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Wijziging van de Wet op het financieel toezicht in verband met het kunnen vaststellen van tijdelijke voorschriften ter bevordering van ordelijke en transparante financiëlemarktprocessen en de stabiliteit van de financiële sector

B

BRIEF VAN DE MINISTER VAN FINANCIËN

Aan de Voorzitter van de Eerste Kamer der Staten-Generaal

Den Haag, 6 oktober 2008

Met deze brief informeer ik u over de door de Autoriteit Financiële Markten (AFM) en De Nederlandsche Bank (DNB) bekendgemaakte verdergaande maatregelen tegen short selling in financiële ondernemingen vanaf zondag 5 oktober 2008. Over deze uitbreiding heeft vooraf goed overleg met mij plaatsgevonden. De tekst van de maatregel is als bijlage bij deze brief opgenomen.

Deze brief wordt zowel gestuurd aan de voorzitter van de Eerste Kamer der Staten-Generaal als de voorzitter van de Tweede Kamer der Staten-Generaal, mede met het oog op de behandeling van het wetsvoorstel tot wijziging van de Wet op het financieel toezicht in verband met het kunnen vaststellen van tijdelijke voorschriften ter bevordering van ordelijke en transparante financiëlemarktprocessen en de stabiliteit van de financiële sector (Kamerstukken II 2008–09, 31 724, nrs. 1–3), dat bij de Eerste Kamer in behandeling is.

De AFM heeft gezien de aanhoudende uitzonderlijke marktomstandigheden verdergaande maatregelen genomen tegen transacties die de handel in aandelen van financiële ondernemingen kunnen verstoren. De maatregel is getroffen om de integriteit en de goede werking van de financiële markten te bevorderen. DNB heeft deze aankondiging verwelkomd vanuit het oogpunt van financiële stabiliteit.

De door de AFM aangekondigde maatregel van 21 september wordt vervangen door de verdergaande maatregelen tegen short selling. Hiermee sluit de AFM aan bij het uitgevaardigde verbod van de Financial Services Authority (FSA) uit het Verenigd Koninkrijk.

De uitgebreide maatregel van de AFM valt uiteen in twee gedeelten. Ten eerste een verbod op het creëren of uitbreiden van een netto short positie in financiële ondernemingen. De reikwijdte van deze maatregel omvat zowel het zogenoemde *naked short sellen* als het zogenoemde

covered short sellen. Daarmee gaat de maatregel dus verder dan de maatregel van 21 september.

Ten tweede wordt het verzoek om netto-economische short posities vanaf 0,25 procent van het aandelenkapitaal van financiële ondernemingen aan de AFM te melden, gehandhaafd. Op dit punt wijkt de maatregel af van de maatregel van de Financial Services Authority (FSA), die uitgaat van een publieke melding. Daarbij speelt een verschil in systematiek van de toezichtsstructuur een rol.

De maatregel van 5 oktober 2008 geldt voor een termijn van 30 dagen. Zowel de duur als de inhoud van deze uitgebreide maatregel kan tussentijds worden gewijzigd. Mocht dit aan de orde komen, zal ik u hierover vanzelfsprekend berichten.

De minister van Financiën,
Wouter Bos

Bijlagen:

- Kennisgeving van AFM en DNB met een overzicht van de Financiële ondernemingen die onder de verdergaande maatregel tegen short selling vallen (bijlage 1);
- FAQs van de AFM (bijlage 2).

Onbekende schakeloptie-instructie.

Stichting Autoriteit Financiële Markten (AFM) en De Nederlandsche Bank N.V. (DNB) geven hierbij te kennen dat de AFM, gezien de huidige uitzonderlijke marktomstandigheden en mede gelet op het aanhangige wetsvoorstel tot wijziging van de Wft, nieuwe maatregelen aankondigt met betrekking tot het houden van een short positie in financiële ondernemingen. Het betreft financiële ondernemingen als bedoeld in de bijlage Financiële Ondernemingen behorend bij deze maatregel. Derhalve is de maatregel van 21 september 2008 met ingang van 5 oktober 2008 niet meer van toepassing onverminderd het bepaalde in paragraaf 2(IV) van onderhavige maatregel.

DNB verwelkomt deze aankondiging vanuit het oogpunt van financiële stabiliteit.

