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VIA ELECTRONIC SUBMISSION AND OVERNIGHT MAIL

May 19, 2011

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

RE: Release Nos. 34–64383; File No. 4–627
Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2)

Dear Ms. Murphy:

Overstock.com, Inc. appreciates the opportunity to respond to the U.S. Securities and Exchange Commission's request for comments (76 Fed. Reg. 26787 (May 9, 2011)) on the short selling studies required by Section 417(a)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ('the Act').

The statutory mission of the Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. Section 417(a)(2) of the Act advances that mission. Specifically, Section 417(a)(2)(B) requires the Commission to study the feasibility, benefits, and costs of conducting a voluntary pilot program in which public companies would agree to have all trades of their shares marked ''long,'' ''short,'' and/or ''market maker short',' and ''buy'' and/or ''buy to cover'' and reported in real time through the Consolidated Tape.

Overstock.com believes that implementation of a disclosure pilot program that adds long, short, and market maker trade designations to the consolidated tape will help investors and regulators to understand price movements. Legitimate market participants benefit from such real-time trading transparency. Accordingly, we urge the Commission to implement as soon as is practical a pilot program that allows companies to opt-in to the program.

The Section 417(a)(2)(B) pilot program should have the following features:

1. The pilot program should include each of the short, market maker short, buy, buy-to-cover, and long designations. This will allow for meaningful analysis of trade data that disentangles trading done for the purpose(s) of market making and/or covering from trading done for the purpose(s) of investing and/or speculating.

2. The pilot program should make the trade data on all companies in the program available publicly. This will ensure that the pilot program produces those conditions that best approximate real-world implementation.

3. The pilot program should report transaction level data (not aggregate data). Trade time is an information component of a trade so the pilot program should reveal when trades occur.

4. The pilot program should include an assortment of issuers and, perhaps, an element of random selection to ensure that the program's validity is not challenged on the grounds that the sample was biased or unrepresentative. To the extent that the pilot program is voluntary, however, Overstock.com is highly interested and offers to participate.

5. The pilot program should include a variety of equity issues, including exchanges traded funds (ETFs). Presently, ETFs are notable both for their popularity as well as their high fails-to-deliver (FTDs), both absolutely and as a share of all FTDs. (See point 15 below.)

6. The pilot program should be coordinated with Commisions's Audit Trail Initiative Team. The Commission's proposed consolidated audit trail system would help to improve accuracy and efficiency in trade accounting. A pilot program conducted as per Section 417 may provide an opportunity for the Commission to test the efficacy a new consolidated audit trail system.

Overstock.com's interest in the pilot program.

7. Overstock.com feels that the pilot program will facilitate even more timely publication of current and historical short sale and FTD data. Overstock.com has a long history of advocacy on issues related to short selling, trade settlement failures and Regulation SHO reform; Overstock.com still holds the issuer record for consecutive *and* total days on the Regulation SHO Threshold List. Overstock.com appreciates that short selling contributes liquidity, efficiency and price discovery to the market. Notwithstanding welcome past actions by the Commission, however, naked short selling, settlement failures and market manipulation persist. Increased transparency may help to curb these pernicious perennial problems.

How issuers would use real-time short and long trade information:

8. Not all trades are equal. Trades executed by market makers mean something quite different than trades executed by investors. Real-time trade data that disaggregates long and short sales will help issuers to disentangle and understand the reasons for short-run movements in stock prices.

9. If issuers suspect that market manipulation is occurring, the availability of real-time trade data may help to support these suspicious. Alternatively, real-time disaggregated data may help to dispel myths regarding market manipulation and/or alleviate unnecessary concerns.

10. Real-time trade data may help issuers to detect and respond appropriately with corrective information to false information in the market, thus assisting in the protection of market integrity.

Potential costs and benefits of a Section 417(a)(2)(B) pilot program to issuers and others:

11. *Issuer Costs*. We believe that there are no direct costs to issuers. A pilot program may, however:
    a. Increase issuers' cost of capital as 'phony liquidity' disappears. This is a cost that issuers should be willing to bear, however, for timely and transparent trade data.
    b. Increase volatility due to herding behavior in short selling and or short squeezes as investors gain real-time information about short sale volume and price changes.
    c. Decrease volatility as investors distinguish market-maker short sales from investment.

