9) Certain Wall Street intermediaries known as "Prime brokers" entrusted to ACT IN GOOD FAITH with their superior Knowledge of, Access to and Visibility of the playing field on Wall Street will be more than happy to breach this trust and share these advantages with hedge funds steering extremely lucrative "Prime brokerage" business in their direction. On Wall Street today with the mergers and acquisition business (M and A) slowing down the prime brokerage business and the lending department business are the cash cows and these two businesses are at the epicenter for many of these delivery failure related abuses (DFRAs).

10) "Prime brokers" that loan billions of dollars to hedge fund managers in their endless search for yet more systemic risk-laden "leverage" are **naturally** going to do whatever they can in their power to make sure that especially the negative bets placed by their hedge fund clients with this loaned money of theirs work out well for both the lender with its money at stake and the loan recipient. This is only **natural** and to be expected.

11) Wealthy hedge fund investors that pay these seemingly usurious "2 and 20" fees expect their hedge fund manager to establish and take advantage of a tilted playing field and to seek out these Wall Street intermediaries willing to breach their public trust in order to justify their paying of these exorbitant fees while hopefully earning themselves superior returns in excess of and often at the expense of less sophisticated investors without this critical mass and financial as well as political "Juice". Wealthy hedge fund investors naturally expect certain "Economies of scale" and better returns than the average Joe because of the larger amounts of money being invested. Hedge fund managers with this $10 billion in annual "Juice" to spread around on Wall Street are **naturally** highly incentivised by their "2 and 20" pay structure to spend this "Juice" where it will do their own pocketbooks the most good. This $10 billion in annual fees and commissions provided by hedge funds is a primary driver in this "cycle of corruption".

12) DTCC management entrusted to ACT IN GOOD FAITH while fulfilling their mandate to "Immobilize" and "Dematerialize" difficult to counterfeit paper-certificated shares into easy to counterfeit electronic book entry shares and to administer the largest of the Registered Clearing Agencies are **naturally** going to see to the needs of their 11,000 "Participants"/owners/bosses that sign their checks.

In reality "Abusive naked short selling" (ANSS) has very little to do with "Short selling". It bears a much closer resemblance to any of a variety of racketeering-related frauds especially those utilizing the "Anonymous pooling" of the assets of those being defrauded leading to the non-traceability of these assets. Typically some form of a "netting" process serving to obfuscate the details of individual transactions is involved as is the need for "cover up" frauds to be used when the existence of the primary fraud is in danger of being revealed. Also prevalent are Ponzi-type schemes and the alleged need for secrecy and lack of transparency usually associated with "Confidentiality" issues perhaps associated with "Proprietary trading methodologies", banking secrecy laws or as a means to prevent further fraudulent behavior like inducing "Upward market volatility" via "Short squeezes".

Even well meaning regulators can't rid the system of a certain type of fraud if they don't fully comprehend the incredibly brilliant design of the fraud and just how pandemic it has become. Education is the key to eliminating these frauds especially if you choose to attach "Scienter" ("a mental state embracing the intent to deceive, manipulate or defraud") as being a necessity for being held "Liable" for this form of blatant criminal misconduct. Who knows, maybe even some of the "bad guys" don't fully appreciate the criminal nature of their own misconduct but then again I kind of doubt it for the most part; constantly refusing to deliver that which you have sold after accessing the proceeds of the sale is not a tough concept for most of us to get our arms around.

If I could ask a favor of you at the SEC please whatever you do don't say that the writer of this "Comment letter" has some good ideas such that maybe we should float yet another "concept release" to make yet more modifications to Reg SHO or address the options market maker exception. We can address these issues indirectly and in an emergency fashion through Rule 10b-21 **now**. The corporations under attack don't have time for yet another trip through the legislation cycle without some kind of a life preserver being thrown stat.

