

## ASIC CLASS ORDER [CO 10/464]

### 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 10/464] under s1020F(1)(c) of the *Corporations Act 2001 (Act)*.

Paragraph 1020F(1)(c) of the Act provides that ASIC may declare that Part 7.9 applies in relation to a class or 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 to ASIC. A short position is a position in relation to a section 1020B product in a listed entity where the quantity of the product that a person has is less than the quantity of the product which the person has an obligation to deliver: subregulation 7.9.99(2). ASIC Class Order [CO10/29] deferred the commencement of short position reporting from 1 April 2010 to 1 June 2010.

## **2. Purpose of the class order**

The purpose of this class order is to amend the definition of short position in regulation 7.9.99 to:

- require a person (e.g. the responsible entity for a managed investment scheme) who holds a product on behalf of another person (except where that other person has the sole discretion to decide whether the product will be sold) to include the product in its calculation of the quantity of the product the person has. This amendment addresses a risk of over-reporting of short positions;
- clarify that if another person (e.g. a bare trustee) is holding a product on the person's behalf, and the person has the sole discretion to decide whether the product will be sold, the person must include the product in its calculation of the quantity of a product it has; and
- clarify the nature of the obligations to deliver referred to in subregulation 7.9.99(4)(b).

## **3. Operation of the class order**

Subregulation 7.9.99(3) describes circumstances where a person is regarded to “have a financial product”.

The class order varies ASIC Class Order [CO 10/29] by inserting new subparagraphs 4(aa) and (ab). By the variation ASIC declares that Part 7.9 of the Act applies in relation to all persons as if subregulation 7.9.99(3) and paragraph 7.9.99(4)(b) were modified.

Notional paragraph 7.9.99(3)(aa) has the effect of requiring a person who holds a product on behalf of another person (except where that other person has the sole discretion to decide whether the product will be sold) to include the product in its calculation of the quantity of the product the person has.

Paragraph 7.9.99(3)(b), as modified, has the effect of requiring a person to include a product in its calculation of the quantity of the product it has if another person is holding the product on the person's behalf but only where the person has the sole discretion to decide whether the product will be sold.

Paragraph 7.9.99(4)(b) states that the product which the person has an obligation to deliver is the product which the person has an obligation to vest title in a lender under a securities lending arrangement. The class order clarifies that paragraph 7.9.99(4)(b) applies as if it includes an obligation to vest title in a lender under a securities lending arrangement even if the obligation to vest title is contingent upon the lender recalling the product.

## **4. Commencement**

This class order commences on the later of 21 June 2010 and the date it is registered under the *Legislative Instruments Act 2003*.

## **5. Consultation**

Given the minor and technical nature of the instrument, no general public consultation was conducted.