ASIC Corporations (Short Selling) Instrument 2018/745

About this compilation

Compilation No. 2

This is a compilation of *ASIC Corporations (Short Selling) Instrument 2018/745* as in force on 30 September 2021. It includes any commenced amendment affecting the legislative instrument to that date.

This compilation was prepared by the Australian Securities and Investments Commission.

The notes at the end of this compilation (the ***endnotes***) include information about amending instruments and the amendment history of each amended provision.

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Short Selling) Instrument 2018/745*.

3 Authority

This instrument is made under subsection 1020F(1) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

Regulations means the *Corporations Regulations 2001*.

section 1020B products has the meaning given by subsection 1020B(1) of the Act.

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Part 2—Short selling exemptions: market participants

5 Market makers: exchange traded funds and managed funds

Part 7.9 of the Act applies in relation to section 1020B products as if section 1020B of the Act were modified or varied by, after subsection (4), inserting the following subsections:

"*Market makers: exchange traded funds and managed funds*

(4A) Subsection (2) does not apply to an ETF market maker in relation to a sale of interests (the ***shorted product***) in, or securities (the ***shorted product***) of an exchange traded fund or a managed fund by the ETF market maker where both of the following are satisfied:

(a) the sale occurs on a day where the operator of the fund or the foreign company (as applicable) allows applications for and redemptions of interests or securities in the same class as the shorted product;

(b) the sale is in the course of making a market in the shorted product on a financial market operated by ASX Limited or Chi-X Australia Pty Ltd.

(4B) The ETF market maker must:

(a) before engaging in conduct in first reliance on subsection (4A), give a notice of reliance to ASIC;

(b) before making an offer to sell the shorted product, keep a record that states that the proposed sale will be a short sale, and preserve the record for 12 months after the day on which the last entry was made in the record;

(c) as soon as reasonably practicable after the sale of the shorted product but before the time for delivery of the shorted product, acquire or apply for a sufficient number of financial products in the same class as the shorted product to enable the ETF market maker to fulfil their delivery obligations under the sale;

(d) if the sales of shorted products by the market maker in reliance on subsection (4A) during a reporting period exceeds the settlement failure limit—give a settlement failure notice to ASIC within 28 days after the end of the reporting period;

(e) if the relevant market operator has given a notice of suspension or cancellation to the ETF market maker—

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give a copy of the notice to ASIC within 28 days of receiving the notice;

(f) if the operator of the scheme or the foreign company has given a notice of suspension or cancellation to the ETF market maker in relation to the exchange traded fund or managed fund—give a copy of the notice to ASIC within 28 days of receiving the notice;

(g) if the ETF market maker no longer seeks to rely on subsection (4A) in relation to an exchange traded fund or a managed fund or a class of exchange traded funds or managed funds—give a notice of cessation to ASIC.

(4C) Subsection (4A) does not apply to an ETF market maker in relation to an exchange traded fund or a managed fund if ASIC has given a notice of exclusion to the ETF market maker and has not withdrawn it.

(4D) In subsections (4A) to (4C):

(a) ***exchange traded fund*** (or ***ETF***) means a scheme or foreign company that satisfies all of the following:

(a) is:

(i) a registered scheme or a managed investment scheme that is not required to be registered under Chapter 5C; or

(ii) a foreign company which has the economic features of a managed investment scheme and is an open-ended investment company registered with the U.S. Securities and Exchange Commission under the *Investment Company Act 1940* of the United States of America;

(b) interests in the scheme or securities of the foreign company are in a class that are able to be traded on a financial market operated by ASX Limited or Chi-X Australia Pty Ltd;

(c) the operator of the scheme or the foreign company has the power and approval to issue interests or securities in that class on any day that those interests or securities are able to be traded on the relevant financial market;

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(d) the operator of the scheme or the foreign company allows applications for and redemptions of interests or securities in that class;

(e) the price or value of the financial product, index, currency, commodity or other thing that the scheme or foreign company invests in or tracks is continuously disclosed or can be immediately ascertained;

(f) the name of the scheme or foreign company does not contain the expression "managed fund" or "hedge fund".