1. Short selling met betrekking tot Financiële Ondernemingen

- (I) Een persoon die een transactie of handelsorder verricht of bewerkstelligt die (of op zichzelf of in samenhang met andere transacties of handelsorders) het volgende effect sorteert:
 - a. het creëren van een Netto shortpositie¹ in een Financiële Onderneming; of
 - b. het vergroten van een Netto shortpositie in een Financiële Onderneming welke positie bestond voor 5 oktober 2008; wordt geacht onder het verbod van artikel 5:58, eerste lid, van de Wet op het financieel toezicht te vallen (marktmanipulatie).
- (II) Onderdeel (I) is niet van toepassing op een persoon handelend in de hoedanigheid van Market Maker².
- (III) Onderdeel (I) is niet van toepassing op een transactie of handelsorder die is verricht of bewerkstelligd voor 5 oktober 2008.
- (IV) Deze regeling wordt van kracht op 5 oktober 2008 en geldt voor een termijn van 30 dagen. Zowel de duur als de inhoud van deze maatregel kan tussentijds worden gewijzigd.

2. Melding van bestaande posities

- (I) De AFM verzoekt de persoon, die een Meldplichtige shortpositie³ – ongeacht op welke wijze en wanneer deze positie ontstaan is – heeft of zal krijgen in een Financiële Onderneming, een adequate doorlopende melding te doen.
- (II) In onderdeel (I) wordt onder «adequate doorlopende melding» verstaan een melding gedaan aan de AFM uiterlijk op de eerstvolgende werkdag nadat de Meldplichtige shortpositie is ontstaan. De melding bevat in elk geval de naam van de persoon die de positie heeft, de omvang van de positie, de naam van de desbetreffende Financiële Onderneming en de datum waarop de Meldplichtige shortpositie werd gehouden.
- (III) De eerste melding onder deze maatregel wordt gedaan einde dag op dinsdag 7 oktober 2008. Deze melding betreft de posities die worden gehouden op maandag 6 oktober 2008 einde dag.
- (IV) Het verzoek om shortposities te melden op grond van de maatregel van 21 september 2008 blijft van kracht voor de shortposities gehouden op 3 oktober 2008 einde dag.
- (V) Dit verzoek wordt van kracht op 5 oktober 2008 en geldt voor een termijn van 30 dagen. Zowel de duur als de inhoud van dit verzoek kan tussentijds worden gewijzigd.

DEFINITIES

1. Netto shortpositie: het economisch belang gerelateerd aan het totaal geplaatste kapitaal van de desbetreffende Financiële Onderneming. Bij het berekenen of een persoon een shortpositie heeft, dient de persoon iedere vorm van economisch belang gerelateerd aan het totaal geplaatste kapitaal van de desbetreffende Financiële Onderneming in aanmerking te nemen.
2. Market Maker: een persoon die op de financiële markten doorlopend blijkt geeft van de bereidheid voor eigen rekening te handelen door financiële instrumenten tegen door hem vastgestelde prijzen te kopen of te verkopen (zowel in het OTC-segment als op de gereglementeerde markten en multilaterale handelsfaciliteiten) op een wijze die er normaal gesproken voor zorgt dat er liquiditeit tot stand wordt gebracht in de markten op constante basis, met dien verstande dat dit zowel voor de bied als de laat kant dient te gelden.
3. Meldplichtige shortpositie: een netto shortpositie die een economisch belang vertegenwoordigt in het totaal geplaatste kapitaal van de desbetreffende Financiële Onderneming van een kwart procent (0.25%) of meer. Bij het berekenen of een persoon een meldplichtige shortpositie heeft, dient de persoon iedere vorm van economisch belang gerelateerd aan het totaal geplaatste kapitaal van de desbetreffende Financiële Onderneming in aanmerking te nemen, met uitzondering van een economisch belang dat hij houdt in de hoedanigheid van Market Maker.

BIJLAGE FINANCIËLE ONDERNEMINGEN

AEGON N.V.	NL0000303709
ING GROEP N.V.	NL0000303600
FORTIS N.V.	BE0003801181
BINCKBANK N.V.	NL0000335578
KAS BANK N.V.	NL0000362648
SNS REAAL N.V.	NL0000390706
VAN DER MOOLEN HOLDING N.V.	NL0000370179
VAN LANSCHOT N.V.	NL0000302636

(De vragen en antwoorden zijn alleen in het Engels beschikbaar)

The AFM has set out answers to frequently asked questions. We will continue to review this information over time and may further update the list to address any other frequently asked questions that arise. The list is not intended to be exhaustive and persons will need to consider how the instrument applies to their particular circumstances taking into account that the purpose of the measures is to prevent potentially abusive behaviour.

