

2012 No. 2554

FINANCIAL SERVICES AND MARKETS

**The Financial Services and Markets Act 2000 (Short Selling)
Regulations 2012**

<i>Made</i> - - - -	<i>4th October 2012</i>
<i>Laid before Parliament</i>	<i>9th October 2012</i>
<i>Coming into force</i> - -	<i>1st November 2012</i>

The Treasury are designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to financial services.

The Treasury in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 make the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Financial Services and Markets Act 2000 (Short Selling) Regulations 2012 and come into force on 1st November 2012.

(2) In these Regulations—

“the Act” means the Financial Services and Markets Act 2000^(c);

“the Authority” means the Financial Services Authority;

“the short selling regulation” means Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps^(d).

Amendment of the Act

2.—(1) The Act is amended as follows.

(2) Sections 131B to 131D^(e) (short selling rules) (including the italic heading before section 131B) are repealed.

(3) In section 131E (power to require information)—

(a) in subsection (1) omit “(“P”);”;

(b) in subsection (2) for the words from “determining whether P” to the end substitute “the exercise by it of functions under the short selling regulation”;

(a) S.I. 2012/1759.

(b) 1972 c.68. Section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c.51) and the European Union (Amendment) Act 2008 (c.7), Schedule, Part 1.

(c) 2000 c.8.

(d) OJ no L 86, 24.3.2012, p1.

(e) Sections 131B to 131K were inserted by section 8 of the Financial Services Act 2010 (c.28).

(c) after subsection (5) insert—

“(5A) The Authority’s powers under this section may be exercised on a request made in the exercise of functions under the short selling regulation by—

- (a) the competent authority for the purposes of that regulation of an EEA State other than the United Kingdom, or
- (b) ESMA.

(5B) If a request of the kind mentioned in subsection (5A) has been made to the Authority, the Authority must, in deciding whether or not to exercise its powers under this section in response to the request, consider whether it is necessary to do so to comply with the short selling regulation.”;

(d) omit subsection (7).

(4) In section 131F (power to require information: supplementary)—

(a) omit subsection (1);

(b) in subsection (6) for paragraphs (a) and (b) substitute—

- “(a) the Authority suspects that P or a member of P’s group has contravened any provision of the short selling regulation;
- (b) the Authority suspects that the person to whom the obligation of confidence is owed or a member of that person’s group has contravened any provision of the short selling regulation; or ”.

(5) After section 131F insert—

“Investigations in support of EEA regulator

131FA.—(1) If so requested by the competent authority of an EEA State other than the United Kingdom (“the EEA regulator”) acting in the exercise of its functions under the short selling regulation, the Authority may appoint one or more competent persons to investigate any matter.

(2) In deciding whether to comply with a request falling within subsection (1), the Authority must consider whether it is necessary to do so in order to comply with the short selling regulation.

(3) Sections 170 to 177 (which relate to investigations) apply in relation to an investigator appointed under subsection (1) as they apply in relation to an investigator appointed under section 168(5).

(4) The Authority may direct an investigator appointed under subsection (1) to permit a representative of the EEA regulator to attend, and take part in, any interview conducted for the purposes of the investigation.

(5) The Authority is not to give a direction under subsection (4) unless it is satisfied that any information obtained by the EEA regulator as a result of the interview will be subject to safeguards equivalent to those contained in Part 23.

(6) The Authority must prepare a statement of its policy with respect to the conduct of interviews in relation to which a direction under subsection (4) has been given.

(7) The statement requires the approval of the Treasury.

(8) If the Treasury approve the statement, the Authority must publish it.

(9) No direction may be given under subsection (4) before the statement has been published.

(10) The Authority may at any time alter or replace a statement issued under subsection (6), and subsections (7) and (8) apply to an altered statement or to a replacement statement.

Entry of premises under warrant

131FB.—(1) A justice of the peace may issue a warrant under this section if satisfied on information on oath given by or on behalf of the Authority that there are reasonable grounds for believing that the conditions in subsection (2) are satisfied.

(2) The conditions are—

- (a) that a relevant person on whom a requirement has been imposed under section 131E or 131F has failed (wholly or in part) to comply with it; and
- (b) that on the premises specified in the warrant—
 - (i) there are documents which have been required; or
 - (ii) there is information which has been required.