ETF market maker, in relation to interests in, or securities of, an exchange traded fund or a managed fund that is able to be traded on a financial market operated by ASX Limited or Chi-X Australia Pty Ltd, means a person who:

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

(b) either has:

(i) entered into an agreement with the relevant market operator; or

(ii) demonstrated to the relevant market operator that it has been appointed by the operator of the scheme or foreign company;

to make a market for those interests or securities.

managed fund means a scheme:

(a) that satisfies paragraphs (a) to (e) of the definition of ***exchange traded fund***; and

(b) whose name contains the expression "managed fund" or "hedge fund".

notice of cessation, in relation to an ETF market maker, means a notice specifying that the ETF market maker no longer intends to rely on subsection (4A) in relation to an exchange traded fund or a managed fund or a class of exchange traded funds or managed funds.

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notice of exclusion, in relation to an ETF market maker, means a notice specifying that the ETF market maker is excluded from relying on subsection (4A) in relation to an exchange traded fund or a managed fund or a class of exchange traded funds or managed funds.

notice of reliance, in relation to an ETF market maker, means a notice that:

(a) states that the ETF market maker intends to rely on subsection (4A) to make short sales of interests in, or securities of, exchange traded funds or managed funds in the course of making a market in those interests or securities; and

(b) includes the name, and unique code assigned by the relevant market operator, for each exchange traded fund and managed fund to which the notice relates.

Note: A new notice of reliance must be given to ASIC if the ETF market maker wishes to rely on subsection (4A) in relation to an exchange traded fund or a managed fund that was not included in an earlier notice of reliance.

notice of suspension or cancellation, in relation to an ETF market maker, means a notice that has the effect of suspending or cancelling:

(a) the agreement with the relevant market operator; or

(b) the appointment by the operator of the scheme or the foreign company;

for the ETF market maker to make a market for interests in, or securities of, an exchange traded fund or a managed fund or class of exchange traded funds or managed funds.

reporting period means a 12-month period commencing on 1 April of any given year and ending on 31 March in the following year.

settlement failure limit, in relation to an ETF market maker, means 1% of the volume or value of the sales by the ETF market maker during a reporting period in reliance on subsection (4A) that have failed to settle within the time period required under the relevant operating rules of the relevant market.

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settlement failure notice, in relation to an ETF market maker, means a notice setting out the volume and value of the sales by the ETF market maker during a reporting period in reliance on subsection (4A) that have failed to settle within the time period required under the relevant operating rules of the relevant market.

(b) for the avoidance of doubt, paragraph (4B)(d) applies to an ETF market maker in relation to a reporting period even if the ETF market maker stopped relying on subsection (4A) during the reporting period because of a notice of cessation or a notice of exclusion.".

6 Market makers: Bona fide hedging

Part 7.9 of the Act applies in relation to section 1020B products as if section 1020B of the Act were modified or varied by, after subsection (4), inserting the following subsections:

"*Market makers: bona fide hedging*

(5A) Subsection (2) does not apply to a market maker in relation to a sale of a security (the ***shorted product***) or managed investment product (the ***shorted product***) by the market maker where all of the following apply:

(a) the market maker has issued, acquired or disposed of a financial product (the ***hedged product***), or has agreed to issue, acquire or dispose of a financial product (the ***hedged product***), in the course of making a market for the hedged product;

(b) the sale of the shorted product is a bona fide transaction to manage, avoid or limit the financial consequences of the dealing or proposed dealing mentioned in paragraph (a);

(c) at the time of the sale, the shorted product is:

(i) a constituent of the index known as the S&P/ASX 300; or

(ii) is an interest in the SPDR S&P/ASX 200 Fund (***STW***);

Note: The S&P/ASX 300 index is compiled and calculated by Standard and Poor's, a division of The McGraw-Hill Companies, Inc. Its constituents are subject to change from time to time. Details of the current constituents may be found via http://www.standardandpoors.com.au/.

(5B) The market maker must only engage in the conduct covered by and in reliance on subsection (5A) if, at the time of the sale, the market maker believes on reasonable grounds that either:

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(a) for any shorted product—before the time for delivery of the shorted product, a securities lending arrangement in relation to financial products in the same class as the shorted product can be put in place so that the shorted product can be unconditionally vested in a buyer by the time for delivery; or

(b) for a shorted product that is an interest in STW—before the time for delivery of the interests in STW, the market maker can acquire or apply for a sufficient number of interests in STW so that the shorted product can be unconditionally vested in a buyer by the time for delivery.

