



KIRKLAND & ELLIS LLP

Private Equity Newsletter

SEC Issues Emergency Orders on Short Selling and Announces Expanded Market Manipulation Investigation

Late last week and over the weekend, in response to recent and increasing tumultuous market volatility, the Securities and Exchange Commission ("SEC") took emergency action to further regulate and temporarily prohibit certain short sale activities in public company securities by:

- completely prohibiting short sales of securities, initially in 799 designated public financial institutions but then amended by the SEC to cover those "banks, savings associations, broker-dealers, investment advisers, and insurance companies, whether domestic or foreign," designated by any national securities exchange listing such financial institutions,
- requiring institutional money managers (including some private fund managers) currently filing Schedule 13Fs with the SEC to report new short sales of most publicly traded securities weekly, and
- strengthening protections against "abusive naked short selling."¹

The SEC also announced an expansion of its ongoing investigation into market manipulation of financial institutions' public securities.

Prohibition on Short Selling Securities of Public Financial Institutions

In light of last week's market turmoil, the rapid collapse of several financial institutions' stocks, the continuing pressure on many other financial institutions' stocks and increasing criticism of

SEC inaction, the SEC issued an emergency order initially prohibiting short selling in securities of 799 designated public financial institutions. The SEC then determined that the short-selling ban should instead cover the securities of those "banks, savings associations, broker-dealers, investment advisers, and insurance companies, whether domestic or foreign," designated by each national securities exchange listing the securities. The SEC directed each such exchange to immediately publish a list on the exchange's website of such institutions. A financial institution is permitted to opt-out of such designation, in which case short sales of its securities would not be covered by the ban.

A short sale is defined as any sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller. Very limited exceptions allow short sales by certain market makers and in connection with market making and market intermediary hedging activities.

The prohibition is effective through October 2, 2008, unless extended by the SEC.

Reporting of Short Sales by Certain Institutional Investment Managers

The SEC also adopted an emergency order requiring institutional investment managers, including private fund managers, currently filing quarterly reports under Section 13(f) of the

PENpoints

In response to recent market turmoil, the SEC has issued an emergency order prohibiting short selling in securities of designated public financial institutions, effective through October 2.

Securities Exchange Act of 1934 — which requires an institutional investment manager (e.g., an investment adviser, a private fund manager or a trust company) exercising investment discretion over at least \$100 million (but excluding certain control positions in companies) of SEC designated Section 13(f) securities to file quarterly reports of such securities with the SEC — to file on a weekly basis a new Form SH, with the SEC for short sales effected during the preceding week. Form SH — which remains non-public for a period of two weeks after filing if designated as non-public by the investment manager in the filing — requires certain disclosures, including:

- disclosure of the number and value of Section 13(f) securities sold short (except for short sales in options); and
- the opening short position, closing short position, largest intraday short position and the time of the largest intraday short position for that security during each calendar day of the prior week.

However, the order contains an exception for reporting small short positions that otherwise would be reportable if both: (1) all of the institutional investment manager's short positions in a Section 13(f) security aggregates to less than 0.25% of the issuer's Section 13(f) securities issued and outstanding and (2) the fair market value of the aggregate short positions is less than \$1,000,000.

This order is effective on September 22, 2008, and the first Form SH must be filed on September 29, 2008. The order is effective through October 2, 2008, unless extended by the SEC.

“Abusive Naked Short Sales” Protections

The SEC also issued an order directed at “abusive naked short selling,” i.e., a short sale in which the seller does not actually borrow the securities and also fails to deliver the securities to the buyer. The order temporarily imposes a hard close-out requirement (i.e., a securities delivery requirement) for short sellers and their broker-dealers on the transaction settlement date (generally three business days after the short sale transaction date, or T+3) and penalties for failing to do so.

In addition, the order temporarily makes it a violation of the federal securities antifraud rules for any person to execute a short sale order if the person deceives a broker-dealer, market intermediary or purchaser about the short seller's delivery of the security on the settlement date (and such security is not so delivered).

This order is effective through October 1, 2008, unless extended by the SEC.

Expanded SEC Market Manipulation Investigation

The SEC also announced an expansion of its ongoing investigation into market manipulation in the securities of certain financial institutions. The expanded investigation requires hedge fund managers, broker-dealers and institutional investors with significant trading activity in financial issuers or positions in credit default swaps to disclose, under oath, such positions to the SEC and provide certain other information. The SEC also approved a formal order of investigation allowing SEC enforcement staff to obtain additional documents and testimony by subpoena.

¹ The SEC also adopted an emergency order temporarily relaxing certain Rule 10b-18 timing conditions and volume limitations for a public company repurchasing its own securities during the current market conditions through October 2, 2008, unless extended by the SEC.

If you have any questions about the matters addressed in this Kirkland PEN article, please contact the following Kirkland authors or your regular Kirkland contact.

Scott A. Moehrke, P.C.
smoehrke@kirkland.com
+1 (312) 861-2199

Jessica Droeger
jdroeger@kirkland.com
+1 (312) 861-2385

Joshua P. O'Donnell
jodonnell@kirkland.com
+1 (312) 861-2159

**Kirkland's Biotechnology & Pharmaceutical Law Seminar
Palo Alto, California
September 25, 2008**

Kirkland's Biotechnology & Pharmaceutical Law Seminar will be held on September 25, 2008, in Palo Alto at the Garden Court Hotel. The program is entitled "The Impact of Recent Business and Legal Developments on Biotech and Pharmaceutical Licenses." There is no charge for this seminar.