(3) A warrant under this section shall authorise a constable—

- (a) to enter the premises specified in the warrant;
- (b) to search the premises and take possession of any documents or information appearing to be documents or information of a kind in respect of which a warrant under this section was issued (“the relevant kind”) or to take, in relation to any such documents or information, any other steps which may appear to be necessary for preserving them or preventing interference with them;
- (c) to take copies of, or extracts from, any documents or information appearing to be of the relevant kind;
- (d) to require any person on the premises to provide an explanation of any document or information appearing to be of the relevant kind or to state where it may be found; and
- (e) to use such force as may be reasonably necessary.

(4) A warrant under this section may be executed by any constable.

(5) The warrant may authorise persons to accompany any constable who is executing it.

(6) The powers in subsection (3) may be exercised by a person authorised by the warrant to accompany a constable; but that person may exercise those powers only in the company of, and under the supervision of, a constable.

(7) In England and Wales, sections 15(5) to (8) and 16(3) to (12) of the Police and Criminal Evidence Act 1984(a) (execution of search warrants and safeguards) apply to warrants issued under this section.

(8) In Northern Ireland, Articles 17(5) to (8) and 18(3) to (12) of the Police and Criminal Evidence (Northern Ireland) Order 1989(b) apply to warrants issued under this section.

(9) In the application of this section to Scotland—

- (a) for the reference to a justice of the peace substitute a reference to a justice of the peace or a sheriff; and
- (b) for the references to information on oath substitute references to evidence on oath.

(10) The Authority may give information under subsection (1) or under section 176(1) at the request of an EEA regulator where the regulator makes the request in the exercise of its functions under the short selling regulation.

(11) The Authority must, in deciding whether or not to exercise a power referred to in subsection (10), consider whether the exercise of that power is necessary to comply with an obligation under the short selling regulation.

(12) In this section—

(a) 1984 c.60. Sections 15(5) to (8) and 16(3) to (12) were amended by paragraph 281 of Schedule 8 to the Courts Act 2003 (c.39), sections 113 and 114 of the Serious Organised Crime and Police Act 2005 (c.15) and S.I. 2005/3496.

(b) S.I. 1989/1341 (N.I. 12), amended by S.I. 2007/288 (N.I. 2).

“EEA regulator” means the competent authority of an EEA State other than the United Kingdom for the purposes of the short selling regulation;

“relevant person” means—

- (a) an authorised person,
- (b) a person who has been an authorised person,
- (c) a person who is for the purposes of section 165 connected with an authorised person or with a person within paragraph (b).

Retention of documents taken under section 131FB

131FC.—(1) Any document of which possession is taken under section 131FB (“a seized document”) may be retained so long as it is necessary to retain it (rather than copies of it) in the circumstances.

(2) A person claiming to be the owner of a seized document may apply to a magistrates’ court or (in Scotland) the sheriff for an order for the delivery of the document to the person appearing to the court or sheriff to be the owner.

(3) If on an application under subsection (2) the court or (in Scotland) the sheriff cannot ascertain who is the owner of the seized document the court or sheriff (as the case may be) may make such order as the court or sheriff thinks fit.

(4) An order under subsection (2) or (3) does not affect the right of any person to take legal proceedings against any person in possession of a seized document for the recovery of the document.

(5) Any right to bring proceedings (as described in subsection (4)) may only be exercised within 6 months of the date of the order made under subsection (2) or (3).”.

(6) In the italic heading before section 131G, for “rules” substitute “regulation”.

(7) In section 131G (power to impose penalty or issue censure), in subsection (1)(a), for “short selling rules” substitute “the short selling regulation”.

(8) After section 131K (statement of policy: procedure) insert—

“Offences

131L.—(1) If a relevant person (“A”) fails to comply with a requirement imposed on A under section 131E or 131F the Authority may certify that fact in writing to the court.

(2) If the court is satisfied that A failed without reasonable excuse to comply with the requirement, it may deal with A (and where A is a body corporate, any director or officer) as if A (or as the case may be the director or officer) were in contempt; and “officer”, in relation to a limited liability partnership, means a member of the limited liability partnership.

(3) A relevant person (“B”) who, in purported compliance with a requirement imposed on B under section 131E or 131F—

- (a) provides information which B knows to be false or misleading in a material particular, or
- (b) recklessly provides information which is false or misleading in a material particular,

is guilty of an offence.

(4) A person guilty of an offence under subsection (3) is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum, or both;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

(5) Any person who intentionally obstructs the exercise of any rights conferred by a warrant under section 131FB is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale, or both.