We have split the FAQs into a number of sections.

Introduction

1. Is this FAQ additional to the FAQ previously issued by the AFM in relation to this topic?

No. This is a new FAQ which replaces any previously issued FAQ by the AFM in relation to this topic (latest version was dated 26 September 2008).

2. Is this FAQ different from the FAQ issued by the FSA in relation to this topic?

Yes.

General

3. At what time do the new short selling provisions come into force?

The provisions preventing short selling in financial companies came into effect at 12.01 hrs on Sunday 5 October 2008. The provisions governing disclosure take effect at the same time.

4. When do these measures end?

The new provisions are currently set to cease to have effect on 3 November 2008.

5. Will the AFM extend these measures?

We will keep this under review in the light of market conditions.

6. Do the new prohibition and disclosure measures apply to both «covered» and «uncovered» short positions?

Yes.

7. Have these measures changed the suspicious transaction reporting regime?

The reporting obligations under the suspicious transaction reporting regime (art 5:62 Wft) remain unchanged, but these evidential provisions newly describe a behaviour that in the opinion of the AFM constitutes market manipulation.

8. Can a person increase their net short position intra-day, provided that the disclosable position held at the end of that day does not exceed the position disclosed at the end of the previous day?

No. Although only a significant (0.25% or above) net short position held at the end of a day requires disclosure, the short selling requirements do not allow a person to actively increase their net short position intra-day.

9. Are issuers of convertible bonds considered to be short selling for these purposes?

No.

10. Are there any exemptions to these new measures?

Market Makers are exempt from the new short selling measures. The term Market Maker is not linked to the Euronext Rulebook. Our indicative view for the purposes of this instrument on market making is as follows:

A Market Maker is an entity that, ordinarily as part of their business, deals as principal in equities and/or derivatives (whether OTC, exchange-traded or on an MTF) in a way that ordinarily has the effect of providing liquidity on a regular basis to the market on both bid and offer sides of the market in comparable size. Trading in circumstances other than genuinely for the provision of liquidity is not exempt.

This exemption covers Market Makers only when, in the particular circumstances of each transaction, they are acting in that capacity. Market Makers are afforded a certain level of flexibility in anticipating sales as long as this activity is genuine market making in line with its existing general levels of business. Consequently, we would not expect Market Makers to hold significant short positions, other than for brief periods. Proprietary trading strategies where the main intention is to create a short position are not Market Makers and are not exempt.

Registration as a Market Maker with an exchange or trading platform is not relevant for the purposes of this definition.

11. What will be the consequences of non-compliance with the new measures?

The competent authorities could take enforcement actions in case of non-compliance.

12. In the case of investment managers who act on behalf of clients, to whom do the short selling measures apply?

Non-discretionary

Where an investment manager manages on a non-discretionary basis, both the short selling prohibition and disclosure requirements apply to the client. The investment manager may make a net short position disclosure on behalf of its client, but this disclosure must clearly identify that it is the client who holds the disclosable position.

Prohibition

Where an investment manager manages on a discretionary basis and where client positions are segregated from the investment manager and from each other in one or more accounts, the prohibition applies at the level of the individual clients. Where an investment manager manages collective investment schemes on a discretionary basis, the prohibition applies at the fund level. Where the fund in question is an umbrella fund with a number of sub-funds, the prohibition applies at the sub-fund level.

Disclosure

The disclosure obligation applies at the level of both the entity to which the prohibition applies and at the level of the investment manager. The investment manager may make a net short position disclosure on behalf of its client. In respect of itself, the investment manager is required to disclose its aggregate net short position across all of the funds it manages on a discretionary basis.

Where a disclosure by an investment manager is the same as that being made for its client/fund/sub-fund, it is permitted to make a single disclosure provided that the disclosure makes it clear that it applies to both parties.

