



Update on UK's Short-Selling Measures: FSA Proposes to End the Ban but to Extend the Disclosure Regime

Our client alerts dated 19 September and 1 October 2008 reported on the emergency temporary measures taken by the UK's Financial Services Authority ("FSA"), which imposed a ban on all short-selling in publicly-quoted UK financial sector companies as well as a heightened obligation to disclose net short positions in the shares of such companies.¹ These measures were expressed to expire on 16 January 2009 unless extended by the FSA.

Despite the FSA's attempt to justify them on grounds of the "extreme circumstances" prevailing in the financial markets after Lehman Brothers' collapse, the measures have been highly controversial and their effectiveness open to dispute. At the time of their introduction, the FSA promised to conduct a comprehensive review of the rules in January 2009.

On 5 January 2009 the FSA published a consultation paper proposing to lift the short-selling ban from 16 January 2009 but to extend the disclosure obligation, in a slightly relaxed version, until 30 June 2009.² In addition, the FSA reserves the right to reinstate the ban if it considers it warranted. A draft of the proposed Short Selling (No 5) Instrument 2009 is appended to the consultation paper.

As originally introduced on 18 September 2008, the FSA rules required disclosures on a daily basis of all net short positions exceeding 0.25% of the issued share capital of the relevant company ("disclosable short position") even if there has not been any change. The rules were modified on 22 October 2008 so that a further disclosure is only required when the short position changes.

From 16 January 2009, it is proposed that the short-seller only be required to make further disclosures at 0.1% bands, i.e., when its position "reaches, exceeds or falls below a disclosable short position of 0.25%, 0.35%, 0.45% and 0.55% of the issued share capital of the company and each 0.1% threshold thereafter."

The disclosure obligation, as modified, will be extended and remain in force until 30 June 2009.

¹ See Morrison & Foerster News Bulletins entitled "UK's New Short-Selling Prohibition" (19 September 2008), <http://www.mofo.com/news/updates/files/080919UKNewShort.pdf> and "Update Regarding UK's Short-Selling Prohibition" (1 October 2008), <http://www.mofo.com/news/updates/files/081001UKUupdate.pdf>.

² FSA CP09/01: Temporary short selling measures (5 January 2009), http://www.fsa.gov.uk/pubs/cp/cp09_01.pdf.

Industry participants are invited to provide their comments by 9 January 2008, in order to enable the new measures to be implemented from 16 January 2009 (when the previous measures will expire).

FSA intends to publish another consultation paper within a month setting out its proposals for a more permanent short-selling regime.³

The parallel short-selling rules which were introduced in June 2008 imposing disclosure obligations in relation to short-selling of shares of UK listed companies (financial sector or otherwise) whilst undergoing rights issues⁴ remain unaffected by the latest FSA proposals.

It is hoped that, as part of the consultation on a longer-term regime, the FSA will review both sets of short-selling rules, if only for the sake of clarity.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

³. See FSA Newsletter entitled "Temporary Short Selling Measures" (January 2009), http://www.fsa.gov.uk/pubs/cp/cp09_01_newsletter.pdf, which provides a summary of FSA CP09/1.

⁴. See Morrison & Foerster News Bulletin entitled "Heightened Derivatives and Trading Disclosure for UK Equity Markets" (9 July 2008), <http://www.mofo.com/news/updates/files/080709Heightened.pdf>.