

CP12/21[★]

Financial Services Authority

Short selling regulation – Handbook changes

August 2012

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The Financial Services Authority invites comments on this Consultation Paper. Comments should reach us by 20 September 2012.

Comments may be sent by electronic submission using the form on the FSA's website at: www.fsa.gov.uk/Pages/Library/Policy/CP/2012/cp12-21-response.shtml.

Alternatively, please send comments in writing to:

Nicole Hirsowitz
Market Infrastructure and Policy
Financial Services Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Telephone: 020 7066 2224

Fax: 020 7066 0781

Email: cp12_21@fsa.gov.uk

It is the FSA's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

A confidential response may be requested from us under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Tribunal.

Copies of this Consultation Paper are available to download from our website – www.fsa.gov.uk. Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

Abbreviations used in this paper

CA	Competent Authority
DEPP	Decision Procedure and Penalties Manual
EEA	European Economic Area
ESMA	European Securities and Markets Authority
EU	European Union
FINMAR	Financial Stability and Market Confidence Sourcebook
FSMA	Financial Services and Markets Act 2000
GEN	General Provisions
SSR	Short Selling Regulation
SUP	Supervision

1

Overview

Introduction

- 1.1** In this Consultation Paper, we invite comments on the following proposed amendments to the FSA Handbook which relate to the EU Short Selling Regulation (SSR¹) that applies from 1 November 2012:
- The repeal of the UK's current short selling regime contained in FINMAR 2.
 - An amendment to DEPP 7 to note that the existing interview policy covers the SSR. We are also proposing applying the existing penalties policy contained in DEPP 6 to the SSR.
 - An amendment to SUP to provide that a firm must allow access to FSA representatives to its business premises so we can fulfil our obligations under the SSR.
 - An insertion in FINMAR 2 outlining the framework for our use of temporary suspension powers given in the SSR.
 - An insertion in FINMAR2 specifying the method for converting a Euro value into Sterling for the purposes of determining one of the categories of shares admitted on UK trading venues to which the temporary suspension powers apply.
 - An insertion in FINMAR 2 outlining the procedure applying to reviews of decisions by the FSA to prohibit persons from using the market-maker and authorised primary dealer exemption.
 - Consequential amendments to the glossary and other parts of the handbook, including GEN.
- 1.2** We make the majority of the proposals based on domestic legislation that we anticipate will be made for the SSR. We understand that the government will propose legislation to

¹ Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.

Parliament before the SSR comes into effect, to amend the Financial Services and Markets Act 2000 (FSMA) and related legislation. We have liaised with the Treasury about the changes that we anticipate that the government will propose as legislation to Parliament. If these proposals change we will revisit our policy and Handbook proposals.

Background

- 1.3 During the 2008 financial crisis, several countries took emergency measures on short selling over concerns that this activity was aggravating the downward spiral in share prices, thereby posing a threat to individual financial institutions and wider financial stability. Various measures were taken, ranging from restricting short sales to temporarily banning short selling in certain sectors. Other measures included introducing a requirement to disclose net short positions at certain thresholds. These developments led to the European Commission proposing, in September 2010, a pan-European short selling regime to provide a common framework for regulating short selling across Europe. This was adopted by the European Parliament and Council in March 2012.
- 1.4 The SSR introduces requirements for reporting significant net short positions in shares and sovereign debt. It imposes a two-tier disclosure regime: private disclosure to Competent Authorities (CAs) of net short positions for sovereign debt and sovereign credit default swaps (CDS), as well as shares at certain thresholds (0.2%); and public disclosure for shares once a higher threshold has been passed (0.5%). The SSR also introduces conditions for undertaking uncovered short selling and imposes restrictions on entering into uncovered sovereign CDS positions, along with various emergency powers to curb short selling. In addition to the various EU legislative measures, ESMA is drawing up guidelines regarding the market maker exemption on which it intends to consult shortly. ESMA may also draw up further guidelines in the future.
- 1.5 The SSR will apply from 1 November 2012. The SSR is directly applicable in the UK, so it does not require specific implementation in domestic legislation and FSA rules. However, there are some areas in the SSR where Member States have discretion about the exercise of their powers, or the SSR requires matters to be dealt with in accordance with national law. The purpose of this Consultation Paper is to seek views and comments on our policies regarding the exercise of discretion and how we will implement the SSR in the UK. We set out the changes to the Handbook that we consider we need to make to ensure effective implementation of the SSR in the UK.

Next steps

- 1.6 The consultation period closes on 20 September 2012. We will then finalise any changes to the Handbook in light of responses. We are having a short consultation period due to the

tight timelines for implementation of the SSR. However, we have actively engaged with interested stakeholders throughout the development of the European legislation and discussed our approach to implementation in a series of roundtables. We also published a special short selling edition of ‘Market Watch’ earlier this month, which gave advance notice of the majority of the proposed changes.

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Detailed proposals

Repeal of Domestic Short Selling Regime

- 2.1** We are proposing to repeal the bulk of FINMAR 2, which contains the current short selling disclosure requirements in the UK.
- 2.2** We currently operate a domestic short position disclosure regime covering selected UK financial stocks and UK companies undertaking rights issues. Public disclosures are required of net short positions of 0.25% of the issued equity or above. The SSR is much broader and covers all financial instruments that are admitted to trading on a trading venue in the EU. Although the public disclosure threshold for net short positions of shares is stipulated by the SSR at 0.5%, positions of 0.2% or above will need to be notified to the Relevant Competent Authority (CA) privately. We made it clear when consulting on changes to our domestic regime in 2009 and 2010 that we expected that it would be superseded by EU legislation in due course.² This was strongly welcomed by consultees. We believe our intention to remove our domestic regime immediately when the SSR applies will be similarly welcomed. We therefore propose to repeal the existing provisions contained in FINMAR 2 with effect from 1 November 2012.
- 2.3** Positions reached under the existing regime that trigger disclosures due by 3.30pm on 1 November 2012 will still need to be disclosed by this deadline. We anticipate that the government's legislation will provide for this situation, without the need for transitional provisions in the Handbook. However, we have included a draft transitional provision for consultation in the event that the legislative provisions do not take effect as anticipated. This is included in FINMAR TP.

Q1: Do you agree with the proposed approach of repealing the existing short selling provisions in FINMAR 2?

² Consultation Paper on the *Implementing aspects of the Financial Services Act 2010*, www.fsa.gov.uk/pubs/cp/cp10_11.pdf, see page 26 and *Extension of the sort selling disclosure obligation* Policy Statement, www.fsa.gov.uk/pubs/policy/ps09_10.pdf

On-site inspections

- 2.4 Article 33 of the SSR requires that CAs have all the supervisory and investigatory powers necessary to exercise their functions under the SSR. These include the power to carry out on-site inspections with or without prior announcement. SUP 2.3.5R already requires a firm to permit representatives or persons appointed for this purpose by the FSA to have access with or without notice during reasonable business hours to any of its business premises in relation to the discharge of the FSA's functions under FSMA. We are therefore proposing to amend this rule to specify that such access must also be provided for the purposes of the FSA's obligations under the SSR.

Q2: Do you agree with the proposed amendment to SUP?

Policy framework for use of temporary suspension powers

- 2.5 Article 23 of the SSR requires that, where the price of a financial instrument on a trading venue has fallen by a specified amount or more during a single trading day in relation to the previous closing price, the CA for the venue must consider whether it is appropriate to impose a temporary prohibition or restriction on short selling, or otherwise limit transactions in that instrument on that venue to prevent a further disorderly decline in its price.
- 2.6 Although we will need to consider each case on its merits, we also need to apply a consistent framework when determining whether or not to impose a temporary suspension or restriction under article 23. We propose to include this framework in FINMAR 2.
- 2.7 The SSR makes it clear that using the suspension and restriction powers should prevent a disorderly decline in the price of the instrument concerned. We therefore propose to adopt this as the basis of our policy. Our framework would consist of a two part test. Intervention would only take place if:
- a) we are of the opinion that the price fall is or may become disorderly; and
 - b) we are satisfied that suspension of short selling or some other limitation of trading would prevent further disorderly decline in the price of the affected financial instrument.