(6) In relation to any contravention by a person, the Authority may not exercise both—

- (a) its powers under section 131G(2), and
- (b) its powers under subsection (1).

(7) In this section—

“court” means—

- (a) the High Court;
- (b) in Scotland, the Court of Session;

“relevant person” means—

- (a) an authorised person,
- (b) a person who has been an authorised person,
- (c) a person who is for the purposes of section 165 connected with an authorised person or with a person within paragraph (b).”.

(9) In section 150(a) (actions for damages for contravention of rules), in subsection (4), omit paragraph (aa) but not “or” at the end of that paragraph.

(10) In section 157(b) (guidance), in subsection (3A), for “rules under section 131B (short selling rules) to which those persons are subject” substitute “its functions under the short selling regulation”.

(11) In section 168(c) (appointment of persons to carry out investigations in particular cases), in subsection (4)—

- (a) omit “or” at the end of paragraph (i);
- (b) at the end of paragraph (j) insert—

“; or

(k) a person may have contravened any provision of the short selling regulation.”.

(12) In section 380(d) (injunctions), in subsection (6)(a)(i), after “auctioning regulation” insert “or the short selling regulation”.

(13) In section 382(e) (restitution orders), in subsection (9)(a)(i), after “auctioning regulation” insert “or the short selling regulation”.

(14) In section 398 (misleading the Authority: residual cases), in subsection (1), after “Act,” insert “or by the short selling regulation,”.

(15) In section 417 (definitions), in subsection (1), in the appropriate place insert—

““short selling regulation” means Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps;”.

(16) In Schedule 1, in paragraph 6(f) (monitoring and enforcement)—

- (a) in sub-paragraph (1), after “auctioning regulation” insert “or the short selling regulation”;
- (b) in sub-paragraph (3), after “auctioning regulation,” insert “the short selling regulation,”.

(a) Section 150(4) was amended by S.I. 2005/381 and by paragraphs 1 and 12 of Schedule 2 to the Financial Services Act 2010.

(b) Section 157(3A) was inserted by paragraphs 1 and 14 of Schedule 2 to the Financial Services Act 2010.

(c) Section 168(4)(j) was inserted by S.I. 2007/126 and amended by S.I. 2012/1906.

(d) Section 380(6)(a)(i) was amended by S.I. 2007/126, 2011/1613 and 2012/1906.

(e) Section 382(9)(a)(i) was amended by S.I. 2007/126, 2011/1613 and 2012/1906.

(f) Paragraph 6(1) and (3) was amended by S.I. 2007/126, 2011/1613 and 2012/1906.

Amendment of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001

3.—(1) The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001(a) are amended as follows.

(2) In regulation 2 in the appropriate place insert—

““short selling regulation information” means confidential information received by the Authority in the course of discharging its functions as a competent authority under the short selling regulation;”.

(3) In regulation 12 after paragraph (3) insert—

“(4) This regulation does not permit disclosure of short selling regulation information to a person specified in the first column in Part 3 of Schedule 1 unless the disclosure is in accordance with article 40 of the short selling regulation or a cooperation arrangement of the kind referred to in article 38 of the short selling regulation.”.

Designation of competent authority

4. The Authority is the competent authority for the purposes of the short selling regulation.

Applications under the short selling regulation

5.—(1) Any application to the Authority under the short selling regulation must—

- (a) be made in such manner as the Authority may direct; and
- (b) contain, or be accompanied by, such other information as the Authority may reasonably require.

(2) At any time after receiving an application and before determining it, the Authority may require the applicant to provide it with such further information as it reasonably considers necessary to enable it to determine the application.

(3) Different directions may be given, and different requirements imposed, in relation to different applications or categories of application.

(4) The Authority may require an applicant to provide information under this regulation in such form, or to verify it in such a way, as the Authority may direct.

(5) Section 398 of the Act (misleading the authority: residual cases) applies to a requirement imposed under this regulation as it applies to a requirement imposed by or under the Act.

Notifications under the short selling regulation

6. Any notification to the Authority under Article 17.5, 17.6, 17.9, 17.10, 18.1 or 19.2 of the short selling regulation must be made in such manner as the Authority may direct.

Saving provision

7.—(1) The repeal of sections 131B to 131D of the Act does not affect the liability of any person to provide disclosure of a disclosable short position for the purposes of the Financial Stability and Market Confidence Sourcebook Instrument 2010(b) where—

- (a) that person held the disclosable short position before 1st November 2012, and
- (b) disclosure is due to be provided on 1st November 2012.

