

09 / 1

Financial Services Authority

# Temporary short selling measures

Feedback on CP09/1

January 2009





# Contents

1	Overview	3
2	Feedback on policy proposals	5
3	Feedback on cost benefit analysis	8

**Annex 1:** List of non-confidential respondents to CP09/01

**Appendix 1:** Short selling instrument, including amendments to the Glossary and the Code of Market Conduct

This Policy Statement reports on the main issues arising from Consultation Paper 09/1 (*Temporary short selling measures*) and publishes final Handbook text.

Please address any comments or enquiries to:

Stephen Sie  
Markets Division  
Financial Services Authority  
25 The North Colonnade  
Canary Wharf  
London E14 5HS

Telephone: 020 7066 3418  
Fax: 020 7066 3419  
E-mail: [cp09\\_01@fsa.gov.uk](mailto:cp09_01@fsa.gov.uk)

Copies of this Policy Statement are available to download from our website – [www.fsa.gov.uk](http://www.fsa.gov.uk). Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

# 1 Overview

## Introduction

- 1.1 In this paper, we explain what we are to do with our temporary short selling measures and give our feedback to the responses we received to our consultation on the issue.
- 1.2 On 18 September 2008 we introduced short selling measures in relation to stocks in UK financial sector companies on an emergency basis (the Measures). These effectively banned the active creation or increase of net short positions in the stocks of UK financial sector companies (the Ban) and required disclosure to the market of significant short positions in those stocks (the Disclosure Obligation). The Measures were temporary and when we introduced them we undertook to conduct a comprehensive review of short selling.
- 1.3 On 5 January 2009 we published Consultation Paper (CP) 09/01 *Temporary short selling measures*. This set out our proposals to extend the Disclosure Obligation until 30 June 2009 and to allow the ban to expire on 16 January 2009. We also proposed amending the obligation, so that once a disclosure has been made, additional disclosures would only be required if a short position changed significantly.
- 1.4 The consultation closed on 9 January 2009 and in this Policy Statement (PS), we summarise and respond to comments received. There were 33 responses, the most significant of which came from 12 trade associations. Two law firms responded and most of the other responses came from authorised firms. We thank respondents for acting within the shorter than normal consultation period and for such a broad and considered range of responses.
- 1.5 In Chapter 2, we provide feedback on the responses to our policy proposals and in Chapter 3 we give feedback on the responses to our cost benefit analysis. Each chapter contains a summary of the comments we received in response to the questions we asked and our feedback on those responses. Annex 1 lists non-confidential respondents and Appendix 1 contains a copy of the FSA's Board instrument including our final Handbook text which does not differ substantially from the consultative draft.

## **Policy decisions**

- 1.6 After taking into account all the comments we received, we have decided to extend the Disclosure Obligation until 30 June 2009 and to allow the Ban to expire on 16 January 2009. Additionally, we have decided to amend the Disclosure Obligation so that once a disclosure has been made, additional disclosures are only required if a short position changes significantly. We will do this by placing disclosure bands every 0.1% above the 0.25% threshold, i.e. at 0.35%, 0.45%, 0.55% etc. Any short position reaching these further thresholds (whether increasing or decreasing) has to be disclosed. If a short position decreases below 0.25% a final disclosure will need to be made. These changes become active at 00:00:01 on 16 January 2009.
- 1.7 Our proposals on the longer-term options for a short selling regime will be published in a further CP within a few weeks of this PS.

# 2 Feedback on policy proposals

- 2.1 This chapter sets out our feedback to the responses received to our proposals set out in Chapter 3 of CP09/01. Generally, our proposals were well received.
- 2.2 Firstly we proposed extending the disclosure regime for significant net short positions in UK financial sector stocks until 30 June 2009. This is because the disclosure of significant short positions would lessen the potential for the misleading effects of short selling (market abuse, disorderly markets and sub-optimal transparency). So we asked:

Q1: Should the Disclosure Obligation be extended until 30 June 2009 while we engage in a comprehensive review of short selling?

- 2.3 Most respondents supported the proposed extension of the Disclosure Obligation, although a few made their support conditional on the more comprehensive review being conducted. Three respondents opposed the proposal, but supported alternative transparency measures. Of these, two supported a regime requiring disclosures to be made to the FSA, which would then publish aggregated short positions on a per stock basis, and one advocated a disclosure regime that applied equally to long and short positions.

**Our response:** For the reasons set out in CP09/01 – and in view of the majority support for our proposals – we will extend the Disclosure Obligation until 30 June 2009. In the circumstances, we believe that the disclosure regime we have proposed remains the appropriate one and we see no case for introducing an equivalent requirement for long positions in the stocks in question. However, we intend to consider the various methods of increasing transparency of short selling further in our CP on the longer-term options for short selling.

