

September 22, 2008

## SEC Amends Short Sale Emergency Order

On September 19, 2008, the SEC issued an emergency order (the “Order”) imposing a temporary ban on short selling of the publicly traded securities of 799 banks, insurance companies, securities firms and their holding companies (referred to as “Included Financial Firms”).<sup>1</sup>

On September 21, the SEC amended the Order as follows:

### **Included Financial Firms**

The Order initially applied to a list of Included Financial Firms, identified in an appendix to the Order. The amendment modifies the list of Included Financial Firms and provides that the national securities exchanges shall select the individual financial institutions with securities covered by the Order. Each national securities exchange listing financial institutions is expected to publish a list, on its internet Web site, of individual listed companies with common equity that will be covered by the Order’s prohibition on short sales. The SEC expects these lists to cover banks, savings associations, broker-dealers, investment advisers, and insurance companies, whether domestic or foreign, and the owners of any of these entities. To the extent an issuer chooses not to be covered by the Order’s prohibition on short sales, the amendment authorizes the applicable national securities exchange to exclude that issuer from its list of covered financial firms.

### **Options and Futures Contract Expiration**

The Order includes an exception to allow short sales that occur as a result of the automatic exercise or assignment of an equity option held prior to effectiveness of the Order due to expiration of the option. The amendment will also allow short sales that occur as a result of the expiration of futures contracts held prior to effectiveness of the Order.

### **Options Assignments**

To allow for creation of long call options, the amendment adds an exception for short sales that occur as a result of assignment to call writers upon exercise.

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<sup>1</sup> Our summary of the original order and other emergency actions can be found at: <http://www.paulweiss.com/files/upload/19Sep08SECR.pdf>

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### **Market Making and Derivatives**

The Order included an exception effective until 11:59 p.m. on September 19, 2008 for market makers effecting short sales as part of bona fide market making and hedging activity related directly to bona fide market making in derivatives on the publicly traded securities of any Included Financial Firm. The amendment extends the exception so that it continues for the duration of the Order. In addition, the amendment clarifies that the exception applies to all market makers, including over-the-counter market makers, and that it applies to bona fide market making and hedging activity related directly to bona fide market making in exchange traded funds and exchange traded notes of which covered securities are a component. However, the exception is limited so that if a customer or counterparty position in a derivative security based on a covered security is established after 12:01 a.m. E.D.T on September 22, 2008, a market maker may not effect a short sale in the covered security if the market maker knows that the customer's or counterparty's transaction will result in the customer or counterparty establishing or increasing an economic net short position (i.e., through actual positions, derivatives, or otherwise) in the issued share capital of Included Financial Firm.

The technical amendments incorporate concepts included in the limitations on increasing net short positions imposed by the U.K. Financial Services Authority (FSA) in its response to short selling. The provisions are not identical because unlike the FSA, the SEC does not have statutory authority over swap contracts and other non-security over-the-counter derivatives.

### **Sales of Restricted Securities**

Finally, the amendment clarifies that the Order does not apply to persons that effect sales of covered securities pursuant to Rule 144 of the Securities Act of 1933. This accommodation is necessary because sales of Rule 144 securities are sales of owned securities.

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This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning the initiatives addressed in this memorandum can be directed to:

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