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Selling Themselves Short: EU Enacts Regulation Banning Naked Short Sales and Sovereign Debt CDS

The EU Regulation on Short Selling and Sovereign Credit Default Swaps has now been published, as has the final technical advice. The Regulation creates a harmonised framework for the disclosure of short positions throughout the EU and creates broad powers for the European Securities and Markets Authority to impose emergency restrictions on short selling. It also contains specific provisions to regulate the shorting of sovereign member state obligations. The Regulation will apply from 1 November 2012.

Introduction

On 15 September 2010, the European Commission (the “**Commission**”) published proposals for an EU Regulation on Short Selling and certain aspects of Credit Default Swaps (the “**Commission Proposal**”).¹ The Commission’s objective was to create a harmonised framework for the regulation of short selling to supersede the divergent and uncoordinated approaches taken by individual member states over the past few years. Such national ad hoc approaches have caused compliance difficulties and opportunities for arbitrage.

On 14 March 2012, a revised version of the Commission Proposal was published as Regulation 236/2012 in the Official Journal of the European Union (the “**Regulation**”). On 28 March 2012 the European Securities and Markets Authority (“**ESMA**”) published its draft technical standards (the “**Standards**”) and on 19 April 2012 ESMA published its final technical advice on the Regulation (the “**Advice**”). The Regulation provides for specific rules to regulate the entry into and disclosure of short positions in shares and sovereign debt instruments and the entry into naked credit default swaps (“**CDS**”) on sovereign reference entities. It also established further powers for ESMA. This note summarises the main elements of the Regulation, the Standards and the Advice and details how the new regime will interact with national rules during a transitional period.

Scope

The ban on naked short sales in shares will cover shares traded on a regulated market or multilateral trading facility. An exemption applies for shares that are principally traded outside the EU but are also traded on an EU trading venue. ESMA will publish, biannually, a list of shares falling under this exemption. If a financial instrument falls within the

¹ If you wish to review further information regarding a discussion of the Commission Proposal, you may refer to our client publication entitled “[New European Proposals on Short Selling](#)” dated 27 September 2010.

scope of the Regulation, the new EU rules will apply regardless of whether a short position on it is taken on an EU or non-EU trading venue.

The rules relating to short positions and CDS on sovereign debt apply to debt issued by the EU or any EU member state (including debt issued by any member state ministry, department, central bank, agency, instrumentality or, in a federal member state, a state in such federation but excluding regional, local or quasi-public bodies). This definition would exclude CDS referencing nationalised entities such as certain German or UK banks. The Regulation also expressly includes any debt issued by the European Investment Bank and any special purpose vehicle set up by one or more member states. It is clear from the recitals to the Regulation that a “special purpose vehicle” for these purposes includes the European Financial Stability Facility and the European Stability Mechanism.

The disclosure requirements are determined with respect to net short positions, taking into account any derivative positions. Long positions in relation to the same financial instrument would be offset against short positions of the same legal entity in determining whether a holding is disclosable.

Disclosure Requirements: Shares

The Regulation requires confidential disclosure to the relevant national regulator of a short position in a class of shares whenever that short position exceeds or falls below 0.2% of the issued share capital of the company concerned and/or any 0.1% increment above 0.2%. The relevant national regulator will be the “home member state” competent authority of the relevant issuer pursuant to the Transparency Directive, i.e. the member state where the issuer’s accounts and other disclosures are filed.

In addition, the Regulation requires public disclosure of a short position whenever the position exceeds or falls below 0.5% of the issued share capital of the issuer concerned and/or any 0.1% increment above 0.5%. All disclosures must include the identity of the person holding the short position.

ESMA can provide an opinion to the Commission if it considers it necessary to adjust these thresholds.

Persons taking a short position on an issuer will have to monitor the impacts of corporate events such as rights issues and buy-backs on their interests to ascertain whether any changes to the total number of shares of the issuer trigger a disclosure obligation.

Trading venues will not, contrary to what was initially stated in the Commission Proposal, be required to flag all short trades or publish daily summaries of the volume of short orders.

Disclosure Requirements: Sovereign Debt

Disclosures in relation to sovereign debt will only be made to the national regulator of the relevant sovereign issuer. There will be no public disclosure requirement. For EU sovereign debt, or debt instruments issued by a special purpose vehicle or international financial institution (such as the European Financial Stability Facility), the relevant national regulator will be the regulator of the member state where the issuer (or in the case of the EU, where the specific issuing institution) is established. For the European Financial Stability Facility this would be the national regulator of Luxembourg.

