



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 196

# Short selling

April 2011

### **About this guide**

This guide contains an overview of the short selling provisions of the *Corporations Act 2001* (Corporations Act) and the Corporations Regulations 2001 (Corporations Regulations) as they relate to securities, managed investment products and certain other financial products. In particular, it addresses the naked short selling prohibition and the reporting and disclosure obligations.

This guide is particularly relevant to institutional investors and brokers who are involved in short selling activity.

### 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 version was issued on 7 April 2011 and is based on legislation and regulations as at 7 April 2011.

Previous versions:

- Superseded Regulatory Guide 196, issued 19 September 2008, reissued 23 April 2010, with minor amendments made to the text on 31 May 2010

### Disclaimer

This guide 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.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview of the short selling provisions

### Key points

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

Short sales are generally referred to as naked short sales and covered short sales: RG 196.2–RG 196.6.

In Australia, covered short sales are permitted: RG 196.3.

Naked short sales are prohibited except where ASIC has given relief: Section C.

If you make a short sale on a licensed market, you may need to comply with reporting and disclosure requirements: Section D.

Failure to report is an offence under s1311: RG 196.10.

### What is a short sale?

RG 196.1 People sometimes sell (short sell) financial products that they do not own with a view to repurchasing them later at a lower price.

#### Covered short sales

RG 196.2 Generally, 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, the sale of the products is a covered short sale.

RG 196.3 Covered short selling is permitted under the Corporations Act. This recognises covered short selling as a legitimate mechanism for price discovery and liquidity, subject to disclosure and subject to intervention by ASIC in exceptional cases.

#### Naked short sales

RG 196.4 Generally, the practice of short selling securities without a securities lending arrangement is known as ‘naked short selling’.

RG 196.5 Under the Corporations Act, a person must not sell a section 1020B product in Australia if, at the time of sale, the person does not have a presently exercisable and unconditional right to vest the product in the buyer: s1020B.

RG 196.6 Naked short sales tend to have a higher risk of settlement failure. This is because the seller has already made the sale but has yet to arrange to have a

presently exercisable and unconditional right to vest at the time of sale. There are a number of exceptions to the naked short selling prohibition: see Table 1 in Section C.

## Short selling disclosure

- RG 196.7 If a seller makes a short sale on a licensed market, the seller may be required to comply with reporting requirements set out in Division 5B of Part 7.9 of the Corporations Act and Division 15 of Part 7.9 of the Corporations Regulations: see the appendix.
- RG 196.8 There are two separate short selling reporting requirements:
- (a) short sale transaction reporting: see RG 196.87–RG 196.114; and
  - (b) short position reporting: see RG 196.115–RG 196.154.
- RG 196.9 These obligations apply to short sales of section 1020B products made on a licensed market, irrespective of whether the seller is in Australia.
- RG 196.10 Failure to comply with the disclosure requirements is an offence under s1311.

### Short sale transaction reporting

- RG 196.11 Short sale transaction reporting is the reporting of daily volumes of section 1020B products that are short sold in the market.
- RG 196.12 In general, covered short sale transactions must be reported to the market operator: see RG 196.95–RG 196.98 and RG 196.101–RG 196.102.
- RG 196.13 ASIC has taken a no-action position on naked short selling in certain circumstances. Some of these are conditional on the seller complying with transactional reporting obligations: see RG 196.67–RG 196.69.
- RG 196.14 Short sale transaction reporting is of benefit to the market in that it may explain share price movements and assist regulators in carrying out market surveillance and investigating alleged cases of market misconduct.

### Short position reporting

- RG 196.15 A short position in relation to a section 1020B product is where the quantity of the product that a person has, when acting in a particular capacity, is less than the quantity of product that the person has an obligation to deliver, when acting in the same capacity: reg 7.9.99(2). When a person makes a covered short sale, the person may be required to report their short positions to ASIC: see RG 196.121–RG 196.132.

- RG 196.16 ASIC has granted relief exempting sellers from reporting 'small' short positions that fall below a reporting threshold: see RG 196.127–RG 196.132 and Table 2 in Section D.
- RG 196.17 Short position reporting is of benefit to the market in that it provides an indication of the level of risk involved in short selling a particular security as well as the market sentiments in that security.

## Exemptions and modifications by ASIC

- RG 196.18 ASIC has power to exempt a person, a financial product or class of persons or financial products from the short selling provisions of Part 7.9 of the Corporations Act. ASIC may also declare that the short selling provisions apply as if specified provisions were omitted, modified or varied: see s1020F.
- RG 196.19 In this regulatory guide, we have indicated where ASIC has used its powers to modify or grant exemptions from the short selling provisions. We have also indicated further modifications to and exemptions from the short selling provisions that we propose to make in the near future.

## Significant breach reporting

- RG 196.20 An Australian financial services (AFS) licensee that breaches or is likely to breach the short selling provisions may need to notify us of that breach: see s912D.

Note: For guidance on breach reporting, see Regulatory Guide 78 *Breach reporting by AFS licensees* (RG 78).

## B Naked short selling prohibition

### Key points

'Naked' short selling is prohibited in Australia subject to limited exceptions: RG 196.23.

To avoid breaching this prohibition, a person selling products must, at the time of sale, have a presently exercisable and unconditional right to vest: RG 196.24–RG 196.39.

### The prohibition in section 1020B

RG 196.21 In Australia, a person may only sell 'section 1020B products' to a buyer if, at the time of sale:

- (a) the person has; or
- (b) the person believes on reasonable grounds that the person has,

a presently exercisable and unconditional right to vest the products in the buyer: s1020B(2).

RG 196.22 Section 1020B products means:

- (a) securities;
- (b) managed investment products (including ETFs);
- (c) financial products referred to in s764A(1)(j) (that is, debentures, stocks and bonds issued by a government); or
- (d) other kinds of financial products prescribed by the regulations.

Note: For the definition of 'section 1020B products', see s1020B(1). For financial products prescribed for the purposes of s1020B(1), see reg 7.9.80B.

RG 196.23 A sale of these products other than as described at RG 196.21 is known as a naked short sale and is an offence under s1311(1) unless it falls within a specific exception: see Table 1 in Section C.

### Interpretation of terms in s1020B

#### What is 'at the time of sale'?

RG 196.24 'At the time of sale' includes when an offer for sale is placed.

- RG 196.25 A person is taken to sell section 1020B products if they purport to, offer to, hold themselves out as entitled to, or instruct the holder of an AFS licence to, sell those products: s1020B(7).
- RG 196.26 ‘At the time of sale’, for the purposes of s1020B(2), is at the point of sale and not at the close of the trading day. For example, a person may enter into any number of transactions through a trading day. At the close of the trading day, a person may have purchased the same number or more of a particular security than has been short sold (this is sometimes referred to as a ‘net no sale position’). A person who has a net no sale position at the close of trading would still need to have a presently exercisable and unconditional right to vest at each point in time during the day when a sale is made (in addition to the times referred to at s1020B(7)).

### **What is a ‘presently exercisable and unconditional right to vest’?**

- RG 196.27 The definition of a ‘presently exercisable and unconditional right to vest’ is important for the purposes of determining whether a sale is a naked short sale (and thus prohibited) or a covered short sale (which is permitted but subject to reporting and disclosure) or neither (an ordinary sale).
- Note: See also RG 196.2–RG 196.3 for a discussion on covered short sales.
- RG 196.28 To have a presently exercisable and unconditional right to vest, a person must, at the time of the sale, have power to direct a transfer of the product, that is, the person must have the absolute ability to give the buyer title to the product.
- RG 196.29 A person who holds legal title to the product at the time of sale would have a presently exercisable and unconditional right to vest for the purposes of s1020B.
- RG 196.30 We understand it is common market practice to rely on securities obtained under a securities lending arrangement to satisfy the need to have a presently exercisable and unconditional right to vest the securities in the buyer.
- RG 196.31 In Australia, securities lending arrangements typically involve the transfer of securities from the owner (lender) to another party (the borrower), with the borrower obliged to return the securities (or their equivalent) either on demand or at the end of the loan term. The borrower usually gives the lender collateral as security for the loan.

Note: While securities lending is a sale with an undertaking to return the transferred securities (or their equivalent), this guide uses the common market terminology to describe the transaction and parties. For detailed analysis on the legal characterisation of securities lending arrangements, see *Beconwood Securities Pty Ltd v ANZ Group Limited* (2008) 246 ALR 361; [2008] FCA 594.

- RG 196.32 We consider that the borrower will satisfy the presently exercisable and unconditional right to vest requirement if the lender has given the borrower

(or a third party as the borrower may direct or procure), at the time of the borrower's sale, a firm commitment to deliver the products. By 'firm commitment', we mean a legally binding commitment.

- RG 196.33 The best evidence of that firm commitment would be written confirmation for delivery into settlement or transfer. In contrast, an agreement made at the time of the sale for a lender to provide the borrower with securities on a 'best endeavours basis' cannot provide a presently exercisable and unconditional right to vest the financial product.
- RG 196.34 We recognise that arrangements between lenders and borrowers will vary. Whether the arrangements are sufficient to reflect a presently exercisable and unconditional right to vest will depend on the particular circumstances of these arrangements.

