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REVISED SUMMARY OF THE SEC'S EMERGENCY ORDERS ISSUED ON SEPTEMBER 18, 2008 TAKING TEMPORARY ACTION TO RESPOND TO MARKET DEVELOPMENTS, AND AMENDMENTS TO THESE ORDERS ISSUED ON SEPTEMBER 21, 2008

To: Clients and Friends of Tannenbaum Helpert Syracuse & Hirschtritt LLP¹
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I. Introduction

The SEC issued two emergency orders on September 18, 2008, and it issued an amendment to each of these orders on September 21, 2008.

The first emergency order (the "Short Sale Order") prohibits short sales² in the publicly traded securities ("Covered Securities") of 799 financial firms. In a September 21, 2008 amendment to the Short Sale Order (the "Short Sale Amendment"), the SEC called upon the national securities exchanges listing financial firms to provide the public with the names of additional financial firms that should be covered by the Short Sale Order on their respective internet websites (the financial firms identified by the SEC and the national securities exchanges for coverage under the Short Sale Order are, collectively, the "Covered Firms").

The second emergency order (the "Form SH Order") requires certain investment managers exercising investment discretion³ with respect to accounts holding section 13(f) securities⁴ having an aggregate fair market value on the last trading day of any month of any calendar year of at least \$100 million to report certain short sales effected on or after Monday, September 22, 2008 in a new form (a "Form SH") that must be electronically filed with the SEC through its EDGAR system. In a September 21, 2008 amendment to the Form SH Order (the

¹ This **GlobalNote**® memorandum provides general information on the subject matter described, and it should not be relied on for legal advice on any matter, which may turn on specific facts. You should seek specific legal advice before acting with regard to the subjects discussed herein. For further information, please see the firm's website: www.thshlaw.com.

² The definition of "short sale" for purposes of the Short Sale Order is provided in Rule 200(a) of Regulation SHO.

³ Defined in Rule 13f-1(b) of the Securities Exchange Act of 1934 (the "Exchange Act").

⁴ Defined in Rule 13f-1(c) of the Exchange Act. The official list of 13(f) securities published by the SEC is available on the SEC's website at: <http://www.sec.gov/divisions/investment/13flists.htm>.

“Form SH Amendment”), the SEC stated that it would permit managers to file their Forms SH on a non-public basis; however, two weeks after the Forms SH are due to be filed, the SEC will make these Forms SH available to the public.

II. The SEC Has Temporarily Prohibited the Effecting of Short Sales in the Publicly Traded Securities of Covered Firms

A. Overview

On September 18, 2008, the SEC issued the Short Sale Order, available at <http://www.sec.gov/rules/other/2008/34-58592.pdf>, prohibiting any person from effecting a short sale in the Covered Securities of Covered Firms identified in Appendix A of the Short Sale Order.

The SEC issued the Short Sale Order because it had concluded that the recent sudden declines in the prices of a wide range of securities could continue and thereby threaten the fair and orderly workings of the U.S. securities markets.⁵

Subsequently, on September 21, 2008, the SEC issued the Short Sale Amendment – to increase the number of Covered Firms and to expand upon and clarify certain exceptions in the Short Sale Order.

The Short Sale Order will terminate at 11:59 p.m. EDT on October 2, 2008, unless further extended by the SEC.

B. The SEC Has Called Upon the National Securities Exchanges to Add to the List of Covered Firms Affected by the Short Sale Order

In the Short Sale Amendment, the SEC stated that it was requiring each of the national securities exchanges listing financial firms to publish a list of additional Covered Firms whose Covered Securities will be affected by the Short Sale Order on their respective internet websites (these exchange-published lists are referred to hereinafter as the “Exchanges’ Published Lists”).

The New York Stock Exchange’s updated list of Covered Securities is available at <http://www.nyse.com/attachment/NYSE%20SS%20ORDERUPDATED.xls>.

The NASDAQ Stock Exchange’s updated list of Covered Securities is available at http://www.nasdaqtrader.com/Trader.aspx?id=trader_sec_shortsale.