- 2.4 We also proposed keeping the scope of the Disclosure Obligation unchanged, as we wanted to keep it as targeted as possible. We believe that the ongoing vulnerability of banks and insurance company stocks to market abuse justified them continuing to be covered. So we asked:

Q2: Do you think that the scope of the Disclosure Obligation should remain the same if it is extended?

- 2.5 Most respondents supported the proposal, although some made their support conditional on the more comprehensive review being conducted. Six respondents argued that the scope should be widened; of these, three sought an extension to cover a wider range of insurance companies (to include all listed Lloyd's vehicles and/or non-UK insurers); and another three argued for an extension of the regime to cover all stocks.

**Our response:** For the reasons set out in CP09/01 – and given the majority support for our proposals – we will retain the current scope of the Disclosure Obligation. The issue of a more general transparency regime for short selling will be a matter for the further consultation we will be undertaking. On the proposals for a more selective widening of the disclosure regime, we still intend to keep the scope of the temporary measures as targeted as possible. We consider that the present coverage continues to reflect the sectors of primary concern as regards risk of potential abuse. Nor does the evidence so far indicate that the other areas nominated for inclusion have been adversely affected by not being included within the regime. While we will continue to monitor the position, we currently do not consider that the scope of the Disclosure Obligation should be widened.

- 2.6 We also proposed amending the Disclosure Obligation so that, once an initial disclosure has been made, further disclosures are only required as positions breach (whether upwards or downwards) bands of 0.1% (i.e. the bands would run from 0.25%, 0.35%, 0.45% etc). We think that such a regime would be more proportionate in the absence of the Ban. So we asked:

Q3: Do you agree with the proposed adjustment to the disclosure regime? Are there any other changes you would wish to see?

- 2.7 Most respondents supported the proposal, although a few again made their support conditional on the more comprehensive review being conducted. Five respondents suggested that we relax the requirement even further, e.g. by increasing the initial reporting threshold and/or widening the bands (a few suggested widening the bands to 0.25%). One respondent opposed the proposal, arguing that the obligation should inversely mirror the disclosure requirement and thresholds for long positions (i.e. 3% short and every 1% short after that).

**Our response:** For the reasons set out in CP09/01 – and given the overwhelming support for this proposal – we will adjust the Disclosure Obligations as proposed. Since we consider a heightened surveillance regime is necessary for significant short positions in stocks in these sectors, we think the thresholds we have proposed are appropriate ones and that a higher initial threshold or wider bands would not be meaningful in the circumstances.

- 2.8 We also proposed allowing the Ban to expire as we believe the risks posed by short selling in terms of the potential for market abuse and creating disorderly markets have declined. So we asked:

Q4: Do you agree that the Ban should be allowed to lapse?

- 2.9 All but one respondent (an individual) supported this proposal.

**Our response:** For the reasons set out in CP09/01 – and given the overwhelming support for this proposal – we will allow the Ban to lapse on 16 January 2009. However, we emphasise that we will keep the position under review and stand ready to reintroduce a ban without consultation, if necessary.

# 3 Feedback on cost benefit analysis

3.1 This chapter sets out our feedback to the responses received to our cost benefit analysis set out in Chapter 4 of CP09/01. This analysis set out the costs and benefits of our proposal to extend the (amended) Disclosure Obligation until 30 June 2009. We then asked:

Q5: What are your views on the costs and benefits of the temporary extension of the Disclosure Obligation?  
Where possible please quantify.

3.2 Many respondents had no comment on this question. A few noted that the costs and benefits are hard to quantify; we only received one response that quantified estimated compliance costs. Two respondents thought that the benefits of our proposals would outweigh the costs. One stated that the costs to its members of complying with the extension of the Disclosure Obligation should not be significant. Another noted that for its members resourcing costs are unbudgeted and met by the reallocation of people engaged in other activities; and that costs vary significantly depending on the complexity and size of a firm. One respondent did not think our cost benefit analysis was thorough.

**Our response:** We welcome the comments received and will continue to work with external stakeholders to develop the cost benefit analysis in our fuller CP.