### **Conditional hold notices**

- RG 196.35 The use of hold notices is a market practice associated with securities lending, although the practice is not governed or defined in standard securities lending agreements.
- RG 196.36 A hold notice is an informal arrangement where a prospective lender 'reserves' or 'holds' securities for, and at the request of, a prospective borrower. Either party can withdraw or terminate the hold notice at any time. The hold notice would typically otherwise lapse within 24 hours or at the end of the trading day.
- RG 196.37 The hold notice is used by prospective borrowers who do not wish to borrow the relevant securities at that time but wish to retain the potential to do so. For example, a prospective borrower may place a hold for a particular security with a lender while contacting another lender to determine the most competitive borrowing rate for that security. As such, while a hold notice has been given, it will not necessarily result in all or any of the held securities being lent or borrowed under a securities lending agreement.
- RG 196.38 The market recognises that hold notices are subject to conditions. For example, a hold notice may be cancelled, and therefore is conditional on whether the relevant securities continue to be available for lending at the time the prospective borrower confirms it wishes to borrow the relevant securities.
- RG 196.39 Given the above, we consider that a hold notice does not provide a seller with a presently exercisable and unconditional right to vest a product in a buyer for the purposes of s1020B(2). A sale made in reliance on a hold notice would be a naked short sale. Furthermore, a prospective lender cannot provide a presently exercisable and unconditional right to vest to a prospective borrower if the prospective lender is itself relying on a hold notice.

## C Exceptions to the naked short selling prohibition

### Key points

There are a number of exceptions to the naked short selling prohibition: see Table 1.

### Exceptions to the naked short selling prohibition

- RG 196.40 From January 2009, the *Corporations Amendment (Short Selling) Act 2008* repealed all but one of the exceptions in the Corporations Act to the naked short selling prohibition. The *Corporations Amendment Regulations 2009 (No. 1)* removed further exceptions in the Corporations Regulations.
- RG 196.41 ASIC has power under s1020F to give relief from the naked short selling prohibition. Generally we will only give this relief to facilitate the orderly operation of markets. To date, we have exercised our power to grant a number of exceptions to the naked short selling prohibition: see Table 1.

Note: For more information on how to apply for ASIC relief, see Regulatory Guide 51 *Applications for relief* (RG 51).

### Situations in which naked short selling is permitted

- RG 196.42 Table 1 sets out a summary of the situations in which naked short selling is allowed, despite the naked short selling prohibition.

**Table 1: Summary of situations in which naked short selling is permitted**

Situation	Source/nature of exemption	Description
Prior purchase agreement	s1020B(4)	<p>A short sale by a person who:</p> <ul style="list-style-type: none"> <li>• before the time of sale, has entered into a contract to buy those products; and</li> <li>• has a right to have those products vested in the person that is conditional only upon all or any of the following: <ul style="list-style-type: none"> <li>– payment of consideration;</li> <li>– receipt of the proper instrument of transfer; or</li> <li>– receipt of the title documents.</li> </ul> </li> </ul> <p>See: RG 196.43–RG 196.45.</p>

Situation	Source/nature of exemption	Description
Giving or writing of certain exchange traded options	[CO 09/1051]	A short sale of a financial product that is done by the giving or writing of certain exchange traded options.  See RG 196.46–RG 196.47.
Unobtained financial products	[CO 09/1051]	A short sale of financial products where, at the time of sale, the person is able to obtain at least the number of financial products of the same class by exercising exchange traded options.  See RG 196.48–RG 196.49.
Certain bonds or debentures of a body corporate and government bonds	[CO 09/1051]	A short sale of: <ul style="list-style-type: none"> <li>• bonds issued by a government; or</li> <li>• bonds/debentures issued by a body corporate if the amount on issue (with the same maturity and coupon terms) exceeds \$100 million,</li> </ul> by a person as principal, provided the seller believes on reasonable grounds that arrangements can be put in place for settlement by the relevant time.  See RG 196.50–RG 196.51.
Exercise of exchange traded options	[CO 08/764]	A short sale resulting from the exercise of exchange traded options (e.g. the exercise of a put option or sale of a call option that is later exercised).  See RG 196.52–RG 196.55.
Selling before completing a recall of loaned securities	AD08-23	A short sale by the owner (seller) of a portfolio of securities or managed investment products placed in an established securities lending program where, at the time of sale, the seller is entitled to recall from the program at least the number of securities or products that are the subject of the sale.  No-action position is subject to conditions.  See RG 196.56–RG 196.58.
Hedging risk from market making activities	[CO 09/774]	A short sale of a security or managed investment product that is a constituent of the S&P/ASX 300 by a market maker to hedge risk from its market making activities. The market maker must hold (or be exempt from holding) an AFS licence.  In addition, at the time of sale, the market maker must believe on reasonable grounds that a securities lending arrangement can be put in place to allow delivery and, by the end of each day, acquire or borrow sufficient products to ensure it can deliver all products sold on the day delivery is due.  See RG 196.59–RG 196.63.

Situation	Source/nature of exemption	Description
Market makers of exchange traded funds	Individual no-action positions provided upon application	<p>A short sale of certain exchange traded funds (ETFs) by an ETF market maker in the course of making a market in ETFs where, as soon as possible after the sale, the ETF market maker purchases or applies for the issue of equivalent ETFs to settle the sale.</p> <p>No-action position is subject to conditions.</p> <p>See RG 196.64–RG 196.66.</p>
Selling of CDIs prior to conversion	Individual no-action positions provided upon application	<p>A short sale of CHESS Depository Interests (CDIs) by a person who has a presently exercisable and unconditional right to vest the underlying securities in a buyer where, as soon as practicable after the sale, the person takes all necessary steps to convert equivalent securities into CDIs of the class sold.</p> <p>No-action position is subject to conditions.</p> <p>Short sales made under this no-action position must be reported to ASX.</p> <p>See RG 196.67–RG 196.69.</p>
Client facilitation services	Individual no-action positions provided upon application	<p>A short sale of securities by a stockbroker to a client, in response to the client's buy order, in the ordinary course of a client facilitation business.</p> <p>No-action position is subject to conditions.</p> <p>See RG 196.70–RG 196.73.</p>
Deferred purchase agreements	[CO 10/111]	<p>A short sale of an ASX listed security or managed investment product (delivery product) as a result of entering into a deferred purchase agreement under which:</p> <ul style="list-style-type: none"> <li>• the issuer agrees to deliver, at least 12 months after entering into the agreement, the delivery product at a specified time in the future (maturity);</li> <li>• the number and value of the delivery products to be delivered at that time is ultimately determined or derived from the value of a predefined reference asset (e.g. another financial product or asset other than a derivative that relates to the delivery product); and</li> <li>• the issuer has the right in certain circumstances to substitute the delivery product with another at maturity.</li> </ul> <p>See RG 196.74–RG 196.80.</p>

### Prior purchase agreements

- RG 196.43 Section 1020B(4) permits naked short selling of section 1020B products by a person who:
- (a) before the time of sale, has entered into a contract to buy those products; and
  - (b) has a right to have those products vested in the person that is conditional only upon all or any of the following:

- (i) payment of consideration;
- (ii) receipt of the proper instrument of transfer; or
- (iii) receipt of the title documents.

RG 196.44 This exception allows a seller to sell the products acquired through the purchase agreement even though the seller may not have a presently exercisable and unconditional right to vest the product in the buyer because the purchase agreement to acquire the products is still conditional at the time of sale. The existence of a prior purchase agreement means that the transaction falls short of a true naked short sale.

Note: To clarify the operation of this exception, ASIC is preparing a class order to confirm that the prior purchase agreement must ensure that section 1020B products equivalent to the products short sold by the person can be unconditionally vested in the buyer of the shorted product by the time of delivery. Once executed, this class order will be available from ASIC's website and the Federal Register of Legislative Instruments.

#### **Do these short sales need to be reported?**

RG 196.45 Persons relying on s1020B(4) to execute naked short sales are not required to make transactional reporting or report short positions in relation to these sales.

#### **Giving or writing of certain exchange traded options**

RG 196.46 Class Order [CO 09/1051] *Short selling relief: Exchange traded options, unobtained financial products and certain bonds and debentures* permits naked short selling by the giving or writing of certain exchange traded options. Without relief, a person could not give or write a call option without holding the underlying product or entering into a securities lending agreement. The giving and writing of options occurs in options markets internationally and significantly facilitates liquidity in the options markets.

Note: This exception was previously contained in reg 7.9.79(1). The effect of the relief provided in [CO 09/1051] is to ensure this exception continues to apply.

#### **Do these short sales need to be reported?**

RG 196.47 Persons relying on this relief to execute naked short sales are not required to make transactional reporting or report short positions in relation to these sales.

#### **Unobtained financial products**

RG 196.48 Class Order [CO 09/1051] permits naked short selling of financial products where, at the time of sale, the person is able to obtain at least the number of financial products of the same class by exercising exchange traded options. We consider this practice does not involve significant settlement risk.