12. *Issuer Benefits*. A pilot program may:
    a. Uncover abusive market manipulation.
    b. Indicate when non-public information may have been leaked.
    c. Help issuers to understand market sentiment with lower latency.
    d. Engender increased confidence in regulators and market integrity.

13. *Regulator Benefits*. A pilot program may:
    a. Serve as a timely tool for regulators to detect and address irregular trading.
    b. Facilitate the current audit trail project for execution of trades.
    c. Reduce errors and omissions in trade tickets and hinder compliance evasion.
    d. Streamline the reporting operations of institutions and exchanges tied to SROs.
    e. Protect the integrity of the markets.
    f. Assist in converging regulation and monitoring with European and Asian systems.
    g. Comply with the Obama Administration's call for greater government transparency.

14. *Investor/Academic/Data Provider Benefits*. There are two dimensions to real-time trade information: volume and price. Currently, short sale data is collected and reported separately by the SROs. When available, this data can be unreliable and prone to double counting and other errors. This seems to violate the spirit, if not the letter, of Regulation NMS. Real-time short sale reporting would help to mend flaws in the current short sale data regime. The additional information contemplated by the pilot program (e.g., short vs. long trade marking; which trades are due to market-making activity; how many purchases are to close out short positions) will enhance overall market efficiency by increasing publicly available data. This information will enable investors to make better decisions and provide new opportunities for proprietary analysis. This information will also level the investor playing field, since broker-dealers that undertake significant market making activity currently have more real-time information than retail investors and issuers.

Other Issues

15. *Settlement Failures in ETFs*. After 2008, overall equity settlement failures, as well as the number of stocks on the Regulation SHO Threshold List, declined markedly. This is likely a consequence of meaningful changes to Regulation SHO and enactment of Rule 204T

which imposed a hard close-out requirement for FTDs. Nevertheless, since 2008 settlement FTDs in ETFs have grown precipitously. This is partially due to the increased popularity of ETFs, which are a relatively novel investment product. The rise in FTDs in ETFs, however, is far greater than the increase in ETF trading volume alone. Below are some daily average statistics for 2010[1]:

a. ETF **volume** was **9%** of **all trading** volume on U.S. equity markets.
b. On average, **FTDs** in ETFs were **62%** of all FTDs; at most they were **93%** of all FTDs.
c. Average daily **FTDs** in ETFs were worth **$1.27 billion**; at peak they were **$7 billion**.
d. The **Regulation SHO Threshold List** featured an average of **45 ETFs** (over **53%** of the full list); on some days the **Threshold List** contained **96 ETFs** (**80%** of the list**)**.
e. **Short sales** in ETFs were roughly **42% of total volume** in ETFs. In some cases short sale volume in ETFs was nearly **100%** of total daily trading volume.

The magnitude of ETF settlement failures is particularly concerning given the presence of leveraged ETFs that offer double and triple exposure, which may give naked short sellers double and triple the short capacity. Anecdotal examples abound of ETFs tracking poorly the performance of underlying assets, including commodities and indices. ETFs may represent a new form of destabilizing and dangerous derivative risk to the settlement system and markets in general. Regulators and policy makers should take urgent action to understand why FTDs in ETFs are large and persistent.

16. *Market Manipulation and Terrorism*. In 2009, the Department of Defense Irregular Warfare Support Program (IWSP) commissioned a report "to consider the implications of financial terrorism and/or economic warfare and to identify and realistically list prospective threats to U.S. economic security."[2] The report, *Economic Warfare: Risks and Responses. Analysis of Twenty-First Century Risks in Light of the Recent Market Collapse*, identified naked short selling and manipulation of the settlement system as important factors in the 2008 financial crisis.[3] According to the authors, "Bear raids were perpetrated by naked short selling and manipulation of credit default swaps, both of which were virtually unregulated. The short selling was actually enhanced by recent regulatory changes including rescission of the uptick rule and loopholes such as "the Madoff exemption."[4] The Report warns that loopholes in the settlement system could be used by terrorists and/or hostile foreign governments to weaken the U.S. economy. The Report recommends that