(5C) The market maker must do at least one of the following things by the end of the day (***sale day***) on which the market maker makes the sale of the shorted product so that the shorted product can be unconditionally vested in a buyer by the time for delivery:

(a) for any shorted product—have acquired a financial product in the same class as the shorted product; or

(b) for any shorted product—have entered into a contract to buy a financial product in the same class as the shorted product where the market maker has a right to have that financial product vested in the market maker that is conditional only upon all or any of the following:

(A) payment of the consideration in respect of the purchase;

(B) the receipt by the market maker of a proper instrument of transfer in respect of the product;

(C) the receipt by the market maker of the documents that are, or are documents of title to, the product; or

(c) for any shorted product—have entered into a securities lending arrangement in relation to financial products in the same class as the shorted products; or

(d) for a shorted product that is an interest in STW—have acquired or applied for interests in STW.

(5D) A market maker that fails to comply with subsection (5C) must notify ASIC in writing of the failure by no later than 9 am in Sydney, New South Wales on the next business day after the sale day.

(5E) The market maker must give to ASIC in the form required by ASIC particulars of the person's short position in relation to the shorted product as at:

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(a) where the nominated time is, or corresponds to a time that is, on or before 11:59 pm in Sydney, New South Wales—the nominated time 3 reporting days before the day the particulars must be given under subsection (5F); and

(b) otherwise—the nominated time 2 reporting days before the day the particulars must be given under subsection (5F); and

(5F) The market maker must give the particulars about the short position:

(a) where the nominated time is, or corresponds to a time that is, on or before 11:59 pm in Sydney, New South Wales—on or before 9 am in Sydney, New South Wales on the third reporting day after entering into the agreement to sell that causes the short position to occur;

(b) otherwise—on or before 9am in Sydney, New South Wales on the second reporting day after entering into the agreement to sell that causes the short position to occur; and

(c) in either case—on or before 9 am in Sydney, New South Wales on each subsequent reporting day as long as the market maker has a short position.

(5G) Paragraph (5F)(c) applies whether or not the particulars about the short position have changed from that given on the previous day.

(5H) The market maker does not have to comply with subsection (5G) in relation to that short position if the market maker:

(a) is required by subsection 1020AB(3) to give particulars of the market maker's short position on a day in relation to a security or product that is in the same class as the shorted product; or

(b) has a short position in relation to the shorted product on a day that does not exceed the value limit and the volume limit on the day.

(5J) In subsections (5A) to (5H):

market maker means a person who holds an Australian financial services licence that covers making a market in a financial product or is exempt from the requirement to hold such a licence for providing that financial service.".

7 Exchange traded options: sales effected by exercising options

Part 7.9 of the Act applies in relation to section 1020B products as if section 1020B of the Act were modified or varied by, after subsection (4), inserting the following subsections:

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"*Exchange traded options: sales effected by exercising options*

(6A) Subsection (2) does not apply to a person (***option holder***) that holds an option registered with ASX Clear Pty Limited in relation to a sale of a security (the ***shorted product***) or managed investment product (the ***shorted product***) where the transaction effecting the sale of the shorted product is the result of the exercise of the option by the option holder.

(6B) The option holder must give to ASIC in the form required by ASIC particulars of the holder's short position in relation to the shorted product as at:

(a) where the nominated time is, or corresponds to a time that is, on or before 11:59 pm in Sydney, New South Wales—the nominated time 3 reporting days before the day the particulars must be given under subsection (6C); and

(b) otherwise—the nominated time 2 reporting days before the day the particulars must be given under subsection (6C).

(6C) The option holder must give the particulars about the short position:

(a) where the nominated time is, or corresponds to a time that is, on or before 11:59 pm in Sydney, New South Wales—on or before 9 am in Sydney, New South Wales on the third reporting day after the exercise of the option that causes the short position to occur;

(b) otherwise—on or before 9 am in Sydney, New South Wales on the second reporting day after the exercise of the option that causes the short position to occur; and

(c) in either case—on or before 9 am in Sydney, New South Wales on each subsequent reporting day as long as the holder has a short position.

