



CLIENT MEMORANDUM

SEC Extends Short Selling Emergency Orders

October 2, 2008

On October 1, 2008, the Securities and Exchange Commission extended emergency short selling orders that it recently adopted. The extended orders generally terminate at 11:59 p.m. (Eastern time) on Friday, October 17, 2008, although the short selling ban for financial stocks may terminate sooner upon the passage of Congressional legislation. These emergency orders supplement other recent SEC actions to strengthen the ban on “naked” short selling and to increase the penalties for violating that ban.

SHORT SELLING BAN FOR FINANCIAL STOCKS

This emergency order prohibits short sales of equity securities of specified financial companies but includes a number of limited exemptions, including the exemption for certain market making transactions.¹ The extended order will expire upon the earlier of 11:59 p.m. (Eastern time) on Friday, October 17, 2008 and 11:59 p.m. (Eastern time) on the third business day after Congress enacts legislation to stabilize the financial system. Since this ban was enacted, it has resulted in lower trading volumes, higher volatility and wider bid and ask spreads in the

covered securities.² As of the time of this memorandum, the SEC had not released its formal extension order, but it appeared that the extended order would not incorporate changes sought by the securities industry.

DISCLOSURE OF SHORT SELLING ACTIVITY ON FORM SH

The SEC has implemented temporary disclosure requirements for institutional investment managers that filed or were required to file a Form 13F for the calendar quarter ended June 30, 2008.³ Specifically, each such institutional investment manager must file a report on

¹ See [Exchange Act Release No. 58611](#) (September 21, 2008). See also Simpson Thacher & Bartlett LLP Client Memorandum, [“Securities and Exchange Commission Amends Emergency Order Prohibiting Short Sales of Securities of Financial Institutions”](#) (September 22, 2008).

² See Tom Lauricella, Kara Scannell and Tennille Tracy, “SEC Extends ‘Short’ Ban as Bailout Advances,” *THE WALL STREET JOURNAL* (October 2, 2008).

³ See [Exchange Act Release No. 58591A](#) (September 21, 2008). See also Simpson Thacher & Bartlett LLP Client Memorandum, [“Recent SEC Actions Regarding Short Sales”](#) (September 23, 2008).

new Form SH⁴ on the first business day of every calendar week immediately following a week in which it effects short sales (as defined in Rule 200 under Regulation SHO) with respect to any 13F security that is not an option.

The SEC extended this emergency disclosure order until 11:59 p.m. (Eastern time) on Friday, October 17, 2008 but intends that the order will continue thereafter as an interim final rule about which the SEC will seek public comments. As of the time of this memorandum, the SEC had not released its formal extension order, but the SEC press release included the following statement: "Disclosure under the emergency order will be made only to the SEC." In its formal extension order, the SEC may confirm that no Form SH filings, including those made on September 29, 2008, will ever be publicly disclosed.

BROADENED SAFE HARBOR FROM LIABILITY FOR ISSUER REPURCHASES UNDER RULE 10B-18

The SEC adopted an emergency order that relaxes certain timing and volume conditions of Rule 10b-18 under the Securities Exchange Act of 1934, which provides a safe harbor from liability for issuer repurchases of their own capital stock.⁵ The SEC took this action because it believes that issuer repurchases can provide an important source of liquidity at times of market volatility. The SEC extended this emergency order until 11:59 p.m. (Eastern time) on Friday, October 17, 2008.

HARD T+3 DELIVERY REQUIREMENT AND "NAKED" SHORT SELLING ANTI-FRAUD RULE

To combat "fails" in delivering securities at the time of settlement and "naked" short selling, the SEC adopted an emergency order which imposes penalties on short sellers and their broker-dealers for failures to deliver securities by three days after the transaction date.⁶ The SEC extended this enhanced delivery emergency order until 11:59 p.m. (Eastern time) on Friday, October 17, 2008 but intends that the order will continue thereafter as an interim final rule about which the SEC will seek public comments. Guidance from the SEC Division of Trading and Markets will continue to apply for the duration of the emergency

orders.⁷ The SEC has adopted final rules to eliminate the exception to the Regulation SHO close-out requirements for options market makers and to charge short sellers with fraud if they deceive broker-dealers or other market participants about their ability to deliver securities for timely settlement of short sales.

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, as well as memoranda regarding recent corporate reporting and governance developments, can be obtained from our website, www.simpsonthacher.com.

⁴ See SEC website for [Form SH](#), [Form SH Instructions](#) and [Guidance Regarding the SEC's Emergency Order Concerning Disclosure of Short Selling](#).

⁵ See [Exchange Act Release No. 58588](#) (September 18, 2008). See also Simpson Thacher & Bartlett LLP Client Memorandum, "[Securities and Exchange Commission Issues Emergency Order Prohibiting Short Sales of Securities of Financial Institutions](#)" (September 19, 2008).

⁶ See [Exchange Act Release No. 58572](#) (September 17, 2008).

⁷ See [SEC Guidance Concerning Rules to Protect Investors Against "Naked" Short Selling Abuses](#) and [SEC Guidance Regarding Sale of Loaned but Recalled Securities](#).

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