IN REGARDS TO THE PROPOSED RULE 10B-21

I for one truly appreciate the efforts of the sincere employees at the SEC on this proposed rule but trust me as written it is far too narrowly-tailored to have much of an overall effect on deterring this particular form of criminal behavior. Abusive naked short selling (ANSS) which is the variety of naked short selling that you at the SEC are hopefully trying to curtail is much more broad-based than this approach can expect to be successful against. Abusive naked short selling (ANSS) as opposed to legitimate naked short selling (LNSS) performed by truly "Bona fide" market makers and only while they are acting in a truly "Bona fide market making capacity" (injecting liquidity on both buy and sell sides when order imbalances occur) relies upon a well-integrated and well-greased support system composed of **"Enablers"** in addition to the parties directly pulling the trigger on the abusive naked short sales themselves. There is plenty of overly trusting investor money available to siphon off in order to make this form of securities fraud lucrative to both the "Enablers" and the participants most proximate to the entering in of the sell orders.

When the DTCC finds itself in a crisis like the one recently faced when a dozen or so corporations fed up with the abusive naked short selling of their shares tried to bail out of the DTCC due to the DTCC's provision of support and cover for their abusive naked short selling DTCC participants boom the SEC is "Johnny on the spot" claiming that it wouldn't be consistent with Section 17 A's ('34 Act) mandate for "Immobilization" and "Dematerialization" to allow these issuers to escape. When the management teams replied by stating the fact that we tried "Immobilization" and "Dematerialization" but abusive DTCC participants that weren't quite up to that ACTING IN GOOD FAITH part of the deal refused to "promptly and accurately clear and settle" our transactions. The SEC response was in essence "Quit your whining". Later when investors complained about the final draft of Reg SHO containing a "grandfather clause" the response of an SEC Commissioner was in effect "you're just whining because your share prices didn't go up once Reg SHO went into effect".

WHAT MIGHT HAVE BEEN

Imagine for a moment if those 12 or so U.S. corporations were able to escape the abuses at the DTCC and implement their plan to base the trading of their shares on paper-certificated shares only ("Custody only") wherein this time around the easy to counterfeit DTCC electronic book entries were not allowed. In essence this amounts to reversing the "Immobilization" and "Dematerialization" instituted to address the 1969 "Paperwork crisis" that nearly paralyzed Wall Street.

Recall how the legislators at the time went way out on a limb and assumed that the DTCC management and participants would ACT IN GOOD FAITH with this new found ability to easily counterfeit securities when they exist in an electronic book entry format. The immediate response of being granted a release from the DTCC would have involved the shareholders of these 12 or so issuers demanding the delivery of their paper-certificated shares from the DTCC vaults in order for them to regain liquidity and the ability to sell their shares. But what would have happened if the allegations were true and that there was a vast disparity between the legitimate paper-certificated shares in the DTCC vault system and the electronic book entries that were floating around in cyberspace at the DTCC and on the books (and off the books) of their "Participants". There would have been the need for massive buy-ins perhaps leading to "Short squeezes" from this modern day version of a "Run on the bank". Whoa, this escape plot needed to be foiled at all costs even if it made the DTCC and the SEC look a little bit heavy-handed. After all, wouldn't you think the DTCC would have loved to have gotten rid of these "Scammy" companies and their shareholders that did nothing but complain about these abuses?

When you move on to a "Custody only" basis for the transferring of ownership of securities the shareholders and the corporations involved absorb all of the costs. I recall a "Comment letter" dealing with the then "proposed" Reg SHO wherein a DTCC participant was urging his colleagues on Wall Street to just make the delivering of shares to investors cost prohibitive so that they couldn't escape the clutches of the DTCC. He commented that his brokerage firm recently did it and it worked like a charm!

