



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### *ASIC Corporations (Amendment) Instrument 2021/754*

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2021/754 (LI 2021/754)*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (*ASIC*).

#### Summary

1. The instrument preserves relief from the short selling prohibition in subsection 1020B(2) of *Corporations Act 2001 (Corporations Act)* for certain deferred settlement trading arrangements involving ASX quoted products that is contained in section 11 of *ASIC Corporations (Short Selling) Instrument 2018/745 (LI 2018/745)*.
2. The relief for deferred settlement trading was due to cease on 30 September 2021, pending ASX Limited's review of trading processes as part of the CHES Replacement project.
3. *ASIC Corporations (Amendment) Instrument 2021/754* removes the expiry date for deferred settlement relief so that it will cease at the same time as the rest of the relief in LI 2018/745 when the instrument sunsets on 1 October 2028 .

#### Background

4. Section 1020B(2) says that a person must not sell section 1020B products unless the person has a presently exercisable and unconditional right to vest the products in a buyer. These 'naked' short sales are prohibited primarily due to the potential for disruptions to the market caused by the failure to deliver the products by the due date for delivery (i.e. 'settlement risk'). ASIC's policy on short selling is set out in Regulatory Guide 196: *Short selling*. Generally, ASIC will provide exemptions from the prohibition against naked short selling in circumstances where the settlement risk is low and the exemption may facilitate activities that benefit the market.

#### *Why deferred settlement trading may contravene subsection 1020B(2)*

5. Products that are issued under various corporate actions such as rights issues or dividend reinvestment plans may commence trading on a licensed market

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before the products are issued. Trading will then occur on a deferred settlement basis – which means that the obligation to settle any trades in the unissued products is deferred until a time set by the operator of the listing market. This is generally three business days after the issue date of the products.

6. Arguably, a person who sells unissued section 1020B products during a deferred settlement trading may be in technical breach of the naked short selling prohibition in subsection 1020B(2).
7. Public offers such as larger IPOs also often have a period of deferred settlement trading – where the new securities trade before they have been issued. Under ASX Operating Rule 3330, ASX may also impose conditions on post-IPO deferred settlement trading. This is termed ‘conditional and deferred settlement trading’. The conditions on trading imposed by ASX are generally standard and correspond with the conditions that the listing company has imposed on the IPO itself. Standard conditions include completion of an underwriting agreement or completion of a corporate restructure required before listing can occur. If these conditions are not fulfilled, under the operating rules all trades that occurred during the period are cancelled.
8. A person who sells section 1020B products where their entitlement is conditional on events such as completion of an underwriting agreement will arguably contravene subsection 1020B(2) because the conditions go beyond the conditions permitted by subsection 1020B(4).

*ASIC’s relief for deferred settlement*

9. Deferred settlement trading has been a standard market practice for some time but compliance with subsection 1020B(2) was uncertain. In December 2017, ASIC adopted a limited no-action position for deferred settlement trading in unissued section 1020B products. ASIC also regularly provided individual relief for conditional and deferred settlement trading.
10. In 2018, ASIC publicly consulted on providing relief by legislative instrument for deferred settlement trading: Consultation Paper 299: *Short selling: Naked short selling relief, position reporting amendments and sunset class orders (CP 299)*.
11. Submissions in response to CP 299 were supportive of legislative relief for deferred settlement trading. The submissions were also in favour of legislative relief for conditional and deferred settlement trading due to the inefficiency associated with seeking individual relief. We also received feedback that deferred settlement trading provides several benefits to the market including greater liquidity, more efficient price discovery and allowing completion of certain administrative processes: see Report 608 *Response to submissions on CP 299 Short Selling: Naked short selling relief, position reporting amendments and sunset class orders*.
12. ASIC’s relief for deferred settlement trading in section 11 of LI 2018/745 is explained in RG [196 Short Selling](#) at paragraphs 78 to 96. In short, ASIC

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provided relief for deferred settlement trading in LI 2018/745 because the risk of settlement failure is no greater than would be the case if the section 1020B products had been issued and were trading on a normal settlement basis (i.e. two business days after the trade date). Conditional and deferred settlement trading also involves minimal settlement risk because if the conditions are not fulfilled, trades that occurred in the conditional market will be cancelled (see ASX Operating Rules 3334).

### **Purpose of the instrument**

13. Part 6, section 18 of LI 2018/745 specified that the relief for deferred settlement trading in section 11 of that instrument would expire at the end of 30 September 2021. ASIC's Media Release for LI 2018/745, MR18-301 said *"In the CHESSE Replacement Consultation Paper (April 2018), the ASX indicated, as part of the Corporate Actions STP Phase 2 Project, that they will review deferred settlement trading processes to assess whether there are any opportunities for simplification and more streamlined timetables. In light of potential changes to the deferred settlement period arising from this project, this aspect of the relief will cease at the end of 30 September 2021."*
14. The CHESSE replacement system is not yet complete and is unlikely to remove the need for deferred settlement trading practices. LI 2021/754 therefore ensures that the relief for deferred settlement trading in section 11 of LI 2018/745 will continue until LI 2018/745 sunsets in the ordinary course after 10 years under the *Legislation Act 2003*. ASIC considers that it is appropriate for LI 2021/754 to extend the operation of the relief for deferred settlement trading in LI 2018/745 for the reasons outlined in paragraphs 11-12 above.

