

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
RELEASE NO. 58190 / July 18, 2008

AMENDMENT TO EMERGENCY ORDER PURSUANT TO SECTION 12(k)(2) OF  
THE SECURITIES EXCHANGE ACT OF 1934 TAKING TEMPORARY ACTION TO  
RESPOND TO MARKET DEVELOPMENTS

Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934,<sup>1</sup> on July 15, 2008, the Securities and Exchange Commission (“Commission”) issued an Emergency Order (the “Order”) related to short selling securities of certain specified substantial financial firms.<sup>2</sup> The Order takes effect on July 21, 2008. The Commission delayed the effective date to create the opportunity to address, and to allow sufficient time for market participants to make, adjustments to their operations to implement the enhanced requirements. The anticipated operational accommodations necessary for implementation of the Order are addressed herein.

A. Bona Fide Market Makers

The borrow and arrangement-to-borrow requirement of the Order does not apply to certain bona fide market makers. (The settlement date delivery requirement of the Order applies to these market makers.) The purpose of this accommodation is to permit market makers to facilitate customer orders in a fast-moving market without possible delays associated with complying with the borrow and arrangement-to-borrow requirement of the Order.

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<sup>1</sup> 15 USC 78l(k)(2).

<sup>2</sup> See Securities Exchange Act Release No. 58166 (July 15, 2008) at <http://www.sec.gov/rules/other/2008/34-58166.pdf>

IT IS THEREFORE ORDERED that, pursuant to our Section 12(k)(2) powers, the following entities are excepted from the requirement of the Order that any person effecting a short sale in the publicly traded securities of substantial financial firms, as identified in Appendix A to the Order (“Appendix A Securities”)<sup>3</sup>, using the means or instrumentalities of interstate commerce, must borrow or arrange to borrow the security or otherwise have the security available to borrow in its inventory prior to effecting the short sale: registered market makers, block positioners, or other market makers obligated to quote in the over-the-counter market, that are selling short as part of bona fide market making and hedging activities related directly to bona fide market making in: (a) Appendix A Securities; (b) derivative securities based on Appendix A Securities, including standardized options; and (c) exchange traded funds of which Appendix A Securities are a component.

B. Documentation

Rule 203(b)(1)(iii) of Regulation SHO requires a broker or dealer to document its compliance with the “locate” requirement contained in Rule 203(b)(1)(i) of the regulation.<sup>4</sup> Brokers and dealers have developed processes and procedures to meet this documentation requirement. Because the borrow or arrangement-to-borrow requirement in the Order constitutes the Commission’s “locate” requirement during the effectiveness

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<sup>3</sup> Appendix A incorrectly referenced “HSI” as a ticker symbol for HSBC Holdings PLC ADS. This reference to HSI is hereby removed from Appendix A. In addition, the reference to BNP Paribas Securities Corp. is hereby changed to BNP Paribas. See Appendix A attached as revised.

<sup>4</sup> Rule 203(b)(1) of Regulation SHO provides: “A broker or dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has: (1) Borrowed the security, or entered into a bona-fide arrangement to borrow the security; or (2) Reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (3) Documented compliance with this paragraph (b)(1).” 17 CFR 242.203(b)(1).

of the Order, brokers and dealers need not change their processes and procedures used to document compliance.

IT IS THEREFORE ORDERED that, pursuant to our Section 12(k)(2) powers, brokers and dealers must document compliance with the borrow and arrangement-to-borrow requirement of the Order and may use the same processes and procedures to document compliance with the Order as used for compliance with Regulation SHO, provided such processes and procedures would comply with Rule 203(b)(1) of Regulation SHO.

C. Sales of Restricted Securities

The Order does not apply to short sales of Appendix A Securities effected pursuant to Rule 144 of the Securities Act of 1933.<sup>5</sup> This is consistent with Rule 203(b)(2)(ii) of Regulation SHO and will permit the orderly settlement of such sales without the risk of causing market disruption due to unnecessary purchasing activity to meet the settlement date delivery requirement of the Order. Such sales, however, remain subject to the requirements of Regulation SHO.

IT IS THEREFORE ORDERED that, pursuant to our Section 12(k)(2) powers, the Order does not apply to any person that effects a short sale pursuant to Rule 144 of the Securities Act of 1933 (17 CFR 230.144) in an Appendix A Security.

D. Syndicate Offerings

The Order does not apply to short sales by underwriters, or members of a syndicate or group participating in distributions of Appendix A Securities in connection with an over-allotment of securities, or any lay-off sale by such person in connection with

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<sup>5</sup> 17 CFR 230.144.

a distribution of Appendix A Securities through a rights or a standby underwriting commitment. It is not necessary for the Order to apply to such selling activity because it is addressed in Regulation M under the Securities Exchange Act of 1934,<sup>6</sup> an anti-manipulation rule, and does not raise the same concerns as “naked” short selling in secondary markets.

IT IS THEREFORE ORDERED that, pursuant to our Section 12(k)(2) powers, the Order does not apply with regard to any sale by an underwriter, or any member of a syndicate or group participating in the distribution of an Appendix A Security, in connection with an over-allotment of securities, or any lay-off sale by such person in connection with a distribution of Appendix A Securities through a rights or a standby underwriting commitment. In addition, the Order does not apply with respect to a net syndicate short position created in connection with a distribution of an Appendix A Security that is part of a fail to deliver position at a registered clearing agency in Appendix A Securities if action is taken to close out the net syndicate short position no later than the 30<sup>th</sup> day after commencement of sales in the distribution.

The Commission believes that these amendments are necessary in the public interest and for the protection of investors to maintain fair and orderly securities markets, and to prevent substantial disruption to securities markets.

By the Commission.

Florence E. Harmon  
Acting Secretary

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<sup>6</sup> 17 CFR 242.100 et seq.

## Appendix A

<u>Company</u>	<u>Ticker Symbol(s)</u>
BNP Paribas	BNPQF or BNPQY
Bank of America Corporation	BAC
Barclays PLC	BCS
Citigroup Inc.	C
Credit Suisse Group	CS
Daiwa Securities Group Inc.	DSECY
Deutsche Bank Group AG	DB
Allianz SE	AZ
Goldman, Sachs Group Inc	GS
Royal Bank ADS	RBS
HSBC Holdings PLC ADS	HBC
J. P. Morgan Chase & Co.	JPM
Lehman Brothers Holdings Inc.	LEH
Merrill Lynch & Co., Inc.	MER
Mizuho Financial Group, Inc.	MFG
Morgan Stanley	MS
UBS AG	UBS
Freddie Mac	FRE
Fannie Mae	FNM