

ASIC CLASS ORDER [CO 10/289] 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 10/289] under paragraph 1020F(1)(a) and (c) of the *Corporations Act 2001* (**Act**).

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

Paragraph 1020F(1)(c) provides that ASIC may declare that Part 7.9 applies in relation to a class of persons or financial products as if specified provisions of Part 7.9 were omitted, modified or varied as specified in the declaration.

1. Background

People sometimes sell (**short sell**) financial products that they do not own with a view to repurchasing them later at a lower price.

Section 1020B regulates the short selling of certain financial products (**section 1020B 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.

Generally, the Act permits a person to execute a short sale (**covered short sale**) where the person relies on an existing securities lending arrangement to have a ‘presently exercisable and unconditional right to vest’ the products in the buyer at the time of sale.

If a seller makes a covered short sale of a section 1020B product on a licensed market, the seller may be required to report their short position to ASIC in accordance with Division 5B of Part 7.9 of the Act and Division 15 of Part 7.9 of the *Corporations Regulations 2001* (**Regulations**).

On 1 April 2010, the *Corporations Amendment Regulations 2009* (No. 8) amended the Regulations to facilitate reporting of short positions. ASIC Class Order [CO 10/29] deferred the commencement of short position reporting from 1 April 2010 to 1 June 2010.

A short position in relation to a section 1020B product is where the quantity of the product which a person has is less than the quantity of the product which the person has an obligation to deliver.

A naked short sale made in reliance on ASIC relief does not trigger the obligation under s1020AB(3) of the Act to report a short position to ASIC.

ASIC Class Order [CO 08/764] permits naked short sales resulting from the exercise of an ASX exchange-traded option (eg. the exercise of a put option or the sale of a call option which is later exercised).

ASIC Class Order [CO 09/774] permits a market maker to make naked short sales of a security or managed investment product to hedge risk from its market making activities.

2. Purpose of the class order

The purpose of this class order is to:

- (a) require a person to give particulars of its short position to ASIC where:
 - (i) the person makes a naked ETO short sale in reliance on [CO 08/764]; or
 - (ii) the person makes a naked short sale in reliance on [CO 09/774]; and
- (b) clarify that a short position in relation to a section 1020B product is to be calculated by reference to covered short sales and permitted naked short sales made by the seller.

3. Operation of the class order

Variation of [CO 08/764]

This class order varies [CO 08/764] by adding a condition requiring a person who makes a naked ETO short sale in reliance on the relief to give particulars of their short position to ASIC. A person does not have to comply with the condition if:

- (a) the person has an obligation under s1020AB(3) to give the particulars; or
- (b) the short position does not exceed the reporting threshold.

Variation of [CO 09/774]

This class order varies [CO 09/774] by adding a condition requiring a person who makes a naked short sale in reliance on the relief to give particulars of their short position to ASIC. A person does not have to comply with the condition if:

- (c) the person has an obligation under s1020AB(3) to give the particulars; or
- (d) the short position does not exceed the reporting threshold.

Variation of [CO 10/29]

This class order varies [CO 10/29] to clarify that:

- (e) a short position in relation to a section 1020B product is to be calculated by reference to covered short sales and permitted naked short sales made by the seller; and
- (f) ASIC must disclose short positions reported under the Act and under [CO 08/764] and [CO 09/774].

4. Commencement

The provisions of this class order will commence as follows:

- (a) paragraphs 1, 2, 3 and 6 commence on the date the instrument is registered under the *Legislative Instruments Act 2003*;
- (b) paragraphs 4 and 5 commence on the later of:
 - (i) the date the instrument is registered under the *Legislative Instruments Act 2003*; or
 - (ii) 1 June 2010.

5. Consultation

In October 2009 Treasury published *Short Selling Disclosure Regulations*; a paper seeking industry input on technical issues relating to draft disclosure regulations for short selling, including the proposal to require short position reporting. The submitting parties were generally supportive of the proposed short position reporting requirement. Submissions to the paper are available at www.treasury.gov.au.