

Asset Management, Financial Institutions Advisory | October 08, 2008

Short Sale Update: Emergency order banning the short selling of securities of certain financial institutions to expire

On September 18, 2008, the U.S. Securities and Exchange Commission (the "SEC") issued an emergency order prohibiting short sales of the securities of certain financial institutions (the "Short Sale Ban Order").¹ On October 2, 2008, the SEC extended the Short Sale Ban Order until the earlier of (a) three business days from the President's signing of the Emergency Economic Stabilization Act of 2008 (the "Economic Stabilization Act") or (b) 11:59 p.m. ET on October 17, 2008.²

On October 3, 2008, the President signed the Emergency Economic Stabilization Act. Accordingly, the Short Sale Ban Order will expire at 11:59 p.m. ET on October 8, 2008.³

The chart below summarizes the recent SEC emergency orders relating to short selling and the current status of each such order.⁴

Release:	Description:	Modified/interpreted by:
Release 34-58572, "Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments" (September 17, 2008) (the "September 17 Order").	<ul style="list-style-type: none"> ▪ Implements Rule 204T, creating penalties for broker-dealers that maintain a fail to deliver position. ▪ Eliminates the "options market maker" exemption from Regulation SHO's close-out requirement. ▪ Adopts antifraud Rule 10b-21 against "naked" short selling. 	<ul style="list-style-type: none"> ▪ SEC Staff FAQ regarding Rule 204T. ▪ FINRA Regulatory Notice 08-50 (Regarding market making exemption attestation). ▪ Release 34-58711, "Order Extending Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments" (October 1, 2008) (Extends the September 17 Order until October 17, 2008). ▪ Press Release 2008-235, "Statement of the Securities and Exchange Commission Concerning Short Selling and Issuer Stock Repurchases" (October 1, 2008) (Stating that "each of these actions will continue in force following the expiration of the Commission's emergency orders").

¹ See SEC Release 34-58592, "Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments" (September 18, 2008). A copy of the Short Sale Ban Order is available on the SEC's Internet website at <http://www.sec.gov/rules/other/2008/34-58592.pdf>.

² See SEC Release 34-58723, "Order Extending Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments" (October 2, 2008) (the "Order Extension"). A copy of the Order Extension is available on the SEC's Internet website at <http://www.sec.gov/rules/other/2008/34-58723.pdf>.

³ Similar bans in the UK and other jurisdictions remain in effect.

⁴ For more information regarding recent SEC emergency orders, please see "Short Sale Update: Emergency actions by the SEC prohibit short selling on stocks of financial institutions; require notice of short sales by institutional investment managers; adopt amendments to Regulation SHO; and adopt new 'naked' short sale antifraud rule; New York Attorney-General announces criminal and civil probe into short selling activity" (September 2008), available at: http://www.shearman.com/am_092208/. For more information about short selling regulation generally, please see "SEC Regulation SHO Takes Effect, Implementing a Mixed Bag of Changes to Short Sale Rules" (March 2005), available at http://www.shearman.com/cm_0305/.

Release:	Description:	Modified/interpreted by:
<p>Release 34-58591, "Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments" (September 18, 2008) (the "Form SH Order").</p>	<ul style="list-style-type: none"> ▪ Requires institutional money managers that exercise investment discretion over \$100,000,000 or more to file a new form (Form SH) with the SEC weekly, which form shows short positions over a threshold amount, by day. 	<ul style="list-style-type: none"> ▪ Form SH and Form SH instructions. ▪ SEC Staff FAQ regarding Form SH. ▪ Release 34-85891A, "Amendment to Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments" (September 21, 2008) (the "Amended Form SH Order") (Relating to confidential nature of Form SH). ▪ Release 34-58724, "Amendment to Order and Order Extending Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments" (October 2, 2008) (Requiring Form SH to be filed October 6 and 14, 2008 prior to October 17, 2008 termination of Form SH Order). ▪ Press Release 2008-235, "Statement of the Securities and Exchange Commission Concerning Short Selling and Issuer Stock Repurchases" (October 1, 2008) (Stating that the Amended Form SH Order will be extended to 11:59 p.m. ET on October 17, 2008, "but the Commission intends that the order will continue in effect beyond that date without interruption in the form of an interim final rule").
<p>Release 34-58592, "Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments" (September 18, 2008) (the "Short Sale Ban Order").</p>	<ul style="list-style-type: none"> ▪ With limited exceptions, bans short sales in a wide variety of financial institution stocks. 	<ul style="list-style-type: none"> ▪ Release 34-58611, "Amendment to Emergency Order Pursuant to Section 12(K)(2) of the Securities Exchange Act of 1934 Taking Temporary Action To Respond To Market Developments" (September 21, 2008) (the "Short Sale Ban Order Amendments"). ▪ Release 34-58723, "Order Extending Emergency Order Pursuant To Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments" (October 2, 2008) (Extending Short Sale Ban Order until three days after the President's signing of the Emergency Economic Stabilization Act of 2008 (which is 11:59 p.m. on October 8, 2008)).

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this memorandum, you may contact your regular Shearman & Sterling contact person or any of the following:

Paul S. Schreiber
New York
+1.212.848.8920
pschreiber@shearman.com

Russell D. Sacks
New York
+1.212.848.7585
rsacks@shearman.com

Charles S. Gittleman
New York
+1.212.848.7317
cgittleman@shearman.com

Nathan J. Greene
New York
+1.212.848.4668
ngreene@shearman.com

Erica J. Laudano
New York
+1.212.848.4933
erica.laudano@shearman.com

Azam H. Aziz
New York
+1.212.848.8154
aaziz@shearman.com

Donna M. Parisi
New York
+1.212.848.7367
dparisi@shearman.com

Geoffrey Goldman
New York
+1.212.848.4867
geoffrey.goldman@shearman.com

M. Holland West
New York
+1.212.848.4579
hwest@shearman.com

Steven Molo
New York
+1.212.848.7456
smolo@shearman.com

Adam S. Hakki
New York
+1.212.848.4924
ahakki@shearman.com

Stuart J. Baskin
New York
+1.212.848.4974
sbaskin@shearman.com

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069 | WWW.SHEARMAN.COM

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