

**Australian Securities and Investments Commission
Corporations Act 2001 — Paragraph 1020F(1)(c) — Amendment**

Enabling legislation

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

Title

2. This instrument is ASIC Class Order [CO 13/1128].

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*, section 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

Amendment

4. ASIC Class Order [CO 12/749] is amended as follows:
 - (a) before the definition of *fund of hedge funds* insert:

“*derivative* includes an agreement under which:

 - (a) a person agrees to deliver securities or interests in a managed investment scheme (each a *delivery product*) to another person at a time (*maturity*) in the future;
 - (b) the maturity is determined by reference to a specified time or the occurrence or non-occurrence of a specified event or circumstance;
 - (c) the number and value of the delivery products to be delivered at maturity is ultimately determined or derived from the value or amount of one or more of the following:
 - (i) other financial products;
 - (ii) an asset;
 - (iii) a rate (including an interest rate or exchange rate);
 - (iv) an index;
 - (v) a commodity.”;

- (b) in the definition of *hedge fund*:
- (i) omit sub-subparagraph (b)(i)(A), substitute:
- “(A) deals in financial products in accordance with investment strategies intended to produce a return with low correlation (including no correlation) to each of the prescribed published indexes or any combination of them; or”;
- (ii) after subparagraph (b)(i) insert on a new line:
- “(For the purposes of sub-subparagraph (B), the calculation of the number of interposed entities through which the scheme acquires an economic interest in a financial product is to be performed by reference to each separate vertical stream of interposed entities.
- Example: Where a head scheme directly invests in schemes A and B, and both schemes A and B directly invest in scheme C, there are 2 vertical streams, with each stream comprising 2 interposed entities. The first vertical stream comprises schemes A and C. The second vertical stream comprises schemes B and C. There is no single vertical stream comprising schemes A, B and C”;
- (iii) in subparagraph (b)(iii) omit “unless;”, substitute “excluding dealings covered by one or more of the following sub-subparagraphs.”;
- (iv) at the end of sub-subparagraph (b)(iii)(B) insert “or”;
- (v) after sub-subparagraph (b)(iii)(B) insert:
- “(C) both of the following apply:
- (I) the dealing takes place on a financial market;
- (II) the notional derivatives exposure of the scheme (excluding derivatives covered by sub-subparagraph (A) or (B)) at any point in time does not exceed 10% of the net asset value of the scheme at that time unless the exposure is attributable to circumstances that were not reasonably foreseeable by the responsible entity and the exposure is for a period of no more than 3 consecutive business days;
- (For the purposes of sub-subparagraph (B):
- (a) a dealing in a derivative for the dominant purpose of managing the financial risk arising from deferring a proposed dealing in another financial product that is not a derivative is taken to be for a period of deferral of 28 days or more if the dealing, and any previous dealing in derivatives that takes

place on a financial market, together are for the dominant purpose of managing the financial risk arising from deferring the same proposed dealing in the other financial product for a period of 28 days or more;

- (b) a dealing in a derivative for the dominant purpose of managing the financial risk arising from deferring a proposed dealing in another financial product is not taken to satisfy the sub-subparagraph merely because the derivative has a term of 28 days or more”;

- (vi) omit subparagraph (b)(v), substitute:

“(v) both of the following are satisfied:

- (A) the responsible entity of the scheme or a person who manages some or all of the scheme property has rights to be paid fees (*performance fees*) substantially based on the performance of that property whether or not the responsible entity or the person also has rights to be paid fees substantially based on the gross or net value of all of the scheme property;
- (B) the responsible entity has made a statement in writing (whether in a Product Disclosure Statement or otherwise) to the effect that performance fees will be payable in the event the responsible entity or the person satisfy certain criteria related to the performance of the scheme property and has not withdrawn that statement.”;

- (vii) at the end of the definition of *hedge fund* insert on a new line:

“For the purposes of determining whether a registered managed investment scheme is covered by two or more subparagraphs of paragraph (b) of this definition, a scheme that deals in derivatives which, but for this provision, results in the scheme being covered by:

- (a) subparagraph (iii) (the *derivatives limb*); and
- (b) either or both of the following:
 - (i) subparagraph (ii) (the *leverage limb*);
 - (ii) subparagraph (iv) (the *short selling limb*);

is taken not to be covered by the leverage limb or the short selling limb unless the scheme is covered by the leverage limb or the short selling limb for some other reason.

A registered managed investment scheme is taken to be covered by two or more subparagraphs of paragraph (b) of this definition if all of the following apply:

- (a) the scheme and any other entity (including, for the avoidance of doubt, a registered scheme or foreign entity) through which the scheme acquires an economic interest in financial products, taken together, would be covered by two or more of those subparagraphs;
- (b) the scheme, taken alone, would not be covered by two or more of those subparagraphs;
- (c) a reasonable person would conclude that the use of one or more of those other entities as a means through which the scheme acquires an economic interest in financial products is for the sole or dominant purpose of bringing about a result that the scheme, taken alone, would not be covered by two or more of those subparagraphs.”;

(c) after the definition of *hedge fund* insert:

“*interposed entity*, in relation to a scheme, means an entity that is interposed between the scheme and a financial product in which the scheme has an economic interest but does not include:

- (a) a registered scheme; or
- (b) an entity which:
 - (i) is incorporated, formed or registered in a foreign jurisdiction in relation to which a prescribed foreign regulatory authority regulates financial services; and
 - (ii) either:
 - (A) is, or whose operator is, specifically authorised by that regulatory authority to make offers of financial products that comprise rights or interests in the entity to the general public in that foreign jurisdiction; or
 - (B) is, or whose operator is, specifically authorised to make offers of financial products that comprise rights or interests in the entity to the general public in another foreign jurisdiction by a prescribed foreign regulatory authority that regulates financial services in that other jurisdiction.