Disorderly price falls

- 2.8 The fact that the price of a financial instrument falls by a significant amount is not necessarily proof that the decline is disorderly. A steep fall in price is in most cases likely to be a response to news about the issuer or the financial instrument, and reflects the market reacting to the new information. For the situation to be considered disorderly there must be factors present other than simply the magnitude of the fall in price. In making our assessment we propose to take into account the following non-exhaustive list of factors:

- a) whether there have been violent movements in the price of the financial instrument on the trading venue, including any sudden and significant step-changes in its price in the same trading session;
- b) whether there is evidence of unusual or improper trading in the financial instrument on a particular trading venue, which could indicate that either by design or effect there was pressure to set the price at a level that would be considered abnormal for the financial instrument;
- c) whether there are unsubstantiated rumours or evidence of dissemination of false or misleading information regarding the financial instrument; and
- d) whether there is an obvious legitimate cause for the price fall in the financial instrument on a particular trading venue, for example, the announcement of poor financial results.

Preventing a further disorderly decline in price

- 2.9** We would not exercise our powers if we did not consider that we needed to intervene to prevent a disorderly decline, for example, if the price of the financial instrument had stabilised after the significant fall in price. We will also take into account the volume of trading in the instrument concerned on the UK trading venue in comparison with the total volume of trading in that instrument. Where this represents only a small proportion of the trading with the main price formation mechanism being elsewhere (e.g. OTC trading or a trading venue outside the UK), preventing short selling solely on the UK trading venue where the price fall had occurred would seem to be unlikely to have a significant impact on the price of the instrument.
- 2.10** However, evidence of significant short selling would be relevant to the second limb of the test as it could indicate that short selling was a driver for the price fall.

Exemption for market makers and authorised primary dealers

- 2.11** The SSR provides that market makers and authorised primary dealers are exempt from a number of the provisions of the SSR, as the requirements could impair their ability to perform their functions and have an adverse effect on the efficiency of EU markets.
- 2.12** Article 23 is not one of the specified provisions to which the exemption applies. However, article 23(3) states that that any measure imposed under article 23(1) shall apply in circumstances, or be subject to exceptions, specified by the competent authority. It also states that exceptions may be specified to apply to market-making and primary-dealer activities. Our general approach would be that, if we did intervene, we would specify these exceptions.

Extension of prohibitions/restrictions

- 2.13 The SSR also provides that a CA may extend any measure imposed for a further period not exceeding two trading days after the end of the second trading day, if there is a further significant fall in the price of the financial instrument of at least half the original specified trigger amount. In deciding whether to extend a measure, we would apply the same criteria set out above. The fact that the price fall had continued, albeit at a lesser level, would be taken into account in assessing whether an extension of the measure would be likely to prevent a further disorderly decline.

Q3: Do you have any comments on the proposed framework?

Market maker and authorised primary dealer exemption prohibition procedure

- 2.14 The SSR provides that some of its requirements (including short position reporting and conditions for undertaking short selling) do not apply to market-making activities or authorised primary dealers trading in sovereign debt. Those wishing to use either of the exemptions must notify the CA in writing that they intend to do so not less than 30 calendar days before they first plan to use the exemption. The CA may prohibit the use of the exemption if it considers that the person does not satisfy the conditions of the exemption. Any prohibition must be imposed within 30 calendar days before the date of intended use of the exemption. We intend to insert in FINMAR 2.6 guidance on our procedure for applying prohibitions.
- 2.15 We propose to use the following procedure if we want to stop a person from using the exemption:
- a) Stage 1: If the case officer examining a notification considered that the person may not satisfy the conditions for using the exemption, they would refer the case to two FSA Markets Division managers. The managers would consider the case and, if they agreed that a prohibition appeared to be warranted, they would issue a ‘minded to prohibit’ letter to the person concerned.
 - b) The ‘minded to prohibit’ letter would set out the reasons why it was considered that the person did not meet the conditions for the exemption and that the FSA was minded to prohibit them from using the exemption. The person would be given reasonable time to make written representations before the final decision was made. This would generally be ten calendar days, but may be longer or shorter as appropriate.

- c) The decision on using the exemption would take place at Stage 2: a senior group of FSA staff (who were not involved in the Stage 1 process) would consider any written representations made by the person in response to the minded to prohibit letter and a make a decision on whether to prohibit the use of the exemption in question.
- d) If the person seeking to use either exemption wishes to challenge our decision, it may request a review of the decision. The review will be conducted by the Markets Regulatory Committee and would exclude any FSA staff involved in Stage 1 or in making the decision at Stage 2. The committee would inform the person of its decision after the review. The review may take place after the expiry of the 30 day period in which the FSA may prohibit use of the exemption but would need to happen within 3 months of the stage 2 decision.

2.16 We consider that this procedure would provide the necessary elements for a robust review mechanism and would be in accordance with general administrative law principles. We will set out our reasons for exercising the prohibition, and the party affected by the decision is entitled to make representations about its eligibility to use the exemption both before and after we make a decision. It also provides for any representations to be considered by a suitably senior group of staff who were independent of the original decision. The ability to judicially review our decision provides a legal backstop in the event of any alleged failure of process.

2.17 In devising this policy we have sought to strike an appropriate balance between allowing representations to be made and the requirement in the SSR for decisions to be taken within a defined short time period.

Q4: Do you have any comments on the proposed policy?

Policy on conducting interviews

2.18 We are currently required to publish our policy on the conduct of interviews where an overseas regulator requests the FSA to exercise information-gathering and investigative powers (section 169 (7) FSMA).

2.19 We anticipate that the amendments to FSMA will require us to publish our statement of policy on conducting interviews involving EEA regulators in relation to short selling. We anticipate that this will apply where the FSA has directed an investigator to permit a representative of an EEA regulator to attend and take part in any interview conducted for the purposes of an investigation, where the FSA has appointed an investigator in response to a request from an EEA regulator which is exercising its functions under the SSR.

2.20 We anticipate that the requirement for the Treasury approval of the policy will continue to apply.

- 2.21 We therefore make our proposal subject to Treasury approval of the use of our existing policy in respect of overseas regulators in relation to interviews involving EEA regulators with regard to the SSR.³ We consider this policy is appropriate for the purpose of investigations in relation to suspected breaches of the SSR.

Q5: Do you agree with our approach of using our existing policy?

Penalties

- 2.22 The SSR requires Member States to establish rules on penalties and administrative measures applicable to infringements of the SSR and to take all measures necessary to ensure that they are implemented. Under Article 41 of the SSR, penalties and measures are required to be effective, proportionate and dissuasive.
- 2.23 We are proposing to apply our current penalty regime, which is set out in DEPP, to infringements of the SSR. We consulted on the substance of the policy in July 2009.⁴ There is no requirement under the SSR to prepare a new policy concerning infringements of the regime and we consider that the DEPP framework meets the requirement that the penalties and administrative measures should be effective, proportionate and dissuasive, supplemented by the related powers in FSMA.
- 2.24 We anticipate that the amendments to FSMA will continue to require us to publish a policy on our penalties regime on short selling. We are currently required to publish our policy for penalties issued under our short selling rules by section 131J of FSMA. We anticipate that we will also be required to publish our statement on penalties imposed under the SSR.
- 2.25 We therefore propose to amend the Handbook to note that the existing policy covers the SSR regime.