Disclosure thresholds for short positions on sovereign debt will be determined by the Commission and published by ESMA. It will be possible for such thresholds to be varied for different member states based on the liquidity of each sovereign bond market and each sovereign issuer’s level of debt. The Advice states that sovereign issuers will be categorised into three groups, with each group having a different disclosure threshold. The lowest threshold triggering disclosure would be 0.1% of the total amount of outstanding issued sovereign debt for that sovereign issuer, with an

ongoing notification requirement for each 0.05% increment above 0.1%. The total issued amount for each sovereign issuer will be rounded up to the nearest million euro and will be calculated and published quarterly by ESMA.

The Commission Proposal had set out details of a separate disclosure requirement for all naked CDS referencing sovereign debt. However, this has been pared back. The final form of the Regulation provides that any CDS which references sovereign debt must be included in the calculation of a net short position, and so naked CDS need not be disclosed separately. The Commission will specify, through delegated legislation, the methods for calculating net short positions, taking the Advice into consideration.

Restrictions on Naked Short Sales in Shares and Sovereign Debt and Naked Sovereign CDS Positions

Shares and Sovereign Debt

Naked (or uncovered) short selling for equities and sovereign debt is effectively to be prevented. Short sales of shares or sovereign debt will require the person taking the short position either to have, or to have located, a share to be delivered. There are various ways in which this requirement may be satisfied:

- (a) *borrow the share or sovereign debt instrument or make alternative arrangements resulting in a similar legal effect.*
- (b) *enter into an agreement to borrow the share or sovereign debt instrument or otherwise have an “absolutely enforceable” contract or property claim to be transferred ownership of the same, so that settlement can be effected when it is due (a sale by either party under a repurchase agreement is also expressly excluded from being a “short sale”).*

Both (a) above and (b) are intended to cover futures, options, repos, standing agreements and rolling facilities. In response to industry feedback, which expressed concern that the potentially exhaustive list of arrangements or agreements proposed by ESMA did not expressly include prime brokerage agreements, securities lending agreements and agreements relating to conversion rights, the Standards were amended to include a “future proof” sweeper provision which is intended to include such agreements and future innovations on similar agreements.

- (c) *make arrangements with a third party under which that third party confirms that the share or sovereign debt instrument has been located so that settlement can be reasonably expected to be effected when it is due.* ESMA Advice states that authorised market participants in the EU, trading venues, central counterparties, settlement systems, central banks, national debt management entities and equivalently regulated financial institutions from outside the EU can be third parties. Lending desks of the same firm as that holding the position are not included but are covered anyway in (a) and (b) above. One issue not covered by the Standards is that the requesting of a confirmation that a share has been located so that settlement can be reasonably expected implicitly discloses an intention to trade, and third parties receiving such requests may therefore commit market abuse by conducting trades based upon their knowledge of the request. It has been suggested that an appropriate carve-out could be included in the revisions to the Market Abuse Directive currently being envisaged by the Commission, but whether this is adopted remains to be seen.

The intention behind the restriction on short sales in shares and sovereign debt in the Regulation is not to impede the market for covered swaps or stock lending/borrowing. The Standards specify that any assessment of whether instruments have been “located” for the purposes of permitted arrangements should take into account the liquidity (the definition of liquidity being broader than the equivalent MiFID definition) of the instrument in question, the time of buy-back of the instrument in question (based upon same-day trading) and whether there is a reservation to the investor of shares already owned by the third party (“icing”).

National regulators will be allowed to suspend the restriction on naked short sales in sovereign debt in their own member state where the liquidity of their debt falls below a threshold (to be calculated in accordance with delegated

legislation to be issued by the Commission). Suspensions will be effective for up to six months at a time and may be renewed.

A further exclusion is provided for short sales of sovereign debt that hedge a long position in the debt instruments of an issuer, the pricing of which has a high correlation with the pricing of the given sovereign debt. This exclusion was introduced as a response to criticism that the Commission Proposal did not recognise the function of short sales for a wide range of hedging purposes. Compared to the exclusion for naked sovereign CDS, whereby only correlation to the value of any asset or liability is required (see next paragraph), the exclusion for sovereign short sales is narrower and requires a high correlation to a long position in another debt instrument. The relevant section of the Regulation does not allow for ESMA to issue technical standards on this issue.

