales of the SPDR S&P/ASX 200 Fund (STW ETF). We also consulted on clarifying our long-standing view that the relief was not applicable to ‘pre-emptive’ hedging. Pre-emptive hedging refers to hedging an anticipated (not current) risk based on an expected (not current) long exposure.

44 Respondents were supportive of extending the relief to STW but expressed mixed views on the proposed clarification for pre-emptive hedging. While some agreed that market makers should not be using the relief for pre-emptive hedging, three submitted that the proposed wording should be amended to permit short sales to hedge the risk from transactions which had already been agreed but where the price would be determined by the price of the hedging arrangements.

45 Some respondents further suggested that the relief should be extended to other ETFs in addition to STW.

ASIC's response

After further consultation with AFMA we have clarified the wording so that the relief applies where the market maker has agreed to a transaction, even though the transaction will not be finalised until the hedged transaction price has been determined.

In the context of this relief, we do not consider that it is 'pre-emptive' hedging where the market maker has *agreed* to issue, acquire or dispose of a product, even though the transaction is not yet finalised because certain agreed conditions have not yet been met.

It is still our view that relief should be limited to naked short sales in constituents of the index known as the S&P/ASX 300 or units in the STW fund. We have not extended the relief to short sales in other ETFs at this time. We consider it is appropriate to extend the relief to naked short sales of STW fund units because of the particularly liquid nature of that fund. Furthermore, this is the only ETF for which options are currently listed by ASX.

Remaking [CO 10/111]—deferred purchase agreements

46 [CO 10/111] permitted naked short selling of a security or managed investment product able to be traded on ASX where the sale arose under a deferred purchase agreement (DPA). This relief was only applicable to DPAs under certain circumstances.

47 We received three responses which supported remaking [CO 10/111]. However, out of these three, AFMA and another respondent suggested that:

(a) the relief should also be applicable to DPAs with a minimum term of one month, or that the requirement for a minimum term be removed entirely, as opposed to a minimum 12-month term. It was argued that this is because the same cost considerations arise for DPAs that mature within 12 months and that DPAs with a maturity of less than 12 months are now commonly traded instruments in the Australian market;

(b) the permissible reference assets should be the same as the delivery products; and

(c) the relief should be extended to include any financial product quoted on ASX, rather than being limited to constituents of the S&P/ASX 200.

ASIC's response

It is our view that [CO10/111] should be remade without substantive amendment. The conditions of this relief (as it was designed in 2010) were to mitigate risks of settlement failure and other market disturbances.

We do not consider that a persuasive case, with supporting data, has been made for amendment at this stage. We have therefore remade [CO 10/111] without further amendments.

Remaking [CO 08/764]—sales effected by exercising options

48 [CO 08/764] permitted naked short selling resulting from the exercise of exchange traded options (ETOs). Responses to this proposal agreed that this class order should be remade. However, AFMA and another respondent suggested extending the scope of the relief to over-the-counter (OTC) options.

ASIC's response

Our view is that this relief should be limited to ETOs. The current relief applies where a person (the short seller):

- buys and later elects to exercise a put option (which gives the short seller 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; or
- sells a call option (which gives the buyer the right to buy the underlying share from the short 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.

We consider that the risk of short sales in these circumstances is manageable in the context of ETOs because of the level of liquidity of the products underlying ETOs. Over-the-counter options may apply to non-standardised and less liquid products—in which case, the settlement risk may be greater. In addition, ETOs are a market overseen by ASX and are subject to ASX rules to mitigate settlement risk.

We have therefore remade [CO 08/764] without further amendments.

Remaking [CO 09/1051]—exchange traded options: other scenarios

49 [CO 09/1051] provided relief from the prohibition against naked short selling in the following circumstances:

(a) giving or writing certain ETOs;

(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; and

(c) in specified circumstances, the sale of:

(i) Government bonds; or

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

50 Responses to this proposal agreed that this class order should be remade. However, AFMA and another respondent suggested broadening the relief which is relevant to options so as to include OTC options.

ASIC's response

We remain of the view that the relief applicable to options should be limited to ETOs. The underlying product for ETOs is generally a product with natural liquidity and the terms of the ETOs are standardised. In addition, ETOs are a market overseen by ASX and are subject to ASX rules to mitigate settlement risk. This makes the risks of market disruption more manageable.

We have therefore remade [CO 09/1051] without amendments.

Appendix: List of non-confidential respondents

- ASX Limited
- Australian Financial Markets Association
- Chi-X Australia Pty Ltd
- Computershare Investor Services Pty Limited
- Law Council of Australia