

ASIC Class Order [CO 08/824]

Variation of Class Orders [CO 08/751] and [CO08/764]

Issued 13/11/2008

Effective the later of 19 November or registration

Class Order [CO 08/824] amends [CO 08/751] and [CO 08/764]

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

Prepared by the Australian Securities and Investments Commission.

Australian Securities and Investments Commission Corporations Act 2001 — Subsection 1020F(1) — Variation

Enabling legislation

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

Title

2. This instrument is ASIC Class Order [CO 08/824].

Commencement

3. This instrument commences on the later of:
 - (a) the date it is registered under the *Legislative Instruments Act 2003*; and
 - (b) 19 November 2008.

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/>.

Variation

Relaxation of covered short selling ban for certain non-financial securities and managed investment products

4. Notional section 1020BD of the Act as set out in paragraph 4 of ASIC Class Order [CO 08/751] is varied by:
 - (a) after subsection (1) inserting:

“Non financial securities and managed investment products

(1A) Subsection (1) does not apply in relation to a sale of a security or product where:

- (a) at the time of the sale, securities or products in the same class are not a constituent of the index known as the S&P/ASX 200 Financials; and

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

- (b) the sale is not the sale of a share issued by any of the following:

- (i) Calliden Group Limited ACN 061 215 601;
- (ii) Futuris Corporation Limited ACN 004 336 636;
- (iii) The Rock Building Society Limited ACN 067 765 717;
- (iv) Wesfarmers Limited ACN 008 984 049;
- (v) Wide Bay Australia Limited ACN 087 652 060.”; and

(b) after subsection (7) inserting:

“(7A) For the avoidance of doubt, nothing in subsections (2) to (6) limits subsection (1A).”.

Disclosure-related variations

5. Paragraph 4 of ASIC Class Order [CO 08/751] is varied by omitting section 1020BC and substituting:

“1020BC Disclosure in relation to the sale of section 1020B products

(1) Subsections (2) and (3) apply to the sale of section 1020B products:

- (a) made on a licensed market; or
- (b) that are off-market crossings that must be reported to the operator of the market.

(2) A person (the *client*) who requests a participant in the market to make a sale of section 1020B products on the client's behalf must, when making the request, inform the participant which (if any) of the following kinds of sales the proposed sale would be:

- (a) a long sale;
- (b) a short sale;
- (c) an exempt covered short sale.

Note : In some cases a sale will not be one of these kinds because, for example, it is a sale to which regulation 7.9.79 of the *Corporations Regulations 2001* applies.

- (3) A participant in the market must before making an offer to sell section 1020B products:
 - (a) if the sale is made on behalf of a client, ask the client which (if any) of the following kinds of sales the proposed sale would be:
 - (i) a long sale;
 - (ii) a short sale;
 - (iii) an exempt covered short sale; and
 - (b) record in written or electronic form which (if any) of the following kinds of sales the proposed sale would be:
 - (i) a long sale;
 - (ii) a short sale;
 - (iii) an exempt covered short sale.

Note: Paragraph (b) applies in relation to sales made by a participant regardless of whether the sale is made as principal or as an agent.

- (4) A participant in the market does not have to comply with paragraph (3)(a) if at the time the client makes the request to sell the section 1020B products, the client informs the participant that the sale is of a specified kind referred to in that paragraph.

Note: The participant must nonetheless comply with paragraph (3)(b) for the sale.

- (5) Where a participant in the market makes a reportable short sale before 7 pm on a trading day (the *sale day*), the participant must by 9 am on the next trading day inform the operator of the market of the total number of products in the same class which the participant has sold before 7 pm on the sale day as a result of any reportable short sale. For the purposes of this subsection, a sale that is made at or after 7 pm on a trading day and before the start of the next trading day is taken to have been made on the next trading day.