Q6: Do you agree with our approach of using the current penalty policy for breaches under the SSR?

Miscellaneous

- 2.26 A Commission Delegated Regulation supplementing the SSR⁵ specifies the significant falls in price of financial instruments which would cause CAs to consider whether they should make a regulatory intervention of the kind described in section 2.3. For this purpose shares

³ The existing policy is contained in DEPP 7.

⁴ See *Enforcement financial penalties* Consultation Paper, available at www.fsa.gov.uk/pubs/cp/cp09_19.pdf

⁵ Commission Delegated Regulation adopted by European Commission 5 July 2012 and subject to approval by European Parliament and Council.

have been divided into four separate categories. One of the categories is defined in terms of the share price: whether the share price is EUR 0.50 or higher or the equivalent in local currency. For the shares admitted to trading on UK trading venues that are not quoted in Euros, the EUR 0.50 figure will need to be converted into the equivalent sterling amount.

- 2.27** To provide a more stable frame of reference and in line with the approach we have taken in other cases where we have needed to convert a Euro figure into Sterling, we propose to specify a fixed Sterling equivalent for EUR 0.50. We would use the EUR/£ daily spot exchange rate of the Bank of England at the end of the first business day of October 2012 rounded up to the nearest penny. This figure would be notified to the market and this would then be the amount used until the following October, unless, in the intervening period, there were significant fluctuations in the exchange rate. In this case we would recalculate the applicable exchange rate, still using the Bank of England spot exchange rate. We would do this when the exchange rate fluctuated by more than 10% from the rate last notified to the market.

Q7: Do you agree with the method proposed for calculating the exchange rate?

- 2.28** Various provisions of the Level 2 measures supplementing the SSR make reference to the main national equity index of the Member State. It is left to national discretion to specify this index. The FSA will treat the FTSE 100 index as the main national equity index of the Member State for the purposes of Article 6 (4) of Commission Implementing Regulation adopted by the European Commission on 29 June 2012 and Article 4 of Commission Delegated Regulation C(2012) 4362 final of 29 June 2012 subject to approval by European Parliament and Council.

Q8: Do you agree with these proposals?

Annex 1

Cost benefit analysis

1. The SSR has direct applicability in the UK, so where it requires actions or legal changes these must be done as if they were required by UK legislation. The Treasury will be laying before Parliament various amendments to the Financial Services and Markets Act 2000 (FSMA) and related legislation.
2. Regarding the costs and benefits of the actual requirements of the SSR, the Commission conducted a full Impact Assessment back in 2010.¹ The benefits anticipated from introducing a pan-European short selling regime were that it would increase transparency, reduce the risk of regulatory arbitrage as well as settlement failure and reduce the risk of negative price spirals arising from short positions in distressed markets. The main cost estimated was the increase of compliance and administrative costs for market participants. Regarding ‘Level 2’ measures (Delegated Acts and Binding Technical Standards), the Commission has published an Impact Assessment of its Proposal for the Commission Delegated Regulation and ESMA included a cost benefit analysis of its proposals when it submitted draft Technical Standards to the Commission.²
3. This CBA will not revisit these anticipated costs and benefits. Instead it will assess the economic impact where there is a degree of policy discretion in our implementation of the SSR.

Repeal of domestic short selling regime

4. Repealing the existing domestic framework for short selling is likely to be beneficial as it will avoid duplicating costs for the industry. If the current regime were not repealed, the industry would need to comply with two regimes at the same time and a duplication of compliance costs would therefore materialise.

1 http://ec.europa.eu/internal_market/securities/docs/short_selling/20100915_impact_assessment_en.pdf

2 http://ec.europa.eu/internal_market/securities/docs/short_selling/20120705-ia_en.pdf

Penalties

5. The existing penalties policy will be sufficient to cover short selling breaches. Moreover, market participants are already aware of the existing penalties policy, so there will be no further costs to industry in terms of understanding our policy. This makes using the existing penalties regime, rather than devising a new one, an efficient way to achieve the intended policy outcomes of bringing the SSR into the regulatory perimeter of the FSA.

Temporary suspension powers

6. The SSR requires that where the price of an instrument on a trading venue has fallen by a specified amount or more during a single trading day in relation to the previous closing price, the CA must consider whether to impose a temporary prohibition or otherwise limit short selling in that instrument. Our proposed approach involves setting out a number of factors to be considered when deciding whether or not a temporary short selling ban or other limitation of transactions in a financial instrument would be warranted. All the factors listed are relevant and would be important to deciding whether or not there should be regulatory intervention. These factors will not change the behaviour of market participants, so no costs or benefits are anticipated from the introduction of the two part test for the overall market. The only costs will be for the FSA. On the basis of our own assessment, two associates will be required to deal with the temporary suspension powers. The costs add up to an overall amount of approximately £135,000 a year.

Market maker/authorised primary dealer prohibition review procedure

7. Our approach envisions a three-stage process to be followed in deciding whether to prohibit a firm from using the exemption. To establish this approach the most relevant factors to give exemptions were considered. The benefits of our proposed approach are that it will ensure that sufficient scrutiny is given to the decision on whether a party should be granted the market maker/authorised primary dealer exemption while, at the same time, enabling the exemption process to be managed in the timeframe laid down in the Regulation.
8. The market maker exemption is a provision of the SSR itself and not an issue in which the FSA has discretion, so the CBA of the exemption itself is not required. From the FSA perspective however, we would need extra resource to manage the process. On the basis of our own assessment, we envisage that we will need to deploy four associates for the initial two months, where we expect to get many notifications. The estimated overall cost for the FSA is therefore £45,000. From the industry's perspective, this process will not change the participant's behaviour and therefore the costs are likely to be low. Costs will mainly entail gathering the required evidence to show that firms are acting as a market maker in a specific stock. However, as stated above these costs are not incremental to those envisaged by the SSR itself.

9. In the event of the FSA prohibiting the use of the exemption, those seeking a review would face additional costs in contesting the FSA decision. Such costs are difficult to estimate as they would be specific to the case at hand. However, they may involve using lawyers and additional resources.

Q9: Do you agree with our approach to the cost benefit analysis?

Annex 2

Compatibility statement

1. Sections 155 and 157 of the FSMA require us to explain our reasons for believing that making proposed rules or guidance is compatible with our general duties under section 2 of the FSMA.
2. This statement explains why we believe that the proposed rules and guidance:
 - are compatible with our statutory objectives;
 - are the most appropriate for meeting these objectives; and
 - take account of the principles of good regulation to which we must have regard.
3. The discretionary measures we are proposing to implement play an important part in the pursuit of our regulatory objectives, particularly market confidence and consumer protection. In terms of the other proposed changes, these are necessary to ensure effective transposition to the SSR.
4. We have taken a proportionate approach as a reflection of the principles of good regulation. We have given particular regard to the need to use resources in the most efficient and economic way; and the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction.
5. We have also considered the international character of financial services and markets and the desirability of maintaining the competitive position of the UK.

Equality and diversity

6. We have considered the equality and diversity impact of these proposed changes and we do not believe that they give rise to any discrimination or other equality concerns.

Annex 3

List of questions

- Q1:** Do you agree with the proposed approach of repealing the existing short selling provisions in FINMAR 2?
- Q2:** Do you agree with the proposed amendment to SUP?
- Q3:** Do you have any comments on the proposed framework?
- Q4:** Do you have any comments on the proposed policy?
- Q5:** Do you agree with our approach of using our existing policy?
- Q6:** Do you agree with our approach of using the current penalty policy for breaches under the SSR?
- Q7:** Do you agree with the method proposed for calculating the exchange rate?
- Q8:** Do you agree with these proposals?
- Q9:** Do you agree with our approach to the cost benefit analysis?