(a) S.I. 2001/2188, to which there are amendments not relevant to these Regulations.

(b) No. 2010/25, made by the Authority under the Act on 22nd July 2010. The definition of “disclosure” was amended by Instrument No. 2010/40 made on 23rd September 2010.

(2) In this regulation, “disclosure” has the meaning given by Financial Stability and Market Confidence Sourcebook Instrument 2010 and “disclosable short position” has the meaning given by the Short Selling Instrument 2008(a).

Review

8.—(1) The Treasury must from time to time—

- (a) carry out a review of regulations 2 to 6,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(2) In carrying out the review the Treasury must, so far as is reasonable, have regard to how the short selling regulation (which is implemented in part by means of regulations 2 to 6) is implemented in other member States.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by the regulatory system established by regulations 2 to 6,
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) The first report under this regulation must be published before the end of the period of five years beginning with the day on which these Regulations come into force.

(5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.

David Evennett
Robert Goodwill

Two of the Lords Commissioners of Her Majesty’s Treasury

4th October 2012

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement certain Articles of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ no L 86, 24.3.2012, p1) (“the short selling regulation”).

Regulation 2(2) repeals sections 131B to 131D of the Financial Services and Markets Act 2000 (c.8) (“the Act”) which give the Financial Services Authority (“the Authority”) power to make short selling rules; this power is superseded by the short selling regulation. Regulation 7 contains a related saving provision.

(a) No. 2008/30, made by the Authority under the Act on 12th June 2008 and amended by Instruments No. 2008/50 made on 18th September 2008, 2008/51 made on 23rd September 2008 and 2010/25 made on 22nd July 2010.

Article 32 of the short selling regulation (designation of competent authorities) is implemented by regulation 4, which designates the Authority as the competent authority for the purposes of the short selling regulation.

Article 33 of the short selling regulation (powers of competent authorities) is partially implemented as follows. Regulation 2(3) and (4) amends sections 131E and 131F of the Act to give the Authority power to require information and documents which it reasonably requires for the purpose of the exercise by it of functions under the short selling regulation. Regulation 2(5) makes provision for on-site inspections by means of a compulsory power of entry under warrant where an authorised person has failed to comply with a requirement for information imposed under section 131E or 131F of the Act. Regulation 2(11) applies section 168 of the Act (appointment of persons to carry out investigations) in relation to suspected or actual contraventions of the short selling regulation. Regulation 2(12) extends section 380 of the Act to make the Authority's power to apply to the court for an injunction available in relation to an actual or likely breach of the short selling regulation. Regulation 2(13) extends section 382 of the Act to give the court power to make a restitution order in respect of breaches of the short selling regulation.

Article 37 of the short selling regulation (cooperation in the case of a request for an on-site inspection or an investigation) is partially implemented by regulation 2(3) which makes provision for the Authority to exercise its powers to require information at the request of the competent authority of an EEA State or ESMA. Regulation 2(5) makes provision for the Authority to appoint an investigator and to apply for a warrant for entry of premises at the request of the competent authority of an EEA State.

Articles 38 and 40 of the short selling regulation are partially implemented by regulation 3 which amends the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (S.I. 2001/2188) to give effect to the restrictions in those Articles on the disclosure of information to the competent authorities of States which are not EEA States.

The requirement to establish rules on penalties and administrative measures in Article 41 of the short selling regulation is implemented by regulation 2(7) which applies the Authority's power in section 131G of the Act to impose penalties or publish a statement censuring a person in relation to breaches of the short selling regulation, and regulation 2(8) which makes criminal penalties available for a failure by an authorised person to comply with information requirements imposed under section 131E or 131F of the Act.

The Regulations also contain provision about notifications and applications to the Authority under the short selling regulation and make consequential amendments to the Act.

Regulation 8 requires the Treasury to review the operation and effect of these Regulations and publish a report within five years after they come into force and within every five years after that. Following a review it will fall to the Treasury to consider whether the Regulations should remain as they are, or be revoked or amended. A further instrument would be needed to revoke or amend the Regulations.

A full impact assessment of the effect that these Regulations will have on the costs of business and the voluntary sector is available from Victoria Gibbs, Primary Markets and Market Conduct team, Her Majesty's Treasury, 1 Horse Guards Road, London SW1A 2HQ and is published with the Explanatory Memorandum alongside the Regulations on www.legislation.gov.uk.

STATUTORY INSTRUMENTS

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