



February 8, 2013

Mr. Steven Maijor
Chairman
European Securities and Markets Authority
103 Rue de Grenelle
75007 Paris
France

Re: Emergency Measures Under the EU Short Selling Regulation

Dear Chairman Maijor,

On behalf of Managed Funds Association (“MFA”)¹ and the Alternative Investment Management Association (AIMA)², we are writing in relation to ESMA’s continued work on the EU Short Selling Regulation (the “SSR”). First of all, we thank you and your staff for publishing helpful Questions and Answers (“Q&A”), which have assisted our respective members in meeting their compliance obligations under the SSR. Both associations also appreciate the consultations and meetings in which they have had the opportunity to participate with ESMA staff.

One purpose of this letter is to offer what we hope are practical suggestions to facilitate Member States’ imposition of emergency bans on short selling and to further market participants’ compliance with those bans. Our comments below apply to general bans on short

¹ The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and all other regions where MFA members are market participants.

² AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector – including hedge fund managers, fund of hedge funds managers, prime brokers, fund administrators, accountants and lawyers. Our membership comprises over 1,200 corporate bodies in over 40 countries.

selling,³ as well as targeted, one-day bans on short selling activity in relation to specific companies.⁴

We respect the authority of individual Member States to exercise their powers of intervention under Chapter V of the SSR and to impose bans on short selling activity. As you may recall from previous submissions and letters, both MFA and AIMA respectfully oppose short selling bans and believe that they do not further the goals of either stabilising markets or enhancing investor confidence. Both associations have also expressed procedural concerns about the manner in which competent authorities have imposed emergency bans on short selling in the past.

Despite the fact that we disagree with the bans as such, we respect the competence of EU Member States to resort to this policy tool and wish to offer what we believe are useful suggestions that would facilitate the efficacy of, and investor compliance with, such bans. Based on the recent experiences of these bans, we believe that there are opportunities, in particular, to improve communications about such bans and how they operate.

We believe that there are three areas, in particular, where communication could be improved to the benefit of all parties:

- greater clarity as to the scope of the emergency measures;
- making use, wherever possible, of concepts, definitions and guidance already agreed and harmonised under the SSR; and
- providing more time for market participants to prepare ahead of the imposition of emergency measures.

Greater clarity as to scope

As a result of their experiences following the introduction of emergency measures by Member States prior to implementation of the SSR, our members have been concerned by the general lack of clarity as to the scope of such bans, particularly with regard to the types of financial instruments covered by the bans (*e.g.*, indices, depositary receipts and derivatives).

We recommend that ESMA consider requesting that competent authorities specify clearly the scope of any emergency measures and, in particular, produce a complete list of financial instruments that are intended to be covered by the measures. ESMA may wish to consider whether it would be appropriate to include these requirements in its opinion under Article 27 of the SSR as conditions for its non-objection to the proposed measures. As a matter of fact, the scope of proposed emergency measures and the types of the instruments covered are likely to be two of the most important factors in ESMA's assessment as to whether the proposed measures are necessary to address the "exceptional" circumstances (that is, both justified and proportionate

³ For example, the 3 month ban on short selling imposed by the Spanish CNMV on November 1, 2012.

⁴ For example, the 24 hour ban on short sales of shares of Saipem S.p.A., imposed by the Italian CONSOB on January 31, 2013.

in light of the relevant risks to market stability). As an alternative, ESMA may wish to issue guidance to competent authorities that the above steps are necessary and appropriate in the case of any proposed emergency measure.

Further, we believe that competent authorities should, in advance and in anticipation of any restriction, produce clear guidance or FAQs on the scope of any proposed emergency measures, and publish the guidance at the same time as the emergency measures. In this regard, our two associations believe that ESMA could perform an extremely valuable function by working with competent authorities to develop guidance or FAQs for what may be more common bans which may be applied (*e.g.*, a restriction on short selling of all shares of issuers of a particular Member State). In this manner, there would be a set of FAQs which could then be standardized for use by competent authorities in relation to their individual emergency measures. Please see the Annex to this letter, which sets out our initial thoughts as to matters which such guidance might usefully cover. We would be very happy to work with ESMA towards the creation of more detailed guidance or FAQs.

Separately, we believe that, where the instrument specifying the ban (and any accompanying guidance or FAQs) is not in the English language, it would be helpful to market participants if ESMA would consider whether an English language translation could be published at the same time. This would facilitate consistent compliance by investors as there would be no competing translations. In the alternative, ESMA could consider, as further described below, requesting that all competent authorities proposing emergency measures provide investors and the markets with more than 24 hours' advance notice of the emergency measures coming into force, to allow sufficient time for translation.