Appendix 1

Draft Handbook text

SHORT SELLING REGULATION INSTRUMENT 2012

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the powers listed in the following provisions of the Financial Services and Markets Act 2000:
- (1) the powers listed in the following provisions of the Financial Services and Markets Act 2000:
 - (a) section 138 (1) (General rule-making power)
 - (b) section 157(XXX) (Guidance); and
 - (2) Regulations [X] and [X] of the [Financial Services and Markets Act 2000 (XXX) Regulations 2012].
- B. The rule-making powers listed above are specified for the purpose of section 153(2) (Rule-making instruments) of the Financial Services and Markets Act 2000.

Commencement

- C. This instrument comes into force on 1 November 2012.

Amendments to the Handbook

- D. The modules of the FSA's Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2).

(1)	(2)
Glossary of definitions	Annex A
Financial Stability and Market Confidence sourcebook (FINMAR)	Annex B
General Provisions (GEN)	Annex C
Supervision manual (SUP)	Annex D
Decision Procedure and Penalties manual (DEPP)	Annex E

Amendments to material outside the Handbook

- E. The Enforcement Guide (EG) is amended in accordance with Annex F to this instrument. The general guidance in EG does not form part of the Handbook.

Notes

- F. In Annex B to this instrument, the "notes" (indicated by "**Note:**") are included for the convenience of readers but do not form part of the legislative text.

Citation

- G. This instrument may be cited as the Short Selling Regulation Instrument 2012.

By order of the Board
[*date*]

Annex A

Amendments to the Glossary of definitions

In this Annex, underlining indicates new text and striking through indicates deleted text, unless otherwise stated.

Insert the following new definitions in the appropriate alphabetical order. The text is not underlined.

<i>authorised primary dealer</i>	(as defined in article 2(1)(n) of the <i>short selling regulation</i>) a natural or legal person who has signed an agreement with a <i>sovereign issuer</i> or who has been formally recognised as a primary dealer by or on behalf of a <i>sovereign issuer</i> and who, in accordance with that agreement or recognition, has committed to dealing as principal in connection with primary and secondary market operations relating to debt issued by that <i>sovereign issuer</i> .
<i>authorised primary dealer exemption</i>	an exemption from articles 7, 13 and 14 of the <i>short selling regulation</i> for the activities of an <i>authorised primary dealer</i> pursuant to article 17 of the <i>short selling regulation</i> .
<i>market maker exemption</i>	an exemption from articles 5, 6, 7, 12, 13 and 14 of the <i>short selling regulation</i> for transactions performed due to <i>market making activities</i> pursuant to article 17 of the <i>short selling regulation</i> .
<i>market making activities</i>	(as defined in article 2(1)(k) of the <i>short selling regulation</i>) the activities of an <i>investment firm</i> , a <i>credit institution</i> , a third-country entity, or a firm as referred to in point (1) of Article 2(1) of <i>MIFID</i> , which is a member of a <i>trading venue</i> or of a market in a third country, the legal and supervisory framework of which has been declared equivalent by the European Commission pursuant to article 17(2) of the <i>short selling regulation</i> where it deals as principal in a <i>financial instrument</i> , whether traded on or outside a <i>trading venue</i> , in any of the following capacities: <ul style="list-style-type: none"> (a) by posting firm, simultaneous two-way quotes of comparable size and at competitive prices, with the result of providing liquidity on a regular and ongoing basis to the market; or (b) as part of its usual business, by fulfilling orders initiated by clients or in response to clients' requests to trade; or (c) by hedging positions arising from the fulfilment of tasks under points (a) and (b).
<i>short selling regulation</i>	regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.
<i>sovereign issuer</i>	(as defined in article 2(1)(d) of the <i>short selling regulation</i>) any of the

following that issues debt instruments:

- (a) the *EU*; or
- (b) a Member State including a government department, an agency, or a special purpose vehicle of the Member State; or
- (c) in the case of a federal Member State, a member of the federation; or
- (d) a special purpose vehicle for several Member States; or
- (e) an international financial institution established by two or more Member States which has the purpose of mobilising funding and provide financial assistance to the benefit of its members that are experiencing or threatened by severe financing problems; or
- (f) the European Investment Bank.

Amend the following as shown.

<i>breach</i>	<p>in <i>DEPP</i>:</p> <p>...</p> <p>(6) a contravention in respect of which the <i>FSA</i> is empowered to take action pursuant to section 131G <u>XX</u> (Breach of short selling rules <u><i>short selling regulation</i></u>: Power to impose penalty or issue censure) of the <i>Act</i>.</p>
<i>competent authority</i>	<p>...</p> <p>(7) <u>the authority designated by each <i>EEA State</i> in accordance with article 32 of the <i>short selling regulation</i>.</u></p>
<i>disclosable short position</i>	<p>a net short position which represents an economic interest of one quarter of 1% or more of the issued capital of a company, excluding any interest held in the capacity of a market maker.</p>
<i>disclosure</i>	<p>disclosure of a <i>disclosable short position</i> which:</p> <ul style="list-style-type: none"> (a) is made on a <i>RIS</i> by no later than 3.30pm on the business day following the day on which the position reaches or exceeds a disclosable short position of 0.25% of the issued capital of a company; and (b) includes the name of the person who has the disclosable short position, the amount of the disclosable short position and the name of the company in relation to which the person has that position.
<i>discretionary</i>	<p>(in <i>COBS</i>, <i>FINMAR</i> and (in relation to <i>firm type</i>) in <i>SUP</i> 16.10</p>

<i>investment manager</i>	(Confirmation of standing data)) a <i>person</i> who, acting only on behalf of a <i>client</i> , manages <i>designated investments</i> in an account or portfolio on a discretionary basis under the terms of a discretionary management agreement.
<i>EEA regulator</i>	<p>(1) a <i>competent authority</i> for the purposes of any of the <i>Single Market Directives</i> or the <i>auction regulation</i>.</p> <p>(2) <u>(in DEPP 7) (as defined in section [XXX] of the Act) the <i>competent authority</i> of an <i>EEA State</i> other than the <i>United Kingdom</i> for the purposes of the <i>short selling regulation</i>.</u></p>
<i>market maker</i>	<p>(1) (except in <i>COBS</i> and <i>FINMAR</i>) (in relation to an <i>investment</i>) a <i>person</i> who (otherwise than in his capacity as the <i>operator</i> of a <i>regulated collective investment scheme</i>) holds himself out as able and willing to enter into transactions of sale and purchase in <i>investments</i> of that description at prices determined by him generally and continuously rather than in respect of each particular transaction.</p> <p>...</p> <p>(3) (in <i>FINMAR</i>) a <i>person</i> who, ordinarily as part of his business, deals as principal in <i>financial instruments</i> (whether <i>OTC</i> or exchange traded):</p> <p style="margin-left: 40px;">(a) to fulfil orders received from another <i>person</i> in response to that <i>person's</i> request to trade or to hedge positions arising out of those dealings; or</p> <p style="margin-left: 40px;">(b) in a way that ordinarily has the effect of providing liquidity on a regular basis to the financial markets on both bid and offer sides of the market in comparable size. [deleted]</p>
<i>net short position</i>	<p>(1) (except in <i>IPRU(INV)</i> and <i>FINMAR</i>) a net short position which gives rise to an economic exposure to the issued <i>share</i> capital of a company. Any calculation of whether a <i>person</i> has a short position must take account of any form of economic interest in the <i>shares</i> of the company.</p> <p>...</p> <p>(3) (in <i>FINMAR</i>) a position which gives rise to an economic exposure to the issued capital of a <i>company</i>, calculated in accordance with <i>FINMAR 2</i>. [deleted]</p>
<i>non-discretionary investment manager</i>	(in <i>FINMAR</i> and in relation to <i>firm type</i> in <i>SUP 16.10</i> (Confirmation of standing data)) a <i>person</i> who, acting only on behalf of a <i>client</i>, manages <i>designated investments</i> in an account or portfolio on a non-discretionary basis under the terms of a <i>non-discretionary management agreement</i>.