Note: This exception was previously contained in reg 7.9.79(2). The effect of the relief provided in [CO 09/1051] is to ensure this exception continues to apply.

**Do these short sales need to be reported?**

RG 196.49 Persons relying on this relief to execute naked short sales are not required to make transactional reporting or report short positions in relation to these sales.

**Certain bonds and debentures of a body corporate and government bonds**

RG 196.50 Class Order [CO 09/1051] also permits naked short selling of:

- (a) bonds issued by a government; or
- (b) bonds or debentures issued by a body corporate if the amount on issue (with the same maturity and coupon terms) exceeds \$100 million,

by a person as principal, provided the seller believes on reasonable grounds that arrangements can be put in place for settlement by the relevant time. The \$100 million threshold for corporate bonds and debentures helps to ensure sufficient liquidity to reduce the likelihood of a failure to deliver.

Note: This exception was previously contained in reg 7.9.80A. The effect of the relief provided in [CO 09/1051] is to ensure this exception continues to apply.

**Do these short sales need to be reported?**

RG 196.51 Persons relying on this relief to execute naked short sales are not required to make transactional reporting or report short positions in relation to these sales.

**Exercise of exchange traded options**

RG 196.52 Class Order [CO 08/764] *Short selling—exercise of exchange traded options* permits naked short selling resulting from the exercise of exchange traded options (e.g. the exercise of a put option or sale of a call option which is later exercised). This is consistent with established market practices in options markets internationally.

RG 196.53 A person who 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) would make a naked short sale if, at the time the option is exercised, the person does not have a presently exercisable and unconditional right to vest the underlying product.

RG 196.54 Similarly, a person who 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, would make a naked short sale if, at the time the option is exercised, the person does not have a presently exercisable and unconditional right to vest the underlying product.

**Do these short sales need to be reported?**

RG 196.55 Transactional reporting of covered and naked short sales resulting from the exercise of ETOs is not required. However, sellers are required to comply with disclosure obligations in relation to short positions that are created.

**Selling before completing a recall of loaned securities**

RG 196.56 In ASIC Advisory (AD08-23) *No action position for owners selling from stock lending portfolios* (24 September 2008), we announced a no-action position permitting naked short sales by the owner (seller) of a portfolio of securities placed in an established securities lending program where:

- (a) the sale is a bona fide sale transaction from the portfolio;
- (b) the seller has made securities of the same type available (whether or not through a custodian) to the securities lender for use in a securities lending program, being securities in which the seller had full beneficial ownership or held as an institutional investor (e.g. in a managed investment scheme, superannuation fund or insurance company statutory fund);
- (c) at the time of sale, the seller is entitled to recall from the program at least the number of securities which are the subject of the sale;
- (d) before or as soon as practicable after the sale, the seller recalls in writing or electronically a sufficient number of securities from the program to settle the sale; and
- (e) the sale is settled at the time required by the market rules (i.e. T+3).

Note: For the purposes of this no-action position, a security includes a managed investment product.

RG 196.57 Under a typical securities lending agreement, the lender has the right to recall securities loaned under the agreement. Ordinarily an owner who wishes to sell the securities placed in a securities lending program first must wait until those securities are delivered back to the owner.

**Do these short sales need to be reported?**

RG 196.58 Persons relying on this no-action position to execute naked short sales are not required to make transactional reporting or report short positions in relation to these sales.

**Hedging risk from market making activities**

RG 196.59 A market maker (as defined in the Corporations Act) regularly states prices at which it proposes to buy or sell financial products on its own behalf. 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 (i.e. a ‘delta neutral’ position) in the product. Market makers often use automated systems to immediately hedge positions established in the course of making a market.

- RG 196.60 Class Order [CO 09/774] *Naked short selling relief for market makers* permits a market maker to make naked short sales where all of the following apply:
- (a) the market maker makes a market for a financial product;
  - (b) the market maker holds, or is exempt from holding an AFS licence for making a market;
  - (c) the naked short sale is a bona fide transaction to hedge the risks arising from the market maker’s market making activities;
  - (d) at the time of the sale, the financial product sold is a constituent of the S&P/ASX 300 index; and
  - (e) at the time of sale, the market maker believes on reasonable grounds that a securities lending arrangement can be put in place before delivery of the financial product sold so that a financial product of the same class as the financial product sold can be delivered to the purchaser.
- RG 196.61 This relief is subject to conditions that, by the end of the day, the market maker must:
- (a) acquire a financial product of the same class as the financial product short sold; or
  - (b) enter into a contract to acquire a financial product of the same class as the financial product short sold; or
  - (c) have entered into a securities lending arrangement in relation to a financial product of the same class as the financial product short sold,
- so that the financial product can be unconditionally vested in the purchaser at the time of delivery.
- RG 196.62 If the market maker is unable to do so, it must notify us in writing by 9 am the following business day.

Note: For further information on the background and rationale of this relief, please refer to Consultation Paper 106 *Short selling to hedge risk from market making activities* (CP 106) and *Response to submissions on CP 106 Short selling to hedge risk from market making activities* (REP 167).

### **Do these short sales need to be reported?**

- RG 196.63 Market makers relying on this relief to execute naked short sales are not required to make transactional reporting of these sales. Market makers who make covered short sales to hedge risk from their market making activities are not required to make transaction reporting of these sales. However, sellers are required to comply with disclosure obligations in relation to short positions that are created.

## Market makers of exchange traded funds

- RG 196.64 We will consider issuing individual no-action positions permitting market makers of certain exchange traded fund (ETF) products to make naked short sales of those ETF products subject to the following conditions:
- (a) the market maker and ASX have entered into an agreement in relation to the market maker's obligations regarding the ETFs, or the market maker is an AQUA Product Market Making Agent appointed by the responsible entity of the ETF to make a market in the ETFs;
  - (b) a sale of units is made in the course of performing a function as a market maker in ETFs;
  - (c) the market maker must, before making an offer to sell ETFs, record in written or electronic form that the proposed sale would be a short sale;
  - (d) as soon as possible after the short sale of ETFs by a market maker has occurred, the market maker purchases or applies for the issue of equivalent ETFs to settle the short sale; and
  - (e) the market maker must use its best endeavours to avoid failure in the settlement of the sale of the ETFs.

- RG 196.65 We recognise that ETF market makers may apply for the creation of new ETFs to fulfil settlement obligations. We also had regard to the important role of ETF market makers who are appointed to provide liquidity to markets for ETF products.

### Do these short sales need to be reported?

- RG 196.66 ETF market makers relying on this no-action position to execute naked short sales are not required to make transactional reporting of these sales. ETF market makers who make covered short sales in the course of making a market in ETFs are not required to make transactional reporting of these sales. However, they are required to comply with disclosure obligations in relation to short positions that are created.

## Selling of CDIs prior to conversion

- RG 196.67 We will consider issuing individual no-action positions permitting naked short selling of certain CHESS Depository Interests (CDIs) by a person who has a presently exercisable and unconditional right to vest equivalent underlying securities in a buyer where:
- (a) as soon as practicable after the sale, the person takes all necessary steps to convert equivalent securities into CDIs of the class sold;
  - (b) the person uses their best endeavours to ensure that delivery of CDIs of the class sold is made to the buyer on the date delivery is due;
  - (c) the person or their broker reports the short sale to the ASX.

RG 196.68 We consider these sales are analogous to a long sale and do not present significant settlement risks, given the seller would have a presently exercisable and conditional right to vest the underlying security at the time of sale. This exception would also provide additional liquidity to the market for CDIs.

**Do these short sales need to be reported?**

RG 196.69 Persons relying on this no-action position to execute naked short sales are required to make transactional reporting of these sales to the ASX.

**Client facilitation services**

RG 196.70 We will consider issuing individual no-action positions permitting brokers to make naked short sales of securities in the course of certain types of client facilitation services. For instance, a broker may make a short sale of securities to a client in response to a client's buy order. Naked short sales are permitted subject to the following conditions:

- (a) the broker has an existing business of providing facilitation services;
- (b) the short sale to the client is a bona fide facilitation transaction in the ordinary course of the broker's facilitation business; and
- (c) the broker makes reasonable inquiries of its facilitation client to understand the purpose of the client's trading.

RG 196.71 Following recent consultation on this topic, we added further conditions to this relief requiring that:

- (a) at the time of the sale, the broker believes on reasonable grounds that a securities lending arrangement can be put in place so that the shorted product can be unconditionally vested in the buyer by the time for delivery; and
- (b) by the end of the day on which the broker makes the sale of the security, the broker:
  - (i) acquires an equivalent security; or
  - (ii) enters into a contract to acquire an equivalent security; or
  - (iii) enters into a securities lending arrangement in relation to an equivalent security,

so that the security can be unconditionally vested in the buyer at the time of delivery.

Note: For more information, see REP 167.

RG 196.72 We consider that client facilitation services add to the efficient operation of the financial markets and are analogous to market making services (for which naked short selling is permitted to hedge risk, see RG 196.59–RG 196.63).