Restriction on Naked Sovereign CDS Positions

Uncovered sovereign CDS will not be permitted under the Regulation. “Uncovered” for these purposes means any CDS which does not hedge against the risk of default on the reference sovereign obligation or the risk of a decline in the value of the sovereign debt, where the person entering into the CDS holds the debt or is subject to a liability which has a value that is correlated to the value of the sovereign debt. ESMA’s initial technical standards on what would constitute a correlation received significant industry criticism because CDS referencing sovereign obligations are commonly entered into as hedges against corporate or financial institution default. ESMA has since relaxed its initial proposal that both reference entities must be in the same member state. The Advice recognises certain instances where cross-border hedges are permitted, provided that both reference entities in question are in the European Economic Area. ESMA’s initial proposal that those entering into the CDS demonstrate a positive correlation in the previous 12 months to justify the proxy-hedge has also been relaxed. The Advice provides that a correlation can also occur in other circumstances, including where the exposure being hedged relates to an enterprise which would be significantly impacted by an economic or financial crisis within a member state or the wider European Economic Area. As redrafted, the Advice therefore permits, in certain circumstances, proxy-hedges which are entered into in anticipation of future correlations. The size of the hedge must still be proportional to the assets or liabilities being hedged.

National regulators may, as under the rules on naked short sales, temporarily suspend the restriction on naked CDS referencing their own member state’s sovereign debt obligations where the sovereign debt market is not functioning properly and the restriction may have a negative impact on the market.

Buy-in Procedures and Fines for Late Settlement

Compared to the Commission Proposal, the Regulation has a much simplified buy-in procedure for settlement failures for trades in shares. It focuses on central counterparties rather than trading venues or settlement systems. Should a person who sells shares on a trading venue fail to deliver them within four days of settlement being due, the central counterparty to the transaction will be required to buy in the shares in order to ensure effective settlement.

If physical settlement is not possible, the central counterparty must give the buyer an amount based on the value of the shares together with compensation for any losses incurred from the settlement failure. Industry feedback has suggested that compensation should also be available to buyers where a buy-in has occurred and the buyer has incurred losses. Further guidance has also been requested on whether the buy-in procedures apply only to short sales in shares or to any sales in shares. ESMA has responded that the Regulation does not permit ESMA to draft technical standards or advice on this matter.

Exemption for Market-Makers

There is an exemption from the notification and disclosure requirements for market-makers acting in their capacity as such. Were it not for this exemption, institutions who offer both “buy” and “sell” prices for an instrument, thereby providing liquidity to the market, may fall foul of the provisions in any situation where there are a greater number of participants on one side of the market than the other. In order to rely upon the exemption, market-makers must either: (i) post firm and simultaneous two-way quotes; or (ii) hedge positions resulting from client dealings. Market-makers must notify the relevant national regulator in writing 30 days in advance of seeking to rely on the exemption.

There is no express exemption in the Regulation for clearing houses and, as a result, it was unclear whether the market-maker exemption could be relied upon by a clearing house. A clearing house acts as buyer to every seller and seller to every buyer in a cleared trade. As a result, its positions will generally be flat, with one buyer to each seller. However, this will not always be the case. For example, if a contract is void or there has been an event of default, a clearing house and its clearing members may have a net short position for a certain period of time. ESMA has stated, in its Advice, that it does not consider that any of these situations, when applied to clearing members, are cases the restriction on uncovered sovereign CDS positions was intended to address and as such should not be treated as uncovered CDS, provided that clearing members who hold such positions cover them as soon as practicable, considering market conditions. The Advice does not clarify whether clearing houses benefit from the express exemption however, though this is clearly intended.

Powers of National Regulators in Exceptional Circumstances

Threat to Financial Stability

National regulators are granted certain additional powers for use in their own jurisdiction that could be invoked when necessary to combat a serious threat to the financial system or market confidence in any member state. These powers are subject to a proportionality test and include enabling a national regulator to:

- (a) require public or private disclosure of short positions held in specific financial instruments or classes of instruments;
- (b) require those engaged in the lending of a specific financial instrument to notify the national regulator of any significant change in the fees requested for such lending;
- (c) prohibit or impose conditions on short sales or similar transactions; and
- (d) limit persons from entering into sovereign CDS transactions or limit the value of positions which are permitted to be taken.