<i>ongoing disclosure</i>	<p>disclosure of a <i>disclosable short position</i> which:</p> <p>(a) is made on a <i>RIS</i> by no later than 3.30pm on the <i>business day</i> following the day on which the position reaches, exceeds or falls below a <i>net short position</i> of 0.25%, 0.35%, 0.45% and 0.55% of the issued capital of a <i>company</i> and each 0.1% threshold thereafter; and</p> <p>(b) includes the name of the <i>person</i> who has the <i>disclosable short position</i>, the amount of the <i>disclosable short position</i> and the name of the <i>company</i> in relation to which the <i>person</i> has that position.</p>
<i>relevant financial instrument</i>	<p>(in accordance with sections 131C(4) and 131C(5) of the <i>Act</i>) a <i>financial instrument</i> that:</p> <p>(a) is admitted to trading on a <i>regulated market</i> or any other <i>prescribed market</i> in an <i>EEA State</i>; or</p> <p>(b) has such other connection with a market in an <i>EEA State</i> as may be specified by the <i>short selling rules</i>.</p>
<i>rights issue</i>	<p>(in <i>LR</i>, <i>FINMAR</i> and <i>DTR</i> 5) an offer to existing <i>security</i> holders to subscribe or purchase further <i>securities</i> in proportion to their holdings made by means of the issue of a renounceable letter (or other negotiable document) which may be traded (as “nil paid” rights) for a period before payment for the <i>securities</i> is due.</p>
<i>rights issue period</i>	<p>the period that commences on the date a <i>company</i> announces a <i>rights issue</i> and which ends on the date that the <i>securities</i> issued under the <i>rights issue</i> are admitted to trading on a <i>prescribed market</i>.</p>
<i>short selling rules</i>	<p>(in accordance with section 131B(8) of the <i>Act</i>) rules concerning the prohibition or disclosure of short selling in relation to <i>relevant financial instruments</i>.</p>
<i>trading day</i>	<p>(1) (in <i>MAR</i> 7 (Disclosure of information on certain trades undertaken outside a regulated market or MTF) and <i>SUP</i> 17 (Transaction reporting)) in relation to post-trade information to be made public about a share under <i>MAR</i> 7.2.10EU, any day of normal trading in a share on a <i>trading venue</i> in the <i>relevant liquid market</i> for this share. [Note: article 4(2) of the <i>MiFID Regulation</i>]</p> <p>(2) other than in (1) or (3), a day included in the calendar of trading days published by <i>FSA</i> at www.fsa.gov.uk.</p> <p>(3) (in <i>FINMAR</i>) as defined in article 2(1)(p) of the <i>short selling regulation</i>, a trading day as referred to in article 4 of Regulation (EC) No 1287/2006.</p>
<i>trading venue</i>	<p>(1) (except in <i>FINMAR</i>) a <i>regulated market</i>, <i>MTF</i> or <i>systematic</i></p>

internaliser acting in its capacity as such, and, where appropriate, a system outside the *EU* with similar functions to a *regulated market* or *MTF*.

[**Note:** article 2(8) of the *MIFID Regulation*]

(2) (in *FINMAR*) (as defined in article 2 (1) (1) of the *short selling regulation*) a *regulated market* or an *MTF*.

Annex B

Amendments to the Financial Stability and Market Confidence sourcebook (FINMAR)

In this Annex, underlining indicates new text and striking through indicates deleted text, unless otherwise stated.

In this Annex, the “*Editor’s Notes*” are provided for the guidance of readers of this instrument and do not form part of the Handbook.

Application

- 2.1.1 R ~~This chapter applies to all *persons* who:~~
- (1) ~~engage, or are intending to engage, in short selling in relation to *relevant financial instruments*; or~~
 - (2) ~~have engaged in short selling in relation to *relevant financial instruments* where the resulting short position is still open. [deleted]~~
- 2.1.1A G This chapter is relevant to all natural and legal persons to whom the *short selling regulation* applies, whether or not they are regulated by the *FSA*.

Purpose

- 2.1.2 G The purpose of this chapter is to ~~set out *rules* and~~ provide *guidance* in relation to ~~short selling in order to promote the *FSA’s* statutory objectives of: the *FSA’s* functions under the *short selling regulation*.~~
- (1) ~~maintaining confidence in the *UK financial system*; and~~
 - (2) ~~contributing to the protection and enhancement of the stability of the *UK financial system*.~~

Note: Other parts of the *Handbook* that may also be relevant to natural and legal persons to whom the *short selling regulation* applies include:

Chapter 2 of *SUP* (the Supervision manual) and *DEPP* (the Decision Procedure and Penalties manual).

The following Regulatory Guides are also relevant:

1. the Enforcement Guide (*EG*)

FINMAR 2.2 (Disclosure of disclosable short positions) is deleted in its entirety. The text of the section is not shown.

Editor’s Note: Please refer to *FINMAR TP* for transitional provisions relating to *FINMAR 2*.

FINMAR 2.3 (Calculation of net short position) is deleted in its entirety. The text of the section is not shown.

Editor's Note: Please refer to FINMAR TP for transitional provisions relating to FINMAR 2.

FINMAR 2.4 (Responsibility for disclosure) is deleted in its entirety. The text of the section is not shown.

Editor's Note: Please refer to FINMAR TP for transitional provisions relating to FINMAR 2.

After FINMAR 2.4 [deleted] insert the following new sections. The text is not underlined.

2.5 Measures to prohibit, restrict or limit transactions in short selling

Approach to imposing measures

2.5.1 G The *FSA* is required by article 23 of the *short selling regulation* to consider whether to impose measures to prohibit or restrict short selling or otherwise limit transactions in a *financial instrument* on a *trading venue* where the price of that *financial instrument* on that *trading venue* has fallen significantly during a single *trading day* in relation to the closing price on that venue on the previous *trading day*. In fulfilling this obligation, the *FSA* will assess:

- (1) whether the price fall is or may become disorderly; and, if so in either case,
- (2) whether the imposition of measures to prohibit, restrict or limit transactions will prevent a further disorderly decline in the price of the *financial instrument*.

2.5.2 G The *FSA* will assess whether the price fall in a *financial instrument* on a *trading venue* is or may become disorderly having regard to at least the following factors:

- (1) whether there have been violent movements in the price of the particular *financial instrument* on a particular *trading venue*, including any sudden or significant movements in price of a *financial instrument* during the *trading day*;
- (2) whether there is evidence of unusual or improper trading in the *financial instrument* on a particular *trading venue* which could indicate that there was pressure to set the price of the *financial instrument* at a level that would be considered abnormal for that *financial instrument*; and
- (3) whether there are unsubstantiated rumours or dissemination of false or misleading information regarding the *financial instrument*.

The list above is not exhaustive and the *FSA* will consider such other factors as it considers appropriate.

2.5.3 G The *FSA* may consider that the price fall in a *financial instrument* is not

disorderly, for example, if the *FSA* considers that there is legitimate cause for a price fall in trading, such as the announcement of poor financial results.

