

# Commentary on Draft Short Selling Regulations

## Regulation 2 – Commencement

The draft regulations have staggered commencement dates. Schedule 1, dealing with the reporting of transactional (gross) short selling information, will commence on the commencement of schedule 3 of the *Corporations Amendment (Short Selling) Act 2008*. This will be on a date before 11 December 2009.

Schedule 2, dealing with the reporting of positional (net) information, will commence on a date to be specified by the Minister by instrument, but no later than 1 April 2010. The delayed commencement of the positional reporting requirements is to provide ASIC and industry with the time to make the necessary preparations for the reporting of positional information.

## Schedule 1 – Transactional Reporting

Schedule 1 effectively replicates the existing reporting requirements for transaction information contained in ASIC Class Order 08/751.

Subregulation 7.9.100(1) specifies the particulars that a seller entering into a covered short sale must disclose for the purposes of section 1020AB(3)(a) of the *Corporations Act 2001*. These particulars are:

- the number of section 1020B products in the sale that are covered by the securities lending arrangement;
- a description of the product. This is intended to differentiate the type of product if the entity that issued the product has multiple products on issue (for example, the entity has both ordinary and preference shares on issue); and
- the name of the entity that issued the product.

Subregulation 7.9.100(2) specifies the timing for disclosure of the particulars in accordance with section 1020AB(3)(b). It requires a seller selling through a financial services licensee (usually a broker) to disclose the particulars to the financial services licensee at the time of entering into the agreement to sell. This is consistent with section 1020AE of the *Corporations Act* that requires the financial services licensees to ask whether a sale is a covered short sale before making a sale.

Subregulation 7.9.100(2) also specifies that a financial services licensee selling on their own behalf must disclose the particulars relating to their own covered short sales to the market operator by 9am on the next business day after entering into the agreement to sell.

Subregulation 7.9.101(1) specifies that the particulars that a financial services licensee must disclose in relation to their clients' covered short sales are the particulars disclosed to the financial services licensee specified in subregulation 7.9.100(1). These are listed in the three bullets above. Subregulation 7.9.101(2) specifies that the

timing for disclosure of these particulars is by 9am on the next business day after entering into the agreement to sell. This is consistent with the timing specified in ASIC Class Order 08/751.

Subregulation 7.9.102(1) specifies that the particulars that a market operator must publicly disclose for the purposes of section 1020AD(2)(a) are the total number of each kind of section 1020B product that have been sold on a particular day and disclosed to the market operator.

Subregulation 7.9.102(2) specifies that the market operator must disclose these particulars on the business day after the agreements to sell were entered into. This is consistent with the current timing for the release of transactional short selling information under the ASIC interim disclosure regime.

Subregulation 7.9.102(3) specifies that the manner of disclosure of the particulars is the market operator's website or any source easily accessible by the public. It is envisaged that the market operator's website will be the primary manner of disclosing the particulars with another publicly accessible source only being utilised when the website is not functioning.

***Issues for comment:***

*Schedule 1 aims to replicate the existing ASIC interim disclosure regime without introducing any new requirements or removing any requirements. Do you consider any changes to Schedule 1 are necessary to achieve this? If so, please explain.*

*Are the requirements of schedule 1 compatible with any systems changes that you have already implemented to comply with the ASIC interim disclosure regime? If not, please explain why.*

*In situations where companies have multiple trading desks, would it be more appropriate for transactions to be reported under schedule 1 where an individual trading desk responsible for the transaction is short in a section 1020B product or only where the company as a whole is short in the section 1020B product?*

## **Schedule 2 – Positional Reporting**

Schedule 2 amends the subregulations contained in schedule 1 in order to facilitate reporting of positional information in addition to transactional information.

Paragraph [1] inserts subregulation 7.9.99 into schedule 1. Subregulation 7.9.99 specifies that a short position is a position in a section 1020B product where the amount of the product that a person has is less than the amount of the product that the person has an obligation to deliver.