[1] The sample is defined by the 963 Exchange Traded Funds (ETFs) that traded on U.S. markets in 2010. Fail-to-deliver data are provided by the SEC Freedom of Information Act (FOIA) Office. Stock volume data are provided by Financial Content. Short sale volume data and SEC Regulation SHO Threshold Lists are posted daily by NYSE, NASDAQ, ARCA, AMEX, CHX, and other major exchanges. For more information, see Appendix A.
[2] Kevin D. Freeman, CFA, "Economic Warfare: Risks and Responses," Cross Consulting and Services, LLC, June 2009, http://www.scribd.com/doc/49755779/Economic-Warfare-Risks-and-Responses-by-Kevin-D-Freeman.
[3] See Alexander Frean, "'Financial terrorists' pose grave risk to US," Times of London, February 2, 2011, http://www.thetimes.co.uk/tto/news/world/americas/article2896273.ece; Bill Gertz, "Financial terrorism suspected in 2008 economic crash," Washington Times, February 28, 2011, http://www.washingtontimes.com/news/2011/feb/28/financial-terrorism-suspected-in-08-economic-crash/; "Financial Terrorism," CNBC, March 2, 2011, http://video.cnbc.com/gallery/?video=3000008152.
[4] Economic Warfare, page 2.

the Commission "eliminate naked short selling by mandating delivery of shares [and] eliminate broad exceptions."[5] Overstock.com agrees with this recommendation.

17. *Settlement Failures and Systemic Risk*. A March 2011 paper reaches a similar conclusion. In "Canaries in the Coal Mine," Bradley et al. address the "extremely high and rising number and frequency of "fails to deliver" in mortgage-backed securities transactions (MBS) and in exchange traded funds (ETFs)."[6] They recommend that "appropriate regulatory authorities" should "impose substantial penalties or fees for all transaction fails."[7] Overstock.com agrees with this recommendation.

18. *Short Position Reporting.* Section 417(a)(2)(A) of the Dodd-Frank Act requires that the Commission conduct a study of short "position" reporting. The Commission observes that term "position" is not defined by Congress with specificity.[8] The scenario that Section 417(a)(2)(a) appears to envision is disclosure of short positions in listed U.S. tickers, including equity and options positions, held by hedge funds, market makers, broker-dealers and other major institutions. Comprehensive and accurate reporting of short positions by all market participants does not seem feasible and, for that reason, would not be useful to issuers.

    Overstock.com proposes an alternative to the scenario described by Congress. Currently, the Commission requires bi-monthly short position reporting by FINRA member firms only as per the current short interest reporting regime.[9] Overstock.com proposes that the Commission study the feasibility of requiring the SROs to make public the breakdown of short interest by FINRA member firm. Short position disclosure by FINRA firm would have the following benefits:

    a. The system would require few changes to the currently regulatory regime.

    b. Issuers would receive accurate, bi-monthly data on the short selling landscape that allows for meaningful comparisons across time.

    c. The system would offer regulators and issuers an "early warning" system for possible manipulation or fraud concentrated at particular broker-dealer(s).

* * * * *

[5] Ibid, page 75.
[6] Harold Bradley et al., "Canaries in the Coal Mine: How the Rise in Settlement "Fails" Creates Systemic Risk for Financial Firms and Investors," The Ewing Marion Kauffman Foundation, March 2011.
[7] Ibid, page 16.
[8] Securities and Exchange Commission, "Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2)," Federal Register (Vol. 76, No. 89), May 9, 2011, p. 26789.
[9] For example, see "Report Overview," NASDAQ Short Interest Publication Schedule, http://www.nasdaqtrader.com/Trader.aspx?id=ShortIntPubSch.

Conclusion

Overstock.com welcomes the opportunity to comment on Section 417(a)(2) of the Dodd-Frank Act. Real-time trade reporting will likely improve the information available to investors and issuers as well as reduce opportunities for market manipulation. Moreover, real-time trade reporting will not likely impose costs on issuers or reduce market liquidity. Either way, the SEC should conduct a voluntary yet academically sound pilot program to verify these predictions. In the process, Overstock.com hopes that SEC will revisit the twin issues of naked short selling and fails-to-deliver, particularly in ETFs. As always, large and persistent settlement failures threaten market integrity and may represent a grave systemic risk.