The loopholes provided by the DTCC's "Continuous Net Settlement" system as well as their "Automated Stock Borrow Program" and "RECAPS" program are integral to the subset of these frauds occurring directly in the DTCC. The critical mass attained by the 11,000 "Participating" broker/dealers (b/ds), banks and thrifts of the DTCC that "Legally" own every share held in "Street name" is beyond comprehension. The DTCC really has literally become "Too big and too important to our financial system to fail or to hold accountable" and don't the perpetrators of these thefts know it. The ability of DTCC participants to access the incredibly corrupt rules and regulations of the DTCC and NSCC is a significant "Enabler". The number of self-serving rules in that text that are in direct contravention of the 7 securities acts is barely countable. The presumption that all 11,000 b/ds and banks entrusted to "promptly and accurately clear and **settle** (involving "good form delivery") securities transactions" while ACTING IN GOOD FAITH was a leap of faith beyond description for the legislators of that time to make. The DTCC management's placing their participants essentially on the "honor system" in this regard was not anticipated by the legislators that wrote Section 17 A as well as UCC Article 8 (allowing the creation of securities entitlements).

The various market participants and prime brokers willing to provide "Deceitful locates" (DLs) and "Deceitful borrows" (DBs) in order to keep their hedge fund clients happy are prominent examples of "Enablers". Oftentimes two co-conspiring brokerage firms will "Pair off" and provide "Deceitful locates" to each other when asked to. Recall that a "Deceitful locate" only lasts for 3 days and once the resultant FTD makes it into either the dark protective sanctuary provided by the DTCC "C" sub accounts or into an Ex-clearing format then it's good for life in our current system.

This is similar to the "Pairing off" done in "Ex-clearing" wherein 2 corrupt b/ds mutually agree not to buy-in each other's FTDs which creates a black hole for unsettled trades and a repository for FTDs to secretly accumulate. How prominent is this? Recall the Evans, et. al. research indicating that 0.12% of the time a buy-in is mandated is it executed. How do they get away with this? Rule 15c6-1 of the '34 Exchange Act prohibits broker/dealers from effecting or entering into a contract to purchase or sell a security that provides for payment of funds or delivery of securities later than the 3rd business day after the date of the contract UNLESS **OTHERWISE EXPRESSLY AGREED TO BY THE PARTIES AT THE TIME OF THE TRANSACTION.**

Now is where things get interesting. Let's say that b/d "TS" a "Theoretically selling" b/d and b/d "TB" a "Theoretically buying" b/d enter into one of these "Expressly agreed to contracts" and set the "Settlement date" for this "Theoretical" transaction at T+100 days. Who is the legal "Owner" of these shares on T+20? Perhaps more importantly, who else knows about the existence of these secret "contractual arrangements"? The DTCC and the SEC certainly don't monitor for these "contractual arrangements" forbidden by the '34 Act although it is critical that they start. Since no money has changed hands and nothing has been delivered then the "participant account" at the DTCC still states that b/d "TS" is the "owner of record" (right below Cede and Co.) of that parcel of shares then b/d "TS" would be allowed to sell these shares whenever it wanted to through the DTCC's CNS (Continuous Net Settlement) program during this 99-day period.

The "good form delivery" of that which you sold within a reasonable timeframe isn't really that difficult of a concept for most to grasp. The obvious solution for a clearance and settlement system with even a modicum of integrity would be to NOT ALLOW FTDs IN THE FIRST PLACE i.e. YOU CAN'T GAIN ACCESS TO AN INVESTOR'S FUNDS OR SELL SECURITIES UNTIL THAT WHICH YOU ARE SELLING SHOWS UP FOR DELIVERY. The funds and the securities could then be exchanged simultaneously JUST LIKE EVERYWHERE ELSE IN THE BUSINESS WORLD! Why should Wall Street especially with all of its conflicts of interest present be any different?

The single most damaging of all of these "Satellite" clearing systems is in the form of Canada's "Central Depository for Securities" or "CDS". When combined with Canada's "Investment Dealers Association" (the "IDA"-their NASD analogue) that publicly finds no issue whatsoever with the abusive naked short selling of U.S. corporations this duet is a main factor in "Enabling" these crimes. Why? Because the CDS is allowed to "Interface" with the DTCC directly via its own "5099 Participant account" and channel in all of the FTDs generated in Canada and allow them to be nurtured, covered up and protected from being bought in by the DTCC management's pleading to be "Powerless" to do what it takes to legally "settle" trades and "Powerless" to monitor the "business conduct" of its participants despite the fact that it acts as an SRO mandated to perform that function.