The amount of a product that a person has includes the amount that a person is holding on their own behalf or another person (for example, a nominee company) is holding on their behalf, has entered into an agreement to buy but not yet received or has lent under a securities lending arrangement.

The amount of a product that a person has an obligation to deliver includes an obligation to deliver resulting from an unsettled sale transaction, a securities lending arrangement (under which the person is a borrower) and any other non-contingent legal obligation to deliver to the product.

Paragraph [2] makes a grammatical amendment to subregulation 7.9.100 necessary to incorporate the positional disclosure requirements.

Paragraph [3] amends subregulation 7.9.100 in schedule 1 to include an additional particular that the seller must disclose. This is the seller's short position calculated as at 3 business days before the day that the regulations require the position to be disclosed by the seller.

Paragraph [4] makes further amendments to subregulation 7.9.100 in schedule 1. It inserts subregulation 7.9.100(3), which provides that the seller must disclose their short position in the form specified by ASIC on or before 9am on the third business day after entering into the agreement to sell that causes the short position to occur. The seller must also re-disclose that short position on each subsequent business day even if that short position has not changed from the previous business day. Finally, paragraph [4] inserts subregulation 7.9.100(6) specifying that disclosure of short positions should be made to ASIC.

It is envisaged that ASIC will use its powers under the Corporations Act to specify a threshold that will exclude small short positions from being reported. ASIC will be responsible for setting this threshold.

Paragraph [5] inserts subregulation 7.9.100A in schedule 1. Subregulation 7.9.100A sets up transitional requirements relating to the disclosure of short positions in place before the commencement of the regulations. It provides that if a person has a short position that results from an agreement to sell entered into before the commencement of the regulations, the seller must disclose that short position to ASIC on or before the third business day after the commencement of the regulations and re-disclose on each subsequent business day. This is consistent with the requirements for short positions entered into after the commencement of the regulations. These transitional requirements are necessary to ensure that comprehensive information on short positions is reported to ASIC.

Paragraph [6] amends subregulation 7.9.102(1) to provide that the particulars that ASIC must publicly disclose in relation to the information provided to it under section 1020AB of the Corporations Act are the total of short positions in a product issued by a listed entity that were disclosed to ASIC on the previous business day. The market operator will remain responsible for the disclosure of transactional information even after schedule 2 commences.

Paragraph [7] amends subregulation 7.9.102(2) to provide that ASIC must disclose the particulars mentioned in paragraph [6] one business day after the information is received. This means the information will be released publicly on the fourth business day after the position is entered into.

Paragraph [8] amends subregulation 7.9.102(3) to specify that the manner that ASIC must publicly disclose the information is by publication on the ASIC website or any source easily accessible by the public. It is envisaged that ASIC's website will be the primary manner of disclosing the particulars with another publicly accessible source only being utilised when the website is not functioning.

***Issues for comment:***

*The definition of short position in schedule 2 aims to provide an accurate indication of the short position that a person has that resulted from a covered short sale transaction. Do you consider that any amendments to the definition are necessary to achieve this? If so, please explain.*

*The requirements in Schedule 2 apply to persons. In some situations, a person (for example, a company) may act in its own capacity as well as some other capacity (for example, as responsible entity for a registered scheme). In this situation, the company would need to take into account both capacities when reporting short positions. Is it appropriate for reporting of short positions to be done at the company level or some lower level (for example, at the individual fund level)?*

*It is envisaged that a person may wish to report the information required by schedule 2 via an agent (for example, a settlement participant). Do you consider that any changes to schedule 2 are necessary to allow for this to occur? If so, please explain.*

*Schedule 2 aims to provide comprehensive information to ASIC on all short positions that result from a covered short sale transaction. Do you consider that any changes to schedule 2 are necessary to allow for this to occur? If so, please explain.*

*Are there any changes that you consider could be made to schedule 2 to allow the reporting requirements to be better integrated with your computer systems or to allow you to meet the requirements more efficiently?*