### **Consultation**

15. ASIC consulted on relief for deferred settlement trading in Consultation Paper 299: *Short selling: Naked short selling relief, position reporting amendments and sunset class orders (CP 299)*.
16. CP 299 is considered sufficient consultation for the purposes of LI 2021/754, which merely provides a longer expiry date for deferred settlement trading relief in section 11 of LI 2018/745.

### **Operation of the instrument**

17. Part 6, section 18 of LI 2018/745 states that section 11 of the instrument, which contains relief for deferred settlement trading arrangements, ceases to have effect at the end of 30 September 2021. Schedule 1 of LI 2021/754 repeals Part 6 of LI 2018/745 so that the relief for deferred settlement trading arrangement will continue in effect with the remainder of LI 2018/745 (i.e. until 1 October 2028).
18. LI 2021/754 commences on the day after it is registered on the Federal Register of Legislation.

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## Legislative instrument and primary legislation

19. The subject matter and policy implemented by LI 2021/754 is more appropriate for a legislative instrument rather than primary legislation because:
- a) The instrument utilises powers given by Parliament to ASIC that allow ASIC to modify the operation of section 1020B to provide a tailored regulatory environment that is fit for purpose. In the absence of the notional modifications made by the instrument, subsection 1020B(2):
    - i. creates uncertainty for market participants who engage in the standard market practice of deferred settlement trading following corporate actions such as rights issues, dividend reinvestment plans or bonus issue (see paragraph 6 above); and
    - ii. means companies preparing to conduct a larger IPO may face uncertainty and need to seek individual relief so that investors, particularly institutional investors, are able to engage in ‘conditional and deferred settlement trading’ following the offer (see paragraph 8 above).
  - b) ASIC considers that legislative relief from subsection 1020B(2) for deferred settlement trading and ‘conditional and deferred settlement trading’ is warranted because such trading has commercial benefits and has not increased settlement failure.
  - c) ASIC considers that the prohibition on naked short selling in subsection 1020B(2) was not intended to impede standard settlement practices. The matters contained in the instrument are therefore a specific amendment designed to ensure the application of the primary legislation (i.e. subsection 1020B(2) of the Corporations Act) remains flexible to adapt to market developments regarding the settlement of section 1020B products and applies in a way consistent with the intended policy and enabling provisions in the Corporations Act.

## Duration and appropriateness of the duration

20. ASIC considered it appropriate to extend the operation of the relief for deferred settlement trading in section 11 of LI 2018/745 for seven years until 1 October 2028, when LI 2018/745 will sunset under the *Legislation Act 2003*. ASIC considered a shorter duration for the deferred settlement trading relief in section 11 of LI 2018/745 because ASX’s replacement of CHES is due to be completed in April 2023. However, the enhanced technology will not remove the need for either standard deferred settlement trading or ‘conditional and deferred settlement trading’. Therefore, relief for deferred settlement trading arrangements will be required on an ongoing basis and for the duration of the remainder of the relief in LI 2018/745.
21. ASIC understands that the Government will consider making future amendments to section 1020B of the Corporations Act to facilitate the relief provided by LI 2018/745 before the instrument sunsets on 1 October 2028. At

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this time, the Government can consider the appropriateness of the relief in section 11 of LI 2018/745 for deferred settlement trading as part of the review of the whole instrument.

### **Legislative authority**

22. *ASIC Corporations (Amendment) Instrument 2021/754* is made under section 1020F of the Corporations Act.
23. *ASIC Corporations (Amendment) Instrument 2021/754* amends *ASIC Corporations (Short Selling) Instrument 2018/745* by repealing Part 6 and thereby removing the expiry date for relief contained in section 11 of that instrument. Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make any instrument of a legislative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to amend such instrument.
24. *ASIC Corporations (Amendment) Instrument 2021/754* is a disallowable instrument.

### **Statement of Compatibility with Human Rights**

25. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

## **Statement of Compatibility with Human Rights**

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### ***ASIC Corporations (Amendment) Instrument 2021/754***

#### Overview

1. *ASIC Corporations (Amendment) Instrument 2021/754* removes the expiry date of short selling relief for deferred settlement trading in section 11 of *ASIC Corporations (Short Selling) Instrument 2018/745* so that the relief now expires when the instrument sunsets on 1 October 2028 rather than 30 September 2021.

#### Assessment of human rights implications

2. This instrument does not engage any of the applicable rights or freedoms.

#### Conclusion

3. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.