



20 January 2014

Mr Greg Yanco
Senior Executive Leader
Market & Participant Supervision
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW

By email: greg.yanco@asic.gov.au

Dear Greg

Real Time Short Sale Tagging

This letter relates to the long running subject of real time short sale tagging (RTSST) and ASIC Market Integrity Rule Part 5.12 (MIR RTSST). We have been in recent communication with Mr Greg Moxon of the Commission in regard to assisting with soundings on a proposed implementation date for MIR RTSST in July 2014. The purpose of this letter is not to advise on the appropriateness of any implementation dates, but to return to the fundamental disagreement the Australian Financial Markets Association (AFMA), on behalf of our members, has with a renewed indication from the Commission that it is continuing to pursue implementation of this very problematic measure, despite our advice against following this path.

As you will be aware AFMA has continuously objected to the implementation of RTSST since the concept was first raised in policy discussions following the imposition of temporary restrictions on short sales in September 2008 and interim reporting and disclosure rules in November 2008. Extensive policy consideration and consultations with industry were carried out by the Government and ASIC in developing firstly the interim ASIC regime then the permanent regulation of short sales in Part 7.9 of the Corporations Act and supporting Corporations Regulations. Careful consideration was given to the merits of RTSST as part of the regulatory impact assessment of the disclosure and reporting regime for short sales carried out by the Treasury in the preparation of the *Corporations Amendment (Short Selling) Act 2008* and the related Corporations Regulations amendments made under Part 7.9 of the Corporations Act. As a result it was not adopted.

Australian Financial Markets Association

ABN 69 793 968 987

Level 3, Plaza Building, 95 Pitt Street GPO Box 3655 Sydney NSW 2001

Tel: +612 9776 7955 Fax: +61 2 9776 4488

Email: info@afma.com.au Web: www.afma.com.au

The key objection to the MIR RTSST is that it is made contrary to the recent policy intentions of the Parliament in the Corporations Act. The provisions governing disclosure of short sales are clearly set out in Part 7.9 Division 5B of the Corporations Act. Any changes to the disclosure requirements needs to be carried out under the scope of this Division. The use of the unrelated market integrity rule discretionary powers under section 798G(1) of the Corporations Act to create a separate short sale disclosure rule defies regulatory logic and good administrative practice.

One of the core problems with RTSST is that complete accuracy in the marking of a short sale in real time is not possible. End of day disclosures allow reconciliations to be made and intra-day errors to be corrected before regulatory reporting is carried out. Under section 1020AB(3) the maximum penalty for an erroneous disclosure is 25 penalty units or 6 months imprisonment. One penalty unit equals \$170. Therefore the maximum monetary penalty is \$4,250 (25 x \$170). The maximum penalty for a breach of Rule 5.12.1 of the MIR RTSST is \$1,000,000. The result is that an operational reporting error could result in \$1,000,000 rather than a \$4,250 fine. The operational compliance risk with this measure is enormous and completely disproportionate to the importance of the data. The imposition of this huge new compliance burden is unwarranted in public policy terms given the existing extensive disclosure requirements.

This is a matter that we have referred to the Treasury as part of the Government's deregulation review. It is highlighted to the Government as a leading example of 'red-tape' that can be easily addressed as it is not yet implemented.

My colleague, Michael Go, Lead Director Markets and I would be pleased to meet with you to discuss how we can assist the Commission take the initiative in getting an early success in pursuing the Government's deregulation agenda. I can be contacted at dlove@afma.com.au or (02) 9776 7995.

Yours sincerely



David Love
Director Policy and International Affairs