

ASIC Class Order [CO 08/751]

Covered short sales

Issued 19/9/2008

Registered on Federal Register of Legislative Instruments 22/9/2008

Effective 22/9/2008 (date of registration)

Related document: [RG 196]

Class Order [CO 08/751] has the effect of prohibiting the sale (covered short sale) of securities, managed investment products and stapled securities on the S&P/ASX 200 Financials index or of certain other APRA regulated businesses quoted on a licensed market, where the person has a 'presently exercisable and unconditional right to vest' the product in the buyer because of a securities lending arrangement entered into before that time. The class order provides some exceptions to this prohibition.

ASIC understands that it is common market practice to rely on products obtained under a securities lending arrangement to satisfy the need to have a 'presently exercisable and unconditional right to vest' products in the buyer. In this regard, it is ASIC's view that a seller has this right only if, at the time of sale, the seller has the absolute ability or power to confer, or enable the conferral of, title in the buyer. This means, a seller relying on a securities lending arrangement must have an enforceable obligation against the lender and have satisfied all their obligations under the arrangement at the time of sale. A 'best endeavours' undertaking from a lender to provide the relevant product at the time of settlement is not sufficient. See Regulatory Guide 196 Short selling: Overview of s1020B.

Where covered short sales and certain naked short sales are permitted, [CO 08/751] imposes certain reporting requirements.

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

This compilation was prepared on 19 November 2008 taking into account amendments up to [CO 08/824]. See the table at the end of this class order.

Prepared by the Australian Securities and Investments Commission.

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

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 08/751].

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/>.

Declaration

4. Part 7.9 applies in relation to all persons as if Division 6 of that Part were modified or varied by inserting after section 1020B:

“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.

[Historical note: Notional s1020BC replaced 19/11/2008 [CO 08/824]. Notional s1020BC formerly read:

‘1020BC Reporting of covered short selling on a licensed market

- (1) This section applies in relation to a sale of section 1020B products by a person in this jurisdiction where:
 - (a) the sale is made on a licensed market; and
 - (b) at the time of the sale:
 - (i) the person has or, if the person is selling on behalf of another person, that other person has; or
 - (ii) the person believes on reasonable grounds that the person 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.
- (2) A person who requests a financial services licensee to make the sale of section 1020B products must, when making the request, inform the licensee that the sale is a short sale to which this section applies.
- (3) A financial services licensee who is a participant on the market must, before selling section 1020B products on behalf of another person, ask the other person whether the sale would be a short sale to which this section applies. The licensee must record the answer in written or electronic form before selling the products.
- (4) A financial services licensee who is a participant on the market must by no later than 9.00am on each trading day inform the market operator of their net covered short position in section 1020B products as at 7:00pm on the previous trading day.
- (5) In this section:

net covered short position means, in relation to a class of section 1020B products sold by a financial services licensee, the amount worked out according to the following formula:

borrowed products sold — borrowed products settled

where:

borrowed products sold means the total number of products in the class the sale of which is covered by subsection (1) that have been sold by the licensee since the commencement of this section; and

borrowed products settled means the total number of products in the class, the sale of which is covered by subsection (1) and in respect of which products have been vested in the buyer since the commencement of this section.

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).'

Previously amended 22/9/2008 [CO 08/752] by inserting the term 'The licensee must record the answer in written or electronic form before selling the products.' at the end of subsection (3).]

1020BD Prohibition of covered short selling of certain securities

- (1) Notwithstanding sections 1020B and 1020BC, a person must not sell a security or managed investment product that is in a class of financial products that is able to be traded on a licensed market if at the time of the sale:
 - (a) the person has or, if the person is selling on behalf of another person, that other person has; or
 - (b) the person believes on reasonable grounds that the person 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 security or product in the buyer because of a securities lending arrangement entered into before that time.

[*Historical note:* Notional subsection 1020BD(1) amended 22/9/2008 [CO 08/753] by:

- inserting the words 'or managed investment product' after the word 'security' (first occurring);
- replacing the term 'securities' (first occurring) with the term 'financial products'; and
- inserting the words 'or product' after the word 'security' (second occurring).]

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.

[Historical note: Notional subsection 1020BD(1A) inserted 19/11/2008 [CO 08/824].]

Hedging by market makers

(2) Subsection (1) does not apply in relation to a sale of a security (the *shorted product*) or product (the *shorted product*) by a person where all of the following apply:

- (a) the person makes a market in a financial product;
- (b) the person issues or sells a financial product (the *counterparty product*) in the course of making that market;
- (c) the person holds an Australian financial services licence covering making a market in the counterparty product or is exempt from holding 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's market making activities;
- (e) the person does not know after making reasonable inquiries that the issue or sale of the counterparty product to another person (the *client*) in the course of making a market will result in the client establishing or increasing

an economic net short position in relation to the shorted product.