**Do these short sales need to be reported?**

- RG 196.73 Persons relying on this no-action position to execute naked short sales are not required to make transactional reporting of these sales. However, they are required to comply with disclosure obligations in relation to short positions that are created.

**Deferred purchase agreements**

- RG 196.74 Under a deferred purchase agreement (DPA), an investor agrees to purchase from the DPA issuer nominated 'delivery products', typically, listed securities or managed investment products. 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), being at least 12 months after the date the investor entered into the DPA.
- RG 196.75 At maturity, to meet its obligations under the DPA, the issuer acquires sufficient delivery products to deliver to the investor. After maturity, and until the investor accepts delivery of and sells the delivery products, the investor has a long exposure to the delivery products.
- RG 196.76 Under a DPA, the DPA issuer is taken to sell delivery products at the time the investor enters into the agreement (because of s1020B(7)) even though the quantity of products to be delivered will not be determined until maturity of the DPA (at least 12 months later).
- RG 196.77 Class Order [CO 10/111] *Short selling: limited relief for deferred purchase agreement issuers from s1020B(2)* permits naked short selling of an ASX listed security or managed investment product (delivery product) as a result of entering into a deferred purchase agreement (DPA) only in circumstances designed to reduce the risk of delivery failure or any market impact that would damage market confidence or integrity in a way that is inconsistent with the policy behind the naked short selling prohibition.
- RG 196.78 In this regard, the relief only applies where the issuer has the ability to substitute the delivery product with another in specified circumstances (thereby addressing the risk of the delivery failure). In addition, relief is limited so that it would not apply where the reference asset (which determines the number and value of the delivery products to be delivered) is the same as the delivery product, or where the reference asset is a derivative that relates to the delivery product.
- RG 196.79 The relief does not apply to an issuer who makes a naked short sale in order to hedge their exposure to a reference asset of a DPA.

Note: For more information about this relief, see [CO 10/111] and its explanatory statement.

**Do these short sales need to be reported?**

- RG 196.80 Persons relying on this relief to execute naked short sales are not required to make transactional reporting or report short positions in relation to these sales.

## D Short selling disclosure

### Key points

A person who short sells on a licensed market will need to consider the short selling disclosure requirements. There are two types of disclosure requirements: short sale transaction (gross) reporting (see RG 196.87–RG 196.114) and short position reporting (see RG 196.115–RG 196.154).

A person who makes a covered short sale through a broker (AFS licensee) must report to the AFS licensee, at the time of sale, information about the short sale being executed. An AFS licensee who makes a covered short sale must report the short sale to the market operator by 9 am on the following trading day. The market operator aggregates this information and publishes it to the market.

Short positions above a threshold must also be reported to ASIC. We then aggregate this information and publish it to the market: see RG 196.143.

## General information

### Which transactions do the short selling disclosure obligations apply to?

- RG 196.81 A seller will need to consider its disclosure obligations if:
- (a) the seller (or a broker acting on the seller's behalf) executes a covered short sale of section 1020B products on a licensed market (RG 196.95–RG 196.98); or
  - (b) following the transaction, the seller has a short position in that product above a threshold (RG 196.123–RG 196.126).
- RG 196.82 A broker will need to consider its disclosure obligations if it executes a covered short sale of section 1020B products on a licensed market on its own behalf or on behalf of a client.

### Types of disclosure

- RG 196.83 There are two separate short selling disclosure requirements:
- (a) **Short sale transaction reporting**, which is reporting of the volume or number of section 1020B products short sold in a transaction (otherwise known as gross short sales); and
  - (b) **Short position reporting**, which is reporting of a position in relation to a listed section 1020B product where the quantity of the product that a person has, when acting in a particular capacity, is less than the amount of product that the person has an obligation to deliver, when acting in the same capacity.

## Objectives of reporting

- RG 196.84 The Government has described transactional reporting as providing an indication of the proportion of trades in a particular security that are short sales and the overall level of short selling that takes place on the market each day. This assists investors and companies in explaining share price movements. For example, if a company's share price is particularly volatile, interested parties are able to refer to the transactional short selling information to gain an understanding of whether there has been an increased level of short selling activity in the stock. This information is also useful for regulators in carrying out market surveillance and investigating alleged cases of market misconduct. This is because the information is likely to be more detailed than positional information, as it identifies individual short sale transactions. Regulators can use this information as an audit trail when conducting investigations.
- RG 196.85 The Government has described positional reporting as providing an indication of the bearish sentiment within a particular stock at any point in time and also the amount of overhang in the stock that will need to be covered at some point by short sellers purchasing shares. In addition, for investors, this information may provide an indication of the level of risk involved in shorting the stock. For example, it may be risky for an investor to take a short position in a particular stock if a significant proportion of that stock has already been shorted. 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.
- RG 196.86 This reporting, complemented by the disclosure of securities lending to the ASX, provides greater transparency on short selling activity in Australia.

## Short sale transaction reporting

### When must a seller report a short sale transaction?

#### Covered short sales made on a licensed market

- RG 196.87 A short sale transaction must be reported if:
- (a) a 'seller' makes a sale of section 1020B products to a buyer on a licensed market in Australia; and
  - (b) before the time of sale, the seller had entered into or gained the benefit of a securities lending arrangement; and
  - (c) at the time of the sale the seller intends that the securities lending arrangement will ensure that some or all of the section 1020B products can be vested in the buyer (s1020AB(1)).

- RG 196.88 The seller may be either:
- (a) a person who engages an AFS licensee to make the sale on the person's behalf; or
  - (b) an AFS licensee who makes the sale on its own behalf.
- RG 196.89 A licensed market means a financial market the operation of which is authorised by an Australian market licence: s761A.
- RG 196.90 A securities lending arrangement means an arrangement under which:
- (a) one entity (the lender) agrees it will:
    - (i) deliver particular securities, managed investment products or other financial products to another entity (the borrower) or to an entity nominated by the borrower; and
    - (ii) vest title in those products in the entity to which they are delivered; and
  - (b) the borrower agrees that it will, after the lender does the things mentioned in paragraph (a):
    - (i) deliver the products (or equivalent products) to the lender or to an entity nominated by the lender; and
    - (ii) vest title in those products (or those equivalent products) in the entity to which they are delivered.

Note: See s1020AA(1).

- RG 196.91 A securities lending arrangement must be between two separate entities. For example, an internal arrangement to 'lend' securities between different proprietary trading accounts held by the one entity does not fall within the meaning of securities lending arrangement.
- RG 196.92 A short sale transaction must be reported regardless of whether the seller is inside or outside Australia.

#### **Naked short sales made in reliance on our CDI conversion relief**

- RG 196.93 A naked short sale transaction must also be reported if made in reliance on our no-action position for CDI conversion: see RG 196.67–RG 196.69.

#### **What particulars must be given when reporting a short sale transaction?**

- RG 196.94 Where a seller must report a short sale transaction, the seller must give the following particulars:
- (a) the number of section 1020B products that the seller will vest in the buyer under the securities lending arrangement;
  - (b) a description of the product; and
  - (c) the name of the entity that issued the product.

Note: See reg 7.9.100.

## **When and to whom must the particulars be given?**

### **If a person engages an AFS licensee to make a sale on their behalf**

- RG 196.95 If a person engages an AFS licensee to make a sale on their behalf, the person must give the particulars outlined in RG 196.94 to the AFS licensee on or before the time of entering into an agreement to sell. This obligation can be met by the person providing the particulars at the time of placing the sell order.
- RG 196.96 The AFS licensee must not make a short sale on a licensed market on behalf of a seller unless, before making the sale, the AFS licensee has asked the seller whether the requested sale is a short sale and has recorded in writing the seller's answer: s1020AE.

### **If an AFS licensee makes a sale on its own behalf**

- RG 196.97 If an AFS licensee makes a sale on its own behalf after the start of a trading day but before 7 pm, the AFS licensee must give the particulars outlined in RG 196.94 to the market operator by 9 am the next trading day after entering into an agreement to sell.
- RG 196.98 If an AFS licensee makes a short sale on its own behalf after 7 pm on a trading day but before the start of the next trading day, the AFS licensee must give the particulars outlined in RG 196.94 to the market operator by 9 am on the second trading day after entering into an agreement to sell.

### **If a person makes a sale in reliance on our CDI conversion relief**

- RG 196.99 If a person makes a short sale in reliance on our CDI conversion relief, after the start of the trading day but before 7 pm, the person must give the particulars outlined in RG 196.94 to the ASX by 9 am the next trading day after entering into an agreement to sell.
- RG 196.100 If a person makes a naked short sale in reliance on our CDI conversion relief, after 7 pm of a trading day but before the start of the next trading day, the person must give the particulars outlined in RG 196.94 to the ASX by 9 am on the second trading day after entering into an agreement to sell.

## **What must an AFS licensee do with information given to it by a seller?**

- RG 196.101 If an AFS licensee is given short sale transaction particulars by a seller (see RG 196.95) after the start of the trading day but before 7 pm, the AFS licensee must give the information to the market operator on or before 9 am on the next trading day after the information is given.