- 2.5.4 G The *FSA* will consider at least the following factors when assessing whether measures to prohibit or restrict short selling or otherwise limit transactions are necessary or likely to prevent a further disorderly decline in the price of the *financial instrument*:
- (1) the volume of trading in that *financial instrument* on the *trading venue* as compared with the total trading volume in the *financial instrument* over at least that *trading day*; and
 - (2) whether the price of the *financial instrument* has stabilised after the significant fall in price.

The list above is not exhaustive and the *FSA* will consider such other factors as it considers appropriate.

- 2.5.5 G Where the *FSA* imposes measures under article 23 of the *short selling regulation* it will normally specify that the measures will not apply to natural or legal persons who have satisfied the criteria to use the *market maker exemption* or the *authorised primary dealer exemption* and who are included on the list maintained and published by *ESMA* pursuant to article 17 (13) of the *short selling regulation*.

Exchange rate calculations

- 2.5.6 G For the purposes of article 23 (1) (b) of Commission Delegated Regulation adopted by the European Commission on 5 July 2012 and subject to approval by the European Parliament and Council, the *FSA* will convert the figure of EUR 0.50 into pounds sterling using the daily spot foreign exchange rate of Sterling to Euro of the Bank of England applicable at the end of the first business day of October 2012 rounded up to the nearest £0.01. The *FSA* will state this figure on its public website. The rate will be calculated on the same basis at the end of the first *business day* of October every subsequent year, unless in the intervening period the daily spot foreign exchange rate of the Bank of England of Sterling to Euro fluctuates by more than 10%, in which case the *FSA* will recalculate the applicable exchange rate.
- 2.5.7 G The *FSA* will treat the FTSE 100 index as the main national equity index of the Member State for the purposes of Article 6 (4) of Commission Implementing Regulation adopted by the European Commission on 29 June and Article 4 of Commission Delegated Regulation C(2012) 4362 final of 29 June 2012 and Article 23 (1) of Commission Delegated Regulation adopted by the European Commission on 5 July 2012, all subject to approval by European Parliament and Council.

2.6 Procedures relating to the market maker exemption and the authorised primary dealer exemption

Decision on use of the market maker exemption or the authorised primary dealer exemption

Note: The *FSA* has powers under the *short selling regulation* to prohibit a natural or legal person from using the *market maker exemption* and the *authorised primary dealer exemption* if the *FSA* considers that that person does not satisfy the conditions of the exemption that that person has notified the *FSA* it intends to use.

- 2.6.1 G Pursuant to the Financial Services and Markets Act 2000 (XXX) Regulations 2012, the *FSA* will direct how notifications to use the *market maker exemption* or the *authorised primary dealer exemption* shall be made. Such directions will be published on the *FSA* website.
- 2.6.2 G (1) If the *FSA* considers that a natural or legal person ('P') who has notified the *FSA* of his intention to use either the *market maker exemption* or the *authorised primary dealer exemption* does not satisfy the criteria to use the *market maker exemption* or the *authorised primary dealer exemption*, the *FSA* will send a letter to P setting out the reasons why it is minded to prohibit P from using the *market maker exemption* or the *authorised primary dealer exemption*.
- (2) P will be given the opportunity to make written representations to the *FSA* concerning P's use of the *market maker exemption* or the *authorised primary dealer exemption*.
- (3) The *FSA* will decide whether to prohibit P's use of either the *market maker exemption* or the *authorised primary dealer exemption* having regard to P's notification and any written representations made by P. The decision whether or not to prohibit the use by P of either the *market maker exemption* or the *authorised primary dealer exemption* will be made by senior staff members of the *FSA* who were not involved in the initial consideration of P's notification.

Review of a decision to prohibit the market maker exemption or the authorised primary dealer exemption

- 2.6.3 G If P is not satisfied with the *FSA*'s decision to prohibit P's use of the *market maker exemption* or the *authorised primary dealer exemption*, P may seek a review of the decision. This will be conducted by a group of at least three senior *FSA* staff. None of the group conducting the review will have been connected with the earlier decision taken in respect of P's use of the *market maker exemption* or the *authorised primary dealer exemption*. The review may take place after the expiry of the 30 day period in which the notification should be made under the *short selling regulation*, but within 3 months of the decision referred to in *FINMAR* 2.6.2G(3).

After FINMAR 3 (Banking Act 2009) insert the following new Transitional Provisions. The text is not underlined.

Transitional Provisions TP 1

(1)	(2) Material to which the transitional provisions apply	(3)	(4) Transitional provision	(5) Transitional provision: dates in force	(6) Handbook provision: coming into force
1	All of <i>FINMAR 2</i>	R	<p><i>FINMAR 2</i> shall have effect as follows:</p> <p><i>A person</i> must comply with <i>FINMAR 2.2.1R</i> and <i>FINMAR 2.2.3R</i> to provide disclosure of a position that has not been disclosed prior to 1 November 2012.</p>	[From 00:00 on 1 November 2012] until 15:30 on 1 November 2012.	1 November 2012

Amend the following as shown.

Schedule 4 Powers Exercised

Sch 4.1G

The following powers and related provisions in or under the <i>Act</i> have been exercised by the <i>FSA</i> to make the <i>rules</i> , statements of policy and guidance in <i>FINMAR</i> :	
	Section 131B (Short selling rules)
	...

Annex C

Amendments to the General Provisions (GEN)

In this Annex, underlining indicates new text and striking through indicates deleted text.

Schedule 4 Powers exercised

...

Sch 4.2G

The following powers and related provisions in or under the <i>Act</i> have been exercised by the <i>FSA</i> to make the <i>rules</i> in <i>GEN</i> :	
	...
	Section 131B (Short selling rules)
	...

...

Sch 4.7AG

The following additional powers and related provisions have been exercised by the <i>FSA</i> in <i>GEN</i> to direct, require or specify:	
	...
	<u>Regulations [X] and [X] of the [Financial Services and Markets Act 2000 (XXX) Regulations 2012]</u>

Annex D

Amendments to the Supervision manual (SUP)

In this Annex, underlining indicates new text.

Access to premises

- 2.3.5 R (1) A *firm* must permit representatives of the *FSA*, or *persons* appointed for the purpose by the *FSA*, to have access, with or without notice, during reasonable business hours to any of its business premises in relation to the discharge of the *FSA*'s functions under the *Act* or its obligations under the *short selling regulation*.

...

Annex E

Amendments to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

- 1.1.1 G This manual (*DEPP*) is relevant to *firms, approved persons* and other *persons*, whether or not they are regulated by the *FSA*. It sets out:

...

- (3) the *FSA*'s policy with respect to the conduct of interviews by investigators appointed in response to a request from an ~~overseas regulator~~ overseas regulator or an EEA regulator (*DEPP* 7).

- 1.1.2 G The purpose of *DEPP* is to satisfy the requirements of sections 63C(1), 69(1), 93(1), 124(1), ~~[XXX]~~, 131J(1), 169(9), 210(1) and 395 of the *Act* that the *FSA* publish the statements of procedure or policy referred to in *DEPP* 1.1.1G.

...

7 **Statement of policy on ~~section 169(7)~~ interviews conducted on behalf of overseas and EEA regulators**

...

Application

- 7.1.1 G *DEPP* 7 applies when the *FSA*:
- (1) has appointed an investigator at the request of an *overseas regulator*, under section 169(1)(b) (Assistance to overseas regulators) or of an EEA regulator under section [XXX] of the Act; and
 - (2) has directed, or is considering directing, the investigator, under section 169(7) or section [XXX] of the Act, to permit a representative of the *overseas regulator* or of the EEA regulator to attend, and take part in, any interview conducted for the purposes of the investigation.
- 7.1.2 G In *DEPP* 7, a "~~section 169(7) requested~~ interview" means any interview conducted for the purposes of an investigation under section 169(1)(b) or section [XXX] of the Act in relation to which the *FSA* has given a direction under section 169(7) or section [XXX] of the Act.