(6D) Paragraph (6C)(c) applies whether or not the particulars about the short position have changed from that given on the previous day.

(6E) The option holder does not have to comply with subsection (6B) in relation to that short position if the holder:

(a) is required by subsection 1020AB(3) to give particulars of the holder's short position on a day in relation to a security or product that is in the same class as the shorted product; or

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(b) has a short position in relation to the shorted product on a day that does not exceed the value limit and the volume limit on the day.".

8 Exchange traded options: other scenarios

(1) A person does not have to comply with subsection 1020B(2) of the Act in relation to a sale of section 1020B products that is done by issuing or selling an exchange traded option on a financial market.

(2) A person does not have to comply with subsection 1020B(2) of the Act in relation to a sale of unobtained section 1020B products if the person (or, where the person is selling as an agent, the principal) is, at the time of the sale, able to obtain at least the number of section 1020B products of the same class as the unobtained section 1020B products by exercising exchange traded options.

(3) For the purposes of subsection (2):

(a) the number of section 1020B products of a class that a person is able to obtain at the time of a sale is to be calculated according to the following formula:

FPIO – FPSO – PS

where:

FPIO (Financial Products Immediately Obtainable) means the number of section 1020B products of the class that, at the time of the sale, the person is able to obtain by exercising exchange traded options at a price:

(a) that does not exceed the sale price payable to the person under the sale; or

(b) that exceeds the sale price by an amount that is no more than an amount deposited by the person with:

(i) ASX Clear Pty Limited; or

(ii) ASX Clear (Futures) Pty Limited;

before and in relation to the sale;

FPSO (Financial Products Subject to Options) means the number of section 102B products of the class sold over which the person has issued exchange traded options which would oblige the person to deliver the products if the options were exercised and that, at the time of sale, have not expired or been exercised;

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PS (unobtained financial products Previously Sold) means the number of unobtained section 1020B products previously sold in sales that have not been completed at the time of the sale; and

(b) the price payable by the person for obtaining section 1020B products by exercising exchange traded options is to be calculated by reference first to the option with the lowest exercise price, then to the option with the second lowest exercise price, and so on in ascending order of price until the necessary number of options would have been exercised.

(4) In this section:

exchange traded option means an option registered with:

(a) ASX Clear Pty Limited; or

(b) ASX Clear (Futures) Pty Limited.

unobtained section 1020B products means section 1020B products of a class:

(a) that a person has agreed to sell; and

(b) in relation to which the person (or where the person is selling as an agent, the principal) does not, at the time of the sale, have a presently exercisable and unconditional right to vest in a buyer.

9 Debentures: Clearing and settlement participants

(1) A person that is entitled to use the clearing and settlement facilities of a CS facility licensee or the Reserve Bank Information and Transfer System does not have to comply with subsection 1020B(2) of the Act in relation to a sale of eligible debentures where the person:

(a) sells the debentures as principal; and

(b) believes on reasonable grounds that arrangements can be put in place before the time for delivery of the debentures that will enable the debentures to be unconditionally vested in a buyer by the time for delivery.

(2) In this section:

eligible debentures mean:

(a) bonds issued by a government; or

(b) debentures or bonds of a body corporate if the value of debentures or bonds on issue with the same maturity and coupon terms exceeds $100,000,000.

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10 Deferred purchase agreements

(1) A person who agrees to sell section 1020B products under a deferred purchase agreement does not have to comply with subsection 1020B(2) of the Act in relation to the sale.

(2) In this section:

deferred purchase agreement means an agreement to sell securities (***delivery products***) or managed investment products (***delivery products***) that are able to be traded on the financial market operated by ASX Limited, under which:

(a) a person agrees to deliver, at least 12 months after entering into the agreement, delivery products at a specified time (***maturity***) in the future to another person; and

(b) the number and value of the delivery products to be delivered at maturity is ultimately determined or derived from the value or amount of one or more of the following:

(i) other financial products (other than a derivative that relates to the delivery products);

(ii) an asset;

(iii) a rate (including an interest rate or exchange rate);

(iv) an index;

(v) a commodity; and

(c) the person who agrees to deliver the delivery products at maturity has the right, in circumstances set out in the agreement, to instead deliver other securities or managed investment products where the securities or products are, at maturity, in a class of financial products that is a constituent of the index known as the S&P/ASX 200.

