

Mr Jason McNamara
Executive Director
Office of Best Practice Regulation
Department of the Prime Minister and Cabinet
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BARTON ACT 2600

Email: helpdesk@obpr.gov.au

22 July 2014

Dear Mr McNamara

Regulation Impact Statement –final assessment second pass

I am writing in relation to the attached Regulation Impact Statement (RIS) prepared for the proposal to repeal the ASIC market integrity rule requiring a market participant of the ASX, Chi-X or APX markets to specify the quantity of a sell order that is “short” at the time the sale order is placed or at the time the trade is reported (Short Sale Tagging Obligation).

The proposal to repeal the ASIC market integrity rule removes a regulatory obligation. Indirect regulatory burdens to business, community organisations and/or individuals arising from the proposal have been quantified and the cost savings of the repeal have been identified and quantified using the Regulatory Burden Measurement framework. These have been agreed with your office.

This proposal is urgent as ASIC seeks to have the repeal in place before the Short Sale Tagging Obligation commences on **28 July 2014**. A repeal of the Short Sale Tagging Obligation must be effected by legislative instrument which must be registered on the Federal Register of Legislative Instruments prior to 28 July 2014. Failure to meet those deadlines will mean that some of the benefits of the repeal to our regulatory population will be impaired.

I am satisfied that, to the best of ASIC’s ability in the available time, ASIC has ensured that the RIS addresses the concerns raised in your letter of 17 July 2014. I indicate how each of OBPR’s concerns have been addressed – the references to OBPR comments are those in Attachment A of your letter.

OBPR comment 1

The RIS is now structured to explicitly address the seven RIS questions and is consistent with the *Australian Government Guide Regulation*.

OBPR comment 2

The problem has been re-framed as the “identification of the most appropriate mechanism for short sale transaction reporting” (see paragraph 30 of the RIS). Accordingly, the benefits of each mechanism (including the Short Sale Tagging Obligation) are canvassed.

OBPR comment 3

The RIS now discusses the original problems in the market that resulted in the introduction of the Short Sale Obligation. It includes, in paragraph 19, references to the issues identified in the Regulation Impact Statement for the introduction of short sale tagging (Previous RIS) and explains how the Short Sale Tagging Obligation was intended to address them by:

- (a) improving the accuracy of short sale transaction reporting including by addressing the difficulties of reporting algorithmic trading;
- (b) enabling more efficient collection of short selling information from sellers and market participants; and
- (c) providing better, more timely data for ASIC and in particular data on a transactional (not aggregated) basis.

OBPR comment 4

The RIS now provides an assessment of the extent to which the issues identified in the Previous RIS still remain (see paragraphs 32 to 41 of the RIS). In particular, the RIS explains why each of these problems is now less acute than it was at the time of the introduction of the Short Sale Tagging Obligation.

OBPR comment 5

The RIS now provides an expanded analysis of the practical difficulties with the implementation of the Short Sale Tagging Obligation (paragraph 42-49). The analysis includes relevant discussion of the original problems although, as noted above, these problems are now less acute.

As best as it is able in the time available, ASIC has addressed the detailed points set out in paragraphs 5(a) to (d) of your letter.

ASIC has been unable to provide a precise number of participants that operate a business model including a central stock loan department as sought in comment 5(a) of your letter. However, we can state that it would include the majority of large participants.

ASIC has not been able to provide cost estimates for the resolution of the implementation issues sought in paragraph 5(b) of your letter. I note however that the consequences of these issues are not limited to cost. As noted in paragraphs 47-48 of the RIS, they include effects on the efficiency of trading and the efficiency of reporting. In some cases, mechanisms to resolve these issues have not been identified.

ASIC has identified the remaining benefits of the Short Sale Tagging Obligation as requested in comment 5(c) of your letter but has also explained why these benefits are now of less value (see for instance paragraph 105 of the RIS).

In order to address comment 5(d) in your letter, ASIC has expanded its explanation of the risk that the implementation issues pose to the accuracy of the reported data (see paragraph 46 of the RIS).

OBPR comment 6

Paragraphs 26 to 31 of the RIS provide a detailed explanation of the policy rationale for disclosure of information about short selling generally and for the Short Sale Tagging Obligation in particular.

OBPR comment 7

The answer to RIS Question 4: *What is the likely net benefit of each option* expressly addresses the benefits as well as the risks and costs of each option from the viewpoint of:

- market participants;
- users of the information;
- ASIC; and
- (where relevant) other stakeholders, specifically market operators.

A “Conclusion” of the discussion of each option balances the respective benefits and costs or risks.

In response to the detailed questions in paragraphs 7(a) to (c) of your letter:

As noted above ASIC has identified the remaining benefits of the Short Sale Tagging Obligation as requested in comment 7(a) of your letter. These are primarily benefits to ASIC. The RIS also explains why these benefits are now of less value to ASIC (see paragraph 105 of the RIS).

The answer to RIS Question 4 provides all available information as to the magnitude of the costs or benefits of each option as requested in comment 7(b) of your letter, including the extent to which that has changed since the publication of the Previous RIS.

