

MEMO# 22888

September 19, 2008

SEC Issues Additional Emergency Orders Related to Short Selling and Issuer Repurchases

[22888]

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TO: EQUITY MARKETS ADVISORY COMMITTEE No. 43-08
ETF ADVISORY COMMITTEE No. 23-08
SEC RULES MEMBERS No. 90-08
CLOSED-END INVESTMENT COMPANY MEMBERS No. 36-08 RE: SEC ISSUES ADDITIONAL
EMERGENCY ORDERS RELATED TO SHORT SELLING AND ISSUER REPURCHASES

The Securities and Exchange Commission issued two emergency orders implementing coordinated actions to address concerns with short selling. The first order temporarily prohibits any person from effecting a short sale in the publicly traded securities of 799 financial companies. [\[1\]](#) The second order temporarily requires that institutional money managers publicly report their new short sales of certain publicly traded securities. [\[2\]](#) The Commission also issued an emergency order easing restrictions on the ability of securities issuers to repurchase their securities. [\[3\]](#)

Temporary Ban on Short Sales

The Short Sale Ban Order temporarily bans short selling in the securities of 799 financial firms, [\[4\]](#) to prevent short selling from being used to drive down the share prices of issuers even where there is no fundamental basis for a price decline other than general market conditions. The Order includes several exemptions to the short sale ban. First, there is a limited exemption for certain bona fide market makers, including registered market makers, block positions, or other market makers, obligated to quote in the over-the-counter market to the extent the short sale is part of bona fide market making in one of the 799-

listed securities. Second, the Order permits short sales that occur as a result of automatic exercise or assignment of an equity option held prior to effectiveness of the Order. Third, to facilitate the expiration of options on September 20, the Order exempts options market makers from its requirements until 11:59 p.m. on September 19, when selling short as part of bona fide market making and hedging activities related directly to bona fide market making in derivatives on one of the 799-listed securities.

The Order is effective immediately and will terminate at 11:59 p.m. Eastern time on October 2, 2008, unless the Commission determines to extend it for up to a total of 30 calendar days. The ban only will apply to short sales effected after the effective date of the Short Sale Ban Order.

The Commission's action is similar to that taken by the UK Financial Services Authority ("FSA"). The FSA amended its Code of Market Conduct to prohibit short selling in 32 UK financial sector securities, while permitting an exception for market makers. The amended FSA rules apply to anyone short selling in the 32-listed securities and not just to UK regulated firms. The FSA ban went into effect today, September 19, 2008, and will remain in effect until January 16, 2009. The FSA stated that a comprehensive review of the rules relating to short selling is expected in January 2009.

Temporary Short Sale Reporting Requirement

The Short Reporting Order will temporarily require that institutional money managers report information about daily short sales of securities. The rule is based on the requirements in Section 13(f) of the Exchange Act of 1934 [\[5\]](#) and will require an "institutional investment manager" who has filed or was required to file a Form 13F for the calendar quarter ended June 30, 2008 to file a report with the Commission on new Form SH on the first business day of every calendar week immediately following a week in which it effected short sales. The Form SH must be filed electronically and will be publicly available on the Commission's EDGAR system. The information required will include the number and value of securities sold short for each Section 13(f) security (except for short sales in options), the opening short position, the closing short position, the largest intraday short position, and the time of the largest intraday short position, for that security during each calendar day of the prior week. A filing will not be required unless qualifying short sales have been effected.

The Order includes a de minimis exemption. Specifically, a manager does not have to report short positions if the short position constitutes less than one-quarter of one percent of the class of the issuer's section 13(f) securities issued and outstanding as reported on the issuer's most recent annual or quarterly report, and any subsequent current report, filed with the Commission – unless the manager knows or has reason to believe the information in the reports is inaccurate – and the fair market value of the short position is less than \$1,000,000.

The Short Reporting Order becomes effective on September 22, 2008, and will terminate at 11:59 p.m. on October 2, 2008 unless extended by the Commission. The first Form SH will be required to be filed on September 29, 2008. The disclosure requirement only will apply to short sales effected after the effective date of the Short Reporting Order.

The Commission's action in this area also is similar to action taken by the FSA. The FSA amended its Code of Market Conduct to impose daily disclosure requirements with respect to pre-existing short positions in 32 UK financial sector securities. The disclosure requirement goes into effect on September 23, 2008 and will expire on January 16, 2009. Under the FSA's disclosure requirement any person holding a "disclosable short position" [6] in one of the 32 UK financial sector securities must provide "adequate ongoing disclosure" on a Regulatory Information Service (RIS) to be filed not later than 3:30 pm on the business day following the day on which the "disclosable short position" is held, except that disclosures filed on September 23 will cover positions held on both September 19 and 22. Anyone who has not covered an open short position of 0.25% or more in a UK financial sector security on September 19, will be required to report that short position daily beginning September 23, until either the position is closed out or the new rules cease to have effect.

Issuer Repurchases

Rule 10b-18 under the Exchange Act provides issuers with a safe harbor to effect repurchases of their securities subject to certain conditions. [7] The Repurchase Order temporarily alters the timing and volume restrictions of Rule 10b-18 under the Exchange Act to provide issuers with greater flexibility to buy back their securities. Specifically, the Repurchase Order suspends the "time of purchases" conditions [8] and modifies the "volume of purchases" condition so that the amount of Rule 10b-18 purchases must not exceed 100 percent of the average daily trading volume (ADTV) for the security. The Repurchase Order explains that this action should aid with liquidity during this period of unusual and extraordinary market volatility. The Order is effective immediately and will terminate at 11:59 p.m. Eastern time on October 2, 2008, unless extended by the Commission.

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endnotes

[1] See Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, SEC Release No. 34-58592 (September 18, 2008) ("Short Sale Ban Order"). The Short Sale Ban Order may be found at: <http://www.sec.gov/rules/other/2008/34-58592.pdf>.

[2] See Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, SEC Release No. 34-58591 (September 18, 2008) (“Short Reporting Order”). The Short Reporting Order may be found at: <http://www.sec.gov/rules/other/2008/34-58591.pdf>.

[3] See Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, SEC Release No. 34-58588 (September 18, 2008) (“Repurchase Order”). The Repurchase Order may be found at: <http://www.sec.gov/rules/other/2008/34-58588.pdf>.

[4] The list of 799 securities is attached as an appendix to the Order. The list may grow as companies contact the SEC seeking inclusion in the list.

[5] See 15 U.S.C. 78m(f).

[6] For purposes of the FSA’s new requirement, “disclosable short position” is defined as “a net short position which represents an economic interest of one quarter of one per cent or more of the issued capital of a company.”

[7] See 17 CFR 240.10b-18.

[8] The suspended timing of purchase conditions in Rule 10b-18 normally provide that purchases must not be : (i) the opening (regular way) purchase reported in the consolidate system; (ii) effected during the 10 minutes before the scheduled close of the primary trading session in the principal market for the security, and the 10 minutes before the scheduled close of the primary trading session in the market where the purchase is effected, for a security that has an ADTV value of \$1 million or more and a public float value of \$150 million or more; and (iii) effected during the 30 minutes before the scheduled close of the primary trading session in the principal market for the security, and the 30 minutes before the scheduled close of the primary trading session in the market where the purchase is effected, for all other securities.