Once a national measure has been adopted, the national regulator must publish a detailed notice of the measure on its website. The measure will be valid for an initial period of up to three months and may be renewed, upon expiry, for further periods of up to three months.

Significant Fall in Price in One Day

Where the price of a financial instrument has fallen significantly (for liquid shares a fall of at least 10% is required) within a trading day, national regulators would be able to restrict or prohibit the short selling of that instrument for one trading day. This period may be extended for an additional two trading days if, on the day of the restriction, the value of the instrument falls by a further half of the decrease that originally triggered the restriction. For instruments which are not liquid shares, the Commission will specify in delegated legislation what will constitute a significant fall in value.

These new powers, in addition to ESMA's emergency powers (see below), are wider in scope than the general disclosure requirements and ban on naked short selling because the new powers apply to all financial instruments regulated under MiFID and not just shares or sovereign debt. This includes corporate bonds and a broad range of derivatives.

Should national regulators from other member states disagree with any action taken by the first national regulator, ESMA will assist in a conciliation process and can ultimately make a binding decision on the matter.

The Role and Powers of ESMA

The Regulation provides for ESMA to have powers to facilitate and coordinate the activities of national regulators. Before a national regulator imposes any new or renewed notification or disclosure requirement, or short selling restriction, for an exceptional situation, it must notify ESMA 24 hours in advance, providing it with details of the proposed measures and evidence supporting the need to take them. ESMA would generally be required to issue an opinion within 24 hours on whether it considers the proposed measure to be necessary to address the exceptional situation. If the national regulator proposes to act, or acts, contrary to the ESMA opinion then it must immediately publish on its website a notice fully explaining its reasons for doing so. ESMA need not issue an opinion however, if it exercises its own emergency powers (see below).

ESMA is given powers to introduce its own intervening measures should it be satisfied that such measures would address a threat to the orderly functioning and integrity or stability of the financial markets where there are cross-border implications and a national regulator has not taken adequate measures to address the threat. The relevant power which has been used as the basis of the powers given to ESMA under the Regulation is set out in Article 9(5) of the ESMA Regulation² which establishes ESMA. It provides that ESMA may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of the financial markets. These are broadly similar to the powers of national regulators. However, ESMA cannot use such powers in relation to sovereign debt instruments or sovereign CDS; such matters are to be dealt with at national level. While the scope of these measures is therefore narrower than the measures which national regulators may take, measures taken by ESMA will prevail over any previous measures taken or imposed by national regulators.

ESMA would have to notify national regulators of the details of its proposed measures no less than 24 hours before those measures are intended to take effect, together with supporting evidence for why they are necessary. The measures will take effect as soon as a notice has been published on the ESMA website, or at a time specified in that notice.

These powers of ESMA provide an interesting insight into the developing shape of the new EU regulatory architecture that was established in January 2011. The new European authorities have greater reach and intervention powers than predecessor European bodies have previously had. However, even under this new dual supervisory regime, the EU regulators will usually need to rely upon the enforcement powers of national authorities.

The UK has formally noted that the powers of ESMA may breach the *Meroni* doctrine that only clearly defined powers can be delegated to non-national agencies.³ Such powers cannot permit a wide margin of discretion within which actual economic policy may be impacted, a margin ESMA arguably has, considering it has the power to choose what intervening measures it wishes to take and whom to apply these to without much by way of criteria or guidance. It would be open for

² Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010.

³ This doctrine was set out by the European Court of Justice in *Meroni v. High Authority* [1957-58] ECR 133.

any person affected by the use of this purported power to challenge ESMA's authority in the European Court of Justice. The UK has indicated that it will be considering how best to ensure that legal certainty is provided. There are also question marks over whether ESMA will have the resources to use effectively any powers, to the extent they exist, given current EU budget restrictions.

