

## SEC Announces Extension of Short Selling Orders

### *October 3, 2008 Supplement<sup>1</sup>*

On October 1, 2008 the Securities and Exchange Commission released a statement concerning short selling in which it announced that it was extending the effectiveness of the four short selling orders in order to "provide clarity about the future expiration of these actions . . . [and] to allow time for the completion of work on the anticipated passage of legislation."<sup>2</sup> In the same statement, the SEC also announced that it intends to release interim final rules to continue some of the requirements without interruption following the expiration of the relevant orders. This update examines how this latest announcement from the SEC affects each of the emergency orders that were set to expire this week.<sup>3</sup>

<sup>1</sup> This *DechertOnPoint* supersedes the *DechertOnPoint* of the same title published on October 2, 2008 and speaks as of 12:00 PM EDT on October 3, 2008. Further changes may be made without notice as market and regulatory events continue to unfold. The version of this *DechertOnPoint* available [here](#) will be the most up to date version available at the time it is viewed. You should not rely on this *DechertOnPoint* without first checking online for further updates.

<sup>2</sup> *Statement of Securities and Exchange Commission Concerning Short Selling*, Press Release 2008-235 (October 1, 2008).

<sup>3</sup> More information regarding the temporary ban on short selling in financial companies, the requirements to disclose short sales, and the easing of restrictions on the ability of issuers to repurchase their own securities can be found in *DechertOnPoint*, Issue 24 at [www.dechert.com/practiceareas/practiceareas.jsp?pg=legal\\_update&pa\\_id=19](http://www.dechert.com/practiceareas/practiceareas.jsp?pg=legal_update&pa_id=19). Further

### **Temporary Ban on Short Selling in Financial Companies**

The SEC has announced that it will extend the effectiveness of the temporary ban on short selling in financial companies in order to allow time for the completion of the anticipated financial rescue legislation. The ban will now remain in effect through the *earlier* of:

- three business days from the President's signing of the Economic Stabilization Act of 2008 (H.R. 1424); or
- 11:59 PM EDT on October 17, 2008.<sup>4</sup>

### **Required Disclosure of Short Sales in Certain Securities**

The SEC has also stated that it will extend the effectiveness of the temporary requirement that certain institutional investment managers report information regarding daily short sales of securities through 11:59 PM EDT on October 17, 2008. As a result of the extension,

---

information regarding the restrictions related to naked short selling can be found in *DechertOnPoint*, Issue 23 at [www.dechert.com/practiceareas/practiceareas.jsp?pg=legal\\_update&pa\\_id=19](http://www.dechert.com/practiceareas/practiceareas.jsp?pg=legal_update&pa_id=19).

<sup>4</sup> *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*, SEC Rel. No. 34-58723 (Oct. 2, 2008).

Forms SH will be required to be filed on Monday, October 6, 2008 and Tuesday, October 14, 2008 (October 13 being a holiday).<sup>5</sup>

The SEC has also announced that it intends to adopt an interim final rule in order that the requirements of the disclosure order will remain in effect uninterrupted following the expiration of the emergency order. The SEC press release notes that the SEC will be seeking comments on all aspects of the rulemaking.

Although the SEC stated previously that it would make the disclosures on Form SH public two weeks after they were due, the SEC has now determined that such disclosures will remain non-public, stating:

The [SEC] believes that the nonpublic submission of Form SH may help prevent artificial volatility in securities as well as further downward swings that are caused by short selling, while at the same time, providing the [SEC] with useful information to combat market manipulation that threatens investors and capital markets. Also, the [SEC] has considered further the reasons to maintain the information as nonpublic in the current market environment, and is concerned that publicly available Form SH data could give rise to additional, imitative short selling that was not intended by the [SEC]'s Order. Accordingly, the [SEC] has determined that Forms SH filed under the [Disclosure Order] including those that were due on September 29, 2008 will remain nonpublic to the extent permitted by law without the filer needing to submit a confidential treatment request.

### Easing of Restrictions on Issuers Repurchasing Their Own Securities

Without any additional commentary, the SEC announced that it is extending the order easing the restrictions on issuers seeking to repurchase their own securities through 11:59 PM EDT on October 17, 2008.<sup>6</sup>

<sup>5</sup> *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*, SEC Rel. No. 34-58724 (Oct. 2, 2008).

