

ASIC CLASS ORDER [CO 09/01052]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Class Order [CO 09/01052] under s1020F(1) of the *Corporations Act 2001* (the *Act*).

Subsection 1020F(1) of the Act relevantly provides that ASIC may exempt a person or class of persons from specified provisions of Part 7.9 or declare that Part 7.9 applies in relation to a person or class of persons as if specified provisions were omitted, modified or varied.

1. Background

People sometimes sell (*short sell*) securities which they do not own with a view to repurchasing them later at a lower price. One approach to facilitating this practice is for people (the *borrowers*) to have in place an arrangement whereby another person (the *lender*) makes securities available to settle the short sale. Under the arrangement, the borrower will have an obligation to transfer equivalent securities to the lender at a later time. The practice of short selling securities supported by a securities lending arrangement is a form of *covered short selling*.

The practice of short selling securities without such an arrangement is known as *naked short selling* and is regulated by s1020B of the Act. Section 1020B has the effect of prohibiting a person from naked short selling.

In September 2008, ASIC took interim measures to regulate covered short selling. It involved the introduction and then partial lifting of the ban on covered short selling. ASIC also set out the reporting regime required for all short sales in Australia. The reporting regime included references to short sales made in reliance on certain naked short selling exemptions at s1020B(4) of the Act. These measures are captured by ASIC Class Order [CO 08/751].

From 8 January 2009, the *Corporations Amendment (Short Selling) Act 2008* will remove all but one of the naked short selling exemptions at s1020B(4) of the Act.

2. Purpose of the class order

As a result of the *Corporations Amendment (Short Selling) Act 2008*, references in ASIC Class Order [CO 08/751] to the current naked short selling exemptions at s1020B(4) will become obsolete. This instrument varies ASIC Class Order [CO 08/751] in order to remove these obsolete references.

3. Operation of the class order

This class order varies ASIC Class Order [CO 08/751] by amending notional 1020BC of the Act. ASIC Class Order [CO 08/751] is amended by ASIC Class Orders [CO 08/752], [CO 08/753], [CO 08/763], [CO 08/801] and [CO 08/824].

Notional s1020BC sets out the disclosure requirements in relation to the sale of section 1020B products. The extent to which these requirements apply depends on whether the sale is a long sale, a short sale or an exempt covered short sale. Notional s1020BC(6) currently defines a "short sale" as including a short sale to which s1020B(4)(b), (d) or (e) applies. This instrument varies the definition of "short sale" by removing the references to these naked short selling exemptions.

The variation commences on the commencement of Schedule 2 to the *Corporations Amendment (Short Selling) Act 2008* (that is, 8 January 2009).

4. Documents incorporated by reference

No documents are incorporated by reference.

5. Consultation

No consultation was undertaken as the instrument is of a minor or technical nature to reflect changes made as a result of the *Corporations Amendment (Short Selling) Act 2008*.