

Financial Services and Markets

Implementing the Financial Services Act 2010: Short Selling

27 April 2010

Meet the new regime, (much the) same as the old regime...

In CP10/11: *Implementing aspects of the Financial Services Act 2010*, the FSA has issued its proposals as to how it will exercise its new statutory powers to make short selling rules under the Financial Services Act 2010.

In substance, very little will change – and in one respect things will even get better. However, the proposals are avowedly temporary in nature – the FSA says that it expects its rules to be superseded once a European short selling regime has been finalised (see CESR's *Report on a Model for a Pan-European Short Selling Disclosure Regime* published in March 2010 (<http://www.cesr-eu.org/popup2.php?id=6487>)).

The proposals

The key points to note about the FSA's proposals are as follows:

- as expected, the FSA will use its new statutory powers to make the short selling rules outside MAR (MAR 1.9.2AE, MAR 1.9.2BR and MAR 1.9.2DE will all be deleted). The new rules will therefore no longer be tied to the market abuse regime and will instead appear in a new Financial Stability and Market Confidence sourcebook (FINMAR);
- the intention appears to be that the new Handbook text in FINMAR will incorporate the matters currently covered by the FAQs;
- the two current disclosure regimes will continue, substantially in the same form:
 - the disclosure regime as regards UK financial sector companies will continue – holders of significant short positions (0.25% and 0.1% thresholds thereafter) in UK banks, UK insurers and the UK-incorporated parent undertakings of UK banks and UK insurers, as defined in the Glossary, will be required to disclose. On the assumption that the FAQs will disappear, so too will the reference to the list of UK financial sector companies on the FSA website;
 - the rights issue regime (requiring disclosure of short positions of 0.25% and above during rights issue periods) will continue to apply, subject to a narrowing in scope – the FSA proposes that it should apply to holdings in UK-incorporated companies and non-UK companies where a UK prescribed market is the *main or sole venue* for trading in the company's securities (rather than applying, as now, to rights issues announced by all companies whose shares are admitted to trading on a prescribed market);
- the FSA has new enforcement powers specifically in relation to short selling. It will have the power to require information and documents which it reasonably requires for the purposes of determining whether a person has contravened the short selling rules. It will also have the power to impose a financial penalty or a public censure on a person who contravenes any short selling rule (or on a person who was knowingly concerned in the contravention). DEPP 6.2 already sets out the FSA's policy for deciding whether or not to impose a financial penalty or public censure and no amendments are proposed to these provisions. The level of any penalty will be assessed in accordance with the FSA's new five-step policy which came into force on 6 March 2010 and as set out in DEPP 6.5 to DEPP 6.5D. Again, no amendments to the DEPP text are proposed.

The consultation paper is at: http://www.fsa.gov.uk/pubs/cp/cp10_11.pdf. The consultation period ends on 25 June 2010.

If you would like further information or advice on these matters, please contact Margaret Chamberlain, Jane Tuckley, Mark Evans or Tim Lewis in the Financial Services and Markets Department or your usual contact at Travers Smith.

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