

Client Briefing

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New Austrian Shorting Rules

On September 18, 2008 the US Securities and Exchange Commission took temporary emergency action to prohibit short selling in 799 financial companies to protect the integrity and quality of the securities market and strengthen investor confidence. Other securities regulators around the world, such as UK's FSA, Germany's BaFin and Spain's CNMV took similar action during the following days.

The Austrian statutory framework did at that time not empower Austria's regulator FMA to prohibit or require reporting of, short selling transactions other than in cases of reasoned suspicion of market manipulation.

On October 20/21 the Austrian parliament enacted a statute authorising emergency action of FMA and with effect of October 13, the Vienna Stock Exchange banned all short selling transactions through its trading system.

Authority of FMA to prohibit short selling

In view of current developments in international financial markets and their impacts on domestic regulated markets the Austrian government drafted a "stability package for financial market", which has been approved by the first chamber of the Austrian Parliament on October 20, 2008. Part of the package is an amendment to the Stock Exchange Act under which, among others:

- The regulator FMA is given authority to prohibit or restrict, by regulation, short selling in specific financial instruments for periods not exceeding

three months (subject to extension for an aggregate period not in excess of nine months). The FMA may also impose reporting and publication requirements regarding short positions.

- The penalty on late delivery of securities into the stock exchange's settlement system is increased to 0.3% of the market value per day and to 0.6% as from the sixth day.

The powers of FMA under the amendment relate to all transactions entered into in Austria that relate to financial instruments admitted to be traded on a regulated market in any EEA member state.

The amendment was on the agenda of the second chamber of Parliament on October 21, 2008 and can be expected to enter into force shortly thereafter (on the day of publication in the Bundesgesetzblatt). To date, FMA has not yet published (draft) regulation exercising its new powers under the amendment.

Prohibition of short selling through the Vienna Stock Exchange's trading system

Already with effect of October 13 the Trading Rules of the Vienna Stock Exchange were changed by introducing an Article 18 on Self-dealings (Cross Trades) and Prohibition of Short Selling. Article 18 mainly states that:

- Short selling transactions are prohibited, except the transactions of exchange members that have assumed the obligation to enter binding bid and ask prices (quotes) into the system (market makers, specialists and liquidity providers in auction trading), if these transactions are necessary in order for them to fulfil their contractual obligations. Also exempt is short selling that serves to secure already existing positions.
- One single exchange member, acting knowingly on the buy and sell side for its own account or for the account of the same customer, may not enter into opposing trades for the same security, if this could lead to the execution of an order in the electronic trading system (crossing trades).

The Trading Rules amendment applies to all securities that may be traded through the Vienna Stock Exchange's trading system.

Reporting of short selling in cases of suspected market manipulation

Before that, on September 22, 2008, FMA had issued a circular letter reminding on the existing rule under the Stock Exchange Act requiring persons involved in professional dealings in financial instruments having their seat or a branch in Austria to report without delay any transactions that give rise to a reasoned suspicion that they constitute market manipulation.

In its circular letter FMA noted that, for example, taking on or holding “net short positions” may constitute a case of market abuse and that a “net short position” of 0.25% or more of an issuer’s capital outstanding was a possible indicator of market abuse.

FMA further pointed out that market manipulation includes the spreading of rumours as well as of false and misleading information if the person who disseminated the information knew or must have known it to be false or misleading. Any such facts or suspected facts shall likewise be reported to FMA.

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