**Practising Law Institute's "Mergers & Acquisitions 2008: What You Need to Know Now"
Chicago, Illinois
September 25 - 26, 2008**

At this two-day program, top deal lawyers, general counsel, regulators and investment bankers will discuss the most important developments and trends for the year ahead, including the new balance of power between strategic and financial buyers, the continuing effects of uncertainty in the credit and equity markets and how contract terms are changing in the wake of the crisis. Kirkland partner R. Scott Falk, P.C., will speak on the "Current M&A Environment" and partner Peter D. Doyle will speak on "Shareholder Activism and the Role of Hedge Funds."

**Kirkland's Real Estate Private Equity Symposium
New York, New York
September 25, 2008**

Kirkland's Third Annual Real Estate Private Equity Symposium will be held in the Firm's New York office. Topics covered will include global perspectives on the current market, the increasing array of fund types participating in the global real estate market and the convergence of infrastructure, real estate and private equity. There is no charge for this seminar.

**PEI Infrastructure Investor Forum
New York, New York
October 22, 2008**

This inaugural forum in New York will look at infrastructure from the perspectives of both fund managers and investors. Kirkland partners Bruce Gelman and Thomas Geraghty will lead a workshop focusing on "State of the Art Structuring for Infrastructure Funds and Investments."

**KICP for Clients: The Fundamentals of Investing in Public Companies
Chicago, Illinois
October 28, 2008**

Join Kirkland partners Christopher Butler, P.C., Keith S. Crow, P.C., Peter D. Doyle, R. Scott Falk, P.C., Robert M. Hayward, Marc Kieselstein, P.C., R. Henry Kleeman and Gerald T. Nowak at this Kirkland seminar, which will focus on the fundamentals of investing in public companies. Featured topics include: "The Nuts and Bolts of Public Company Investing," "Tactics of and Defenses Against Activist Shareholders" and "Tales from the Trenches." There is no charge for this seminar.

**The Ninth Annual European Real Estate and Private Fund Investing Forum
London, England
October 29 - 30, 2008**

This two-day seminar will focus on topics including: a macroeconomic overview, fund allocation and portfolio management strategies, the latest structures and debt financing available in today's market, U.S. residential distress and distressed opportunities in Europe. Kirkland partners Gary E. Axelrod and Jennifer M. Morgan will speak.

Chicago
Kirkland & Ellis LLP
Aon Center
200 East Randolph Drive
Chicago, IL 60601
+1 (312) 861-2000
+1 (312) 861-2200 fax

Hong Kong
Kirkland & Ellis LLP
8th Floor, ICBC Tower
3 Garden Road
Central
Hong Kong
+852-3761-3300
+852-3761-3301

London
Kirkland & Ellis
International LLP
30 St Mary Axe
London, EC3A 8AF
United Kingdom
+44 (0)20 7469 2000
+44 (0)20 7469 2001 fax

Los Angeles
Kirkland & Ellis LLP
777 South Figueroa Street
Los Angeles, CA 90017
+1 (213) 680-8400
+1 (213) 680-8500 fax

Munich
Kirkland & Ellis
International LLP
Maximilianstrasse 11
80539 Munich
Germany
+49 (0)89 2030 6000
+49 (0)89 2030 6100 fax

New York
Kirkland & Ellis LLP
Citigroup Center
153 East 53rd Street
New York, NY 10022
+1 (212) 446-4800
+1 (212) 446-4900 fax

Palo Alto
Kirkland & Ellis LLP
950 Page Mill Road
Palo Alto, CA 94304
+1 (650) 859-7000
+1 (650) 859-7500 fax

Mailing Address:
P.O. Box 51827
Palo Alto, CA 94303

San Francisco
Kirkland & Ellis LLP
555 California Street
San Francisco, CA 94104
+1 (415) 439-1400
+1 (415) 439-1500 fax

Washington, D.C.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
+1 (202) 879-5000
+1 (202) 879-5200 fax

Kirkland & Ellis LLP's Private Equity Practice

Kirkland & Ellis LLP's private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 200 private equity firms in every major market around the world.

Kirkland has been widely recognized for its preeminent private equity practice. *The Lawyer* magazine recently recognized Kirkland as one of the firms in "The Transatlantic Elite," noting that the firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent." In 2008, Mergermarket ranked Kirkland first by volume for Global and North American Buyouts in its "League Tables of Legal Advisers to Global M&A for Full Year 2007." Also in 2008, Kirkland received prestigious first-tier rankings in both private equity and fund formation from Chambers & Partners. Kirkland was named the "International Law Firm of the Year" in 2007 by *The Lawyer* magazine.

Subscribe to Kirkland PEN

To subscribe to Kirkland PEN, please e-mail kirklandpen@kirkland.com.

KIRKLAND & ELLIS LLP

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this publication may constitute Attorney Advertising. Prior results do not guarantee a similar outcome.

© 2008 KIRKLAND & ELLIS LLP. All rights reserved.

www.kirkland.com