13. How do the short selling requirements apply across different trading desks?

If trading desks within a firm are housed within the same legal entity, the aggregate position of the legal entity (across all desks holding positions in financial companies) would be expected to apply for these purposes, excluding positions taken under the Market Maker exemption.

14. When calculating a net short position should financial instruments be accounted for on a notional basis or a delta adjusted basis?

Any financial instruments should be accounted for on a delta adjusted basis.

15. What does «economisch belang gerelateerd aan het totaal geplaatst kapitaal van de financiële onderneming» (economic exposure in the issued share capital of a company) mean?

It means any instrument (contracts for differences, spread bets, options, ADR's, etc) giving rise to an exposure, whether direct or indirect, to the total issued share capital of a financial company. The issued share capital of a financial company would include ordinary shares and preference shares but would exclude debt securities.

16. Should any holdings in a financial company that are held as part of a basket of shares or a share index be included in any aggregation of a person's economic interest in the company?

Any economic interest held as part of a basket, index or exchange traded fund («ETF») where the predominance of the components in the basket, index or ETF are financial companies must be included.

Market participants should be aware of their overall position and the effect of their trading strategy on their net short positions in financial companies. For example, a short sale of an index that does not have a predominance of financial companies within it, which creates a new or increased net short position in one or more financial companies, on its own would be permitted. But, where a market participant goes short in an index and offsets positions in that index, by going long in its constituents other than one or more financial companies, he is not permitted to obtain a new or increased net short position in one or more financial companies. This would apply to trading in any derivatives products relating to an index.

Where an index is exempt from the prohibition on short selling because the predominance of its components are not financial companies, it is not necessary to take into account the financial company components of the holding in the index when making calculations to determine whether there is an obligation to disclose net short positions.

17. Is stock lending caught by the prohibition?

No, the AFM is not imposing any additional restrictions on stock lending activities. However, we would urge firms that do lend stock to be vigilant and, where they suspect that stock is being borrowed for the purpose of prohibited short selling, to alert the AFM.

NB, in making this call for vigilance, the AFM is not seeking to extend the current suspicious transaction reporting regime under article 5:62 Wft. Stock lenders should also note that a sale of lent stock would not create a short position for the stock lender but would for the borrower.

18. If I transfer a short position from one counter-party to another with no change in the net short position would this constitute market abuse?

Where the position is transferred to the new counterparty on the same terms it will not be treated as creating or increasing a net short position. Any net short position will still be subject to the new disclosure requirements.

Derivatives

19. How do these provisions apply to derivatives?

Any derivative trades that are either delta neutral or delta positive at the time the orders are entered into are permitted. Please be aware that when rolling derivative positions expire, the delta position should not create a new overall net short position in a financial company.

Prohibition

20. Which financial companies are subject to the prohibition?

We have published a list of financial companies as attachment to our measure dated 5 October 2008. The list has been prepared on a best endeavours basis.

21. Is all short selling in financial companies prohibited?

No. Persons are prohibited from entering into transactions that have the effect of creating a new net short position in a financial company post 4 October 2008, or from increasing a net short position that was held before 5 October 2008. This means that it is still possible to hold a net short position established before 5 October 2008. It also means that it is possible to short a financial company post 4 October 2008, provided that the person can offset the short position with an equivalent long position in relation to that same company. It should also be noted that any net short position that arises or increases, not as a result of any additional transaction, but due to a change in delta as a result of changing market conditions, is not caught by the prohibition (but may require disclosure if it is 0.25% or more as a disclosable net short position).

22. In the context of a merger, is it permissible to offset one stock against another, i.e. by going short in the offeree and long in the offeror?

No, until the merger is complete, positions in the companies involved should be treated separately for the purposes of calculating net short positions. Accordingly, if the result of the transaction is to create a new net short position in a financial company post 4 October 2008, or increase a net short position in a financial company that was held before 5 October 2008, this is not permitted.

23. Can I hedge a long position in the convertible bonds of a financial company by taking a short position in the equity of that company?

Yes, provided that this does not create a new or increased net short position in that company.

24. Does the prohibition also cover OTC transactions?

Yes.

25. Does the prohibition cover trading in Credit Default Swaps?

No.

26. Will the notice apply to listings of financial companies traded on trading platforms in other countries?

Yes, the notice applies to all transactions executed in or from The Netherlands.