ASIC has not identified any distributional impact between small and large entities as suggested in paragraph 7(c) of your letter but has separately addressed the interests of each stakeholder group listed above.

OBPR comment 8

This comment assumes that the incremental costs of the implementation issues raised by participants were the primary reason for ASIC’s change of approach to this problem. In fact, the primary reasons are:

- the greatly decreased likelihood that the expected benefits of the Short Sale Tagging Obligation will materialise and the increased risk that the Short Sale Tagging Obligation will be counter-productive. These issues are described and analysed in paragraphs 42-49 of the RIS.
- the reduced importance of some of the expected benefits of the Short Sale Tagging Obligation. This is explained and analysed in 32 to 41 of the RIS.

The result of these factors is that ASIC no longer considers that the likely benefits of the Short Sale Tagging Obligation will outweigh the costs and risks it poses. This analysis is contained in ASIC's response to RIS Question 6: *What is the best option from those ASIC has considered.*

OBPR comment 9

In this comment, OBPR asks if there are other ways of implementing the Short Sale Tagging Obligation that deliver similar benefits to those which were originally envisaged without the costs identified in the RIS. ASIC considers that there are two such options already identified in the RIS. These are:

- Option 2 – *Class Waiver* described in paragraphs 57-58 of the RIS; and
- Option 3 – *Amend the Short Sale Tagging Obligation* described in paragraphs 59 of the RIS.

Both these options constituted attempts to preserve some of the benefits of the Short Sale Tagging Obligation while effectively resolving the cost and risks. Both of these options would lead to the tagging of some, but not all, trades. Analyses of options 2 and 3 are contained in paragraphs 76 to 93 and 94 to 102 respectively.

OBPR comment 10

The RIS confirms that EOD Reporting would still continue under ASIC's preferred option (see paragraph 55 of the RIS), along with short position reporting. The RIS sets out the objectives of the short sale disclosure regime and notes that the accuracy of the published data is critical to the attainment of these objectives (see paragraphs 27 to 28 of the RIS). The RIS explains the risks that the Short Sale Tagging Obligation currently poses to the accuracy of that data (see paragraph 33 of the RIS).

The RIS describes the use that ASIC makes, and could potentially make, of available short sale information along with the other resources now available to ASIC (paragraphs 38 to 40).

The RIS does not include a comprehensive survey of the short sale disclosure regime along with an identification of all regulatory gaps. Such a survey would require considerable research, analysis and consultation and has not been possible in the time available to finalise this urgent proposal.

OBPR comment 11

The RIS confirms that EOD Reporting would still continue under ASIC's preferred option (see paragraph 55 of the RIS).

The RIS provides cost estimates for the Short Sale Tagging Obligation but not for End of Day Reporting. Estimates for End of Day Reporting are not available in time for the finalisation of this RIS. However, ASIC has made reference to the concerns expressed by market participants that the Short Sale Tagging Obligation will be more burdensome than End of Day Reporting which is an ongoing obligation (see for instance paragraph 35 of the RIS).

OBPR comment 12

As requested in this comment and discussed with Daniel Wild of OBPR, ASIC has described, in broad terms, the tasks and activities that would be required to meet the Short Sale Tagging Obligation (see paragraph 63 of the RIS).

OBPR comment 13

An explanation of why the costs incurred by participants to date have been contained is included in paragraph 70 of the RIS. This explains that some participants have delayed expenditure until the conclusion of ongoing discussions with ASIC about the complexities of categorising some trades in real time. In many cases, ASIC understands that changes to participant systems could not be finalised until these matters were addressed.

OBPR comment 14

This is attached.

OBPR comment 15

The RIS now provides a more detailed account of the consultation that has been undertaken to date, including consultation with respect to the introduction of the Short Sale Tagging Obligation (see Part C of the RIS).

OBPR comment 16

Mixed feedback has been received at nearly all stages of consultation, other than consultation for the proposed repeal of the Short Sale Tagging Obligation.

The RIS now confirms that that implementation difficulties were raised by at least some participants since the early stages of consultation. However the precise nature, magnitude and complexity of these difficulties has become clearer since participants commenced their preparations for the Short Sale Tagging Obligation (see paragraph 119 of the RIS).

OBPR comment 17

The RIS confirms that ASIC has discussed with stakeholders and publicly announced its intention to seek the Minister's consent to repeal the Short Sale Tagging Obligation and received no representations arguing against the repeal (see paragraphs 123 to 124 of the RIS).

OBPR comment 18

The RIS's conclusion uses the framework adopted in the body of the document and, in particular, addresses (in paragraphs 127 to 129) the mechanisms set out in the answer to RIS

Question 1: *What is the problem ASIC is trying to solve* for assessing alternative mechanisms.

The RIS discusses any costs associated with the preferred option of repealing the Short Sale Tagging Obligation (see for example paragraphs 130-131).

I am satisfied that the RIS now meets best practice consistent with the *Australian Government Guide to Regulation*.

I submit the RIS to the Office of Best Practice Regulation for formal final assessment.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Greg Yanco', written over a faint horizontal line.

Greg Yanco
Senior Executive Leader – Market and Participant Supervision