Note: This index is compiled and calculated by Standard and Poor's, a division of The McGraw-Hill Companies, Inc. Its constituents are subject to change from time to time. Details of the current constituents may be found via http://www.standardandpoors.com.au/.

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Part 3—Short selling exemptions: capital markets

11 Deferred settlement trading arrangements on licensed markets

Part 7.9 of the Act applies in relation to section 1020B products as if section 1020B of the Act were modified or varied by, after subsection (4), inserting the following subsections:

"*Public offers—conditional deferred settlement trading arrangements*

(7A) Subsections (7B) to (7F) apply to a sale of section 1020B products on a licensed market, during a deferred settlement trading period, in relation to a public offer.

(7B) A person must only, in this jurisdiction, sell section 1020B products to a buyer on a licensed market during a deferred settlement trading period if, at the time of the sale:

(a) the person has or, if the person is selling on behalf of another person, that other person has; or

(b) the person believes on reasonable grounds that the person has or, if the person is selling on behalf of another person, that other person has;

an entitlement to be issued with or sold the products under or in connection with a public offer.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(7C) A person has an entitlement to be issued with section 1020B products under or in connection with a public offer if:

(a) before the commencement of the deferred settlement trading period:

(i) the products are offered for issue under a prospectus, pathfinder prospectus or Product Disclosure Statement (each the ***offer document***) in connection with either:

(A) the proposed listing of a listing body or listing scheme; or

(B) the proposed admission to quotation of the products in relation to a listed corporation; and

(ii) the person made an application, including payment of application monies, to acquire the products from the listing body (or the responsible entity of the

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listing scheme) or the listed corporation, under or in connection with the offer document; and

(b) the products are to be issued to applicants under the offer document subject only to all or any of the following:

(i) completion of any agreement between the listing body (or the responsible entity of the listing scheme) and underwriters or other participants involved in the proposed listing in accordance with its terms, as disclosed in the offer document;

(ii) completion of any corporate restructure, or corporate transaction (including acquisitions or divestments), by the listing body (or the responsible entity of the listing scheme) or a related body corporate, as disclosed in the offer document;

(iii) the decision of the listing body (or responsible entity of the listing scheme) or listed corporation to issue the products to applicants under the offer document.

(7D) A person has an entitlement to be sold section 1020B products under or in connection with a public offer if:

(a) before the commencement of the deferred settlement trading period:

(i) the products are offered for sale by a person (the ***sale offeror***) under a prospectus, pathfinder prospectus or Product Disclosure Statement (each the ***offer document***) in connection with the proposed listing of a listing body or listing scheme; and

(ii) the listing body (or the responsible entity of the listing scheme) makes an offer of section 1020B products for issue under the offer document that are in the same class as the products offered by the sale offeror; and

(iii) the person made an application, including payment of application monies, to acquire the products from the sale offeror under or in connection with the offer document; and

(b) the products are to be sold by the sale offeror to applicants under the offer document subject only to all or any of the following as applicable:

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(i) completion of any agreement between the listing body (or the responsible entity of the listing scheme) and underwriters or other participants involved in the proposed listing in accordance with its terms, as disclosed in the offer document;

(ii) completion of any corporate restructure, or corporate transaction (including acquisitions or divestments), by the listing body (or the responsible entity of the listing scheme) or a related body corporate, as disclosed in the offer document;

(iii) completion of the transfer of the products to the sale offeror, as disclosed in the offer document;

(iv) the sale offeror's decision to transfer the products to applicants under the offer document;

(v) all or any of the matters specified in paragraphs (4)(a), (b) or (c); or

(7E) Subsections (2) and (7B) do not apply in relation to a sale of section 1020B products on a licensed market during a deferred settlement trading period:

(a) by a person who, during the deferred settlement trading period but before the time of the sale, has entered into a contract on the market to buy the products; or

(b) by a person selling on behalf of the person mentioned in paragraph (a) in the circumstances covered by that paragraph.