The American Stock Exchange’s updated list of Covered Securities is available at <http://www.amex.com/amextrader/tdrInfo/data/axNotices/2008/reg08044.ShortSaleBanList.pdf>.

⁵ In issuing the Short Sale Order and the Short Sale Amendment, the SEC was exercising powers granted to it under Section 12(k)(2) of the Exchange Act.

The Exchanges' Published Lists include banks, savings associations, broker-dealers, investment advisers, and insurance companies (whether domestic or foreign), and companies that control or have majority ownership of any of these entities.

Additionally, the SEC stated in the Short Sale Amendment that individual issuers may request to be excluded from the Short Sale Order's prohibition on short sales. The SEC has authorized the national securities exchanges to exclude such issuers from the Exchanges' Published Lists.

We advise you to check the Exchanges' Published Lists for the names of Covered Firms.

C. Short Sales Due to Options and Futures Contract Expiration

The Short Sale Order provides an exception permitting short sales that occur as a result of the automatic exercise or assignment of equity options held prior to the effectiveness of the Short Sale Order after the expiration of such options. The Short Sale Amendment provides a further exception to permit short sales that occur as a result of the expiration of futures contracts held prior to the effectiveness of the Short Sale Order.

D. Options Assignment Exception for Call Writers

To enable the creation of long call option positions on Covered Securities, the Short Sale Amendment provides an exception to writers of call options. Specifically, the Short Sale Amendment provides that the Short Sale Order's prohibitions will not apply to the writers of call options who wind up effecting a short sale in any Covered Security as a result of an assignment following an exercise by the holders of call options.

E. Market-Making and Derivatives

The Short Sale Amendment extends a temporary exception that was provided in the Short Sale Order for market-makers who effect short sales as part of bona fide market-making and hedging activities related directly to bona fide market-making in derivatives on Covered Securities for the duration of the Short Sale Order. The SEC clarified in the Short Sale Amendment that this exception applies to all market-makers, including over-the-counter market-makers. Additionally, the SEC clarified in the Short Sale Amendment that this exception applies to bona fide market-making and hedging activities related directly to bona fide market-making in both (i) exchange traded funds and (ii) exchange traded notes which are composed, at least in part, of Covered Securities.

F. Sales of Restricted Securities

The SEC clarified in the Short Sale Amendment that the Short Sale Order does not apply to persons who effect sales of Covered Securities pursuant to Rule 144 of the Securities Act of

1933 (“Rule 144 Securities”).⁶

III. Certain Managers Are Required to Electronically Disclose Short Sales

A. Overview

The Form SH Order requires certain managers to report certain short sales of section 13(f) securities (as explained below) in a new form (“Form SH”).⁷

The SEC issued the Form SH Order for the same reason that it issued the Short Sale Order: it concluded that the recent sudden declines in the prices of a wide range of securities could continue and thereby threaten the fair and orderly workings of the U.S. securities markets.

Pursuant to the Form SH Order, short sales of section 13(f) securities effected on or after Monday, September 22, 2008 are reportable unless they satisfy the “Form SH *De Minimis* Test” described below (short sales of 13(f) securities that do not satisfy the Form SH *De Minimis* Test are referred to as “reportable short sales”). The class of 13(f) securities covered by the Form SH Order includes exchange-traded funds but excludes options.

Pursuant to the Form SH Order, all managers who either have filed or were required to file a Form 13F for the calendar quarter ended June 30, 2008⁸ are required to file a report on the new Form SH with the SEC on the first business day⁹ of *every calendar week* immediately following a week in which they effected reportable short sales.

Managers are not required to file Forms SH if/when short sales of section 13(f) securities were not effected since a previous filing of a Form SH.

Forms SH must be filed electronically using the SEC’s EDGAR system, and they may be filed in Word format.

For each reportable short sale on each day of a given calendar week, the Form SH must disclose:

- (i) the number and the value of securities sold short;

⁶ The SEC stated that this accommodation is necessary because sales of Rule 144 Securities are sales of owned securities.

