



HM Treasury

# The Short Selling Regulations 2024

## **Policy Note**

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November 2023



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ISBN: 978-1-96693-62-3 PU: 3374

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# Chapter 1

## Context

1.1 This statutory instrument (SI) is part of HM Treasury's programme to build a smarter regulatory framework for financial services which is tailored to the UK.

1.2 The Financial Services and Markets Act 2023 repeals retained EU law relating to financial services. This enables the government to deliver a smarter regulatory framework for financial services. Retained EU law will be repealed and replaced with rules set by our independent and expert regulators, operating within a framework set by government and Parliament.

1.3 In December 2022 the government published a [Call for Evidence on the Short Selling Regime](#). The government published a [response to this Call for Evidence](#) in July 2023, setting out the government's intended approach to reforming the UK short selling regime. Alongside this, the government published a [Consultation on the regulation of sovereign debt and credit default swaps](#) under the short selling regime. The government has published the [response to this Consultation](#) alongside this policy note and illustrative SI.

1.4 The government is publishing a draft of the SI that will implement the reforms to the UK short selling regime set out in these Government Response documents alongside this explanatory policy note. The government welcomes any technical comments on the draft SI by **10 January 2024**.

# Chapter 2

## Purpose

2.1 The note sets out the policy background for the draft Short Selling Regulations 2024, a summary of the policy intent and how the SI will achieve this, stakeholders likely to be impacted and how to comment on the SI.

2.2 This is a draft SI and should not be treated as final. For example, consequential amendments have not been included but will be incorporated into the final version to be laid. It is being published for technical checks, such as any significant errors or oversights in the legal drafting that would mean that the provisions in this SI would not achieve the desired outcomes explained in this note, or that would lead to significant unintended consequences.

2.3 Whilst the policy approach in this area as set out in these published provisions is settled, the drafting approach, and other technical aspects of the proposal, may change before the final instrument is laid before Parliament.

2.4 This draft instrument contains provisions related to the designated activity of short selling shares and related instruments. As set out in the government's *Building a Smarter Financial Services Regulatory Framework: Delivery Plan*<sup>1</sup>, the government will create an SI regulating certain common aspects of designated activities (the 'DAR SI'), to consolidate legislation and reduce complexity for firms carrying out more than one designated activity. The government expects to publish the DAR SI for technical checks early next year and expects it to contain a set of cross-cutting supervision and enforcement provisions that will apply to all designated activities, including short selling. For this reason, this draft SI does not contain supervision and enforcement provisions.

2.5 This draft SI therefore focuses on the designating activity of short selling, the rulemaking powers provided by HM Treasury to the Financial Conduct Authority (FCA) related to this activity and FCA powers to intervene in exceptional circumstances.

2.6 Stakeholders will have an opportunity to provide technical feedback on the DAR SI when it is published, and so stakeholders should focus feedback on technical checks related to the provisions contained in this draft short selling SI.

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<sup>1</sup>[Building\\_a\\_smarter\\_financial\\_services\\_framework\\_for\\_the\\_UK.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/114444/Building_a_smarter_financial_services_framework_for_the_UK.pdf)

# Chapter 3

## Policy Background

What did any law do before the changes to be made by this instrument?

**3.1** Short selling is the practice of selling a security that is borrowed or not owned by the seller with the intention of buying it back later at a lower price to make a profit. Short selling is regulated in the UK by the Short Selling Regulation (SSR)<sup>2</sup>. This is the UK version of the EU Short Selling Regulation (EU SSR), as incorporated into UK law by the European Union (Withdrawal Act) 2018.

**3.2** The EU SSR was introduced in 2012, in response to concerns over the short selling of shares in financial institutions and the short selling of euro area sovereign debt, including through credit default swaps. In particular, at the time there were concerns from some about the lack of information and transparency to the market and authorities on whether and how short selling was impacting prices, exacerbating uncertainty and downward price movements, and potentially increasing risks to financial stability.

**3.3** The SSR applies to financial instruments admitted to trading or traded on a UK trading venue (unless they are principally traded on a third country venue). The regulation also applies to UK sovereign debt and related credit default swaps. The SSR has several core provisions:

1. It requires holders of net short positions in shares or sovereign debt to make notifications of their positions to the FCA once certain thresholds have been met.
2. It requires holders of net short positions in shares to publicly disclose these positions once certain thresholds have been met.
3. It outlines restrictions on investors entering into uncovered short positions in shares or sovereign debt.
4. It allows persons carrying out stabilisations or persons that meet the definition of a market maker to apply to the FCA to be exempt from restrictions on uncovered short selling and notification requirements.
5. It provides the FCA with powers to restrict short selling in certain circumstances to prevent a disorderly decline in the price of a financial instrument or in response to a serious threat to financial stability or market confidence.