(7F) For the purposes of subsections (7A) to (7E):

(a) nothing in those subsections limits the generality of anything else in any of them;

(b) ***deferred settlement trading arrangements***, in relation to a public offer of section 1020B products, means arrangements determined by ASX Limited in accordance with the operating rules of the financial market operated by it, under which the trading of section 1020B products in relation to the public offer may be conditional and the settlement of sales of those products is deferred according to a timetable published by ASX Limited.

deferred settlement trading period, in relation to a public offer, means a period determined by ASX Limited in accordance with the operating rules of the financial market operated by it, during which deferred settlement trading arrangements apply in relation to the public offer.

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listed corporation means a body corporate that is included in the official list of ASX Limited.

listing body means a body corporate that is seeking inclusion in the official list of ASX Limited.

listing scheme means a registered scheme that is seeking inclusion in the official list of ASX Limited.

pathfinder prospectus means a draft prospectus sent to a person in the circumstances covered by subsection 734(9).

public offer means:

(a) a proposed issue or sale of section 1020B products in relation to a proposed listing of a listing body or listing scheme on the financial market operated by ASX Limited; or

(b) a proposed issue of section 1020B products in relation to a proposed admission to quotation of the products in relation to a listed corporation.

Corporate actions—deferred settlement trading arrangements

(7G) Subsections (7H) to (7J) apply to a sale of section 1020B products on a licensed market, during a deferred settlement trading period, in relation to a corporate action.

(7H) A person must only, in this jurisdiction, sell section 1020B products to a buyer on a licensed market during a deferred settlement trading period if, at the time of the sale:

(a) the person is or, if the person is selling on behalf of another person, that other person is;

(b) the person believes on reasonable grounds that the person is or, if the person is selling on behalf of another person, that other person is:

in a class of persons who, because such persons hold financial products of a particular class, have an entitlement to be issued with the section 1020B products under or connection with the corporate action.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(7I) Subsections (2) and (7H) do not apply in relation to a sale of section 1020B products on a licensed market during a deferred settlement trading period:

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(a) by a person who, during the deferred settlement trading period but before the time of the sale, has entered into a contract on the market to buy the products; or

(b) by a person selling on behalf of the person mentioned in paragraph (a) in the circumstances covered by that paragraph.

(7J) For the purposes of subsections (7G) to (7I):

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

(a) a compromise or arrangement under Part 5.1;

(b) a rights issue;

(c) a dividend or distribution reinvestment plan;

(d) a bonus issue;

(e) a conversion of convertible notes or convertible securities;

(f) a conversion of shares under section 254H.

deferred settlement trading arrangements, in relation to a corporate action, means arrangements determined by ASX Limited in accordance with the operating rules of the financial market operated by it, under which the settlement of sales of section 1020B products in relation to the corporate action is deferred according to a timetable published by ASX Limited.

deferred settlement trading period, in relation to a corporate action, means a period determined by ASX Limited in accordance with the operating rules of the financial market operated by it, during which deferred settlement trading arrangements apply in relation to the corporate action.

12 Initial public offers: Sale offers through special purpose vehicles

(1) A body (the ***special purpose body***) does not have to comply with subsection 1020B(2) of the Act in relation to a sale of shares in a body (the ***listing body***) by the special purpose body where all of the following are satisfied:

(a) the sale of the shares is made under a prospectus or pathfinder prospectus or both in connection with the proposed listing of the listing body on the financial market operated by ASX Limited;

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(b) at the time of the sale, an agreement exists between the special purpose body and a person (the ***selling shareholder***) who has a presently exercisable and unconditional right to vest the shares in a buyer;

(c) under the agreement the selling shareholder agrees to sell the shares to the special purpose body (or its nominee) and the special purpose body agrees to purchase (or agrees to procure its nominee to purchase) the shares from the selling shareholder, on the condition that the listing body is included in the official list of the financial market and the shares are admitted to quotation on that market;

(d) at the time of the sale, the special purpose body is not selling the shares on behalf of the selling shareholder;

(e) the listing body makes offers to issue shares which are in the same class as the shares offered for sale by the special purpose body, under either:

(i) if the special purpose body is selling the shares under a prospectus (whether or not it is also selling the shares under a pathfinder prospectus)—the prospectus; or

(ii) if the special purpose body is selling the shares under a pathfinder prospectus (and not also under a prospectus)—a prospectus.