Transitional Measures

National Measures in Force Before 15 September 2010

The Regulation will apply from 1 November 2012. However, existing national measures, imposed by national regulators before 15 September 2010, may continue to apply until 1 July 2013 if the relevant national regulator notifies the Commission of such measures. This means that both the new requirements of the Regulation and disparate national short selling restrictions may remain operative in parallel in various parts of the EU for a period of up to eight months. Some current national restrictions are summarised below:

UK: On 6 August 2010 the FSA published a new Financial Stability and Market Confidence sourcebook, containing rules on short selling. These rules are still in force, and, since they were published prior to 15 September 2010, the FSA may, if it notifies the Commission, continue to apply them until 1 July 2013, although the FSA has suggested that the current rules will be superseded by the Regulation when the Regulation becomes effective. The scope of the UK disclosure requirements is limited to short positions relating to UK financial sector companies or companies undergoing a rights issue, in either case with shares admitted to trading on a UK prescribed market. By contrast, the Regulation would apply to all listed companies regardless of whether they are in the financial sector or the fact of a rights issue. There is currently only a *public* disclosure requirement in the UK, and this is for short positions of 0.25% and incremental thresholds of 0.1% thereafter. As a result, the proposed new regime will require a regulatory disclosure to be made at a lower percentage trigger, but a public disclosure would be required at a higher threshold. There are at present no UK measures requiring disclosure of short positions in sovereign debt or sovereign CDS.

France: In the wake of the financial crisis, France, by a decision of the Président of the French regulator, AMF, dated 12 August 2011, confirmed by the Collège of AMF on 25 August 2011 and by a decree of Ministry of Finance dated 9 November 2011, prohibited, until 11 February 2012, any short selling position or the increase of any existing net short position, including intraday, by any person established or residing in France or in any other country, in the equity shares or securities giving access to the capital of 11 credit institutions and insurance companies (April Group, Axa, BNP Paribas, CIC, CNP Assurances, Crédit Agricole, Euler Hermès, Natixis, Paris Ré, Scor and Société Générale). The prohibition did not apply to financial intermediaries acting as market-makers or liquidity providers in the securities concerned or in any forward derivatives based on these securities (as both of these types of entity are market members that have signed a contract for this purpose with the relevant market undertaking or with the issuer concerned or are acting as counterparty for block trades in equities). Because of the general improvement in the market, the prohibition has not been renewed after 11 February 2012. From this date, the short selling ban regarding equity shares and securities giving access to the capital of the abovementioned 11 credit institutions and insurance companies has been lifted.

Germany: Germany has adopted comprehensive national rules for the restriction of certain uncovered short selling activities, as well as reporting requirements for certain short sale positions. In July 2010, the Act on the Prevention of Abusive Dealings in Securities and Derivatives (*Gesetz zur Vorbeugung gegen missbräuchliche Wertpapier- und Derivategeschäfte*) was adopted, which introduced a general prohibition on uncovered short selling in traded shares and government bonds issued by member states in euros which were admitted for trading on a regulated market in Germany as well as uncovered trading in CDS referencing bonds of member states of the Eurozone and its regional governments (*Regionalregierungen*) and municipalities (*Gebietskörperschaften*). Since these national short selling restrictions

essentially correspond to the Regulation, we expect that there is little incentive for Germany to extend its national legislation beyond 1 November 2012.

Germany also introduced a national reporting system for short sales. The Regulation partially expands the reporting obligations previously existing in Germany. Under a general decree (*Allgemeinverfügung*) issued by the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht; BaFin*) in March 2010, reporting obligations had been introduced which were triggered by the same thresholds as under the Regulation, but limited to short positions in the shares of ten German financial institutions. The general decree expired on 26 March 2012 at which point a new Section 30i of the Securities Trading Act (*Wertpapierhandelsgesetz; WpHG*) entered into force. Section 30i WpHG expands the reporting obligations to short positions in all shares admitted for trading on a regulated market in Germany, but, unlike the Regulation, does not cover short positions in sovereign debt. Further details are set out in BaFin's Net Short Sale Position Regulation (*Netto-Leerverkaufspositionsverordnung*)⁴. Given the broader scope of the reporting obligations under the Regulation and that 30i WpHG has only come into force after the cut-off date for existing measures of 15 September 2010, we expect that Germany is unlikely to opt for an extension of its national reporting regime beyond 1 November 2012.

Belgium: A Royal Decree dated 23 September 2008 introduced rules to prohibit naked shorting (the selling of shares to another without "complete coverage") and created an obligation to publish, on the website of the Belgian national regulator, among other places, any net economic short position in excess of 0.25% of the share capital of a financial institution to which these measures apply. This prohibition is for an indefinite period.