Arbitrage

- (3) Subsection (1) does not apply in relation to a sale of a security or product by a person as part of a dual listed arbitrage transaction.
- (4) Subsection (1) does not apply in relation to a sale of a security or product by a person as part of an index arbitrage transaction.

Hedging in relation to underwriting and conversions

- (5) Subsection (1) does not apply in relation to a sale of a security or product by a person for the purposes of managing, avoiding or limiting the financial consequences of:
 - (a) underwriting:
 - (i) in relation to a body—a dividend reinvestment plan or security purchase plan of the body; or
 - (ii) in relation to a registered scheme—a distribution reinvestment plan or interest purchase plan of the scheme; or
 - (b) being issued with securities or products on the conversion of a convertible security or convertible product.

[Historical note: Notional s1020BD(5)(b) replaced 24/10/2008 [CO 08/801]. Notional s1020BD(5)(b) formerly read:

“(b) being issued with securities or products on the conversion of a convertible security or convertible product, where the number of securities or products in that body or scheme or a related entity to be issued on conversion is referable to the volume weighted average price of that security or product during a specified period on a financial market.”.]

Hedging of pre-22 September 2008 exposures

- (6) Subsection (1) does not apply in relation to a sale of a security or product by a person for the purposes of managing, avoiding or limiting the financial consequences of issuing, acquiring or disposing of a security or product in the same class or a derivative relating to securities or products in that class in the course of making a market, where the person issued, acquired or disposed of, or entered into an enforceable agreement to issue, acquire or dispose of, the security, product or derivative before 22 September 2008.

Interpretation

- (7) In this section:

able to be traded includes (in addition to the meaning given by section 761A), in relation to a security or managed investment product and a market, traded on the market under terms by which the security or product must be transferred together with one or more other financial products.

dual listed arbitrage transaction means a purchase or sale of financial products effected in the ordinary course of trading on a financial market together with an offsetting sale or purchase of those financial products or equivalent financial products effected at the same time, or at as nearly the same time as practicable (see subsection (8)), in the ordinary course of trading on another financial market for the purpose of obtaining a profit from the difference between the prices of those financial products or those financial products and the equivalent financial products in the 2 financial markets.

equivalent financial product means:

- (a) in relation to a share in a body:
 - (i) an interest (a ***depository interest***) in the share that has been issued for the purpose of enabling beneficial ownership of a share in the same class in the body to be recorded in and transferred through a clearing and settlement facility;
 - (ii) a share in or a depository interest that relates to a share in another body with which the body has contractually agreed to carry on business as a single economic enterprise under terms which have the effect of giving the shares in each body as nearly as practicable the same interest in the enterprise;
- (b) in relation to a managed investment product—a depository interest that relates to the product;
- (c) in relation to a depository interest that relates to a share in a body:
 - (i) a share in the body;
 - (ii) where the body is under a contractual agreement with another body of the kind referred to in subparagraph (a)(ii)—a share in or a depository interest that relates to a share in the other body;
- (d) in relation to a depository interest that relates to a managed investment product—the managed investment product.

exchange traded fund means a managed investment scheme or a separately managed portfolio of assets managed with the objective of investing in securities or

products in a manner that tracks the performance of a particular financial market index.

index arbitrage transaction means:

- (a) a sale of securities or managed investment products which are represented in a particular financial market index effected in the ordinary course of trading on a financial market and substantially in accordance with the proportion in which the securities or products are represented in the index, together with an offsetting purchase of:
- (i) derivatives issued over the index; or
 - (ii) interests in an exchange traded fund which replicates or substantially replicates the composition of the index,

effected at the same time, or at as nearly the same time as practicable, in the ordinary course of trading on the same or another financial market for the purpose of obtaining a profit from the difference between the aggregated value of the securities or products and the value of the derivatives or interests, where the value of the offsetting purchase is equal to or greater than the aggregated value of the securities or products sold; or

- (b) a purchase of securities or products which are represented in a particular financial market index effected in the ordinary course of trading on a financial market and substantially in accordance with the proportion in which the securities or products are represented in the index, together with an offsetting sale of:

- (i) derivatives issued over the index; or
- (ii) interests in an exchange traded fund which replicates or substantially replicates the composition of the index,

effected at the same time, or at as nearly the same time as practicable, in the ordinary course of trading on the same or another financial market for the purpose of obtaining a profit from the difference between the aggregated value of the securities or products and the value of the derivatives or interests, where the value of the offsetting sale is equal to or less than the aggregated value of the securities or products bought.

interest purchase plan means an offer of interests in a managed investment scheme under an arrangement which involves all of the following:

- (a) an offer is made to each person recorded in the register of members of the scheme as a member of the scheme;
- (b) each offer is made on the same terms and conditions;
- (c) the issue price is less than the market price during a specified period in the 30 days prior to either the date of the offer or the date of the issue;
- (d) no member may be issued with interests with an application price totalling more than \$5,000 in any consecutive 12 month period;
- (e) the member must provide the issuer on application for the interests with a certification to the effect that the aggregate of the application price for:
 - (i) the interests the subject of the application; and
 - (ii) any other interests in the class applied for by the member under the arrangement or any similar arrangement in the 12 months prior to the application,
 does not exceed \$5,000.