(2) In subsection (1):

pathfinder prospectus means a draft prospectus sent to a person in the circumstances covered by subsection 734(9) of the Act.

Part 4—Exemptions from short selling reporting

13 Market makers: exchange traded funds and managed funds

(1) An ETF market maker does not have to comply with subsection 1020AB(3) of the Act to the extent it requires the ETF market maker to give the particulars specified in paragraphs 7.9.100(1)(a) to (c) of the Regulations.

(2) Subsection (1) applies in relation to a sale of interests in, or securities of, an exchange traded fund or a managed fund by the ETF market maker in the course of making a market in those interests or securities on a financial market operated by ASX Limited or Chi-X Australia Pty Ltd.

(3) In subsections (1) and (2):

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exchange traded fund (or ***ETF***) has the meaning given by subsection 1020B(4D) of the Act.

ETF market maker has the meaning given by subsection 1020B(4D) of the Act.

managed fund has the meaning given by subsection 1020B(4D) of the Act.

Note: Section 5 of this instrument notionally inserts subsection 1020B(4D) of the Act.

14 Market makers: bona fide hedging

(1) A market maker does not have to comply with subsection 1020AB(3) of the Act to the extent it requires the market maker to give the particulars specified in paragraphs 7.9.100(1)(a) to (c) of the Regulations.

(2) Subsection (1) applies in relation to a sale of a security (the ***shorted product***) or a managed investment product (the ***shorted product***) by the market maker where both of the following are satisfied:

(a) the market maker has issued, acquired or disposed of a financial product (the ***hedged product***), or has agreed to issue, acquire or dispose of a financial product (the ***hedged product***), in the course of making a market for the hedged product; and

(b) the sale of the shorted product is a bona fide transaction to manage, avoid or limit the financial consequences of the dealing or proposed dealing mentioned in paragraph (a).

(3) In this section:

market maker has the meaning given by subsection 1020B(5J).

Note: Section 6 of this instrument notionally inserts subsection 1020B(5J) of the Act.

15 Low volume and low value short positions

(1) A seller with a short position in relation to a security or managed investment product that does not exceed the value limit and the volume limit on a day does not have to comply with the following provisions in relation to the short position:

(a) section 1020AB of the Act to the extent that it requires the seller to give the particulars specified in paragraph 7.9.100(1)(d) of the Regulations; or

(b) regulation 7.9.100A of the Regulations.

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Note: But for this section, particulars of a short position to which these regulations apply would need to be given to ASIC.

(2) In this section:

value limit has the meaning given by subsection 1020B(1) of the Act.

volume limit has the meaning given by subsection 1020B(1) of the Act.

Note: Section 16 of this instrument notionally inserts definitions of ***value limit*** and ***volume limit*** into subsection 1020B(1) of the Act.

Part 5—Definitional and other changes

16 Definitional changes

Part 7.9 of the Act applies in relation to section 1020B products as if subsection 1020B(1) were modified or varied by inserting the following definitions in the appropriate alphabetical order:

global end calendar time, in relation to a person's short position, means 11:59 pm on the trading day in the location of the person (or another person within the same corporate group) to whom the transaction giving rise to the short position is accounted for in the balance sheet of the person (or the other person).

nominated time, in relation to a person's short position, means:

(a) if an opt-out nomination is in force—the global end calendar time;

(b) otherwise—7 pm in Sydney, New South Wales.

opt-out nomination:

(a) an opt-out nomination, in relation to a nominated time for a person's short position, is in force from a specified date if both of the following apply:

(i) the person has given a written notice to ASIC specifying that the person will be using the global end calendar time from the specified date, provided the specified date is at least 30 days after the date of giving the notice;

(ii) ASIC has not notified the person within 30 days after the date of giving the notice that ASIC objects;

(b) an opt-out nomination, in relation to a nominated time for a person's short position, ceases to be in force from a specified date if both of the following apply:

(i) the person has given a written notice to ASIC specifying that the person will not be using the global end calendar time

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from the specified date, provided the specified date is at least 30 days after the date of giving the notice;

(ii) ASIC has not notified the person within 30 days after the date of giving the notice that ASIC objects.

