

## Securities and Exchange Commission Amends Emergency Order Prohibiting Short Sales of Securities of Financial Institutions

*September 22, 2008*

On September 18, 2008, the Securities and Exchange Commission (the "Commission") issued an emergency order<sup>1</sup> (the "Order"), temporarily prohibiting any person from effecting a short sale<sup>2</sup> in the publicly traded securities of financial firms identified in the Order (the "Included Financial Firms"), subject to three exceptions.<sup>3</sup> The Order was effective immediately upon its issuance and terminates at 11:59 p.m. EDT on October 2, 2008, unless further extended by the Commission.

On September 21, 2008, the Commission issued an amendment (the "Amendment") to the Order to address current and anticipated technical and operational concerns resulting from the requirements of the Order.<sup>4</sup>

The Amendment contains the following modifications and clarifications to the Order:

- the list of Included Financial Firms is modified to include issuers identified as being financial institutions by any national securities exchange listing the publicly traded common equity securities of such issuer (each a "Covered Security" and collectively, "Covered Securities"). Issuers may request an exchange to exclude the issuer from the scope of the Order;
- the Amendment clarifies that the Order does not apply to sales of Covered Securities effected pursuant to Rule 144 of the Securities Act of 1933. The Commission reasoned in the Amendment that such sales are sales of owned securities;

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<sup>1</sup> See Commission Release No. 34-58592 (September 18, 2008).

<sup>2</sup> A short sale is generally a sale of a security by an investor who does not actually own such security. In an ordinary short sale, the short seller borrows shares of stock and sells them, with the expectation the loan will be settled by buying a corresponding amount of shares of stock in the market at a later date, which shares will be delivered to the share lender.

<sup>3</sup> See Simpson Thacher & Bartlett LLP Client Memorandum, "[Securities and Exchange Commission Issues Emergency Order Prohibiting Short Sales of Securities of Financial Institutions](#)" (September 19, 2008).

<sup>4</sup> See Commission Securities Exchange Act of 1934 Release No. 58611 (September 21, 2008).

- the exception for a short sale in any Covered Security is extended to short sales in Covered Securities as a result of automatic exercise or assignment of futures contracts held prior to effectiveness of the Order due to expiration of such futures contracts;
- an exception was added for a short sale in any Covered Security effected by the writer of a call option as a result of assignment following exercise by the holder of the call option; and
- the Amendment clarifies that the exception for short sales in Covered Securities made by a market maker extends to such short sales made by an over-the-counter market maker and includes short sales by such market maker as part of a bona fide market making and hedging activity related directly to bona fide market making in (a) derivative securities based on Covered Securities, or (b) exchange traded funds and exchange traded notes of which Covered Securities are a component. If a customer's or counterparty's 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 in the issued share capital of an Included Financial Firm. The Amendment also requires all market makers relying on such exception to, as soon as operationally practicable, publish a notice on their internet Web site that, pursuant to the Order, the market maker may not knowingly effect a short sale in a manner prohibited by such exception.

This memorandum is for general information purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners can be obtained from our website, [www.simpsonthacher.com](http://www.simpsonthacher.com).