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July 23, 2008

The Honorable Christopher Cox  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of  
1934 Taking Temporary Action to Respond to Market Developments  
File No. S7-20-08

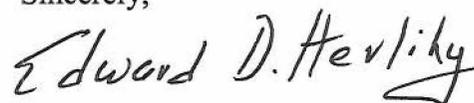
Dear Chairman Cox:

In consideration of the Commission's request for comments in response to the above-referenced Emergency Order dated July 15, 2008, attached please find four memos this firm has recently published. As outlined in the attached memos, among other things, we urge the Commission to expand the Emergency Order beyond its initial 30-day period and extend its coverage to all issuers of publicly traded securities. In addition, the Commission should immediately re-impose the "Uptick" Rule or take alternative measures to dampen volatility and address abusive and manipulative short selling.

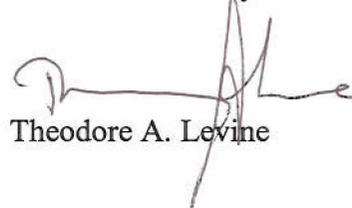
The Honorable Chairman Cox  
July 23, 2008  
Page 2

Please do not hesitate to contact us if we can be of further assistance.

Sincerely,



Edward D. Herlihy



Theodore A. Levine

cc: The Honorable Paul S. Atkins  
SEC Commissioner  
The Honorable Kathleen L. Casey  
SEC Commissioner  
The Honorable Elisse B. Walter  
SEC Commissioner  
Dr. Erik Sirri, Director  
Division of Trading and Markets  
Ms. Linda Thomsen, Director  
Division of Enforcement

July 1, 2008

It's Time for the SEC to Constrain Abusive Short Selling

Last July, the SEC eliminated the “Uptick Rule,” a 70-year-old regulation that constrained short selling in declining markets by requiring that listed securities be sold short only at a price above their last different sale price. In recent months, there has been a dramatic increase in short selling and volatility in a declining market environment. The SEC, on an urgent basis, should consider re-imposing the Uptick Rule, or taking alternative measures, in these extraordinary times to dampen volatility and address abusive and manipulative short selling.

Adopted in 1938 in response to growing negative sentiment toward short sellers, the Uptick Rule was designed to prevent short selling from being used to hammer down stocks in “bear raids” and to prevent short sellers from accelerating declines by exhausting bid supplies and forcing prices lower — while still allowing unrestricted short selling in advancing markets. The SEC abolished the rule following (1) a pilot program, conducted between May 2005 and August 2007, that suspended the Uptick Rule for certain stocks, and (2) the receipt of three academic studies examining the results of the pilot. The decision to eliminate the Uptick Rule was prompted by the SEC’s view that market changes had rendered the Rule less effective (decimal pricing, derivative proliferation, regulatory arbitrage, and numerous exceptions and exemptions) and less essential (increased liquidity and transparency, sophisticated surveillance, and stringent penalties). The SEC also cited a need for “regulatory simplicity and uniformity,” and the lack of specific evidence of “manipulative” or “abusive” shorting, in voting to eliminate the Rule.

The limitations of the SEC’s pilot program, which was conducted in a period of a rising market and unusually low volatility, have become painfully clear in recent months. The risks associated with unrestricted short selling in periods of high volatility and large market declines were necessarily beyond the pilot’s scope. Today, many of the same conditions that led to the adoption of the rule in 1938 are re-appearing. Short sales are at record levels and there are suggestions that false rumors about the demise of firms (e.g. Bear Stearns and Lehman) and bear raids are taking place. Other regulators have begun to address abusive short-selling – for example, the U.K.’s FSA introduced a disclosure regime for short selling during rights issues last week. By contrast, the SEC is merely relying on its surveillance and enforcement efforts to address these abusive activities. Those tools are not adequate in today’s market. Manipulation and fraudulent intent are difficult to prove. Moreover, the SEC’s enforcement efforts can address wrongdoing only after the fact — a delay that imperiled stocks cannot afford.

The Uptick Rule was effective for over 70 years in addressing abusive short selling and manipulative conduct, and similarly effective measures are needed today.

Edward D. Herlihy  
Theodore A. Levine

July 14, 2008

SEC Takes a First Step to Address Manipulative Rumor-Mongering;  
More Aggressive Action Still Needed

Yesterday, in an unusual Sunday statement, the Securities and Exchange Commission announced that it, FINRA and NYSE Regulation would immediately begin examinations of broker-dealer and investment adviser supervisory and compliance controls, with the goal of stemming the spread of false rumors intended to manipulate security prices. While these actions represent a significant first step toward combating activities that threaten the integrity of the securities markets, more aggressive and immediate actions are needed in response to the current crisis.

The joint SEC/SRO examinations will focus on the supervisory and compliance controls of broker-dealers and investment advisers and whether the controls are reasonably designed to prevent manipulative conduct, including “the creation or spreading of false information intended to affect securities prices.”