- RG 196.102 If an AFS licensee is given short sale transaction particulars by a seller after 7 pm on a trading day but before the start of the next trading day, the AFS licensee must give the information to the market operator on or before 9 am on the second trading day after the information is given.

Note: In CP 145 *Australian equity market structure: Proposals*, we set out proposed market integrity rules that will require a market participant to distinguish short sale orders and trade reports where the sell-side is a short sale: see proposal I4. A market participant must specify to the market operator, at the time the sale order is placed or at the time the trade is reported, the quantity of the sale of section 1020B products that is short. It is proposed that the current exemptions to transactional reporting will continue to apply so that the short sales made under these exemptions will not be required to be tagged under this proposal. No manual adjustments or splitting of orders are expected to be required.

### **What will the market operator do with these particulars?**

- RG 196.103 The market operator will publicly disclose the total number of each kind of section 1020B product that have been sold on a particular day and disclosed to the market operator. The public disclosure will be made on the day the sales are reported to the market operator.
- RG 196.104 Short sale transactional reporting provides an indication of the proportion of trades in a particular security that are short sales and the overall level of short selling that takes place on the market each day. This assists investors and companies in explaining share price movements.
- RG 196.105 For example, if a company's share price is particularly volatile, interested parties will be able to refer to the public disclosure of short transaction information to gain an understanding of whether there has been an increase in the level of short selling activity in that security.
- RG 196.106 Short sale transaction information is also useful for regulators in carrying out market surveillance and investigating alleged cases of market misconduct.

### **Examples of short sale transaction reporting**

- RG 196.107 The following examples demonstrate the transactional reporting obligations that apply in particular circumstances. For ease of reference, each of the examples refers to ordinary shares in XYZ Limited. The examples should be considered in isolation, that is, the circumstances in one example should not be considered in the circumstances of the others.

*Example 1: An AFS licensee makes a covered short sale of a section 1020B product on behalf of a person*

At 3:45 pm on a trading day T, an AFS licensee, on behalf of person A, sold 100 ordinary shares in XYZ Limited on a licensed market. Before the time of sale, person A entered into a securities lending arrangement for ordinary shares in XYZ Limited. At the time of the sale, person A intended that the securities lending arrangement would ensure that all 100 ordinary shares in XYZ Limited could be vested in the buyer.

RG 196.108 In this example, person A is the ‘seller’. Person A must give particulars specifying the short sale of 100 ordinary shares in XYZ Limited to the AFS licensee at or before the time when person A enters into the agreement to sell the 100 ordinary shares in XYZ Limited.

RG 196.109 When the AFS licensee receives the particulars, it must give those particulars to the market operator on or before 9 am on the next trading day (T+1).

Note: In the same scenario, if the sale occurred at 7:30 pm on day T, that AFS licensee must give the particulars to the market operator on or before 9 am on the second trading day after that seller makes the sale (T+2).

*Example 2: An AFS licensee makes a covered short sale of a section 1020B product on behalf of another AFS licensee*

Before 7 pm on a trading day T, AFS licensee X, on behalf of AFS licensee Y, sold 800 ordinary shares in XYZ Limited on a licensed market. Before the time of sale, AFS licensee Y entered into a securities lending arrangement for ordinary shares in XYZ Limited. At the time of the sale, AFS licensee Y intended that the securities lending arrangement would ensure that all 800 ordinary shares in XYZ Limited could be vested in the buyer.

RG 196.110 In this example, AFS licensee Y is the ‘seller’. AFS licensee Y must give particulars specifying the short sale of 800 ordinary shares in XYZ Limited to AFS licensee X at or before the time when licensee Y enters into the agreement to sell the 800 ordinary shares in XYZ Limited.

RG 196.111 When AFS licensee X receives the particulars from AFS licensee Y, it must give those particulars to the market operator on or before 9 am on the next trading day (T+1).

Note: In the same scenario, if the sale occurred at 7:30 pm on day T, AFS licensee X must give the particulars to the market operator on or before 9 am on the second trading day after the sale (i.e. T+2).

*Example 3: An AFS licensee makes a sale of a section 1020B product relying partially on a securities lending arrangement*

Before 7 pm on a trading day T, AFS licensee C, on its own behalf, sold 500 ordinary shares in XYZ Limited on a licensed market. Before the time of sale, AFS licensee C entered into a securities lending arrangement for ordinary shares in XYZ Limited. At the time of the sale, AFS licensee C held 200 shares in XYZ Limited and intended that the securities lending arrangement would ensure that the remaining 300 ordinary shares out of the 500 ordinary shares sold in XYZ Limited could be vested in the buyer.

- RG 196.112 In this example, AFS licensee C must give particulars specifying the short sale of 300 ordinary shares in XYZ Limited to the market operator on or before 9 am on the next trading day (T+1).

*Example 4: An AFS licensee makes a covered short sale of a section 1020B product after 7 pm on a trading day but before the commencement of the next trading day*

After 7 pm on a trading day T but before the commencement of the next trading day (T+1) AFS licensee O, on its own behalf, sold 200 ordinary shares in XYZ Limited. Before the time of sale, AFS licensee O entered into a securities lending arrangement for ordinary shares in XYZ Limited. At the time of the sale, AFS licensee O intended that the securities lending arrangement would ensure that all 200 ordinary shares in XYZ Limited could be vested in the buyer.

- RG 196.113 In this example, AFS licensee O must give particulars specifying the short sale of 200 ordinary shares in XYZ Limited to the market operator on or before 9 am on the second trading day after the sale (i.e. T+2).

*Example 5: An AFS licensee makes a naked short sale of a section 1020B product in reliance on our CDI conversion no action position*

At 2 pm on a trading day T, AFS licensee W sold 1000 ordinary shares in XYZ Limited on the ASX to a buyer in reliance on our CDI conversion relief.

- RG 196.114 In this example, AFS licensee W must give particulars specifying the short sale of 1000 ordinary shares in XYZ Limited to the ASX on or before 9 am on the next trading day (T+1).

Note: In the same scenario, if the sale occurred at 7:30 pm on day T, the sale is taken to have occurred on T+1. AFS licensee W must give particulars specifying the short sale of 1000 ordinary shares in XYZ Limited to the ASX on or before 9 am on the second trading day after AFS licensee W made the sale (i.e. T+2).

## Short position reporting

### What is a short position?

RG 196.115 A short position arises where the quantity of the product that a person has, when acting in a particular capacity, is less than the quantity of the product that the person has an obligation to deliver, when acting in the same capacity: reg 7.9.99. For example, if a seller, acting in a particular capacity, has an obligation to deliver 5000 units in a particular section 1020B product and, acting in the same capacity, has only 2000 units in that section 1020B product, the seller's short position is 3000 units.

Note: ASIC Class Order [CO 10/1037] *Variation of Class Order [CO 10/29]* modifies the definition of 'short position' in reg 7.9.99 to clarify how a person should determine their short position in a product in circumstances where the person, acting in more than one capacity, has products and has obligations to deliver products. See RG 196.118–RG 196.119 for a more detailed explanation of the effect of [CO 10/1037].

### When does a person have a product for the purposes of determining a short position?

RG 196.116 A person has the product if:

- (a) the person is holding the product on the person's own behalf (reg 7.9.99(3)(a));
- (b) the person is holding the product on behalf of another person except where that other person has the sole discretion to decide whether the product will be sold (reg 7.99(3)(aa));
- (c) another person is holding the product on the person's behalf but only where the person has the sole discretion to decide whether the product will be sold (reg 7.9.99(3)(b));
- (d) the person has entered into an agreement to buy the product but has not received it (reg 7.9.99(3)(c)); or
- (e) the person has vested title in the product in a borrower, or in an entity nominated by the borrower, under the securities lending arrangement (reg 7.9.99(3)(d)).

Note: See RG 196.119 for an explanation of how a person should determine their short position in a product in circumstances where the person, acting in more than one capacity, has products and has obligations to deliver products.

**When does a person have an obligation to deliver a product for the purposes of determining a short position?**

- RG 196.117 The product that the person has an obligation to deliver is the product that the person:
- (a) has an obligation to deliver under a sale agreement where the product has not been delivered (reg 7.9.99(4)(a));
  - (b) has a contingent or non-contingent obligation to vest title in a lender under a securities lending arrangement (reg 7.9.99(4)(b)); or
  - (c) has any other non-contingent legal obligation to deliver (reg 7.9.99(4)(c)).