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<sup>2</sup> Regulation 236/2012/EU of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, as it has been retained in UK law following EU Exit



6. It contains buy-in procedures and late settlement requirements to ensure settlement discipline.

3.4 The SSR In January 2021, the Treasury laid an SI to lower the initial notification threshold for net short positions to the FCA from 0.2% to 0.1% of total issued share capital. This measure was introduced in response to market uncertainty due to the Covid-19 pandemic, and the government committed at the time to keeping the threshold under review. In addition to the publication of the draft instrument to which this policy note relates, the Treasury will shortly lay a separate instrument to increase this threshold back to 0.2% of issued share capital.

# Chapter 4

## Summary of Statutory Instrument

4.1 This SI replaces retained EU law related to short selling and creates a new regulatory framework for short selling.

### What does the policy instrument do?

4.2 In broad terms, this instrument sets out the scope of the new UK short selling regime and provides the FCA with a range of related rulemaking powers to specify firm-facing short selling requirements in their handbook. It also includes emergency intervention powers for the FCA to require additional short selling-related information and to restrict short selling in exceptional circumstances where there is a serious threat to financial stability or market confidence, or to prevent a disorderly decline in the price of a financial instrument.

4.3 Specifically, the instrument:

### Scope

- **Defines and sets out the designated activity of short selling of shares and related instruments**, as well as other terms related to this activity. By defining short selling as a designated activity, the Treasury can give the FCA rulemaking, supervisory and enforcement powers, in relation to short selling, without requiring all firms in scope of the activity to seek FCA authorisation.<sup>3</sup> For example, this instrument sets out definitions of key terms, such as the definition of a short sale, and gives the FCA rulemaking powers to expand on these definitions in more detail where required.
- **Empowers the FCA to exempt shares from requirements and requires the FCA to publish a list of shares to which certain rules apply.** This is in response to feedback in the Call for Evidence that a 'positive' list of in scope shares would be more beneficial for market participants than the current 'negative' list of exempt shares.

### FCA rule making power

- **Provides the FCA with the power to make rules requiring a person engaged in short selling activity concerning shares to**

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<sup>3</sup> Where firms engage in short selling activity as part of an authorised activity, they will still be required to be FCA authorised in the usual way.

**comply with specified conditions or requirements.** This power includes, but is not limited to, the ability for the FCA to impose restrictions on uncovered short selling to ensure settlement of trades related to short selling if it considers it appropriate to do so, such as borrowing and locate arrangements.

## Disclosure

- **Sets the initial notification threshold for net short position reporting to the FCA at 0.2% of issued share capital.** HMT would be able to change this threshold by Statutory Instrument.
- **Gives the FCA a rulemaking power to set out aspects of the net short position notification regime.** The SI highlights several areas that FCA rules could cover, including how to calculate a net short position, as well as further detail of the notification regime.
- **Requires the FCA to aggregate and publish net short positions they receive by issuer.** This figure would be published based on positions held on each working day.

## Market maker exemption

- **Provides the FCA with a rulemaking power to exempt market making activities and stabilisations from certain short selling requirements.** The instrument sets out that market makers qualify for the market maker exemption framework established by the FCA if they are either: i) a member of a UK trading venue or, ii) a trading venue in an overseas jurisdiction for which HMT has made a determination. The instrument also includes a placeholder for a regime that will allow HM Treasury to make such determinations in relation to overseas jurisdictions, which will be included in the SI when laid. The instrument also has a placeholder for a transitional provision to carry forward the existing SSR equivalence determination for the EEA.

## Emergency powers

- **Gives the FCA powers to intervene in exceptional circumstances.** These powers apply more broadly than the designated activity of short selling which covers shares and related instruments. The FCA's powers to intervene in exceptional circumstances extend to all financial instruments as defined in Part 1 of the Schedule 2 of the Regulated Activities Order. Specifically, the instrument empowers the FCA to require notifications of short positions and information on lending fees, as well as prohibit or impose conditions on short sales and related transactions if there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the UK. As part of this, the FCA has to assess that the intervention is necessary to address the threat and that it will not have a detrimental impact on financial markets which is

disproportionate to its benefits. The instrument also gives the FCA the power to restrict short selling following a significant price fall where it considers this necessary to prevent a disorderly decline in the price of the financial instrument. As part of this, the FCA will also have to be of the view that the intervention will not have a disproportionate detrimental effect on financial markets.

- **Requires the FCA to publish a statement of policy setting out further detail of how it considers it will use its powers to intervene in exceptional circumstances.** This is in response to feedback on HMT's Call for Evidence on the SSR for further clarity on the FCA's use of short selling emergency powers.

## What will change in comparison to the previous REUL provisions?

**4.4** In line with the government's approach to building a Smarter Regulatory Framework for financial services, this instrument looks to replace the SSR with a model where the FCA generally sets the detail rule-making powers that firms must adhere to, within a framework set by government and Parliament. This draft SI implements the changes to the short selling regime announced in the Government Response to the Short Selling Review, published July 2023, and in the Government Response to the Short Selling Regulation Consultation – sovereign debt and credit default swaps, published November 2023.

**4.5** For this reason, most firm-facing requirements that were previously detailed in legislation will be replaced by rules in the FCA's handbook, using the rule and guidance-making powers for the FCA included in this SI. A list of areas the FCA may consult on is included in the role of the regulator section below.