Note: A person in relation to whom an opt-out nomination has ceased to be in force from a specified date under paragraph (b) may give a further written notice under paragraph (a).

reporting day has the meaning given by regulations made for the purposes of Division 5B.

securities lending arrangement has the meaning given by subsection 1020AA(1).

short position has the meaning given by regulations made for the purposes of Division 5B.

value limit: the ***value limit***, in relation to a person for a security or managed investment product that is able to be traded on a financial market, is not exceeded on a day if:

$$A \times B$$

does not exceed $100,000 where:

A = the person's short position in relation to the security or product as at the nominated time.

B = either:

(a) the last sale price for the security or product on the financial market on the day (or, if there is no such price on that day, the last sale price on the financial market); or

(b) the price determined and published by the operator of the market after the close of trading for the day as the value of the security or product on the day.

volume limit: the ***volume limit***, in relation to a person for a security or managed investment product that is able to be traded on a financial market, is not exceeded on a day if:

$$\frac{A}{B} \times 100$$

does not exceed 0.01 where:

A = the person's short position in relation to the security or product as at the nominated time.

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B = the total quantity of securities or products in the same class of securities or products on the day.

17 Short position reporting and short sale transaction reporting

(1) Part 7.9 of the Act applies in relation to section 1020B products as if Division 15 of Part 7.9 of the Regulations were modified or varied as follows:

(a) in subregulation 7.9.99(1) omit the definition of ***reporting day***, substitute:

"***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.";

(b) omit subregulation 7.9.99(2) (excluding the heading), substitute:

"(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.";

(c) omit paragraph 7.9.99(3)(b), substitute:

"(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";

(d) omit paragraph 7.9.99(4)(b), substitute:

"(b) has a contingent or non-contingent obligation to vest title in a lender under a securities lending arrangement; or";

(e) after subregulation 7.9.99(4) insert:

"(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

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(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.";

(f) omit subregulation 7.9.99(5) (excluding the heading), substitute:

"(5) Unless the contrary intention appears, a reference in this Division to a time is a reference to the legal time in Sydney, New South Wales.";

(g) omit paragraph 7.9.100(1)(d), substitute:

"(d) the seller's short position as at:

(i) where the nominated time is, or corresponds to a time that is, on or before 11:59 pm in Sydney, New South Wales—the nominated time 3 reporting days before the day the particulars must be given under subregulation (4); and

(ii) otherwise—the nominated time 2 reporting days before the day the particulars must be given under subregulation (4).";

(h) after subregulation 7.9.100(1) insert:

"(1A) 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:

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(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.";

(i) in subregulation 7.9.102(1A) after "under section 1020AB of the Act" (twice occurring) insert "(or in accordance with a legislative instrument made under section 1020F of the Act)";

(2) Part 7.9 of the Act applies in relation to section 1020B products as if section 1020AA were modified or varied by, after subsection (4), inserting:

"(5) For the purposes of applying this Division to a sale of a section 1020B product that is a CGS depository interest, a reference to a listed entity or a listed product is to be read as if there were a listed entity to which that product relates.";

(3) Part 7.9 of the Act applies in relation to section 1020B products as if section 1020AB were modified or varied by omitting paragraph (3)(a) and substituting:

"(a) give the entity mentioned in subsection (4) particulars specified in the regulations in relation to:

(i) the circumstances mentioned in paragraphs (1)(a), (b) and (c); or

(ii) the sale of a 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) in relation to the sale; and".

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Endnotes

Endnote 1—Instrument history

Instrument number	Date of FRL registration	Date of commencement	Application, saving or transitional provisions
2018/745	27/9/2018 (*see* F2018L01356)	28/9/2018	
2019/784	17/9/2019 (*see* F2019L01206)	18/9/2019	-
2021/754	29/9/2021 (*see* F2021L01334)	30/9/2021	-

Endnote 2—Amendment history

ad. = added or inserted am. = amended LA = *Legislation Act 2003* rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Section 2	rep. s48D LA
Section 5 (notional subsection 1020B(4A)(b))	rs. 2019/784
Subsection 13(2)	rs. 2019/784
Part 6	rep. 2021/754

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