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Short Selling Call for Evidence

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Dear HM Treasury,

## **Financial Markets Law Committee's Response to HM Treasury's Short Selling Call for Evidence**

### **Background**

The role of the Financial Markets Law Committee (the "**FMLC**" or the "**Committee**") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

On 9 December 2022, HM Treasury ("**HMT**") published its call for evidence on the UK's Short Selling Regulation (the "**SSR**"), requesting views from stakeholders on a number of topics including the FCA's emergency intervention powers and the disclosure requirements.

The FMLC sets out below a number of uncertainties with respect to the SSR which the FMLC recommends HMT should address in its review.

### **Emergency Intervention Powers**

If HMT chooses to retain the FCA's emergency intervention powers in any revised version of the SSR, the operation of these powers and the scope of any ban enacted should be clear from the outset. Historically, where short selling bans have been enacted (both in the UK and in EU jurisdictions), the scope and therefore what actions can and cannot be taken in relation to the relevant shares have, on occasion, been uncertain. Examples of such uncertainty have included whether and in what circumstances it is possible to increase a net short position via index derivatives where a stock which is subject to a short-sale ban is a constituent of such index, or whether it is possible to reduce a long position in an index derivative thereby increasing the net short position in such a banned stock. The FMLC recommends that the SSR should require the FCA, when exercising any emergency intervention powers, to clearly describe the scope of the ban, including its impact on long positions, derivatives and the rolling of existing positions.

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## **Notification and Disclosure Requirements**

### **1. Percentage of issued share capital**

The SSR requires persons to publicly disclose net short positions which exceed the relevant limit expressed as a percentage of issued share capital. Identifying the issued share capital creates problems for firms as there is no “golden source” of information, information on the website of the company, on Bloomberg and other sources are not always consistent or up to date.

If HMT chooses to retain the requirement for persons to publicly or privately disclose this information, the FMLC recommends the FCA be either required to maintain a source of this information which participants can refer to, or provide a list of sources which participants are able to rely on for the purposes of the disclosure. This would provide firms certainty as to which figure, or figures, they should be using for their disclosure.

### **2. Determination of a notifiable position in shares**

Certain shares are exempt from the notification and disclosure requirements in the SSR if their principal venue for trading is located outside the UK. Although the FCA maintains a list of exempted shares, this list is only required to be updated every two years, with the 31 December 2020 list having only recently been updated as at 31 December 2022, with no update required under Article 16 of the SSR until 31 December 2024). This creates uncertainty for firms when they are determining whether they need to notify and disclose in relation to shares whose principal venue appears to be outside of the UK but whose shares do not yet appear on the UK list of exempted shares.

To minimise this uncertainty there are a number approaches which could be taken. The FCA could be required to ensure the list of exempted shares is updated regularly, at least once per month, or firms could be permitted under the revised SSR to be able to make their own determination, on reasonable grounds, about whether a share’s principal venue for trading is located outside the UK without being required to refer to the list. Alternatively, the FCA could instead be required to publish and maintain a list of all in scope shares (rather than an exempt list) similar to the current approach for the Hong Kong short selling regime.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours faithfully,



**Brian Gray**

Chief Executive<sup>1</sup>

<sup>1</sup> FMLC acknowledges the assistance of Jon May of Marshall Wace LLP and Neil Robson of Katten Muchin Rosenman UK LLP writing this letter.