Sincerely,

Jonathan E. Johnson III

Jonathan E. Johnson III
President

cc: The Honorable Mary L. Schapiro, Chairman, Securities and Exchange Commission
The Honorable Luis A. Aguilar, Securities and Exchange Commission
The Honorable Kathleen L. Casey, Securities and Exchange Commission
The Honorable Troy A. Paredes, Securities and Exchange Commission
The Honorable Elisse B. Walter, Securities and Exchange Commission
Mr. Robert Khuzami, Director of the Division of Enforcement
Mr. Robert W. Cook, Director of the Division of Trading and Markets

APPENDIX A

Table 1: Summary Statistics for ETFs in 2010

VARIABLE	MEAN	STD. DEV.	MINIMUM	MAXIMUM
ETF Fails-to-Deliver (Millions)	30.35	14.96	7.13	136.45
ETF Volume (Millions)	1,398.66	510.24	481.59	3,981.93
ETF Short Sale Volume (Millions)	778.08	275.79	273.42	2,147.90
ETF Short Interest (Millions)	1,776.16	97.82	1,585.48	1,987.07
ETF Shares Outstanding (Millions)	17,654.27	805.48	16,452.00	19,239.92
ETF Stock Borrow Rate(s)	-0.85	1.68	-80.25	0.25
ETF FTDs / Volume	0.26	0.18	0.00	1.97
ETF Short Sales / Volume	0.42	0.03	0.33	0.98
ETF FTDs / ETF Shares Outstanding	0.004	0.001	0.00	0.90
ETF Short Sales / ETF Shares Outstanding	0.025	0.006	0.01	0.95
ETF Short Interest / ETF Shares Outstanding	0.049	0.003	0.04	0.98
ETFs on Regulation SHO Threshold List	45.43	17.78	1.00	96.00
Ratio of Reg SHO ETFs to All Reg SHO Stocks	0.53	0.15	0.02	0.80
Value of ETF FTDs (Millions)	$ 1,270.74	$ 867.83	$ 240.67	$ 7,019.00
Value of All Market FTDs (Millions)	$ 1,953.55	$ 933.21	$ 596.00	$ 7,509.89
Ratio of Value of ETF FTDs to Value of All Market FTDs	0.62	0.12	0.19	0.93
Ratio of ETF Volume to All Market Trading Volume	0.09	0.02	0.04	0.18

The sample is defined by the 963 Exchange Traded Funds (ETFs) that traded on U.S. markets in 2010. Data are for all trading days from January 4, 2010 to December 31, 2010. Fail-to-deliver data are provided by the SEC Freedom of Information Act (FOIA) Office. Stock volume data are provided by Financial Content. Short Sale volume data are provided individually by the major stock exchanges. SEC Regulation SHO Threshold Lists are posted daily by NYSE, NASDAQ, ARCA, AMEX and CHX. Stock borrow data provided by Finadium. Data on shares outstanding are provided by Bloomberg.