Similarly, any emergency measure introduced by ESMA pursuant to Article 28 of the SSR should also be issued in accordance with the above recommendations.

The use of already agreed and harmonised concepts and definitions

A number of concepts and definitions relating to short selling were agreed during the legislative process through which the SSR passed and are now harmonised across the EU. Moreover, they are understood by the market. We believe that ESMA can play an extremely helpful role in encouraging Member States which intend to introduce emergency measures under the SSR to make use of these concepts and definitions, unless there is a valid and pressing reason not to do so. By way of example, the term “short sale” should have the same meaning when used in the context of short selling bans as it does in the SSR.

This discipline will be of great help to the market in understanding, as soon as possible, the scope and intentions of a given national ban, so making the introduction of such measures more efficient and less disruptive.

Providing the market time ahead of the imposition of emergency measures

Article 27 of the SSR gives ESMA powers to perform a facilitation and coordination role in relation to emergency measures taken by the competent authorities. Although our respective

members appreciate that ESMA is only provided with a 24-hour period in which to issue an opinion on the proposed measures, we believe that it would aid the certainty in the markets greatly if ESMA would, as a matter of course, request that all competent authorities proposing emergency measures provide investors and the markets with at least 24 hours' advance notice of the emergency measures coming into force. This would allow for the news of the measures to be disseminated globally and would allow market participants to implement appropriate controls to ensure compliance with the measures. Such advance notice would reduce the potential for confusion and market disruption that could have a destabilizing effect on financial markets. We would note the example of the recent restriction on uncovered short sales of Italian shares; the restriction was announced on November 11, 2011, but took effect only from December 1, 2011.

Advance notice of emergency measures would help in a number of ways. For example, it allows time for market participants to translate and consider in depth the exact text of the announcement – and, if necessary, to raise questions of the relevant Competent Authority – thereby avoiding confusion and potential for unintentional non-compliance. Further, it allows positions which would be in contravention of the emergency measures to be unwound in an orderly manner, which is to the benefit of the market.

Finally, it would be extremely helpful for emergency measures to be announced, not only on a competent authority's website, but *via* an announcement in a regulatory information service (such as RNS provided by the London Stock Exchange or PR Newswire Disclose provided by PRNewswire). This is particularly important for temporary bans, such as 24 hour bans on specific companies. This would avoid investors having to check continuously the websites of all Member State competent authorities on a daily (and intra-day) basis.

MFA and AIMA fully appreciate that ESMA does not have authority under the SSR to direct competent authorities to follow specific requirements with regard to short selling bans. We are not suggesting that ESMA undertake a task for which it lacks authority. Instead, we suggest that as part of its role to coordinate activities under Article 27 of the SSR, ESMA could use its good offices to encourage competent authorities to consider the steps outlined in this letter in advance of imposing or extending an emergency ban. In the interest of clarity, we have taken the liberty of summarising our concerns in the attached list ("Summary of Considerations for Short Sale Bans").

Together, our memberships constitute a substantial component of the regulated community and we seek to assist them in meeting their regulatory responsibilities. Although both associations respectfully disagree with the principle of the underlying policy, we believe that the steps outlined in this letter would improve the likelihood that market participants will be able to comply fully and expeditiously with emergency short sale bans. We hope that ESMA will view our efforts in that light.

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MFA and AIMA would be pleased to discuss this matter with you or your staff further. Please do not hesitate to contact, for the MFA, Stuart J. Kaswell (skaswell@managedfunds.org) or the undersigned at +1 (202) 730-2600 or, for AIMA, Jiri Krol (jkrol@aima.org) at +44 (0)207 822-8380.

Respectfully submitted,



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Cc: Verena Ross, Executive Director
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Summary of Considerations for Short Sale Bans

1. When does the ban take effect? Is the competent authority willing to provide more than 24 hours' notice?
2. What means has the competent authority taken to publicise the ban, ensuring that the financial community becomes aware of the ban as quickly as possible? Has the competent authority published the ban on a regulatory information service?
3. What is the scope of the ban? What products does it cover? Is there a list specifying which products are covered and does it provide clarity for products about which there may be confusion?
4. Does this ban differ from prior bans imposed by the competent authority and if so, what are the specific differences?
5. Does the competent authority's prior interpretive guidance/FAQ continue to apply? If not, what substitute guidance has the competent authority prepared? Would ESMA's *pro forma* FAQs apply or has the competent authority issued its own set of FAQs and identified specific points of departure from the ESMA *pro forma* FAQs?
6. Has an English language translation of all requirements and interpretive materials been published?