According to SEC Chairman Cox, “The examinations ... are aimed at ensuring that investors continue to get reliable, accurate information about public companies in the marketplace.” “They will also provide an opportunity to double-check that broker-dealers and investment advisers have appropriate training for the employees and sturdy controls in place to prevent intentionally false information from harming investors.”

While this is an important first step, the SEC needs to undertake additional bold measures to constrain abusive short-selling and rumor-mongering. We urge the SEC to undertake a 45-day study of the markets, looking at all market participants, to determine the extent to which abusive and manipulative short-selling and spreading of false rumors is taking place, to issue a public report of its findings and to fashion appropriate regulatory and enforcement responses to what it finds. In addition, as we recently urged (see our memo of July 1, 2008), the SEC should immediately re-impose the Uptick Rule for a 120-day period in order to temper the heightened volatility and short-selling in the current market environment.

Of course, none of these prophylactic measures will have a significant impact in today’s fragile markets if the SEC fails to promptly bring enforcement actions against those who are engaged in abusive and manipulative short-selling. Where appropriate, the Commission should coordinate its enforcement efforts with the Department of Justice and U.S. Attorneys.

Edward D. Herlihy  
Theodore A. Levine  
Caitlin S. Hall

July 16, 2008

SEC Bars Naked Short Sales of Major Financial Firms; More is Needed

Yesterday evening, the Securities and Exchange Commission issued an emergency rule barring naked short sales of the stock of Fannie Mae, Freddy Mac and seventeen primary dealers such as Lehman, Goldman Sachs, Merrill Lynch and Morgan Stanley. The rule, which takes force July 21 and will be in effect for thirty days, comes on the heels of a week in which Fannie Mae and Freddie Mac stocks were battered by unsubstantiated rumors. While the Commission's effort to respond, in what it called "unusual and extraordinary circumstances," to "disruption in the functioning of the securities markets that could threaten fair and orderly markets" is commendable, immediate stronger SEC action is necessary.

Under the emergency rule, no person may effect a short sale in the securities of any of nineteen major financial firms, including Fannie Mae and Freddy Mac, unless it (1) has borrowed or arranged to borrow the security or otherwise has the security available to borrow in its inventory prior to effecting the sale, and (2) delivers the security on the settlement date. The rule thus somewhat tightens current regulations, which also permit short sales where an investor has "reasonable grounds" to believe the securities can be borrowed in time to be delivered on the settlement date.

The SEC's emergency action late yesterday represents a step in the right direction; however, additional prompt measures are necessary to remedy what Chairman Cox called a "witch's brew" of short selling and manipulative behavior. The SEC needs to expand the temporary action beyond its initial thirty-day period and extend its coverage to all publicly traded securities. We have previously urged the SEC to heed market participants' calls to immediately reimpose the "Uptick" Rule to temper heightened market volatility, and continue to believe that is the correct course, especially given that current market conditions differ substantially from the low volatility and rising security prices that existed when the SEC conducted its pilot study.

Moreover, while the Commission's attempts to rein in the "substantial threat of sudden and excessive fluctuations of securities prices" are critical, they alone are not enough; the Commission must promptly complete ongoing investigations and bring enforcement actions against those who engage in abusive and manipulative short selling. It is uncontroverted that there are false rumors in the marketplace. The key question is who is creating and spreading the rumors and for what purpose. There needs to be a public report by the SEC to provide clarity on the extent to which abusive and manipulative short-selling and spreading of false rumors is taking place (see our memos of July 1 and July 14).

Edward D. Herlihy  
Theodore A. Levine  
Caitlin S. Hall

July 21, 2008

Market's Dramatic Response to Naked Short Sale Restrictions  
Underscores Need for Additional SEC Action

Last Tuesday, the SEC issued an emergency order barring naked short sales in the stocks of nineteen major financial firms in response to what it called a "substantial threat of sudden and excessive fluctuations of securities prices." Since the Commission's announcement, other issuers, including banks, facing significant short interests in their stocks, have questioned why they were excluded from the list. While the Commission's effort to respond to abusive and illegal short sale practices is notable, the market's reaction to the emergency order underscores the urgent need for a more comprehensive approach.

Under the emergency order, which took effect today, short sales in the selected securities are prohibited unless a seller borrows or enters into a "bona fide" agreement to borrow the shares prior to effecting the sale. By contrast, shares in other securities may be sold short if the seller has "reasonable grounds" to believe the securities can be borrowed in time to be delivered on the settlement date.

As an important first step toward protecting the markets, the Commission should take swift action to enforce its existing authority, by strictly looking for abuses of the "reasonable grounds" requirement. Additionally, the SEC should work quickly to expand the emergency order's reach to all publicly traded securities on an extended basis.

The SEC should also take additional measures to ensure the stability and integrity of the securities markets. We have continuously urged the Commission to heed market participants' calls to immediately re-impose the "Uptick Rule," and believe doing so is vital to any attempt to maintain investor confidence in the fairness of the markets and prevent "bear raids." The Commission must also promptly complete its ongoing investigations into abusive and manipulative short-selling and the spread of false rumors, bring enforcement actions against those who have engaged in such practices, and publicly report on the results of its investigation.

Edward D. Herlihy  
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