Purpose

- 7.1.3 G The purpose of *DEPP* 7 is to set out the *FSA*'s statement of policy on the conduct of interviews to which a direction under section 169(7) or section [XXX] has been given or the *FSA* is considering giving. The *FSA* is required to prepare and publish this statement of policy by section 169(9) and (11) and

section [XXX] of the *Act*. As required by section 169(10) and section [XXX] of the *Act*, the Treasury has approved the statement of policy.

- 7.1.4 G The *FSA* is keen to promote co-operation with *overseas regulators* and *EEA regulators*. It views provision of assistance to *overseas regulators* and *EEA regulators* as an essential part of the principles set out in section 2(3)(e) of the *Act* to which it must have regard in discharging its general functions.

...

- 7.2.1 G Under section 169(1)(b) and section [XXX] of the *Act*, the *FSA* may appoint an investigator to investigate any matter at the request of an *overseas regulator* or *EEA regulator*. The powers of the investigator appointed by the *FSA* (referred to here as the '*FSA*'s investigator') include the power to require *persons* to attend at a specified time and place and answer questions (the compulsory interview power).

- 7.2.2 G Where the *FSA* appoints an investigator in response to a request from an *overseas regulator* or *EEA regulator* it may, under section 169(7) or section [XXX] of the *Act*, direct him to permit a representative of that regulator to attend and take part in any interviews conducted for the purposes of the investigation. The *FSA* may only give a direction under section 169(7) or section [XXX] if it is satisfied that any information obtained by an *overseas regulator* or *EEA regulator* as a result of the interview will be subject to the safeguards equivalent to those contained in Part XXIII (Public Record, Disclosure of Information and Cooperation) of the *Act*.

...

- 7.2.4 G The *FSA*'s policy on how it will use its investigative powers, including its power to appoint investigators, in support of *overseas regulators* and *EEA regulators*, is set out in the *FSA*'s Enforcement Guide (*EG*).

Use of direction powers

- 7.2.5 G The *FSA* may need to consider whether to use its direction power at two stages of an investigation:
- (1) at the same time that it considers the request from the *overseas regulator* or *EEA regulator* to appoint investigators;
 - (2) after it has appointed investigators, either at the request of the *overseas regulator* or *EEA regulator* or on the recommendation of the investigators.
- 7.2.6 G Before making a direction under section 169(7) or section [XXX] the *FSA* will discuss and determine with the *overseas regulator* or *EEA regulator* how this statement of policy will apply to the conduct of the interview, taking into account all the circumstances of the case. Amongst other matters, the *FSA* will at this stage determine the extent to which the representative of the *overseas regulator* or *EEA regulator* will be able to participate in the interview. The *overseas regulator* or *EEA regulator* will be notified of this determination on

the issuing of the direction.

- 7.2.7 G The direction will contain the identity of the representative of the *overseas regulator* or *EEA regulator* that is permitted to attend any interview and the role that he will play in the interview. If the *FSA* envisages that there will be more than one interview in the course of the investigation, the direction may also specify which interview(s) the ~~overseas~~ representative is allowed to attend.
- ...
- 7.2.9 G The *FSA*'s investigator will act on behalf of the *FSA* and under its control. He may be instructed to permit the representative of the *overseas regulator* or *EEA regulator* to assist in the preparation of the interview. Where the *FSA* considers it appropriate, it may permit the representative to attend and ask questions of the interviewee in the course of the interview. The interview will be conducted according to the terms of the direction and the notification referred to in *DEPP* 7.2.6G
- 7.2.10 G If the direction does permit the representative of an *overseas regulator* or *EEA regulator* to attend the interview and ask the interviewee questions, the *FSA*'s investigator will retain control of the interview throughout. Control of the interview means the following will apply:
- (1) The *FSA*'s investigator instigates and concludes the interview, introduces everyone present and explains the procedure of the interview. He warns the interviewee of the possible consequences of refusing to answer questions and the uses to which any answers that are given can and cannot be put. The *FSA*'s investigator will always ask preliminary questions, such as those establishing the identity of the interviewee.
 - (2) The *FSA*'s investigator determines the duration of the interview and when, if at all, there should be any breaks in the course of it.
 - (3) The *FSA*'s investigator has responsibility for making a record of the interview. The record should note the times and duration of any breaks in the interview and any periods when the representative of the *overseas regulator* or *EEA regulator* was either present or not present.
 - (4) Where the *FSA*'s investigator considers it appropriate, he may either suspend the interview, ask the overseas representative to leave the interview, or terminate the interview and reschedule it for another occasion. In making that decision he will bear in mind the terms of the direction, any agreement made with the *overseas regulator* or *EEA regulator* as to the conduct of the interview and the contents of this statement of policy.
- 7.2.11 G The *FSA* will in general provide written notice of the appointment of an investigator to the *person* under investigation pursuant to the request of an *overseas regulator* or *EEA regulator*. Whether or not the interviewee is the *person* under investigation, the *FSA*'s investigator will inform the interviewee of the provisions under which he has been appointed, the identity of the

requesting authority and general nature of the matter under investigation. The interviewee will also normally be informed if a representative of the *overseas regulator* or *EEA regulator* is to attend and take part in the interview. Notification of any of these matters may not be provided in advance of the interview if the *FSA* believes that the circumstances are such that notification would be likely to result in the investigation being frustrated.

- 7.2.12 G The interviewee will normally be given a copy of the direction issued under section 169(7) or section [XXX] in advance of the interview unless to do so would be likely to result in the investigation being frustrated. The interviewee will also be provided with a copy of this statement of policy.

...

- 7.2.14 G When the *FSA's* investigator has exercised the compulsory interview power, at the outset of the interview the interviewee will be given an appropriate warning. The warning, amongst other things, must state that the interviewee is obliged to answer all questions put to them during the interview, including any put by the representative of the *overseas regulator* or *EEA regulator*. It will also state that in criminal proceedings or proceedings for *market abuse* the *FSA* will not use as evidence against the interviewee any information obtained under compulsion during the interview.

- 7.2.15 G The *FSA's* investigator may decide which *documents* or other information may be put to the interviewee, and whether it is appropriate to give the interviewee sight of the documents before the interview takes place. Where the *overseas regulator* or *EEA regulator* wishes to ask questions about *documents* during the interview and the *FSA's* investigator wishes to inspect those *documents* before the interview, he will be given the opportunity to do so. If the *FSA's* investigator wishes to inspect them and has not been able to do so before the interview, he may suspend the interview until he has had an opportunity to inspect them.

- 7.2.16 G When the *FSA's* investigator has exercised the compulsory interview power, the *FSA's* investigator will require the *person* attending the interview to answer questions. Where appropriate, questions may also be posed by the representative of the *overseas regulator* or *EEA regulator*. The interviewee will also be required to answer these questions. The *FSA's* investigator may intervene at any stage during questioning by the representative of the *overseas regulator* or *EEA regulator*.

Language

- 7.2.17 G Interviews will, in general, be conducted in English. Where the interviewee's first language is not English, at the request of the interviewee arrangements will be made for the questions to be translated into the interviewee's first language and for his answers to be translated back into English. If a translator is employed at the request of the representative of the *overseas regulator* or *EEA regulator* then the translation costs will normally be met by the *overseas regulator* or *EEA regulator*. Where interviews are being conducted in pursuance of an *EU* law obligation these costs will be met by the *FSA*. In any

event, the meeting of costs in relation to translators and, where applicable, the translation of documents will always be agreed in advance with *overseas regulator* or EEA regulator.