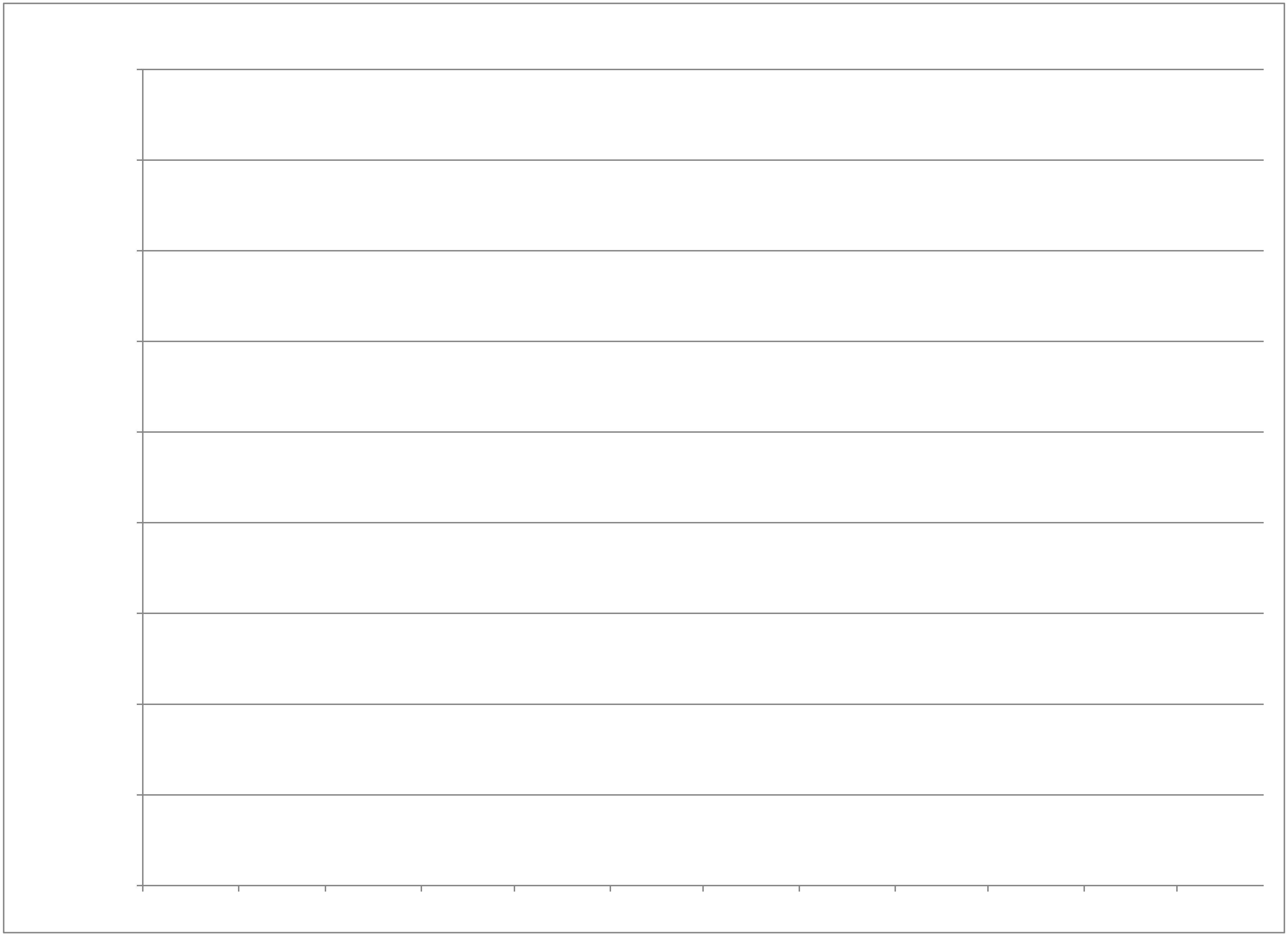
Figure 1: Daily CNS Fails-to-Deliver in ETFs and Russell 3000 Stocks

Data are for trading days from January 4, 2010 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.

Figure 2: Dollar Value of Daily CNS Fails-to-Deliver in ETFs and Russell 3000 Stocks

Data are for trading days from January 4, 2010 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.

Figure 3: Daily CNS Fails-to-Deliver in ETFs, Russell 3000 Stocks, and All Stocks



Data are for trading days from January 4, 2010 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.

Figure 4: Dollar Value of Daily CNS Fails-to-Deliver in ETFs, Russell 3000 Stocks, and All Stocks

Data are for trading days from January 4, 2010 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.

Figure 5: Daily Regulation SHO Threshold List Totals for ETFs, Russell 3000 Stocks, and All Stocks

Data are for trading days from January 4, 2010 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.

Figure 6: ETF Volume by Type

Data are for trading days from January 2, 2008 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.

Figure 7: ETF Fails-to-Deliver (FTDs) by Type

Data are for trading days from January 2, 2008 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.

Figure 8: Value of ETF Fails-to-Deliver (FTDs) by Type

Data are for trading days from January 2, 2008 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.

Figure 9: Value of ETF Fails-to-Deliver (FTDs) by Type; Y-Axis Truncated

Data are for trading days from January 2, 2008 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.

Figure 10: Value of ETF Fails-to-Deliver (FTDs) by Type; 2009 through 2010

Data are for trading days from January 2, 2009 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.

Figure 11: ETFs on the Regulation SHO Threshold List by Type

Data are for trading days from January 2, 2008 through December 31, 2010. Fails-to-deliver data are available through the SEC Freedom of Information Act (FOIA) Office at http://www.sec.gov/foia/docs/failsdata.htm.