27. Does the prohibition apply at the same threshold as the disclosure requirement?

No. The disclosure requirement applies where a person holds a net short position of 0.25% or above. The prohibition applies where a person enters into a transaction that creates a new net short position in a financial company post 4 October 2008 or increases a net short position in a financial company that was held before 5 October 2008.

28. Does this prohibition apply to orders entered prior to 00.01 hrs on 5 October 2008?

No.

29. In the case of investment managers who act on behalf of clients, to whom do the disclosure measures apply?

See FAQ 12.

30. Why is disclosure required if there is a general prohibition against creating or increasing a net short position?

The notice sets out that a person may have a disclosable interest despite the prohibition on short selling because they had a disclosable short position before 5 October 2008 or because they had a net short position before that date which due to other extraneous factors becomes a disclosable net short position.

31. How is the relevant denominator calculated?

The relevant denominator for the calculation of net short positions is the total issued share capital of the financial company comprising ordinary shares or preference shares. See also the AFM website (www.afm.nl) > Public database > Notifications > Issued Capital > Search

32. Should positions held on trading platforms in other countries be included in the numerator?

Yes.

33. To whom does the disclosure responsibility apply (e.g. the financial company or the holder of the short position in that company)?

The disclosure obligation applies to the holder of the net short position. See also FAQ 10.

34. In what format must the disclosure be made?

The disclosure must be made by means of a «Notification form short position» on the AFM website.

35. What is the process for making a disclosure?

To make a disclosure, the notification form can be sent by fax or e-mail and postal mail to:

Netherlands Authority for the Financial Markets (AFM)
Disclosure & Registration Department
PO Box 11 723 1001 GS Amsterdam
The Netherlands
fax number: +31 (0)20 – 797 3822
e-mail: melden.en.registreren@afm.nl

36. Should the disclosure be made on a gross or net basis?

A holder of economic interests in a financial company may net its long and short positions in that company. The disclosable position will be any net short position of 0.25% or above.

37. When disclosing the net short position, will the holder of that position be required to include details of both short and long positions (if applicable) in order to provide a breakdown of the net economic interest?

No. Only the aggregate net short position of 0.25% or above will need to be disclosed. There is no requirement to disclose any individual short and long positions underlying the net position.

38. Does an aggregated net short position need to be broken down into its component parts for the purposes of the disclosure (i.e. any positions in cash settled shares, CFDs, other derivative instruments etc)?

No. Only the aggregate net short position requires disclosure.

39. What is the first deadline for announcing a net short position of 0.25% or above under the new disclosure requirements?

The first disclosure deadline is Tuesday 7 October 2008 close of business. This disclosure should relate to any net short position of 0.25% or above held at close of business on Monday 6 October 2008. Please note that the obligation to disclose a net short position under the September 21, 2008 notice still applies to positions held at close of business on Friday 3 October 2008.

40. How frequently are net short position disclosures required?

Subsequent to the first disclosure deadline of Tuesday 7 October 2008, a person must disclose any net short position of 0.25% or above by end of business on the day following each day on which the disclosable short position is held. The net short position disclosed should be that held at the end of the previous day. A disclosure is required even if the size of the short position has not changed since the previous disclosure.

41. If a person's previously disclosed net short position falls below the 0.25% disclosure threshold, is a further disclosure of this fact required?

Yes. If a person's net short position falls below 0.25%, one last disclosure of that fact is required.

42. Where a person has a structure that includes more than one legal entity, at what level is a net short position disclosure required?

A disclosure should be made at group level and needs to be specified at group level, provided that the disclosure clearly states which position belongs to which entity. Each legal entity is allowed to disclose on behalf of the group. All the positions within the group have to be aggregated.

Further questions

43. What if I have another question not covered by the FAQs or wish to make a comment about the new rules?

We may publish additional FAQs or clarify existing ones as further questions arise.

For technical questions (only) in relation to the short selling provisions please call on + 31 (0)20 797 3777 or e-mail to marketsupervision@afm.nl
For technical questions (only) in relation to the disclosure of pre-existing short positions please call on + 31 (0)20 797 3717 or e-mail to melden.en.registreren@afm.nl

For all other queries or comments in relation to the new rules, please write in to: Netherlands Authority for the Financial Markets (AFM)
Financial Infrastructure Department
P.O. Box 11 723
1001 GS AMSTERDAM
The Netherlands