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Short Selling Notifications: Temporary Bans, Submitting Notifications and other Considerations

Of interest to: firms running short strategies

In recent days we have seen National Competent Authorities (‘NCAs’) throughout the European Economic Area (‘EEA’) issue temporary short selling bans prohibiting short selling in certain instruments under Article 20 of the Short Selling Regulation (236/2012). These prohibitions are temporary and form part of wider price stabilisation interventions by NCAs as the COVID-19 (’Coronavirus’) pandemic continues to impact financial markets globally.

We have listed below some key considerations for firms running short strategies as they endeavour to remain in line with the short selling rules imposed by the range of NCAs across the EEA.

- The European Securities and Markets Authority (‘ESMA’) has lowered its minimum threshold for short selling notifications to 0.1% of a company’s issued share capital. ESMA considers that a duration of three months is justified considering the information available now. ESMA is aware of the increasing administrative burden that this decision will put upon certain market participants and intends to revert to the regular reporting obligation as soon as the situation improves. At the same time, ESMA has not discarded the possibility of extending the measure, should the situation deteriorate further. The FCA has acknowledged this amendment but stated that these notifications will require amendments to their technology. As such, where the FCA is the relevant competent authority firms should continue to notify under the old thresholds until further notice.

- The temporary short selling bans that are being issued by European NCAs are only in force for a short duration, which is outlined on the official announcement when a temporary ban has been imposed. The London Stock Exchange website is the official Regulatory News Service (RNS) in the United Kingdom for the announcement of temporary short selling bans. Please contact Optima directly for further information on specific notification requirements to other NCAs.

- Firms needing to submit short selling notifications to the FCA should ensure that they are registered and able to submit short selling notifications via the FCA's new Electronic Submission System (ESS). If firms are not set up and have urgent notifications to make, disclosures should be drafted using the FCA 'Excel' disclosure form and emailed to PMU@fca.org.uk. It is crucial that firms do this, to ensure that they meet the requirement of being "open and co-operative with the regulator" (Principle 11 *'Relations with regulators'* and SMCR Senior Manager Conduct Rule 4 *'You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice').*

- When shorting indexes (through an index future or similar), firms need to be aware of their notification obligation if they are net short a component name in the index (or underlying name) and this puts their aggregate short position above the threshold in that firm's issued share capital.

- Temporary short selling bans do not require firms to close out their net short positions, but they are prohibited from entering any further short sales in the named securities for the duration of the ban.

- Local time of the reportable security is used to calculate the market close time of 3.30pm when submitting disclosures. For example, a firm in London opening a net short position in a German stock where a disclosure is required will need to disclose that by 3.30pm local time in Frankfurt.

- Net short positions are net at the ‘firm’ level, not the ‘fund’ level. Disclosures are made as an aggregate calculation across all the firm’s funds, including long and short positions in an instrument.

Useful Links

ESMA Short Selling Page

ESMA Decision Short Selling Thresholds

FCA Statement regarding New ESMA Thresholds

Short Selling Reporting Excel Form

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