

**MEMO# 22927**

September 29, 2008

## **SEC Issues Guidance on Securities Lending and Short Sales**

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TO: ETF ADVISORY COMMITTEE No. 28-08  
EQUITY MARKETS ADVISORY COMMITTEE No. 49-08  
SEC RULES MEMBERS No. 105-08  
CLOSED-END INVESTMENT COMPANY MEMBERS No. 44-08  
ACCOUNTING/TREASURERS MEMBERS No. 22-08  
INVESTMENT ADVISER MEMBERS No. 12-08  
COMPLIANCE MEMBERS No. 48-08 RE: SEC ISSUES GUIDANCE ON SECURITIES LENDING AND SHORT SALES

The Securities and Exchange Commission's Division of Trading and Markets issued the following guidance regarding sales of loaned securities. [\[1\]](#) This guidance replaces in its entirety the informal SEC staff guidance circulated to members via email on Friday, September 26, and is intended to clarify certain issues relating to securities lending and the SEC's short sale emergency orders (listed below). Specifically, the guidance provides that a sale of lent securities, for which a bona fide recall is initiated within two business days, is not a short sale for purposes of the SEC's short sale emergency orders.

**Question:** Some market participants have read the Emergency Orders to say that if a person that has loaned a security to another person sells that security, and a bona fide recall is initiated within two business days, then the sale should be treated as "long" for purposes of the Commission's Emergency Order. Is this a correct interpretation of the Emergency Orders?

**Answer:** Yes, we agree with this interpretation of the Emergency Orders. We confirm that, if a person that has loaned a security to another person sells the security and a bona fide recall is initiated within two business days after trade date, the person that has loaned the security is deemed to own the security for purposes of Rule 200(g)(1) and Rule 200(b) of

Regulation SHO, and such sale will not be treated as a short sale for purposes of:

- i. Form SH in the Order Requiring Institutional Money Managers to Report New Short Sales, Exchange Act Release 58591 (September 18, 2008), as amended, Exchange Act Release 58591a (September 21, 2008);
- ii. the Order Halting Short Selling in Financial Stocks, Exchange Act Release No. 58592 (September 18, 2008), as amended, Exchange Act Release 58611 (September 21, 2008); and,
- iii. Rule 204T in the Order to Protect Investors against "Naked" Short Selling Abuses, Exchange Act Release 58572 (September 17, 2008).

For purposes of the above-referenced Emergency Orders, we confirm that a broker-dealer may mark such orders "long." Thus, the close-out requirement for long sales under Rule 204T would apply to sales of such securities.

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#### **endnotes**

[1] See Division of Trading and Markets Guidance Regarding Sale of Loaned But Recalled Securities, September 28, 2008. The SEC staff guidance may be found at: <http://www.sec.gov/divisions/marketreg/loanedsecuritiesfaq.htm>.

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