

ASIC CLASS ORDER [CO 08/801]

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 08/801 under section 1020F(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 ASIC has prohibited covered short selling of securities, managed investment products and stapled securities quoted on licensed markets in Australia. This prohibition came into effect on 22 September 2008.

A covered short sale is a sale of securities by a person who does not own them but has a securities lending arrangement in place to settle the sale.

Under ASIC Class Order 08/751 there are certain exemptions from the covered short selling prohibition. One exemption is for persons who hold a convertible security (eg a convertible bond) to short sell for the purposes of hedging their exposure to the underlying security: notional section 1020BD(5)(b) inserted by ASIC Class Order 08/763.

2. Purpose of the class order

ASIC Class Order 08/801 expands the exemption under notional section 1020BD(5)(b) for persons who hold a convertible security. This variation to ASIC Class Order 08/751 means that persons can short sell to hedge exposure to the underlying security through a fixed conversion price or ratio convertible security. The exemption was previously limited to convertible securities where the number of shares issued on conversion is referable to the volume weighted average price (VWAP) of the share over a period.

There is a similar commercial need to hedge exposures as a result of holding a security that converts at a fixed price or ratio and a security that converts by reference to VWAP. The policy behind this covered short selling exemption is to facilitate fundraising by companies.

3. Operation of the class order

ASIC Class Order 08/801 varies notional section 1020BD(5)(b) so that the exemption applies to a sale of a security or product by a person for the purposes of managing, avoiding or limiting the financial consequences of being issued with securities or products on the conversion of a convertible security or convertible product. The paragraph omits reference to convertible securities that convert by reference to the VWAP.

4. Consultation

ASIC informally consulted with various industry bodies and participants on this variation before making the instrument. No general public consultation was undertaken given the technical (minor and machinery) nature of the change.