**How is a short position determined where the person is acting in different capacities?**

- RG 196.118 For the purposes of determining a short position in a product, a person has the product or has an obligation to deliver the product only if the person is acting in one or more of the following capacities:
- (a) the person is acting on their own behalf (reg 7.9.99(4A)(a));
  - (b) the person is acting on behalf of another person except where that other person has the sole discretion to decide whether the product will be sold (reg 7.9.99(4A)(b)); or
  - (c) another person is acting on behalf of the person but only where the person has the sole discretion to decide whether the product will be sold (reg 7.9.99(4A)(c)).
- RG 196.119 In determining a short position:
- (a) subject to RG 196.119(b), the capacities referred to in each of the subparagraphs in RG 196.118 are taken to be separate capacities (reg 7.9.99(4B)(a));
  - (b) where a person is acting on their own behalf, as described in RG 196.118(a), and another person is acting on the person's behalf, as described in RG 196.118(c), the person is taken to be acting in the same capacity (reg 7.9.99(4B)(b)); and
  - (c) for the capacity described in RG 196.119(b), where a person is acting on behalf of a person under an arrangement and is acting on behalf of another person under a different arrangement, the person is taken to be acting in a different capacity for each arrangement (reg 7.9.99(4B)(c)).

Note: [CO 10/1037] modifies the definition of 'short position' in reg 7.9.99 to clarify how a person should determine their short position in a product in circumstances where the person, acting in more than one capacity, has products and has obligations to deliver products. A person calculating their short position in a product must not net 'long' and 'short' positions that are held in different capacities. However, a person who acts on their own behalf—for example, both making a market in a financial product and conducting proprietary trading—acts in the same capacity. See RG 196.153–RG 196.154 for an example of how to determine a person's short position reporting obligations where the person is acting in different capacities.

## When did short position reporting commence?

- RG 196.120 The obligations on short sellers to report short positions commenced on 1 June 2010. The obligation on ASIC to aggregate and publish the received data commenced on 21 June 2010.

Note: In [CO 10/29], we delayed the commencement of short seller obligations to lodge short position reports from 1 April 2010 to 1 June 2010 and rescheduled the commencement of ASIC obligations to publish aggregated short position reports from 1 April 2010 to 21 June 2010. For more information, see ASIC Advisory 10-42AD *Short position reporting*.

## Short position reporting requirements

- RG 196.121 On commencement of these obligations, if a seller has an existing short position in a section 1020B product above the reporting threshold (see RG 196.127 and Table 2) as at 7 pm on 1 June 2010, they must provide details of this position to ASIC on or before 4 June (i.e. within three reporting days): reg 7.9.100A(1)(a).

Note: Under reg 7.9.100A(1), the short position reporting obligations apply to short positions at 'the close of business' on the day that regulation commences. In [CO 10/29], we modified the reference to 'the close of business' in reg 7.9.100A(1) to mean '7 pm on 1 June 2010'.

- RG 196.122 Subsequent to making this report, as long as the seller holds a short position in that section 1020B product above the reporting threshold, the seller is obliged to provide daily reports to ASIC on the size of this short position. Once the seller's position falls below the threshold, the seller is no longer required to report its short position in that section 1020B product to us unless and until the seller's short position exceeds the reporting threshold: see RG 196.127 and Table 2.

## When must the short position be reported to ASIC?

- RG 196.123 Generally, a person must report their short position in relation to a section 1020B product in a listed entity:
- (a) if the person:
    - (i) makes a covered short sale of the section 1020B product on a licensed market (i.e. the seller intends that a securities lending arrangement will ensure that the section 1020B products can be vested in the buyer);
    - (ii) at 7 pm on the day the person makes that sale, the person has a short position in that product; and
    - (iii) that short position is above the reporting threshold; or
  - (b) if at 7 pm on subsequent reporting days after a person has reported a short position, the person continues to have a short position above the

reporting threshold (see RG 196.127 and Table 2 for information on the reporting threshold).

Note 1: Under reg 7.9.100(1)(d), the short position reporting obligations apply to short positions held at 'the close of business'. In [CO 10/29], we modified the reference to 'the close of business' in reg 7.9.100(1)(d) to mean '7 pm'.

Note 2: For ease of reference, we will refer to short positions in (a) and (b) as 'reportable short positions' in the remainder of this section.

- RG 196.124 The short position reporting obligation applies to a person irrespective of whether the person is inside or outside Australia.
- RG 196.125 When a reportable short position is first created, the short position must be reported to ASIC within three reporting days (and, in any event, by 9 am on the third reporting day after the short position is first created): s1020AB(3) and reg 7.9.100(4)(a).
- RG 196.126 If the person continues to hold a reportable short position on subsequent reporting days, the short position on each subsequent day must be reported to ASIC on or before 9 am three reporting days after the date of the short position: s1020AB(3) and reg 7.9.100(4)(b).

### Are there exceptions to short position reporting?

- RG 196.127 In [CO 10/135] we granted relief exempting sellers from reporting a short position where the seller's short position as at 7 pm on a particular day is less than or equal to:
- \$100,000; and
  - 0.01% of the total quantity of securities or products in the relevant class of securities or products.
- RG 196.128 A seller does not have to rely on this relief and may choose to report all its short positions to ASIC regardless.
- RG 196.129 Table 2 sets out the circumstances in which a seller is exempted from reporting a short position to ASIC.

**Table 2: When is a seller exempted from reporting a short position to ASIC?**

Value of short position	Percentage of total quantity of securities or products in the relevant class	
	Less than 0.01%	More than or equal to 0.01%
Less than or equal to \$100,000	Reporting <b>not</b> required	Reporting required
Greater than \$100,000	Reporting required	Reporting required

### Policy behind the reporting threshold

RG 196.130 The threshold is set at a level intended to relieve sellers with small short positions from having to report those positions, while giving a reasonable representation of the market's overall short positions in section 1020B products.

### Calculating the reporting threshold

RG 196.131 The value of a short position is calculated by reference to either:

- (a) the last sale price of a security or product for the day; or
- (b) the price determined and published by the market operator after the close of trading that day.

RG 196.132 For example, sellers can use the closing price of a security for the day published on a market operator's website or in a national newspaper, or the Valuation Price published by ASX Limited.

Note: See Example 9 for a worked example of the operation of the short position reporting threshold.

### How are short positions reported to ASIC?

RG 196.133 A person must report their short positions as at 7 pm on each reporting day. Short positions reports must be received by ASIC before 9 am three reporting days after the date of the short position: reg 7.9.100(1)(d).

RG 196.134 In order to report short positions, a person must have a unique identifier. An Australian person may use their Australian Company Number (ACN) or Australian Registered Body Number (ARBN). Overseas persons may use their SWIFT Bank Identifier Code (BIC) or may register with ASIC to obtain a unique identity code.

RG 196.135 Registration can be completed on our website at: [www.asic.gov.au](http://www.asic.gov.au). Please follow the link to 'short position reports' via 'How to lodge with ASIC'.

RG 196.136 A person may authorise a submitting entity to lodge short position reports on the person's behalf and respond to any queries related to the submitted reports. The submitting entity must have an ACN, ARBN or a BIC code.

RG 196.137 ASIC receives short position reports electronically via the Financial Information eXchange (FIX) protocol. A person (or their submitting entity) must report to ASIC directly using the FIX protocol.

Note: The FIX protocol is a series of messaging specifications for the electronic communication of trade-related messages. For further information, please refer to [www.fixprotocol.org](http://www.fixprotocol.org).

- RG 196.138 The format and information requirements of a short position report are specified in the ASIC document *Short selling: Short position reporting—FIX Rules of Engagement* (Rules of Engagement).

Note: The Rules of Engagement can be downloaded at [www.asic.gov.au/asic/asic.nsf/byheadline/Short+selling+reporting+-+FIX+rules+of+engagement](http://www.asic.gov.au/asic/asic.nsf/byheadline/Short+selling+reporting+-+FIX+rules+of+engagement).

### When has a short position report been successfully lodged?

- RG 196.139 We use the FIX protocol to confirm receipt of short position reports. If ASIC does not confirm receipt, the short position reports must be resubmitted.
- RG 196.140 We may reject a short position report if the format or information does not comply with the FIX protocol or does not comply with data validation rules as specified in the Rules of Engagement. We will provide a rejection reason for rejected short position reports.
- RG 196.141 Where a short position report is rejected, it must be resubmitted in the correct format.
- RG 196.142 For full technical specifications of short position reporting, please refer to the Rules of Engagement.

### What will we do with the short position reports?

- RG 196.143 We will publicly disclose the total of short positions in a product issued by a listed entity that were disclosed to us the previous trading day. That is, total short positions held in a product on day T will be published on T+4.

## Examples of short position reporting

- RG 196.144 The following examples demonstrate the short position reporting obligations that apply in particular circumstances. For ease of reference, each of the examples refers to person A and XYZ Limited (a listed company). The examples should be considered in isolation, that is, the circumstances in one example should not be considered in the circumstances of the others.

#### *Example 6: Having a short position upon commencement of short position reporting*

At 7 pm on 1 June 2010 (day X, a reporting day), person A had an existing short position of 10,000 ordinary shares in XYZ Limited.

Assume that this short position was above the reporting threshold.

- RG 196.145 In this example, person A must report to us on or before 9 am three reporting days after day X that they had a short position of 10,000 ordinary shares in XYZ Limited on day X.
- RG 196.146 If person A continues to have a short position in relation to ordinary shares in XYZ Limited and that short position is above the reporting threshold, they must continue to report the subsequent day's short position (even if it is unchanged) on or before 9 am three reporting days after the date of that short position.