securities lending arrangement has the same meaning as in section 1020BC.

security purchase plan means an offer of securities in a body under an arrangement which involves all of the following:

- (a) an offer is made to each person recorded in the register of members of the body as a member of the body;
- (b) each offer is made on the same terms and conditions;
- (c) the issue price is less than the market price during a specified period in the 30 days prior to either the date of the offer or the date of the issue;
- (d) no member may be issued with securities with an application price totalling more than \$5,000 in any consecutive 12 month period;
- (e) the member must provide the issuer on application for the securities with a certification to the effect that the aggregate of the application price for:
 - (i) the securities the subject of the application; and
 - (ii) any other securities in the class applied for by the member under the arrangement or any similar arrangement in the 12 months prior to the application,
 does not exceed \$5,000.

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

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

[Historical note: Notional subsection 1020BD(7A) inserted 19/11/2008 [CO 08/824].]

(8) For the avoidance of doubt and without limiting the meaning of the definition of *dual listed arbitrage transaction*, if two financial markets are in different time zones, the purchase or sale (the *first transaction*) and the offsetting sale or purchase (the *second transaction*) is taken to have occurred at a time that is, so far as practicable, the same time if the second transaction is effected in a session of trading that:

(a) overlaps with; or

(b) occurs soonest after the close of:

the session of trading in which the first transaction was effected.”

[Historical note: Notional subsection 1020BD(2) and (3) replaced 23/9/2008 [CO 08/763] by notional subsections 1020BD(2)—(8). Notional subsections 1020BD(2) and (3) previously read:

‘(2) Subsection (1) does not apply in relation to a sale of a security or product by a person who is a Market Maker or Warrant Market Maker for the purposes of managing, avoiding or limiting the financial consequences of issuing or holding a derivative in the course of the person’s market making activities.

Note: Subsection (2) enables a market maker to make covered short sales to hedge derivative positions that have entered into in the course of their market activities to the extent that they are contemplated by the ASX Market Rules.

(3) In this section:

able to be traded includes (in addition to the meaning given by section 761A), in relation to a security or managed investment product and a market, traded on the market under terms by which the security or product must be transferred together with one or more other financial products.

Market Maker has the same meaning as in the ASX Market Rules as at 19 September 2008.

market making activities means the acquisition or disposal of derivatives by a person acting in the capacity of a Market Maker or Warrant Market Maker in the circumstances and manner covered by sections 10 or 23 of the ASX Market Rules as at 19 September 2008.

securities lending arrangement has the same meaning as in section 1020BC.

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

Warrant Market Maker has the same meaning as in the ASX Market Rules as at 19 September 2008.’

Notional section 1020BD previously inserted 22/9/2008 [CO 08/752].

Notional subsection 1020BD(2) previously amended 22/9/2008 [CO 08/753] by inserting the words ‘or product’ after the word ‘security’.

Notional subsection 1020BD(2) previously amended 22/9/2008 [CO 08/753] by inserting the definition of ‘able to be traded’.]

Dated this 19th day of September 2008

Signed by Anthony D'Aloisio
as a delegate of the Australian Securities and Investments
Commission

Notes to ASIC Class Order [CO 08/751]

Note 1

ASIC Class Order [CO 08/751] (in force under s1020F(1)(c) 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 making or FRLI registration	Date of commencement	Application, saving or transitional provisions
[CO 08/751]	22/9/2008	22/9/2008	-
[CO 08/752]	22/9/2008	22/9/2008	-
[CO 08/753]	22/9/2008	22/9/2008	-
[CO 08/763]	23/9/2008	23/9/2008	-
[CO 08/801]	24/10/2008	24/10/2008	-
[CO 08/824]	18/11/2008	19/11/2008	-

Table of Amendments

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

Provision affected	How affected
Notional s1020BC(3)	am. [CO 08/752]
Notional s1020BC	rs. [CO 08/824]
Notional s1020BD	ad. [CO 08/752]; am. [CO 08/753]
Notional s1020BD(1A)	ad. [CO 08/824]
Notional s1020BD(2)	rs. [CO 08/763]
Notional s1020BD(3)	rs. [CO 08/763]
Notional s1020BD(4)	ad. [CO 08/763]
Notional s1020BD(5)	ad. [CO 08/763]
Notional s1020BD(5)(b)	rs. [CO 08/801]
Notional s1020BD(6)	ad. [CO 08/763]
Notional s1020BD(7)	ad. [CO 08/763]
Notional s1020BD(7A)	ad. [CO 08/824]
Notional s1020BD(8)	ad. [CO 08/763]