<sup>6</sup> *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*, SEC Rel. No. 34-58703 (October 1, 2008).

### Restrictions on Naked Short Selling

The SEC has also extended the effectiveness of the hard T+3 close out requirement for naked short selling and the penalties for violation through 11:59 PM EDT on October 17, 2008.<sup>7</sup> The SEC has also announced that it intends to adopt an interim final rule in order that the naked short selling restrictions adopted in the emergency order will remain in effect uninterrupted following the expiration of the emergency order. The SEC press release notes that the SEC will be seeking comments on all aspects of the rulemaking.

The extension order also specifically incorporates and adopts the *Division of Trading and Markets: Guidance Regarding the Commission's Emergency Order Concerning Rules to Protect Investors Against "Naked" Short Selling Abuses*<sup>8</sup> and the *Division of Trading and Markets Guidance Regarding Sale of Loaned but Recalled Securities*<sup>9</sup> to apply through the duration of this emergency order.

### The Future of Short Selling Regulation

There are two final noteworthy aspects of the SEC's statement concerning short selling. First, the SEC specifically states that short selling plays an important role in the market:

The [SEC] notes that short selling plays an important role in the market for a variety of reasons, including contributing to efficient price discovery, mitigating market bubbles, increasing market liquidity, promoting capital formation, facilitating hedging and other risk management activities, and importantly, limiting upward market manipulations.

The SEC also notes that there are also circumstances in which short selling can be abusive, and explains that the emergency orders were designed to minimize the possibility of abusive short selling.

<sup>7</sup> *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*, SEC Rel. No. 34-58711 (October 1, 2008).

<sup>8</sup> Available at [www.sec.gov/divisions/marketreg/204tfaq.htm](http://www.sec.gov/divisions/marketreg/204tfaq.htm).

<sup>9</sup> Available at [www.sec.gov/divisions/marketreg/loanedsecuritiesfaq.htm](http://www.sec.gov/divisions/marketreg/loanedsecuritiesfaq.htm).

Second, the SEC states that its “actions have been taken in consultation with regulators of the major developed securities markets around the world, with whom we have coordinated in monitoring market reactions.”

Although it is not possible to predict with certainty whether the SEC will continue to allow short selling, or what limits may be imposed if it does, one thing is certain: the SEC will be looking closely at what the rest of the world’s financial regulators are doing.

■ ■ ■

This update was authored by Jennifer Epstein (+44 20 7184 7403; [jennifer.epstein@dechert.com](mailto:jennifer.epstein@dechert.com)) and David Vaughan (+1 202 261 3335/+1 212 698 3652; [david.vaughan@dechert.com](mailto:david.vaughan@dechert.com)).

---

## Practice group contacts

For more information, please contact the authors, one of the attorneys listed, or any Dechert attorney with whom you regularly work. Visit us at [www.dechert.com/financialservices](http://www.dechert.com/financialservices).

### **Karen L. Anderberg**

London  
+44 20 7184 7313  
[karen.anderberg@dechert.com](mailto:karen.anderberg@dechert.com)

### **Elliott R. Curzon**

Washington, D.C.  
+1 202 261 3341  
[elliott.curzon@dechert.com](mailto:elliott.curzon@dechert.com)

### **Brendan C. Fox**

Washington, D.C.  
+1 202 261 3381  
[brendan.fox@dechert.com](mailto:brendan.fox@dechert.com)

### **Peter D. Astleford**

London  
+44 20 7184 7860  
[peter.astleford@dechert.com](mailto:peter.astleford@dechert.com)

### **Douglas P. Dick**

Washington, D.C.  
+1 202 261 3305  
[douglas.dick@dechert.com](mailto:douglas.dick@dechert.com)

### **Wendy Robbins Fox**

Washington, D.C.  
+1 202 261 3390  
[wendy.fox@dechert.com](mailto:wendy.fox@dechert.com)

### **Margaret A. Bancroft**

New York  
+1 212 698 3590  
[margaret.bancroft@dechert.com](mailto:margaret.bancroft@dechert.com)

### **Peter Draper**

London  
+44 20 7184 7614  
[peter.draper@dechert.com](mailto:peter.draper@dechert.com)

### **Richard Frase**

London  
+44 20 7184 7692  
[richard.frase@dechert.com](mailto:richard.frase@dechert.com)