*Example 7: No short position at 7 pm on a reporting day*

Person A reported a short position of 60,000 ordinary shares in XYZ Limited on day Y (a reporting day) three reporting days after day Y.

Before 7 pm on day Y+1, person A purchased total of 200,000 ordinary shares in XYZ Limited and made covered short sales of a total of 140,000 ordinary shares in XYZ Limited.

- RG 196.147 In this example, person A did not have a short position in XYZ Limited at 7 pm on day Y+1. Accordingly, person A would not be required to report their position in XYZ Limited as at day Y+1 to us on day Y+4.

*Example 8: Having a short position that is above the reporting threshold at 7 pm on a reporting day*

At 7 pm on day V (a reporting day), person A had a short position of 50,000 ordinary shares in XYZ Limited.

At 9 pm on day V, person A made covered short sales of a total of 50,000 ordinary shares in XYZ Limited.

On day V+1, before 7 pm, person A purchased a total of 30,000 ordinary shares in XYZ Limited and made covered short sales of a total of 80,000 ordinary shares in XYZ Limited.

Assume that any short positions were above the reporting threshold.

- RG 196.148 In this example, person A must report to us by 9 am three reporting days after day V that they had a short position of 50,000 ordinary shares in XYZ Limited on day V.
- RG 196.149 At 7 pm on day V+1, person A had a short position of 150,000 ordinary shares in XYZ Limited. Person A must report to us by 9 am three reporting days after day V+1 that they had a short position of 150,000 ordinary shares in XYZ Limited on day V+1.

*Example 9: Having a short position that is below the reporting threshold at 7 pm on a reporting day*

At 7pm on day G, person A had a short position of 10,000 ordinary shares in XYZ Limited. The market price of an ordinary share in XYZ Limited determined and published by the market operator after the close of trading on day G was \$8.29. At 7 pm on day G, XYZ Limited had 125,000,000 ordinary shares on issue.

- RG 196.150 In this example, the value of person A's short position is \$82,900. Person A's short position equates to 0.008% of the total quantity of ordinary shares in XYZ Limited. Person A would not be required to report their short position in XYZ Limited on day G because it does not exceed the reporting threshold because is less than \$100,000 and 0.01% of the total number of securities in the relevant class.
- RG 196.151 However, if person A's short position in XYZ Limited increased so that at 7 pm on day G+1 the short position was above the reporting threshold, person A would need to report their short position as at 7 pm on day G+1 to us by 9 am on day G+4.

*Example 10: Short position reporting for permitted naked short sales*

At the start of trading on day K, person A (stockbroker) had a long position of 10,000 ordinary shares in XYZ Limited. By 7 pm on day K, person A had sold a total of 60,000 ordinary shares in XYZ Limited, relying on our ETF market maker no-action position.

Assume that any short position is above the reporting threshold.

- RG 196.152 In this example, person A had a short position of 50,000 ordinary shares in XYZ Limited at 7 pm on day K. Person A must report to us by 9 am three reporting days after day K that, on day K, they had a short position of 50,000 ordinary shares in XYZ Limited.

*Example 11: Having products and obligations to deliver products in more than one capacity*

At 7 pm on 17 January 2011 (day L, a reporting day), person A holds the following positions in a section 1020B financial product:

- 10,000 short in their capacity as trustee of fund P;
- 20,000 short in their capacity as trustee of fund Q; and
- 40,000 long in their capacity as trustee of fund R.

- RG 196.153 In this example, person A must report to us on or before 9 am three reporting days after day L that they had a short position of 30,000 on day L.
- RG 196.154 Person A is able to report to ASIC a short position of 30,000—or of 10,000 and 20,000 in two reports, if desired.

## **Failure to report short sale transactions or short positions**

RG 196.155 Failure to comply with the short selling reporting and disclosure requirements is an offence: s1311.

Note: This does not apply in relation to requirements under our no-action positions.

## Key terms

Term	Meaning in this document
10-42AD (for example)	An ASIC advisory (in this example numbered 10-42)
ABN	Australian Business Number
ACN	Australian Company Number
AFS licence	An Australian financial services licence under s913B that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an Australian financial services licence under s913B Note: This is a definition contained in s761A.
ARBN	Australian Registered Body Number
ASIC	Australian Securities and Investments Commission
BIC	A Bank Identifier Code approved by the International Organization for Standardization (ISO)
CDI	A CHESS Depository Interest quoted on the ASX that confers a beneficial interest in the foreign financial product to which it relates
[CO 09/1051] (for example)	An ASIC class order (in this example numbered 09/1051)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
CP 106 (for example)	An ASIC consultation paper (in this example numbered 106)
DPA	Deferred purchase agreement
ETF	Exchange traded fund, an open-ended fund that invests in a basket of securities that make up an index
FIX	Financial Information eXchange protocol for the electronic communication of trade-related messages Note: For further information, see <a href="http://www.fixprotocol.org">www.fixprotocol.org</a> .
licensed market	A financial market that is operated by a person that holds an Australian market licence that authorises the person to operate the market in this jurisdiction
market maker	Has the meaning in s766D

Term	Meaning in this document
reg 7.6.04 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.6.04)
REP 167 (for example)	An ASIC report (in this example numbered 167)
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 <i>Short selling: Short position reporting</i> .
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)
Rules of Engagement	The ASIC document <i>Short selling: Short position reporting—FIX Rules of Engagement</i>
s1020AB (for example)	A section of the Corporations Act (in this example numbered 1020AB)
section 1020B products	Has the meaning given by s1020B(1). It includes securities, managed investment products, debentures stocks or bonds issued by a government, or products listed in reg 7.9.80B
securities lending arrangement	Has the meaning given by s1020AA
seller	Has the meaning given by s1020AB(1)
S&P/ASX 300	The index known as the S&P/ASX 300 compiled and calculated by Standard and Poor's, a division of The McGraw-Hill Companies, Inc.
trading day	Has the meaning given by reg 7.9.100(3)

## Related information

### Headnotes

short selling, covered short selling, naked short selling, naked short selling prohibition, naked short selling relief, presently exercisable and unconditional right to vest, prior purchase agreement, giving or writing of certain exchange traded options, unobtained financial products, bonds/debentures of a body corporate and government bonds, exercise of exchange traded options, selling before completing a recall of lent securities, hedging risk by market makers, market makers of exchange traded funds, sale of CHESSE Depository Interests prior to conversion, facilitation services, deferred purchase agreements, disclosure for covered short selling, disclosure for naked short selling, failure to report, disclosure of incorrect information.

### Class orders and pro formas

[CO 08/764] *Short selling—exercise of exchange traded options*

[CO 08/824] *Variation of Class Orders [CO 08/751] and [CO 08/764]*  
([CO 08/751] revoked 11 December 2009: see [CO 09/1063])

[CO 09/774] *Naked short selling relief for market makers*

[CO 09/1051] *Short selling relief: Exchange traded options, unobtained financial products and certain bonds and debentures*

[CO 09/1063] *Revocation of Class Order [CO 08/751] and variation of Class Order [CO 08/764]*

[CO 10/29] *Short selling: positional reporting*

[CO 10/135] *Relief for small short positions*

[CO 10/111] *Short selling: limited relief for deferred purchase agreement issuers from s1020B(2)*

[CO 10/464] *Variation of Class Order [CO 10/29]*

[CO 10/1037] *Variation of Class Order [CO 10/29]*

### Regulatory guides

RG 51 *Applications for relief*

RG 78 *Breach reporting by AFS licensees*

RG 108 *No-action letters*

## Information sheets

INFO 95 *Requirements for disclosure and reporting of short sales*

INFO 98 *Short selling: Short position reporting*

## Legislation

Corporations Act, s912D, 1020AA, 1020AB, 1020AC, 1020AD, 1020AE, 1020AF, 1020B, 1020F, 1311

Corporations Amendment Regulations 2009 (No. 1)

Corporations Amendment Regulations 2009 (No. 8)

*Corporations Amendment (Short Selling) Act 2008*

Corporations Regulations, regs 7.9.80B, 7.9.99, 7.9.100, 7.9.100A, 7.9.101, 7.9.102

## Cases

*Beconwood Securities Pty Ltd v ANZ Group Limited* (2008) 246 ALR 361; [2008] FCA 594

## Consultation papers and reports

CP 106 *Short selling to hedge risk from market making activities*

CP 145 *Australian equity market structure: Proposals*

REP 167 *Response to submissions on CP 106 Short selling to hedge risk from market making activities*

## Media and information releases

AD08-23 *No action position for owners selling from stock lending portfolios* (24 September 2008)

MR09-94 *ASIC lifts ban on covered short selling of financial securities* (25 May 2009)

10-42AD *Short position reporting* (5 March 2010)

11-04AD *ASIC standardises reporting of short positions* (11 January 2011)

## Other publications

*Short selling: Short position reporting—FIX Rules of Engagement*

## Appendix: Consolidated Division 15 of Part 7.9 of the Corporations Regulations 2001

This appendix sets out a consolidated version of Division 15 of Part 7.9 of the Corporations Regulations 2001, as notionally amended by [CO 10/29] as at 17 January 2011. The underlined text indicates the notional amendments made by the class order.

