

ASIC Class Order [CO 09/774]

Naked short selling relief for market makers

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Registered on Federal Register of Legislative Instruments 23/9/2009

Effective 23/9/2009 (date of registration)

Related document: AD 09/182, CP 106 and REP 167

Class Order [CO 09/774] provides conditional relief to market makers to permit them to engage in naked short selling in order to hedge risks from their market making activities.

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

Prepared by the Australian Securities and Investments Commission.

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 200;

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

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.

Interpretation

- 6. In this instrument:

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

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.

Dated this 18th day of September 2009

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