

German Short Sale Regulation

A new regulation has been put in place in Germany to regulate naked short sales: The Abusive Securities- and Derivatives Trades Prevention Act (Gesetz zur Vorbeugung gegen missbräuchliche Wertpapier- und Derivategeschäfte) will come into force on 27 July 2010 and implements changes to the Securities Trading Act (Wertpapierhandelsgesetz, WpHG).

The Act replaces the current General Decree of the Federal Supervisory Authority (BaFin) dated 18 May 2010.

This note summarizes the main changes that are relevant for Equiduct participants and does not cover the provisions on credit derivatives of § 30j WpHG. It also does not cover provisions that empower BaFin to conduct appropriate measures to protect the functioning of financial markets outlined in §4a WpHG.

Naked short sales in shares or government bonds (denominated in Euro, includes national, regional, local administrative units) admitted to trading on a regulated market of a German exchange are banned (new §30h WpHG). The ban does not apply to shares of companies domiciled outside Germany (except if the company is solely admitted to trading on a regulated market of a German exchange). The ban applies globally, and irrespective of the trading venue.

A 'naked short sale' applies when – at the end of the day the trade was concluded – the seller

- is not the owner of the sold securities and
- does not have any unconditionally enforceable claim under the law of obligations or under property law for the transfer of title in a corresponding number of securities of the same kind.

The ban is effective as of 27 July 2010. The ban does not apply to transactions concluded before the effective date, unless these are prohibited by a different rule.

Reporting of short positions

(Covered) Net short positions in shares admitted to trading on the regulated market of a German exchange must be reported to the BaFin until the end of the next trading day, if the net short position exceeds 0.2% of outstanding shares (new §30i WpHG). If the net short position exceeds 0.5% of outstanding shares, the position must also be reported to the public via the Electronic Federal Gazette within said period.

Changes in the net position that exceed said thresholds in $\pm 0.1\%$ steps must be reported accordingly.

A 'net short position' applies when the net position of all financial instruments related to an issuer results in a short economic exposure to its owner.

The transparency requirement becomes effective on 26 March 2012. Net short positions that have been created before the effective date must be reported the day following the effective date, unless they have been reported earlier.

Exemptions

Exemptions from the ban and the transparency obligations apply (§30h (2) sentence 1 and §30i (4) WpHG) to firms providing investment services, if they

- trade on own account on a regular and permanent basis, or

- fill client orders on a regular and permanent basis and hedge the resulting positions

and if the respective transaction is related to this business. BaFin must immediately be given notice about the intent to take on these activities, whereas the affected instruments must be declared (BaFin will provide an appropriate form as well as additional information in English on www.bafin.de soon).

Exemptions from the ban apply (§30h (2) sentence 2) to transactions which trading participants conclude with the customer for settlement of a transaction in financial instruments at a fixed or definable price (fixed price transaction).

The law will be enforced globally. BaFin will seek the support of the local regulators.

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