From 12 August 2011 the ban was temporarily extended to "covered shorting" (where the short position is created with borrowed shares) in addition to "naked shorting". On 13 February 2012 the Belgian national regulator replaced the interim ban on the holding of net short positions with a reporting obligation for significant net short positions and with a "locate rule".

However, in accordance with the Regulation, because these extensions and modifications came into force after 15 September 2010 they will cease to apply from 1 November 2012.

Italy: In the second half of 2011 Consob, the Italian securities regulator, addressed both the disclosure of short positions and the entry into of short sales. In July 2011, Consob introduced reporting obligations in respect of net short positions held on shares admitted to trading on the Italian regulated markets. The disclosure thresholds applied by Consob are substantially similar to those set out in the Regulation.

Alongside the short selling reporting regime, in August 2011 Consob introduced an outright temporary ban in taking or increasing net short positions with respect to shares in certain Italian banks and financial institutions admitted to trading on the Italian regulated markets. The applicability of these regulatory measures has been extended several times. The temporary ban on net short positions with respect to shares in certain Italian banks and financial institutions was eventually lifted by Consob on 24 February 2012, whilst the disclosure regime in respect of net short positions remains in full force.

⁴ For If you wish to review further information regarding details on developments in German legislation on short selling, you may refer to our client publication entitled "[New German Long and Short Disclosure Regimes](#)" dated 6 February 2012.

Further, effective from 1 December 2011, Consob, pending implementation of the Regulation, introduced an outright ban on naked short sales in respect of all shares admitted to trading on the Italian regulated markets. Unlike other countries, Consob has not yet adopted measures addressing disclosure or trading in sovereign debt or sovereign CDS.

Italy's current regime does not include any provisions imposed prior to 15 September 2010. As such, its national laws will not be subject to the transitional provisions detailed above, and will cease to be effective from 1 November 2012.

Naked CDS

The ban on naked CDS is a ban on "entering into" naked CDS from 1 November 2012, which, read in isolation, would mean that it would be possible to enter into naked CDS up until 31 October 2012 and hold those CDS until maturity.

However, the transitional provisions of the Regulation include a conflicting provision which states that a CDS resulting in a naked position but concluded prior to 25 March 2012 or during a six month suspension of the restriction on naked CDS (which national regulators are permitted to impose) is permitted to be "held" to maturity. This transitional provision, read in isolation, would mean that any naked CDS positions entered into in between 25 March 2012 and 1 November 2012 would need to be closed out by 1 November 2012.

As a result, it is not clear whether naked CDS positions entered into in between March 2012 and 1 November 2012 are permitted to be held to maturity or if such positions need to be closed out by 1 November 2012. As the transitional provisions were amended immediately prior to the publication of the Regulation in the Official Journal of the European Union it is possible that positions will need to be closed out by 1 November 2012. This is also the view taken by ESMA in its consultation on the Regulation. Neither the Standards nor the Advice has provided any further guidance on this issue.

Comparison with the US Position

The restrictions on naked short selling compare with those under US Regulation SHO, which imposes penalties and restrictions on short selling for market participants who fail to satisfy settlement obligations under a short trade affecting a publicly traded equity security. The SEC has also adopted a rule imposing restrictions on short trading subject to various price tests, which are similar in concept to the intervention powers in the Regulation. However, to date the US has not imposed regulatory or public disclosure requirements on short sellers. Instead, it maintains a transaction reporting system that requires market participants to mark short sales (if applicable) and to report short sales to the applicable reporting facility. Under the Dodd-Frank Act, the SEC is required to conduct two studies on short selling on the following topics: (i) the feasibility, benefits, and costs of real-time reporting of short sales; and (ii) the state of short selling on exchanges and OTC markets. The first report was due one year after the enactment of the Dodd-Frank Act (21 July 2011), but the SEC now aims to publish the report by June 2012. The second report is due by 21 July 2012 and the SEC is planning to deliver this report between July and December 2012. Depending on the outcome of these studies, additional rules on short-selling may be adopted by the SEC. The Dodd-Frank Act further requires the SEC to adopt rules providing for the public disclosure of short sales and the enforcement of rules prohibiting illegal short sales. There is currently no detail on the scope of these rules or on a timetable for their proposal and adoption.

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 publication, you may contact your regular Shearman & Sterling contact person or any of the following:

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