A fraud similar to these "Expressly agreed to contracts" occurs in the use of certain types of "Repurchase agreements". In an effort to bypass expensive "Borrows" or the unavailability of a "Borrow" some abusive naked short sellers enter into bogus "Repurchase agreements" similar to the "Expressly agreed to contracts" described above. They feel they can bypass labeling a "Short sale" as a "Short sale" and effectively bypass borrowing fees or the unavailability of a borrow if they agree to "repurchase" the shares they are selling at some time in the future. This allows the "pairing off" of abusive DTCC participants intent on committing these thefts. I can easily picture abusive DTCC participants coming up with these clever MOs and somehow justifying in their own mind that they're so clever that they deserve to get away with this behavior that most can recognize as being criminal in nature. Perhaps part of the problem is that they don't have to look their victims in the eye. Does a clever "safe cracker" feel that he deserves the contents of somebody's safe if he's clever enough to outsmart the locking mechanism?

Recall the definition of a "Short sale": - the sale of a security that the seller does not own and that is **consummated by the delivery of a security** borrowed by or on behalf of the seller. Perhaps their theory is that since there was no "consummation by the delivery of a security" which was circumvented by the promise to buy the securities back later then it technically wasn't a "Short sale" that needed to be labeled as a "Short sale". Perhaps so but it's still fraudulent to intentionally drive share prices downwards by creating and refusing to cover FTDs. All of these clever behaviors need to be **specifically** codified as being not only clever but also unlawful in Rule 10b-21.

In these "repurchase related frauds" (RRFs) during this interim time period before the shares get "repurchased" incredibly damaging FTDs are generated which poison the share structure of the targeted corporation which is under attack. You can expect these types of games being played (frauds being committed) in development stage corporations with very few shares that are "Legally borrowable". Why? Because the lack of "Supply" of "Legally borrowable" shares (a natural deterrent to these crimes) makes a legitimate "Borrow" very expensive due to supply and demand interactions. This makes it more important to fraudulently bypass this expensive "Borrow". Most legitimate "Borrows" come from one of 2 sources. The first is margin accounts wherein the investor signed a margin agreement allowing the "hypothecation" of these shares. The second is from institutional investors wanting to make a little rental income on the side. The problem is that the companies typically attacked usually have little or no shares held in margin accounts since they are nonmarginable securities and they typically have little or no institutional ownership. Thus there are very few "legally" loanable shares available and those that are would fetch a hefty rental fee.

Why attack corporations with very few "legally borrowable" shares; does this not seem counterintuitive since the borrows would be very expensive? At first glimpse it does but keep in mind that these corporations with hard to borrow shares usually happen to be the development stage corporations that are the most defenseless against these "Bear raids". Why would you pay for an expensive "Pre-borrow" if you can bypass this expense or possibly unavailable borrow by partnering up with a MM willing to pretend to be acting in a bona fide market making capacity in exchange for this extra "Order flow" you are willing to provide.

In a clearance and settlement system with integrity the added expense of borrowing hard to borrow shares would naturally protect these relatively defenseless stocks from attack. The going well out of one's way to intentionally remove the natural market deterrents to these crimes by both the DTCC and the SEC is totally unconscionable given their respective mandates.

The lack of legally borrowable shares is seen as a minor inconvenience necessitating the perpetration of a few accessory frauds during the perpetration of the main fraud involving selling that which you refuse to deliver and thereby the intentional creation of illegitimate FTDs and portraying them as being legitimate i.e. of an ultra-short term lifespan. If you attack a Microsoft-sized company and force their share price down 50% they'll just take the cash in their coffers and buy back and cancel shares which will turn the tables on the fraudsters. Yet to be cash flow positive development stage corporations don't have this luxury.

Legitimate "Repurchase agreements" are typically overnight vehicles used in the banking business. Again, Rule 10b-21 would be an excellent vehicle to specifically identify this type of activity as being deemed unlawful so that there is no confusion or plausible deniability created and the scienter prerequisite can be met.