### **Sander M. Bieber**

Washington, D.C.  
+1 202 261 3308  
[sander.bieber@dechert.com](mailto:sander.bieber@dechert.com)

### **Jennifer O. Epstein**

London  
+44 20 7184 7403  
[jennifer.epstein@dechert.com](mailto:jennifer.epstein@dechert.com)

### **David M. Geffen**

Boston  
+1 617 728 7112  
[david.geffen@dechert.com](mailto:david.geffen@dechert.com)

### **Stephen H. Bier**

New York  
+1 212 698 3889  
[stephen.bier@dechert.com](mailto:stephen.bier@dechert.com)

### **Ruth S. Epstein**

Washington, D.C.  
+1 202 261 3322  
[ruth.epstein@dechert.com](mailto:ruth.epstein@dechert.com)

### **John Gordon**

London  
+44 20 7184 7524  
[john.gordon@dechert.com](mailto:john.gordon@dechert.com)

### **Daphne T. Chisolm**

Charlotte  
+1 704 339 3153  
[daphne.chisolm@dechert.com](mailto:daphne.chisolm@dechert.com)

### **Susan C. Ervin**

Washington, D.C.  
+1 202 261 3325  
[susan.ervin@dechert.com](mailto:susan.ervin@dechert.com)

### **David J. Harris**

Washington, D.C.  
+1 202 261 3385  
[david.harris@dechert.com](mailto:david.harris@dechert.com)

### **Christopher D. Christian**

Boston  
+1 617 728 7173  
[christopher.christian@dechert.com](mailto:christopher.christian@dechert.com)

### **Joseph R. Fleming**

Boston  
+1 617 728 7161  
[joseph.fleming@dechert.com](mailto:joseph.fleming@dechert.com)

### **Richard L. Heffner**

London  
+44 20 7184 7665  
[richard.heffner@dechert.com](mailto:richard.heffner@dechert.com)

**Robert W. Helm**  
Washington, D.C.  
+1 202 261 3356  
robert.helm@dechert.com

**Andrew Hougie**  
London  
+44 20 7184 7373  
andrew.hougie@dechert.com

**Paul Huey-Burns**  
Washington, D.C.  
+1 202 261 3433  
Paul.huey-burns@dechert.com

**Jane A. Kanter**  
Washington, D.C.  
+1 202 261 3302  
jane.kanter@dechert.com

**Angelyn Lim**  
Hong Kong  
+852 3518 4718  
angelyn.lim@dechert.com

**Geoffrey R.T. Kenyon**  
Boston  
+1 617 728 7126  
geoffrey.kenyon@dechert.com

**Stuart Martin**  
London  
+44 20 7184 7542  
stuart.martin@dechert.com

**George J. Mazin**  
New York  
+1 212 698 3570  
george.mazin@dechert.com

**Jack W. Murphy**  
Washington, D.C.  
+1 202 261 3303  
jack.murphy@dechert.com

**John V. O'Hanlon**  
Boston  
+1 617 728 7111  
john.ohanlon@dechert.com

**Jeffrey S. Poretz**  
Washington, D.C.  
+1 202 261 3358  
jeffrey.poretz@dechert.com

**Jon S. Rand**  
New York  
+1 212 698 3634  
jon.rand@dechert.com

**Robert A. Robertson**  
Newport Beach  
+1 949 442 6037  
robert.robertson@dechert.com

**Keith T. Robinson**  
Hong Kong  
+1 852 3518 4705  
keith.robinson@dechert.com

**Alan Rosenblat**  
Washington, D.C.  
+1 202 261 3332  
alan.rosenblat@dechert.com

**Kevin P. Scanlan**  
New York  
+1 212 649 8716  
kevin.scanlan@dechert.com

**Frederick H. Sherley**  
Charlotte  
+1 704 339 3100  
frederick.sherley@dechert.com

**Patrick W. D. Turley**  
Washington, D.C.  
+1 202 261 3364  
patrick.turley@dechert.com

**Brian S. Vargo**  
Philadelphia  
+1 215 994 2880  
brian.vargo@dechert.com

**David A. Vaughan**  
Washington, D.C. / New York  
+1 202 261 3355 / +1 212 698 3652  
david.vaughan@dechert.com

**Anthony H. Zacharski**  
Hartford  
+1 860 524 3937  
anthony.zacharski@dechert.com