

ASIC CLASS ORDER [CO 08/763]

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 08/763] under s1020F(1)(c) of the *Corporations Act 2001* (the **Act**).

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

1. Background

Under ASIC Class Order [CO 08/751] (as amended by ASIC Class Order [08/752] and ASIC Class Order [08/753]), ASIC has prohibited covered short selling of securities, managed investment products and stapled securities quoted on licensed markets in Australia, subject to certain exceptions. This prohibition came into effect on 22 September 2008.

Where covered short selling is permitted, the short selling transaction needs to be disclosed in accordance with ASIC Class Order [CO 08/751]. These reporting requirements are equivalent to end of trading day net short sale position disclosure under the ASX Market Rules. The reporting requirements came into effect on 19 September 2008, and apply to trading from 22 September 2008.

Having consulted with the finance industry, ASIC has decided to permit certain market operations, despite the prohibition on covered short selling, in line with overseas developments.

2. Purpose of the class order

The purpose of ASIC Class Order [CO 08/763] is to vary ASIC Class Order [CO 08/751] to allow certain covered short sales that are commonly used in ordinary commercial transactions to manage financial risk where there is a limited prospect of their misuse.

3. Operation of the class order

This class order varies ASIC Class Order [CO 08/751] by amending notional s1020BD of the Act (added to that instrument by ASIC Class Order [CO 08/752] and amended by ASIC Class Order [CO 08/753]).

Section 1020BD prohibits the covered short selling of securities, managed investment products and stapled securities traded on licensed financial markets in Australia

subject to a limited exemption for certain market makers. Generally, class order [CO 08/763] allows certain covered short sales by:

- inserting an exception for hedging of pre-22 September positions of market makers arising from their client business, to the effect that the prohibitions on covered short sales will not apply to hedging a position that was taken by an entity prior to 22 September 2008 as part of its business of dealing as principal in equities, operations or derivatives (whether OTC or exchange-traded) to fulfil orders received from clients or to respond to a client's request to trade, in each case;
- inserting an exception for arbitrage transactions in relation to the securities of dual listed entities to make covered short sales of the relevant securities in Australia;
- inserting an exception for covered short sales as part of an index arbitrage;
- broadening the exception provided for market makers by inserting an exception for transactions by market makers that satisfy all of the following requirements:
 - (a) the market maker must be an entity that makes a market as set out in section 766D of the Corporations Act 2001;
 - (b) the market maker must hold an Australian financial services licence relating to making a market or rely upon an exemption so it does not need an Australian financial services licence;
 - (c) the covered short sale is a bona fide transaction to manage the entity's risk arising from its market making activities; and
 - (d) the market maker must not enter into a short sale in respect of a product if it knows the client's transaction for which it is making the market will result in the client or counterparty establishing or increasing an economic net short position in respect of a product covered by the ASIC Class Orders; and
- inserting an exception for covered short sales that occur to manage the risk of underwriting dividend reinvestment plans, share purchase plans and for certain holders of convertible financial products.

The instrument commences on the date it is registered. This was 23 September 2008.

4. Documents incorporated by reference

No documents are incorporated by reference.

5. Consultation

ASIC informally consulted with various industry bodies and participants on 22 and 23 September 2008 before making the instrument. No general public consultation was

undertaken given the urgency of granting the exemptions to ensure the continued orderly operation of Australia's financial markets.