

ASIC CLASS ORDER [CO 10/1037]

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 10/1037] under s1020F(1)(c) of the *Corporations Act 2001* (the Act).

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

1. Background

In December 2008, Government passed the *Corporations Amendment (Short Selling) Act 2008*. One aspect of the amendments was the introduction of a framework for a permanent disclosure regime.

In December 2009, the details of the Government's permanent disclosure regime were provided under the *Corporations Amendment Regulations 2009 (No 8)* (SR No 327 of 2009). The Government's permanent disclosure regime is comprised of two separate short selling reporting requirements:

- “short sale transaction reporting” (i.e. the reporting of daily volumes of section 1020B products that are short sold in the market); and
- “short position reporting” (i.e. the reporting of a position in relation to a listed section 1020B product where the quantity of the product which a person has is less than the amount of product which the person has an obligation to deliver).

The Government described short position reporting as providing an indication of the bearish sentiment within a particular product at any point in time and also the amount of overhang in the product that will need to be covered at some point in time by short sellers purchasing products.

Under ASIC Class Order [CO 10/29], we deferred the commencement date of short position reporting from 1 April 2010 to 1 June 2010.

Generally, a person must report their short position in relation to a section 1020B product in a listed entity if the person makes a covered short sale of the section 1020B product on a licensed market (i.e. the seller intends that a securities lending arrangement will ensure that the section 1020B products can be vested in the buyer).

At the time ASIC issued [CO 10/464] in June 2010, ASIC informed relevant industry associations that it was preparing a class order that will modify the definition of 'short position' in regulation 7.9.99 to require a person to include products that the person

holds on behalf of another person (other than in a capacity as bare trustee) in its calculation of the quantity of a product that a person has.

This class order is relevant to short position reporting only.

2. Purpose of the class order

We have observed different industry practices for calculating and reporting short positions.

The variation to the “short position” definition in regulation 7.9.99 clarifies how a person should calculate their short position in a product in circumstances where the person, acting in more than one capacity, has products and has obligations to deliver products. A person calculating their short position in a product must not net “long” and “short” positions that are held in different capacities. However, a person who acts on their own behalf, for example, both making a market in a financial product and conducting proprietary trading, acts in the same capacity.

This clarification supports the purpose of short position reporting, by ensuring a more accurate representation of the market’s overall short positions in section 1020B products.

3. Operation of the class order

The class order varies ASIC Class Order [CO10/29] by inserting new subparagraphs 4(aaa) and (ac).

Subparagraph 4(aaa) of [CO 10/29] varies subregulation 7.9.99(2) of the Corporations Regulations such that “short position” means “a position in relation to a section 1020B product in a listed entity where the quantity of the product which a person, acting in a particular capacity, has is less than the quantity of the product which the person, acting in the same capacity, has an obligation to deliver”.

Subparagraph 4(ac) of [CO 10/29] inserts subparagraph 7.9.99(4A) of the Corporations Regulations to clarify those instances where the person has the product or has an obligation to deliver the product, where the person is acting in one or more of the following capacities:

- the person is acting on their own behalf; or
- the person is acting on behalf of another person except where that other person has the sole discretion to decide whether the product will be sold; or
- another person (e.g. a bare trustee) is acting on behalf of the person but only where the person has the sole discretion to decide whether the product will be sold.

Subparagraph 4(ac) of [CO 10/29] also inserts subparagraph 7.9.99(4B) which identifies whether the capacities in subparagraph 7.9.99(4A) are to be taken as the same or different capacities in relation to short position reporting.

4. Documents incorporated by reference

No documents are incorporated by reference.

5. Consultation

ASIC informally consulted with the Australian Financial Markets Association, The Financial Services Council, Alternative Investment Management Association and Australian Bankers Association before making this instrument.

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