net asset value, in relation to a scheme, means the value of the assets of the scheme less the value of the liabilities of the scheme (other than

liabilities to members as members of the scheme), as they would appear on a balance sheet at the time of calculation made up for lodgment as part of a financial report under Chapter 2M of the Act if the scheme were a reporting entity.

notional derivatives exposure, in relation to a scheme, means the absolute sum of:

- (a) the face value of, or the notional amount in respect of, each derivative as at the date on which the derivative is entered into, held by the scheme that gives rise to an exposure (***long exposure***) because the scheme would benefit by an increase in the price or value of the underlying or reference asset to which the derivative relates; and
- (b) the face value of, or the notional amount in respect of, each derivative as at the date on which the derivative is entered into, held by the scheme that gives rise to an exposure (***short exposure***) because the scheme would benefit by a decrease in the price or value of the underlying or reference asset to which the derivative relates;

adjusted as follows:

- (c) if a derivative gives rise to a long exposure and another derivative gives rise to a short exposure, and both derivatives are otherwise on the same terms and relate to an underlying or reference asset of the same class, the face value of, or notional amount in respect of, each derivative is to be offset against each other.

prescribed foreign regulatory authority means a foreign regulatory authority included in Schedule 10F.

prescribed published index means a published index which is widely used for benchmarking purposes and is solely or predominantly comprised of one or more of the following asset classes:

- (a) shares that are able to be traded on a financial market;
 - (b) interests in managed investment schemes that are able to be traded on a financial market;
 - (c) debentures of a body corporate;
 - (d) debentures, stocks or bonds issued by a government;
 - (e) bills of exchange, promissory notes, certificates of deposit or other negotiable short-term money market instruments.”;
- (d) after paragraph 5 insert:

“5A. Part 7.9 of the Act applies in relation to all persons as if the Regulations were modified or varied by, after Schedule 10E, inserting:

“Schedule 10F Prescribed foreign regulatory authorities
(subregulation 7.9.11S(8))

Item	Foreign regulatory authorities
1	Alberta Securities Commission
2	Finanzmarktaufsicht of Austria
3	Financial Services and Markets Authority of Belgium
4	British Columbia Securities Commission
5	Financial Supervision Commission of Bulgaria
6	Cyprus Securities and Exchange Commission
7	Czech National Bank
8	Finanstilsynet of Denmark
9	Dubai Financial Services Authority
10	Estonian Financial Supervision Authority
11	Finanssivalvonta of Finland
12	Autorité des Marchés Financiers of France
13	Bundesanstalt für Finanzdienstleistungsaufsicht of Germany
14	Hellenic Capital Market Commission of Greece
15	Guernsey Financial Services Commission
16	Hong Kong Securities and Futures Commission
17	Pénzügyi Szervezetek Állami Felügyelete of Hungary
18	Fjármálaeftirlitið of Iceland
19	Central Bank of Ireland
20	Isle of Man Financial Supervision Commission
21	Israel Securities Authority
22	Commissione Nazionale per le Società e la Borsa of Italy
23	Financial Services Agency of Japan
24	Jersey Financial Services Commission
25	Finanšu un kapitāla tirgus komisija of Latvia
26	Finanzmarktaufsicht of Liechtenstein
27	Bank of Lithuania
28	Commission de Surveillance du Secteur Financier of Luxembourg
29	Securities Commission of Malaysia
30	Malta Financial Services Authority
31	Autoriteit Financiële Markten of the Netherlands
32	New Zealand Financial Markets Authority
33	Finanstilsynet of Norway
34	Ontario Securities Commission
35	Securities and Exchange Commission of Pakistan
36	Polish Financial Supervision Authority
37	Comissão do Mercado de Valores Mobiliários of Portugal
38	Quebec Autorité des Marchés Financiers
39	Romanian National Securities Commission
40	The Monetary Authority of Singapore
41	Národná banka Slovenska
42	Financial Services Board of the Republic of South Africa
43	Comisión Nacional del Mercado de Valores of Spain
44	Finansinspektionen of Sweden
45	Securities Commodities Authority of the United Arab Emirates
46	Financial Conduct Authority of the United Kingdom
47	U.S. Securities and Exchange Commission

” ”

Transitional

5. A responsible entity of a simple managed investment scheme:
- (a) that was either a *hedge fund* or *fund of hedge funds* within the meaning of subregulation 7.9.11S(8) of the Regulations as in force immediately before the commencement of this instrument; and
 - (b) that is neither a *hedge fund* nor *fund of hedge funds* within the meaning of subregulation 7.9.11S(8) of the Regulations as in force immediately after the commencement of this instrument; and
 - (c) in relation to which a Product Disclosure Statement prepared or purported to be prepared in accordance with Part 7.9 of the Act as it applies but for Subdivision 4.2C of Division 4 of Part 7.9 of the Regulations was in use immediately before the commencement of this instrument;

may continue to use that Product Disclosure Statement until 1 February 2014 despite the amendments made by this instrument.

Interpretation

6. In this instrument:

Regulations means the *Corporations Regulations 2001*.

simple managed investment scheme has the meaning given by subregulation 1.0.02(1) of the Regulations.

Dated this 25th day of September 2013

Signed by Grant Moodie
as a delegate of the Australian Securities and Investments Commission