The concept of not allowing a transaction to be portrayed as having cleared and **<u>settled</u>** UNTIL delivery occurs and not allowing a seller to touch the funds of an investor UNTIL delivery occurs is so simple and straight forward that it boggles the mind as to why it is not the law of the land as suggested by all of the world's leading authorities on clearance and settlement issues. The reason it's not the law of the land is because the ever-dominating financial industry members would not get paid their commissions and mark-ups UNTIL delivery occurred and obviously their income would drop because so many of these transactions do indeed fail to "Legally settle" (irrespective of what the DTCC says) due to the lack of "Good form delivery".

The DTCC management can throw all of these transactions into a box labeled "kinda-sorta settled" all they want but these trades still aren't legally "settling". Compare the concept of "Good form delivery" to the aforementioned "Expressly agreed to contracts" and fraudulent "Repurchase agreements". There is nothing associated with those "Arrangements" that even remotely resembles "Good form delivery" or any kind of delivery for that matter. Since when did the definition of "settlement" become so malleable? "Settlement" refers to the <u>conclusion</u> of a transaction in which that which was purchased is paid for and that which was paid for is delivered i.e. "delivery versus payment". Why should a broker acting in an "agency" capacity get access to his commission check before his client gets delivery of that which he or she purchased? A real estate broker doesn't why should a Wall Street broker. Again, what's so special about Wall Street?

The fraudsters don't even have to fake "Good form delivery" in our current system. Could you imagine the purchasers of the fake shares involved in these transactions trying to sell that which they purchased and being told the truth and that they couldn't sell them because unfortunately there never were any shares purchased because an "Expressly agreed to contract" or "Repurchase agreement" was involved; better luck next time and by the way thanks for the commission? If you're truly proud of all of these loopholes then tell the world about them and let <u>informed</u> investors decide whether or not to hop onto this grossly tilted playing field. If you're not proud of them then get rid of them. The one thing you can't do is to refuse to get rid of them <u>and</u> refuse to bring them to the attention of the investing public as clearly mandated by the '33 Act.

Many "Prime brokers" that service the needs of hedge funds must be willing to break whatever laws need to be broken in order to attract the business of these financial behemoths theoretically not needing to be regulated. These are often the providers of the "Deceitful locates" and "Deceitful borrows". Remember that hedge fund managers are under unbelievable pressure to perform but are exposed to the opportunity to create unfathomable wealth if they can consistently provide extraordinary returns above and often at the expense of those of America's investing public. Consider the following scenario:

HYPOTHETICAL CASE STUDY: NO BORROW AVAILABLE FOR A "HARD TO BORROW" SECURITY

Thus hopefully you at the SEC commissioned to provide "Investor protection and market integrity" can appreciate that abusive naked short selling is not only pandemic in our markets but not amenable to sharply focused enforcement modalities as seen in the proposed Rule 10b-21. The point being that this monster has a lot of tentacles and utilizing the laser approach on just one aspect of it just results in an end run to the next handiest loophole of which many remain even after Reg SHO. How else can you explain the same corporations remaining on the Reg SHO "Threshold lists" for hundreds of days at a time even though T+13 day buy-ins are theoretically mandated? Remember the Evans study showing that even "mandated" buy-ins are universally ignored on Wall Street. Under which "Shell" in this "Shell game" are those "Failures to deliver" hiding today? How about tomorrow?

THIS IS CRIMINAL BEHAVIOR

The other point that needs to be conveyed to you at the SEC as well as those at the DOJ is that this is indeed criminal activity. In securities law the crime referred to as "Stock manipulation" involves the intentional interference with the natural levels of supply and demand of the shares of a publicly-traded corporate entity. In Abusive Naked Short Selling ("ANSS") and Delivery Failure Related Abuses ("DFRAs") both the "Supply" of readily sellable legitimate shares and the supply of readily sellable but mere "Securities entitlements/IOUs" becomes grossly exaggerated. How does the supply of legitimate shares go up? It's due to the fact that these usually yet to be cash flow positive smaller corporations are forced during these attacks to raise funds to pay their monthly "Burn rate" by selling legitimate shares into the open market at artificially depressed prices. It's the artificially depressing of the share prices where the crime is committed not the forcing of a company to raise money to pay its bills.