### Division 15 Disclosure in relation to short sales covered by securities lending arrangement of listed section 1020B products

#### 7.9.99 Interpretation

- (1) In this Division:

reporting day, in relation to a short position, means a day that a licensed market that has admitted to quotation the section 1020B product is open for trading.

#### *Meaning of short position*

- (2) In this Division, a **short position** is a position in relation to a section 1020B product in a listed entity where the quantity of the product which a person, acting in a particular capacity, has is less than the quantity of the product which the person, acting in the same capacity, has an obligation to deliver.

Note: A person may have more than one position in relation to the product on a particular day. For example, a person will have two positions in relation to the product if the person, acting in a particular capacity, has a position and the person, acting in a different capacity, also has a position.

- (3) In subregulation (2), the person has the product if:
- (a) the person is holding the product on the person's own behalf; or
  - (aa) the person holds the product on behalf of another person except where that other person has the sole discretion to decide whether the product will be sold; or
  - (b) another person is holding the product on the person's behalf but only where the person has the sole discretion to decide whether the product will be sold; or
  - (c) the person has entered into an agreement to buy the product but has not received it; or
  - (d) the person has vested title in the product in a borrower, or in an entity nominated by the borrower, under a securities lending arrangement.
- (4) In subregulation (2), the product which the person has an obligation to deliver is the product which the person:
- (a) has an obligation to deliver under a sale agreement where the product has not been delivered; or
  - (b) has a contingent or non-contingent obligation to vest title in a lender under a securities lending arrangement; or
  - (c) has any other non-contingent legal obligation to deliver.

(4A) In subregulation (2), the person has the product or has an obligation to deliver the product only if the person is acting in one or more of the following capacities:

- (a) the person is acting on their own behalf; or
- (b) the person is acting on behalf of another person except where that other person has the sole discretion to decide whether the product will be sold; or
- (c) another person is acting on behalf of the person but only where the person has the sole discretion to decide whether the product will be sold.

(4B) For the purposes of subregulation (2):

- (a) subject to paragraph (b), the capacities referred to in each of the paragraphs in subregulation (4A) are taken to be separate capacities;
- (b) where a person is acting on their own behalf under paragraph (4A)(a) and another person is acting on the person's behalf under paragraph (4A)(c), the person is taken to be acting in the same capacity; and
- (c) in paragraph (4A)(b), where a person is acting on behalf of a person under an arrangement and is acting on behalf of another person under a different arrangement, the person is taken to be acting in a different capacity for each arrangement.

#### *References to time*

- (5) A reference in this Division to a time is a reference to the legal time in Sydney, New South Wales.

### **7.9.100 Seller disclosure**

(1) For paragraph 1020AB(3)(a) of the Act, the particulars that a seller must give in relation to a sale of a listed section 1020B product where the seller has a presently exercisable and unconditional right to vest the product in a buyer under a securities lending arrangement are as follows:

- (a) the number of section 1020B products that the seller will vest in the buyer under the arrangement;
- (b) a description of the product;
- (c) the name of the entity that issued the product;
- (d) the seller's short position as at 7 pm three reporting days before the day the particulars must be given under subregulation (4).

(1A) A seller is not required to give the particulars mentioned in paragraph (1)(d) in relation to an agreement to sell entered into before 1 June 2010.

(1B) For the purposes of paragraph (1)(d), the short position in relation to a section 1020B product is to be calculated by reference to both of the following:

- (a) the section 1020B product for which the seller has a presently exercisable and unconditional right to vest in the buyer under a securities lending arrangement;
- (b) the section 1020B product for which the seller does not have a presently exercisable and unconditional right to vest in a buyer but who does not have to comply with subsection 1020B(2) of the Act in relation to the sale.

(2) For subparagraph 1020AB(3)(b)(i) of the Act, in relation to particulars mentioned in paragraphs (1)(a), (b), and (c):

- (a) the seller mentioned in subparagraph 1020AB(1)(a)(i) of the Act must give the particulars at the time of entering into an agreement to sell; and
- (b) the seller mentioned in subparagraph 1020AB(1)(a)(ii) of the Act must give the particulars on or before 9 am:
  - (i) if the sale occurs after the start of the trading day but before 7 pm—on the next trading day after entering into an agreement to sell; and
  - (ii) if the sale occurs after 7 pm but before the start of the next trading day—on the second trading day after entering into an agreement to sell.
- (3) A reference to *trading day* in subregulation (2) is to a trading day of the market where the sale is executed or reported.
- (4) For subparagraph 1020AB(3)(b)(i) of the Act, in relation to particulars mentioned in paragraph (1)(d), the seller must give the particulars:
  - (a) on or before 9 am on the third reporting day after entering into the agreement to sell that causes the short position to occur; and
  - (b) on or before 9 am on each subsequent reporting day as long as the seller has a short position.
- (5) Paragraph (4)(b) applies whether or not the particulars about the short position have changed from that given on the previous day.
- (6) For subparagraph 1020AB(3)(b)(ii) of the Act, in relation to particulars mentioned in paragraph (1)(d), the seller must give the particulars in the form required by ASIC.
- (7) For subparagraphs 1020AB(4)(a)(ii) and (b)(ii) of the Act, in relation to the particulars mentioned in paragraph (1)(d), the entity is ASIC.

#### **7.9.100A Seller disclosure of existing short position**

- (1) If a seller has a short position which arises from an agreement to sell, entered into before 1 June 2010, the seller must:
  - (a) give particulars about the short position as at 7 pm on 1 June 2010 on or before 9 am on 4 June 2010; and
  - (b) give particulars about the short position as at 7 pm on each subsequent day after 1 June 2010 on or before 9 am on the third reporting day after that subsequent day as long as the seller has a short position.
- (2) The particulars must be given to ASIC in the form required by ASIC.

#### **7.9.101 Licensee disclosure**

- (1) For paragraph 1020AC(2)(a) of the Act, the particulars that a financial services licensee must give in relation to information given to the licensee under section 1020AB of the Act in relation to a sale of a listed section 1020B product is the information specified in paragraphs 7.9.100(1)(a), (b) and (c).
- (2) For paragraph 1020AC(2)(b) of the Act:
  - (a) the time for disclosure of the information is on or before 9 am:
    - (i) if the information is given to the licensee after the start of the trading day but before 7 pm—on the next trading day after the licensee is given the information under section 1020AB of the Act; and

- (ii) if the information is given to the licensee after 7 pm but before the start of the next trading day—on the second trading day after the licensee is given the information under section 1020AB of the Act; and
- (b) the manner for disclosure of the information is by electronic transmission to the operator.
- (3) A reference to **trading day** in subregulation (2) is to a trading day of the market where the information is given.

### 7.9.102 Public disclosure of information

- (1) For paragraph 1020AD(2)(a) of the Act, the particulars which the operator of a licensed market must publicly disclose in relation to information given to the operator under section 1020AB or 1020AC of the Act in relation to a sale of a listed section 1020B product are the total number of each kind of section 1020B product that has been sold on a particular day and disclosed to the operator under section 1020AB or 1020AC of the Act.
- (1A) For paragraph 1020AD(2)(a) of the Act, the particulars which ASIC must publicly disclose in relation to information given to it under section 1020AB of the Act (or in accordance with a legislative instrument made under section 1020F of the Act) in relation to a sale of a listed section 1020B product are the total of all short positions in a product issued by a listed entity that have been disclosed to ASIC under section 1020AB of the Act (or in accordance with a legislative instrument made under section 1020F of the Act) on the previous reporting day.
- (1B) ASIC is not required to publicly disclose the particulars mentioned in subregulation (1A) in relation to information given to it before 21 June 2010.
- (2) For subparagraph 1020AD(2)(b)(i) of the Act, the time for the disclosure of the information mentioned in subregulation (1) is:
  - (a) if the information is given to the licensee after the start of the trading day but before 7 pm—on the next trading day after the day the agreements to sell were entered into; and
  - (b) if the information is given to the licensee after 7 pm but before the start of the next trading day—on the second trading day after the day the agreements to sell were entered into.
- (3) A reference to **trading day** in subregulation (2) is to a trading day of the market in relation to which the operator is responsible for disclosure of the information.
- (3A) For subparagraph 1020AD(2)(b)(i) of the Act, the time for the disclosure of the information mentioned in subregulation (1A) is the first reporting day after the day the information is received.
- (4) For subparagraph 1020AD(2)(b)(ii) of the Act, the manner of public disclosure of the information mentioned in subregulation (1) is by publication:
  - (a) on the operator's website; or
  - (b) in any other form that is easily accessible by the public.
- (5) For subparagraph 1020AD(2)(b)(ii) of the Act, the manner of public disclosure of the information mentioned in subregulation (1A) is by publication:
  - (a) on ASIC's website; or
  - (b) in any other form that is readily accessible by the public.