Tape-recording

- 7.2.18 G All compulsory interviews will be tape-recorded. The method of recording will be decided on and arranged by the *FSA's* investigator. Costs will be addressed similarly to that set out in the preceding paragraph. The *FSA* will not provide the *overseas regulator* or EEA regulator with transcripts of the tapes of interviews unless specifically agreed to, but copies of the tapes will normally be provided where requested. The interviewee will be provided with a copy of tapes of the interview but will only be provided with transcripts of the tapes or translations of any transcripts if he agrees to meet the cost of producing them.

Representation

- 7.2.19 G The interviewee may be accompanied at the interview by a legal adviser or a non-legally qualified observer of his choice. The costs of any representation will not be met by the *FSA*. The presence at the interview of a representative of the *overseas regulator* or EEA regulator may mean that the interviewee wishes to be represented or accompanied by a *person* either from or familiar with that regulator's jurisdiction. As far as practical the arrangements for the interview should accommodate this wish. However, the *FSA* reserves the right to proceed with the interview if it is not possible to find such a *person* within a reasonable time or no such *person* is able to attend at a suitable venue.
- 7.2.20 G In relation to the publication of investigations by *overseas regulators* or EEA regulators, the *FSA* will pursue a policy similar to the policy that relates to its own investigations.

...

Sch 3.2 G

The <i>FSA's</i> power to impose financial penalties is contained in:	
	<u>section 131G</u>
	section 206
	...

...

Sch 4.1 G

The following powers and related provisions in or under the <i>Act</i> have been exercised by the <i>FSA</i> to make the statements of policy in <i>DEPP</i> :	
	...
	<u>Section [XXX] Statement of policy</u>
	Section 131J Statement of policy
	...

...

Annex F

Amendments to the Enforcement Guide (EG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.2 In the areas set out below, the *Act* expressly requires the FSA to prepare and publish statements of policy or procedure on the exercise of its enforcement and investigation powers and in relation to the giving of *statutory notices*.

...

(4) section 169 requires the FSA to publish a statement of its policy on the conduct of certain interviews in response to requests from *overseas regulators*; ~~and~~

(4A) section [XXX] requires the FSA to publish a statement of its policy on the conduct of certain interviews in response to requests from *EEA regulators*; and

...

...

Assisting overseas regulators

2.16 The FSA views co-operation with its overseas counterparts as an essential part of its regulatory functions. Section 354 of the *Act* imposes a duty on the FSA to take such steps as it considers appropriate to co-operate with others who exercise functions similar to its own. This duty extends to authorities in the UK and overseas. In fulfilling this duty the FSA may share information which it is not prevented from disclosing, including information obtained in the course of the FSA's own investigations, or exercise certain of its powers under Part XI of the *Act*. Further details of the FSA's powers to assist overseas regulators are provided at *EG* 3.12 – 3.15 (Investigations to assist overseas authorities), *EG* 3.15A – D (Information requests and investigations to assist EEA regulators in relation to short selling), *EG* 4.8 (Use of statutory powers to require the production of documents, the provision of information or the answering of questions), *EG* 4.25 – 4.27 (Interviews in response to a request from an overseas regulator or EEA regulator), and *EG* 8.18 – 8.25 (Exercising the power under section 47 to vary or cancel a firm's part IV permission in support of an overseas regulator). The FSA's statement of policy in relation to interviews which representatives of overseas regulators or EEA regulators attend and participate in is set out in *DEPP* 7.

...

3.1 The FSA has various powers under sections 97, 131E, [XXX], 165 to 169 and 284 of the *Act* to gather information and appoint investigators, and to require the production of a report by a *skilled person*. In any particular case, the FSA will decide which powers, or combination of powers, are most appropriate to use having regard to all

the circumstances. Further comments on the use of these powers are set out below.

...

Information requests and investigations to assist EEA regulators in relation to short selling

3.15A The FSA may use its section 131E power to require information and documents from natural or legal persons to support both its monitoring and its enforcement functions.

3.15B An officer with authorisation from the FSA may exercise the section 131E power to require information and documents from natural or legal persons. This includes an FSA employee or an agent of the FSA.

3.15C The FSA's power to conduct investigations to assist *EEA regulators* in respect of the *short selling regulation* is contained in section [XXX] of the *Act*. The section provides that at the request of an *EEA regulator* or ESMA, the FSA may either use its power under section 131E to require the production of information, or appoint a person to investigate any matter.

3.15D Section [XXX] states that the FSA must, in deciding whether or not to exercise its investigative power, consider whether the exercise of that power is necessary to comply with an obligation under the *short selling regulation*.

Use of statutory powers to require the production of documents, the provision of information or the answering of questions

4.8 The FSA's standard practice is generally to use statutory powers to require the production of documents, the provision of information or the answering of questions in interview. This is for reasons of fairness, transparency and efficiency. It will sometimes be appropriate to depart from this standard practice, for example:

...

- (3) In some cases, the FSA is asked by *overseas regulators* or *EEA regulators* to obtain documents or conduct interviews on their behalf. In these cases, the FSA will not necessarily adopt its standard approach as it will consider with the *overseas regulator* or *EEA regulator* the most appropriate method for obtaining evidence for use in their country.

...

Interviews in response to a request from an overseas regulator or EEA regulator

4.25 Where the FSA has appointed an investigator in response to a request from an *overseas regulator* or *EEA regulator*, it may, under section 169(7) or [XXX] of the *Act* respectively, direct the investigator to allow a representative of that regulator to attend, and take part in, any interview conducted for the purposes of the

investigation. However, the FSA may only use this power if it is satisfied that any information obtained by an *overseas regulator* or *EEA regulator* as a result of the interview will be subject to safeguards equivalent to those in Part XXIII of the *Act* (section 169(8) and [XXX] respectively).

...

4.27 Under sections 169(9) and [XXX] respectively, the FSA is required to prepare a statement of policy with the approval of the Treasury on the conduct of interviews attended by representatives of *overseas regulators* or *EEA regulators*. The statement is set out in *DEPP 7*.

...

7.2 The FSA has the following powers to impose a financial penalty and to publish a *public censure*.

(1) It may publish a statement:

...

(ea) if a ~~person~~ natural or legal person has contravened any provision of the short selling ~~rules-regulation~~, or any requirement imposed on ~~the person-that person~~ under section 131E or 131F, under section 131G of the Act; and

...

(2) It may impose a financial penalty:

...

(ca) on a ~~person~~ natural or legal person who has contravened any provision of the short selling ~~rules-regulation~~, or any requirement imposed on ~~the person-that person~~ under section 131E or 131F, or any ~~person~~ natural or legal person who was knowingly concerned in the contravention, under section 131G of the Act; and

...

Appendix 2

Designation of Handbook Provisions

FSA Handbook provisions will be ‘designated’ to create a FCA Handbook and a PRA Handbook on the date that the regulators exercise their legal powers to do so. Please visit our website [for further details about this process](#).

We plan to designate the Handbook Provisions which we are proposing to create and/or amend within this Consultation Paper as follows:

Handbook Provision	Designation
FINMAR 2.5	FCA
FINMAR 2.6	FCA
FINMAR TP 1.1	FCA

1 One-minute guide <http://media.fsahandbook.info/latestNews/One-minute%20guide.pdf>

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The Financial Services Authority
25 The North Colonnade Canary Wharf London E14 5HS
Telephone: +44 (0)20 7066 1000 Fax: +44 (0)20 7066 1099
Website: www.fsa.gov.uk

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