This artificially induced "Oversupply" of readily sellable "Book entries" (Some legitimized by paper-certificated shares and some not) found on an investor's monthly brokerage statement then interacts with the ambient "Demand" levels to accomplish "Price discovery" at an artificially manipulated lower level. As mentioned these usually small corporations that are yet to be cash flow positive are then forced by necessity to constantly go to the markets to raise funds at usually steep discounts (associated with the implied risk associated with "Penny stocks" whose share prices are in free fall) to these already artificially depressed levels in order to just service these monthly burn rates. This results in a predictable "Death spiral" in the share price of the targeted corporations as these "Failures to deliver" pile up in their various hiding places around Wall Street out of sight of the investing public but well within the sight of the SEC, the DTCC "Participants" and the SROs except for those held in ex-clearing formats. To exacerbate this "Death spiral" phenomenon one has to keep in mind that as the share price tanks those that are selling the nonexistent shares gain yet more "Leverage" as their collateralization requirements lessen which allows this extra "Cash flow" (the investor's cash) to support further rounds of naked short selling. Notice the self-fulfilling prophecy aspect of these frauds and their self-propelling nature. Why? It's all because a development stage corporation has to pay its monthly bills or file for bankruptcy.

This brings us to the concept of **"STOCK FRAUD"** which is legally defined as: **A deliberate misrepresentation (deception) made during the buying and selling of securities which causes another to suffer damages usually of a monetary nature.** The "Damages" have to do with the predictable/inevitable drop in share price associated with the artificial increase in the "Supply" ("Manipulation") of readily sellable "Book entries" (the arithmetic sum of legitimate "Shares" plus "FTDs"). Note also that the "Effective demand" variable is also manipulated downwards as the price buoying effect of buy orders is muted by the constant selling of fake shares into what should be share price enhancing buy orders. The simultaneous increase in the "Supply" variable and decrease in the "Effective demand" variable is what produces the drops in share prices which can be very dramatic. The net effect is that illegitimate delivery failures not associated with "Bona fide" market making are the proximate cause of predictable damages.

Due to the reality of the "Ultimate paradox" when a buy order appears for development stage issuers the antennae of the abusive DTCC participants go up. Why? Because of the existence of the "Ultimate paradox", "DRAMA" and the fact that there is a check attached to each buy order. This results in the aggressive "undercutting" of preexisting offers and the banging of bids when a buyer's order appears. There is a race to that check because there's no need to deliver anything after grasping that check. This phenomenon results in a "blanket" of sell orders at the lowest offer that seems to never lift no matter how many buy orders enter the market. If a MM had its druthers it would like to sell fake shares at higher levels but if there are competitors out there also going after the same checks then the feeding frenzy will be at lower levels.

A lot of times these buy orders don't even make it to the market because the buying b/d can naked short sell into that buy order via "desking" at its own trading desk. A buying b/d has "first dibs" on that check. It still has to report this trade in a timely manner and this is part of the reason you see trades being executed between the highest bid and the lowest offer.

In "Abusive naked short selling" (ANSS) the "Misrepresentation/deception" is two-fold. Firstly, there is the "Misrepresentation" involving what you are selling as being a legitimate "Share" or unit of equity ownership in a corporation with its full "Package of rights" attached. The phraseology used by the investor to his broker was to buy me 100 "Shares" of "ABC" company. Secondly is the "Misrepresentation" that you are going to deliver on T+3 that which you are selling. Fraudulent behavior usually involves a "Deception" that leads to monetary gains of the "Deceiver" and monetary losses to those being "Deceived".

On Wall Street this "Deception" gets partially obfuscated by the fact that the "Legal" or "Nominal" owner of all shares held in "Street name" is the DTCC's nominee "CEDE and Co." Some at the DTCC contend that with "legal ownership" comes the right to pretty much do anything they want with their "Shares" that you paid for.