# List of non-confidential respondents to Consultation Paper 09/01

Association of British Insurers (ABI)

Alternative Investment Management Association (AIMA)

Allen & Overy LLP

Altima Partners

Amlin

Association of Private Client Investment Managers and Stockbrokers (APCIMS)

Ashurst LLP

Aviva Investors

British Bankers' Association

Bernard Footitt

Catlin Group Limited

Cazenove Capital

Citadel

Financial Services Practitioner Panel

Henderson Global Investors

Hedge Fund Standards Board (HFSB)

Hiscox

Investment Management Association (IMA)

Legal & General Investment Management

London Investment Banking Association (LIBA), International Securities Lending Association (ISLA), Securities Industry and Financial Markets Association (SIFMA) (joint response)

London International Financial Futures Exchange (LIFFE)

London Stock Exchange (LSE)

Makinson Cowell Limited

Managed Funds Association (MFA)

Peter de Bruyn Kops

Prudential plc and M&G Limited (joint response)

The Association of Corporate Treasurers (ACT)

The Investor Relations Society

# Short selling instrument, including amendments to the Glossary and the Code of Market Conduct

## SHORT SELLING (NO 5) INSTRUMENT 2009

### Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 119 (The code);
  - (2) section 121 (Codes: procedure);
  - (3) section 149 (Evidential provisions);
  - (4) section 156 (General supplementary powers); and
  - (5) section 157(1) (Guidance).
- B. The rule-making powers listed above are specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

### Commencement

- C. This instrument comes into force on 16 January 2009 and applies in relation to any position held on or after that date.

### Amendments to the Handbook

- D. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- E. The Market Conduct sourcebook (MAR) is amended in accordance with Annex B to this instrument.

### Citation

- F. This instrument may be cited as the Short Selling (No 5) Instrument 2009.

By order of the Board  
14 January 2009

## Annex A

### Amendments to the Glossary of definitions

In this Annex, striking through indicates deleted text.

*net short position*

~~a net short position which gives rise to an economic exposure to the issued share capital of a company.~~

~~Any calculation of whether a person has a short position must take account of any form of economic interest in the shares of the company.~~

## Annex B

### Amendments to the Market Conduct sourcebook (MAR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 1.9 Market abuse (misleading behaviour) & market abuse (distortion)

...

Short selling in relation to financial sector companies

1.9.2C E (1) ~~A person who enters into a transaction that (whether by itself or in conjunction with other transactions) has the effect of:~~

~~(a) creating a *net short position* in a *UK financial sector company*; or~~

~~(b) increasing any *net short position* in a *UK financial sector company* that the person had immediately before 19 September 2008;~~

~~is, in the opinion of the *FSA*, engaging in *behaviour* that is *market abuse (misleading behaviour)*. [deleted]~~

~~(2) Paragraph (1) does not apply to a person acting in the capacity of a market maker. [deleted]~~

~~(3) Paragraph (1) does not apply to a transaction entered into or an order placed before 19 September 2008. [deleted]~~

~~(4) This provision ceases to have effect on 16 January 2008. [deleted]~~

~~Disclosure of pre-existing positions~~

1.9.2D E (1) Failure by a person who has a *disclosable short position* in a *UK financial sector company* to provide adequate ongoing disclosure of their position is *behaviour* which, in the opinion of the *FSA*, is *market abuse (misleading behaviour)*.

(2) In paragraph (1), “adequate ongoing disclosure” means disclosure made on a *RIS* by no later than 3.30pm on the *business day* following:

(a) the first day on which the position reaches, exceeds or falls below a *disclosable short position* is held after 30 October 2008; and of 0.25%, 0.35%, 0.45% and 0.55% of the issued share capital of the company and each 0.1%

threshold thereafter.

~~(b) each day on which the *disclosable short position* changes.~~

~~(2A) The disclosure referred to in (1) must include the name of the person who has the position, the amount of the *disclosable short position* and the name of the company in relation to which it has that position. Where the change in position results in the person no longer holding a *disclosable short position*, there must be disclosure to that effect.~~

~~(3) The first disclosure required under this provision is by 3.30pm on 23 September 2008 which should relate to positions held on 19 September and 22 September. For the avoidance of doubt, changes in a *disclosable short position* between the thresholds referred to in (2) do not need to be disclosed under this section. For example, an increase from 0.25% to 0.31% of the issued share capital of the company does not need to be disclosed.~~

~~(4) This provision ceases to have effect on 16 January 2009. For the avoidance of doubt, (1) applies during a *rights issue period*.~~

~~(5) This provision ceases to have effect on 30 June 2009.~~

1.9.2E G ~~MAR 1.9.2DE refers to a person providing adequate ongoing disclosure of *disclosable short positions*. A person may have such an interest despite MAR 1.9.2CE because they had a *disclosable short position* before 19 September 2008 or because they had a short position before that date which due to other extraneous factors becomes a *disclosable short position*. [deleted]~~

**PUB REF: 001676**

The Financial Services Authority  
25 The North Colonnade Canary Wharf London E14 5HS  
Telephone: +44 (0)20 7066 1000 Fax: +44 (0)20 7066 1099  
Website: <http://www.fsa.gov.uk>

Registered as a Limited Company in England and Wales No. 1920623. Registered Office as above.