



AIMA AUSTRALIA

SUBMISSION TO THE TREASURY, AUSTRALIAN GOVERNMENT

CONSULTATION DRAFT: CORPORATIONS AMENDMENT REGULATIONS
(SHORT SELLING REGULATIONS) SEPTEMBER 2009

23 October 2009

**A submission prepared by the Regulatory Committee
of the Alternative Investment Management Association
Australia Chapter**

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Background on AIMA Australia

The Alternative Investment Management Association (**AIMA**) was established in 1990 as a direct result of the growing importance of alternative investments in global investment management. It is a not-for-profit educational and research body that specifically represents practitioners in hedge funds, futures funds and currency fund management - whether managing money or providing a service such as prime brokerage, administration, legal or accounting advice. AIMA's global membership is in excess of 1000 members, comprising 3000+ individuals in 46 countries.

The Australia network of AIMA Australia (**AIMA Australia**) represents participants in alternative investments in Australia. AIMA Australia has over 55 members, including fund of funds managers, institutional investors, hedge fund managers, prime brokers, lawyers, auditors and other service providers.

AIMA Australia has been active in the debate and consultations concerning the regulation of short selling in Australia over the past 18 months. In particular, AIMA Australia published a Position Paper on Short Selling in April 2008, which set out AIMA Australia's position and explained many of the market uses and advantages of short selling in the hedge fund industry. AIMA Australia has also made submissions to The Treasury in relation to:

- the Exposure Draft of the Corporations Amendment (Short Selling) Bill 2008, dated 21 October 2008;
- The Treasury Consultation Paper March 2009: Short Selling Disclosure Regime, dated 7 April 2009.

The purpose of the present submissions is for AIMA Australia to make submissions to The Treasury concerning the Consultation Draft: Corporations Amendment Regulations (Short Selling Regulations) September 2009 (**Consultation Draft Regulations**).

1. Introduction: re-cap of AIMA Australia's views on disclosure reform

Information disclosed should be valid

- AIMA Australia sees as the critical object of disclosure reform the establishment of an efficient and workable regime for the disclosure of short selling, which produces valid and useful information, for the benefit of market participants and investors, at reasonable cost. The information which is disclosed should be valid, in the sense of being a true reflection of market movements or the proportion of market positions which represent short sales.

Reform in Australia should be consistent with off-shore reform

- Moreover, AIMA Australia considers that any reform of market regulation in Australia should be consistent in principle, as well as in detail, with such reform efforts in other jurisdictions.

2. **AIMA Australia's specific comments on the Consultation Draft Regulations**

(a) ***Positional reporting is preferred to transactional reporting***

AIMA Australia supports the disclosure of positional information in relation to short sales and it believes that disclosure in this form should be in place of transactional reporting. Accordingly, AIMA Australia endorses the positional reporting to the Australian Securities and Investments Commission (**ASIC**) proposed under the Consultation Draft Regulations.

However, the transactional reporting currently in place under ASIC Class Order 08/751 (**CO 08/751**) and proposed to be replicated under the Consultation Draft Regulations is undesirable because, as AIMA Australia has previously argued it does not produce a result which is accurate, complete or useful to the market. Transactional reporting does not allow a proper or accurate assessment to be made of the total position occupied by short selling in the equity positions of any particular stock. This is because it does not account for the impact of purchases or derivative activity that may reduce or close out the short sale entirely.

AIMA Australia understands that the Government plans to review the new short selling disclosure arrangements 12 months after the commencement of the new positional reporting requirements. It urges The Treasury to reconsider the usefulness and desirability of keeping short selling transactional reporting at the time of such review.

(b) ***Fortnightly positional reporting***

The Consultation Draft Regulations will require:

- daily transactional reporting of covered short selling to market operators such as the Australian Securities Exchange, which simply replicates the existing flawed position under CO 08/751;
- positional reporting of short sold positions in listed entities to ASIC by 9.00 am on the third business day after entering into the sale that created the short position; and
- reporting to ASIC by 9.00 am on each subsequent business day, of short sold positions already reported to ASIC, as long as those short positions exist and irrespective of whether or not those positions have changed since they were last reported.

AIMA Australia is extremely concerned about the prejudicial nature of these proposed requirements. Short selling is widely used by sophisticated asset managers in every major market and it is a highly sought after skill by major institutional investors. There is no basis of inappropriate behaviour or actual enforcement action that would remotely warrant daily supervision or reporting of short sold positions. Moreover, setting these unjustified short term reporting standards is again placing the Australian regime outside of the international norms and practices for short selling disclosure.

AIMA Australia has already submitted market data to Treasury which demonstrates that reporting even on a fortnightly basis forces market participants to disclose their positions well before modest short selling

programs can be completed. No such forced disclosure exists for substantial purchasers of shares, where the identical opportunity exists for insider trading and market manipulation.

In particular, AIMA Australia questions the usefulness and benefit of requiring daily reporting to ASIC, particularly where a short sold position remains unchanged and points to the excessive administrative burden and expense which daily reporting will impose on reporting entities. AIMA Australia notes that this requirement represents a significant departure from other regulatory reporting frameworks under the Corporations Act 2001 (Cth), for example in the case of reporting substantial holdings under Chapter 6C, where the reporting requirement is only triggered when there is a change in an existing position: e.g. where a person has an existing substantial holding and their holding moves by at least 1%.

(c) ***Disclosure of aggregated information***

AIMA Australia supports the disclosure of information on an aggregated basis, consistent with the US and Canadian positions. Accordingly, it is pleased to see that under the Consultation Draft Regulations it is envisaged that ASIC will disclose the short positions for each class of security on an aggregated basis.

(d) ***A threshold is undesirable - but if necessary, it should be 2% or higher***

AIMA Australia notes that it is envisaged that ASIC will specify a threshold that will exclude "small" short sold positions from having to be disclosed. AIMA Australia recognises that there is some support amongst various regulators and trade bodies for some form of threshold for reporting, to exclude small short sold positions because below this de minimus level, information is of little value to market participants or these small positions do not pose any form of systemic risk. If a threshold for excluding a percentage of total short positions is to be set, AIMA globally has been requesting that this should be set at a level of at least 2 per cent. This is extremely relevant if a high frequency of reporting is required in Australia.

(e) ***Anonymity of holders of short positions***

AIMA Australia strongly opposes the identification of holders of short positions. Treasury has previously recognised that this could provide a disincentive for investors to engage in short selling because of the possibility that confidential trading information is released to the market or that the investor may be unfairly targeted by other participants in the market. Accordingly, AIMA Australia is pleased to see that under the Consultation Draft Regulations it is envisaged that ASIC will not disclose the identity of the holders of short positions.

Contact points

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