



TEMPERATURE

# SEC Bans Short Sales in Financial Services Companies; Requires Disclosure of Short Sales

On September 18, 2008, the Securities and Exchange Commission (SEC) issued two emergency orders to address heightened concerns over market manipulation in light of recent turmoil in the financial markets. The first order, effective immediately, prohibits short selling by all persons in the securities of 799 financial services companies.<sup>1</sup> The second order, effective at 12:01 a.m.

EDT on September 22, 2008, adopted short sale reporting requirements for institutional investment managers that have Form 13F filing obligations.<sup>2</sup>

On Sunday, September 21, 2008, the SEC adopted clarifying amendments to both orders.<sup>3</sup> The emergency orders and the amendments thereto were adopted by the SEC in coordination with similar efforts by the U.K. Financial Services Authority (FSA) in its responses to the market crisis.<sup>4</sup>

## **Ban on short selling of financial stocks**

The SEC has temporarily banned all short selling of any publicly traded securities of 799 financial services companies. A list of the companies is available on the SEC's website, [www.sec.gov](http://www.sec.gov). In its Sunday, September 21, 2008 amendment to this order, the SEC delegated to each national securities exchange the authority to identify additional listed companies that qualify for inclusion in the list of companies covered by the prohibition on short sales.

Registered market makers, block positioners and other market makers obligated to quote in the over-the-counter market are exempt from the ban if they are selling short as part of bona fide market-making in the applicable security. In addition, the ban does not apply to short sales as a result of automatic exercise or assignment of an equity option, or in connection with settlement of a futures contract, that is held prior to the effectiveness of the ban due to expiration of the option or futures contract.

The ban is immediately effective and will terminate at 11:59 p.m. EDT on October 2, 2008, unless extended.

## **Disclosure requirement for institutional investment managers**

The SEC has imposed temporary disclosure requirements on institutional investment managers that have filed, or were required to file, a Form 13F for the calendar quarter ended June 30, 2008—i.e. those institutional investment managers that exercise investment discretion with respect to accounts holding Section 13(f) securities having an aggregate fair market value of at least \$100 million.

The order requires such institutional investment managers to file a report on new Form SH (available on the SEC's web site) on the first business day of every calendar week immediately following a week in which a short sale was effected.

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Form SH must disclose, for each calendar day of the prior week, the:

- number and value of securities sold short during the day
- opening short position
- closing short position
- largest intraday short position
- time of such largest intraday short position

This disclosure requirement will apply only to short sales effected after the effective date of the order. No filing will be required when no short sales of a Section 13(f) security have been effected since the filing of the last Form SH. In addition, an institutional investment manager need not report short positions otherwise reportable if (i) the short position is less than one-quarter of 1% of the issued and outstanding securities of that class,<sup>5</sup> and (ii) the fair market value of the short position is less than \$1 million.

This new disclosure requirement is effective at 12:01 a.m. EDT on September 22, 2008 and terminates at 11:59 p.m. on October 2, 2008, unless extended. The first Form SH is required to be filed on September 29, 2008.

Forms SH must be filed electronically with the SEC. In its Sunday, September 21, 2008 amendment to the order, the SEC indicated that Forms SH initially will be filed on a non-public basis. The SEC will make the Forms available to the public two weeks after the due date for the Forms SH.

### **Interpretive Questions**

There are a number of open interpretive questions concerning the emergency orders discussed above as well as other recent SEC actions. And, of course, the market crisis giving rise to these actions remains fluid. We expect the SEC and its staff to provide additional guidance, at least informally, over the coming days. We also expect continued efforts to coordinate responses among the SEC, the FSA and other worldwide authorities. Accordingly, this discussion, which is only a summary of key aspects of the orders, is subject to further SEC guidance and further developments.

<sup>1</sup> Exchange Act Release No. 34-58592 (September 18, 2008) (<http://www.sec.gov/rules/other/2008/34-58592.pdf>).

<sup>2</sup> Exchange Act Release No. 58591 (September 18, 2008) (<http://www.sec.gov/rules/other/2008/34-58591.pdf>).

<sup>3</sup> Exchange Act Release No. 58611 (September 21, 2008) (<http://www.sec.gov/rules/other/2008/34-58611.pdf>) and Exchange Act Release No. 58591A (September 21, 2008) (<http://www.sec.gov/rules/other/2008/34-58591a.pdf>).

<sup>4</sup> Brown Rudnick's Client Alert about the FSA's new short selling rules is available at [http://www.brownrudnick.com/nr/pdf/alerts/Brown\\_Rudnick\\_Client\\_Alert\\_FSA\\_Short\\_Selling\\_Rules\\_Hallam\\_9-08.pdf](http://www.brownrudnick.com/nr/pdf/alerts/Brown_Rudnick_Client_Alert_FSA_Short_Selling_Rules_Hallam_9-08.pdf).

<sup>5</sup> As reported on the issuer's most recent annual or quarterly report, and any current report subsequent thereto, filed with the SEC pursuant to the Securities Exchange Act of 1934, unless the institutional investment manager knows or has reason to believe the information contained therein is inaccurate.

If you have any questions as to the scope or interpretation of the new rules and what they may mean for you, or need assistance with disclosure, please contact your Brown Rudnick attorney or one of the following attorneys:

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