

ASIC CLASS ORDER [CO 09/01051]

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 09/01051] under s1020F(1)(a) of the *Corporations Act 2001* (the *Act*).

Paragraph 1020F(1)(a) of the Act relevantly provides that ASIC may exempt a person or class of persons from specified provisions of Part 7.9.

1. Background

Section 1020B regulates the short selling of certain financial products. That provision has the effect of prohibiting a person from selling (*naked short selling*) these financial products unless they have a “presently exercisable and unconditional right to vest” the product in the buyer.

The Act and the *Corporations Regulations 2001* (*Corporations Regulations*) provide some exceptions to this prohibition.

From 8 January 2009, the *Corporations Amendment (Short Selling) Act 2008* will remove all but one of the exemptions to the naked short selling prohibition in the Act. The government's ban on naked short selling will also involve removing the exceptions that currently exist in the Corporations Regulations. The amendment to the Corporations Regulations is proposed to take effect in 2009.

The government has noted ASIC's power to grant exemptions from the naked short selling prohibition to allow certain forms of naked short selling to ensure the ordinary operation of the market.

2. Purpose of the class order

This instrument deals with the removal of the exceptions that currently exist in the Corporations Regulations and ensures that these forms of naked short sales can continue. These exemptions are broadly similar to the exemptions currently in the Corporations Regulations.

3. Operation of the class order

Generally, this instrument provides that a person does not have to comply with the short selling prohibition at s1020B(2) in the following situations:

- (a) A short sale of a financial product that is done by the giving or writing of certain exchanged traded options;

- (b) A short sale of unobtained financial products where, at the time of sale, the person or, where the person is selling as an agent, the principal is able to obtain at least the number of shares of the same class by exercising exchange traded options; and
- (c) A short sale of bonds issued by a government or certain bonds and debentures issued by a body corporate valued over \$100 million.

The instrument will therefore reinstate the substance of the exemptions as they currently appear at regulations 7.9.79 and 7.9.80A, except that relief for the short sale of unobtained shares at reg 7.9.79(2) will be extended to also apply to the short sale of unobtained financial products.

The exemptions from the requirement to comply with s1020B(2) commence on the day regulations 7.9.79 and 7.9.80A of the Corporations Regulations are omitted.

4. Documents incorporated by reference

No documents are incorporated by reference.

5. Consultation

Before making this instrument ASIC consulted with various parties including the ASX and the Australian Office of Financial Management.