- (6) In this section:

exempt covered short sale means a sale of section 1020B products where:

- (a) at the time of the sale, the person making the sale has or, if the person is selling on behalf of another person, that other person has a presently exercisable and unconditional right to vest the products in the buyer because of a securities lending arrangement entered into before that time; and
- (b) one or more of subsections 1020BD(2) to (6) apply to the sale; and
- (c) subsection 1020BD(1A) does not apply to the sale.

long sale means a sale of section 1020B products where at the time of the sale the person making the sale has or, if the person is selling on behalf of another person, that other person has a presently exercisable and unconditional right to vest the products in the buyer other than because of a securities lending arrangement entered into before that time.

off-market crossing means, in relation to section 1020B products that are able to be traded on a licensed market, a sale of the products where all of the following apply:

- (a) the sale is not on the market;
- (b) under the operating rules of the market, the sale must be reported to the operator of the market;
- (c) a participant in the market makes the sale:
 - (i) on behalf of both the buyer and the seller of the products; or
 - (ii) on behalf of the buyer of the products and on the participant's own behalf as seller of the products; or
 - (iii) on behalf of the seller of the products and on the participant's own behalf as buyer of the products.

reportable short sale means:

- (a) a sale of section 1020B products to which subsections (2) and (3) apply (see subsection (1)) that is:
 - (i) a short sale; or
 - (ii) an exempt covered short sale; or
- (b) a sale of section 1020B products which would contravene subsection 1020B(2) but for ASIC Class Order [CO 08/764].

section 1020B products has the meaning given by subsection 1020B(1).

securities lending arrangement means an arrangement under which:

- (a) one entity (the *lender*) agrees that it will:
 - (i) deliver particular section 1020B 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.

sell has a meaning affected by subsection 1020B(7).

short sale means a sale of section 1020B products:

- (a) where both of the following are satisfied:
 - (i) at the time of the sale, the person making the sale has or, if the person is selling on behalf of another person, that other person has, a presently exercisable and unconditional right to vest the products in the buyer because of a securities lending arrangement entered into before that time;
 - (ii) subsection 1020BD(1A) applies to the sale whether or not any of subsections 1020BD(2) to (6) also apply to the sale; or
- (b) to which any of paragraphs 1020B(4)(b), (d) or (e) apply.

Note: The sales referred to in paragraph (b) are the sales which a person must inform a licensee are short sales under subsection 1020B(5) and other sales of the same kind.

- (7) For the avoidance of doubt, a person who informs a financial services licensee that a sale is a short sale in accordance with subsection 1020B(5) is taken for the purposes of this section to have informed the licensee that the sale is a *short sale* within the meaning of this section.”.

- 6. ASIC Class Order [CO 08/764] is varied by omitting paragraphs 5 to 9 (including the headings to those paragraphs but not the heading “**Conditions**”) and substituting:

“*Sellers of securities or managed investment products*

5. A person (the *client*) who sells a security or product through a participant in a licensed market as the result of the exercise of an ETO must inform the participant whether the sale is a naked ETO short sale. The client must inform the participant:
 - (a) where the client requests the participant to exercise the ETO—at the time the request is made; or
 - (b) otherwise—as soon as practicable after the client becomes aware that the sale has been made.

Market participants

6. A participant in a licensed market who sells a security or product on behalf of a client as the result of the exercise of an ETO must ask the client whether the sale is a naked ETO short sale. The participant must ask:
 - (a) where the client requests that the ETO be exercised—at the time the request is made; or
 - (b) otherwise—as soon as practicable after the sale has been made.
7. A participant in a licensed market does not have to comply with paragraph 6 if, at the relevant time, the participant has been informed by the client whether the sale is a naked ETO short sale.
8. A participant in a licensed market must record in written or electronic form whether any sale of a security or product the participant makes as the result of the exercise of an ETO is a naked ETO short sale. The record must be made:
 - (a) where the sale is made on behalf of a client—at the time the participant is informed whether the sale is of that kind; or
 - (b) otherwise—at the time of the sale.

Interpretation

9. In this instrument:

naked ETO short sale means a sale of a security or managed investment product which would contravene subsection 1020B(2) of the Act but for paragraph 4.

request in relation to the exercise of an ETO does not include a request to exercise the ETO on its expiry date if the price of the security or managed investment product to which it

relates is at a specified level at a specified time on that date.”.

Dated this 13th day of November 2008

Signed by Stephen Yen, PSM
as a delegate of the Australian Securities and Investments
Commission