

# ASIC Class Order [CO 09/774]

## Naked short selling relief for market makers

This instrument has effect under s1020F(1)(a) of the *Corporations Act 2001*.

This compilation was prepared on 19 April 2011 taking into account amendments up to [CO 11/269]. See the table at the end of this class order.

Prepared by the Australian Securities and Investments Commission.

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### Australian Securities and Investments Commission Corporations Act 2001 — Paragraph 1020F(1)(a) — Exemption

#### Enabling legislation

1. The Australian Securities and Investments Commission (**ASIC**) makes this instrument under paragraph 1020F(1)(a) of the *Corporations Act 2001* (the **Act**).

#### Title

2. This instrument is ASIC Class Order [CO 09/774].

#### Commencement

3. This instrument commences on the date it is registered under the *Legislative Instruments Act 2003*.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (**FRLI**) in electronic form: see *Legislative Instruments Act 2003*, s 4 (definition of **register**). The FRLI may be accessed at <http://www.frli.gov.au/>.

#### Exemption

4. A person does not have to comply with subsection 1020B(2) of the Act in relation to a sale of a security (the **shorted product**) or managed investment product (the **shorted product**) by that person where all of the following apply:
  - (a) the person makes a market for a financial product;
  - (b) the person issues, acquires or disposes of a financial product (the **hedged product**) in the course of making that market;
  - (c) the person holds an Australian financial services licence that covers making a market in the hedged product or is exempt

from the requirement to hold such a licence for providing that financial service;

- (d) the sale of the shorted product is a bona fide transaction to manage, avoid or limit the financial consequences of the person issuing, acquiring or disposing of the hedged product in the course of making a market in the hedged product;
- (e) at the time of the sale, the shorted product is a constituent of the index known as the S&P/ASX 300;

Note: This index is compiled and calculated by Standard and Poor's, a division of The McGraw-Hill Companies, Inc. Its constituents are subject to change from time to time. Details of the current constituents may be found via <http://www.standardandpoors.com.au/>.

- (f) at the time of the sale, the person believes on reasonable grounds that a securities lending arrangement can be put in place, before the time for delivery of the shorted product, so that a financial product equivalent to the shorted product can be unconditionally vested in the purchaser of the shorted product by the time for delivery.

## **Conditions of the relief**

### *Securities lending arrangement*

5. A person relying on the exemption in paragraph 4 must:
- (a) by the end of the day (*sale day*) on which the person makes the sale of the shorted product:
    - (i) have acquired a financial product equivalent to the shorted product; or
    - (ii) have entered into a contract to acquire a financial product equivalent to the shorted product where the person has a right to have that financial product vested in the person that is conditional only upon all or any of the following:
      - (A) payment of the consideration in respect of the acquisition;
      - (B) the receipt by the person of a proper instrument of transfer in respect of the product;
      - (C) the receipt by the person of the documents that are, or are documents of title to, the product; or
    - (iii) have entered into a securities lending arrangement in relation to a financial product equivalent to the shorted product,

so that the shorted product or an equivalent product can be

unconditionally vested in the purchaser of the shorted product by the time for delivery; and

- (b) if paragraph (a) has not been satisfied, notify ASIC in writing by 9:00 am on the business day after the sale day that paragraph (a) has not been satisfied.

#### *Positional reporting*

5A. Subject to paragraph 5D, a person relying on the exemption in paragraph 4 must give to ASIC in the form required by ASIC particulars of the person's short position in relation to the shorted product as at 7pm 3 reporting days before the day the particulars must be given under paragraph 5B.

5B. The person must give the particulars about the short position:

- (a) on or before 9 am on the third reporting day after entering into the agreement to sell that causes the short position to occur; and
- (b) on or before 9 am on each subsequent reporting day as long as the person has a short position.

5C. Subparagraph 5B(b) applies whether or not the particulars about the short position have changed from that given on the previous day.

5D. A person:

- (a) that is required by subsection 1020AB(3) of the Act to give particulars of the person's short position on a day in relation to a security or product that is in the same class as the shorted product; or
- (b) with a short position in relation to the shorted product on a day that does not exceed the value limit and the volume limit on the day;

does not have to comply with paragraph 5A in relation to the short position.

#### **Interpretation**

6. In this instrument:

***makes a market*** has the meaning given by section 766D of the Act.

***reporting day*** has the meaning given by subregulation 7.9.99(1) of the Corporations Regulations 2001.

**securities lending arrangement** means an arrangement under which:

- (a) one entity (the **lender**) agrees that it will:
  - (i) deliver particular securities, managed investment products or other financial products to another entity (the **borrower**) or to an entity nominated by the borrower; and
  - (ii) vest title in those products in the entity to which they are delivered; and
- (b) the borrower agrees that it will, after the lender does the things mentioned in paragraph (a):
  - (i) deliver the products (or equivalent products) to the lender or to an entity nominated by the lender; and
  - (ii) vest title in those products (or those equivalent products) in the entity to which they are delivered.

**short position** has the meaning given by subregulation 7.9.99(2) of the *Corporations Regulations 2001*.

7. In paragraph 5D:

- (a) the **value limit** in relation to a person for a security or managed investment product that is able to be traded on a financial market is not exceeded on a day if:

$$A \times B$$

does not exceed \$100,000 where:

A = the person's short position in relation to the security or product as at 7pm on the day.

B = either:

- (a) the last sale price for the security or product on the financial market on the day (or, if there is no such price on that day, the last sale price on the financial market); or
  - (b) the price determined and published by the operator of the market after the close of trading for the day as the value of the security or product on the day.
- (b) the **volume limit** in relation to a person for a security or managed investment product that is able to be traded on a financial market is not exceeded on a day if:

$$\frac{\text{A}}{\text{B}} \times 100$$

does not exceed 0.01 where:

A = the person's short position in relation to the security or product as at 7pm on the day.

B = the total quantity of securities or products in the same class of securities or products on the day.

## Notes to ASIC Class Order [CO 09/774]

### Note 1

ASIC Class Order [CO 09/774] (in force under s1020F(1)(a) of the *Corporations Act 2001*) as shown in this compilation comprises that Class Order amended as indicated in the tables below.

### Table of Instruments

Instrument number	Date of FRLI registration	Date of commencement	Application, saving or transitional provisions
[CO 09/774]	23/9/2009 ( <i>see</i> F2009L03613)	23/9/2009	
[CO 10/289]	29/4/2010 ( <i>see</i> F2010L01077)	Paras 1,2, 3 & 6: 29/4/2010 Paras 4 & 5: 1/6/2010	-
[CO 11/269]	19/4/2011 ( <i>see</i> F2011L00620)	19/4/2011	-

### Table of Amendments

ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted

Provision affected	How affected
Subpara 4(e) .....	rs. [CO 11/269]
Para 5.....	am. [CO 10/289]
Para 5A–5D.....	ad. [CO 10/289]
Para 6.....	am. [CO 10/289]
Para 7.....	ad. [CO 10/289]