**4.6** The scope of financial instruments covered by different provisions in this instrument is also different to the SSR. Article 16 of the SSR exempted shares traded on a UK trading venue that are principally traded outside the UK from various SSR requirements, including reporting requirements and restrictions on uncovered short selling. The designated activity for short selling in this instrument has a broader scope of shares traded on a UK trading venue and related instruments. The SI gives the FCA the power to exempt shares from requirements where it considers it appropriate to do so and requires the FCA to publish a list of shares that the FCA considers are subject to their rules.

**4.7** The SSR also contained various provisions related to sovereign debt and sovereign credit default swaps (CDS). This instrument does not include restrictions on uncovered short selling of sovereign debt and CDS, as well as sovereign debt notification requirements, in line with the approach set out in the Government Response to the consultation on aspects of the SSR related to sovereign debt and CDS. Once the regime has come into force, there will no longer be restrictions on uncovered short selling of sovereign debt and CDS or notification requirements related to short sales of sovereign debt. This

instrument maintains emergency intervention powers for sovereign debt and CDS in the same way as other financial instruments.

4.8 As mentioned above, this instrument requires the FCA to publish aggregated net short positions based on individual position notifications it receives. This is a change to the current regime where the FCA publishes individual net short positions above 0.5% of issued share capital, which was announced in the Government Response to the Short Selling Review.

### What will not change in comparison to the previous REUL provisions?

4.9 Notwithstanding the changes highlighted above, this instrument maintains an overarching regulatory framework to facilitate short selling and the benefits it provides to the orderly and effective functioning of the market, while protecting against risks. The instrument restates core definitions relevant to short selling regime. It also restates the requirement for firms to notify the FCA of net short positions above 0.2% of issued share capital.

### What are the firm facing impacts going to be?

4.10 The repeal of retained EU law and its replacement with a new framework that is tailored to the UK will benefit firms in several ways. In particular, firms will benefit from the replacement of detailed EU provisions which were designed to apply across the EU with rules set by the UK's expert and independent regulators (in the case of short selling, the FCA) tailored to the UK. Beyond this, replacing retained EU law will enable firms to benefit from a streamlined and accessible legislative framework for financial services, where rules adapt over time in response to changing practices in an agile manner.

4.11 Firms will also benefit from specific changes to the short selling regulatory framework in this instrument that were announced in the government response to the Call for Evidence, such as replacing the current public disclosure regime based on individual net short positions with an aggregated net short position disclosure regime. As set out in the government response document, the FCA will take the outcome of the Call for Evidence into account when considering and consulting on the rules for this new regime.

4.12 Firms may also face additional costs as they familiarise themselves with the new regime. For example, costs may arise from engaging lawyers and consultants to understand new obligations and guidance.

### Role of the regulator

4.13 The FCA is working closely with the government to support the development of this new legislative framework. The FCA will set out its detailed approach for how it will use its new rule making powers to implement. The FCA will consult market participants, including taking

into account feedback to the Treasury's Call for Evidence, and would include the following areas in its consultation:

- Restrictions on uncovered short selling, including provisions related to borrowing and locate requirements in the current SSR.
- How firms should report net short positions to the FCA, including reporting deadlines, the form and content of a notification and issued share capital.
- An exemption for market making and stabilisation activities, taking into account feedback in the Treasury's Call for Evidence on ways to streamline the notification regime, including how quickly exemptions can be applied.
- Its Statement of Policy setting out its approach to using its emergency intervention powers.
- Arrangements and criteria for list of reportable shares, including the criteria that shares in scope of the regime must be principally traded on a UK regulated market or multilateral trading facility.
- Arrangements for how it will publish aggregated net short position reports.

# Chapter 5

## Stakeholders and contact

5.1 HM Treasury intends to legislate in 2024, subject to Parliamentary time allowing.

### Comment on this SI

5.2

5.3 HM Treasury will consider technical comments on this draft statutory instrument, focused on any changes that need to be made to this draft instrument to achieve the policy intent set out in section four of this policy note and the Government Response to the Call for Evidence on the SSR.

5.4 Any comments should be provided to [MarketConduct@hmtreasury.gov.uk](mailto:MarketConduct@hmtreasury.gov.uk) by **10 January 2024**.

# Chapter 6

## Next steps

6.1 HM Treasury plans to lay this instrument before Parliament in 2024, subject to Parliament time allowing.

6.2 This legislation will commence at the same time as the FCA makes new rules, alongside the repeal of the SSR and other related legislation.



# Chapter 7

## Further information

7.1 Read HM Treasury's [Call for Evidence on the SSR](#), published in December 2022, and the [Government Response](#) published in July 2023

7.2

7.3 Read HM Treasury's [Consultation on aspects of the SSR related to sovereign debt and CDS](#), published in July 2023, and the [Government Response](#) published in November 2023.

7.4

7.5 Read HM Treasury's [Policy statement – Building a smarter financial services framework for the UK](#)

### **HM Treasury contacts**

This document can be downloaded from [www.gov.uk](http://www.gov.uk)

If you require this information in an alternative format or have general enquiries about HM Treasury and its work, contact:

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