⁷ The Form SH is available at <http://www.sec.gov/about/forms/formsh.pdf>, and the SEC’s Form SH “General Instructions” are available at http://www.sec.gov/about/forms/formsh_instructions.pdf.

⁸ Pursuant to section 13(f) of the Exchange Act (and rule 13f-1(a) thereunder).

⁹ Exchange Act Rule 0-2 describes the SEC’s business hours. Forms SH must be filed on or before 5:30 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever currently is in effect in Washington, DC (“Eastern Time”) on the applicable business day.

- (ii) the opening short position;
- (iii) the closing short position;
- (iv) the largest intraday short position; and
- (v) the time of the largest intraday short position.

The first required Form SH must be filed on Monday, September 29, 2008 by 5:30 p.m. Eastern Time. The Form SH Order will terminate at 11:59 p.m. on October 2, 2008 unless further extended by the SEC.

B. The Form SH Order Provides a *De Minimis* Test for Reporting Short Sales

A manager does not have to report a short position in a section 13(f) security if the short position satisfies the following *de minimis* test (the “Form SH *De Minimis* Test”) on each day in the applicable reporting period:

- (i) the short position constitutes less than one-quarter of one percent of the class of the issuer’s section 13(f) securities issued and outstanding as reported on the issuer’s most recent annual or quarterly report, and any current report subsequent thereto, filed with the SEC pursuant to the Exchange Act, unless a manager knows or has reason to believe the information contained therein is inaccurate, **and**
- (ii) the fair market value of the short position is less than \$1 million.¹⁰

C. Under the Form SH Amendment, Forms SH May Be Filed on a Non-Public Basis

The SEC released the Form SH Amendment on September 21, 2008 which, among other things, notes that a Form SH may be initially filed on a non-public basis.¹¹ However, two weeks after the due date for a Form SH, the SEC will make the Form SH available to the public.¹²

¹⁰ Pre-existing short positions are not to be considered in determinations of whether the Form SH *De Minimis* Test has been met. For example, if, prior to September 22, 2008, a manager has a “grandfathered” short position in 10,000 shares of a 13(f) security, and then, on September 22, 2008, the manager shorts an additional 200 shares of the 13(f) security, only the 200 shares are to be considered for purposes of the Form SH *De Minimis* Test.

¹¹ Managers can have their Forms SH treated as non-public by adding the phrase “NON-PUBLIC” (capitalized and in bold lettering) at the top and bottom of each page in the entire form – including the Form SH cover page, the Form SH summary page, and the Form SH information table.

¹² In the Form SH Amendment, in Footnote 8, the SEC contended that by two weeks after the due date, the reasons to maintain the short sale information contained in the Forms SH as non-public will have diminished.

D. Whether Managers are Required to Report Sales of Long Positions in 13(f) Securities When, Overall, They Are Net Short in Such Securities

A situation can arise in which a manager has a “grandfathered” net short position in a 13(f) security and then sells a long position in this 13(f) security. Here, a question may arise as to whether this sale is subject to Form SH’s disclosure requirements. Under Regulation SHO, if the manager is net short the position, this sale should be marked as a short sale. If the resulting position does not satisfy the Form SH *De Minimis* Test¹³, then it is reportable under the Form SH Order.

E. Short Sales Resulting From Exercises of Long Puts or Assignments on Short Calls Are Reportable on Form SH

If a manager exercises a put and is net short under Regulation SHO, the resulting transaction is a short sale and is reportable on Form SH, provided that the resulting position does not satisfy the Form SH *De Minimis* Test. Similarly, if a manager effects a short sale as a result of assignment to it as a call writer, upon exercise, the resulting transaction is a short sale and may be reportable on Form SH, provided that the resulting position does not satisfy the Form SH *De Minimis* Test.

Short positions in 13(f) securities resulting from the exercise of options contracts are reportable as of the date of exercise.

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If you have any questions or wish to discuss the Short Sale Order, the Form SH Order, or either of their respective amendments, please do not hesitate to contact us.

¹³ See explanation *infra*, Note 10.