Re: S7-08-08
The proposed Rule 10b-21 Amendment to the '34 Exchange act

Dear Chairman Cox and Commissioners,

I thank you once again for the opportunity to comment on the proposed Rule 10b-21 addressing abusive naked short selling (ANSS) frauds. A rare opportunity to get inside the heads of the secretive Wall Street brokerage industry and secrecy-obsessed hedge fund community occurs when the SEC invites "comment letters" on proposed legislation attempting to address corrupt practices on Wall Street. If not contested by those in favor of and benefiting from the corrupt "status quo" on Wall Street the end result might be changes to this "status quo" lest these parties not allow their powerful voices to be heard. The problem for these market "professionals" is that they must go public with these "comment letters" wherein the victims of these corrupt practices get a glimpse of the mindset and perhaps the identity of those fighting to maintain the corrupt status quo. What further complicates matters for those in favor of the corrupt status quo in the case of abusive naked short selling (ANSS) is that this subject matter has gained the attention of victimized investors worldwide that are angrily screaming for <u>meaningful</u> reform.

Those in favor of the corrupt status quo then have the unenviable task of convincing the SEC in a public forum that the corrupt status quo is just fine while not revealing to the victims of these abuses any information that might serve to individually identify these parties and make them the target of any investor efforts to seek compensation for damages incurred. In other words from doing the targeting of corporations to bring down to becoming the target of perhaps criminal investigations. After all, the victims of these abuses are the brokerage firms' clients and Rule 10b-21 brings into the mix concepts such as "deception" and "fraud" and the "aiding and abetting" of criminal behavior. Thus it becomes necessary to utilize a "lobbyist" or "trade group" of b/ds or hedge funds to attempt to get their points across such that the individual b/ds and hedge funds proffering these arguments cannot be identified and directly linked to the often unpopular stances being taken. Usually just the opposite is true when the angry individual victims of these crimes submit "comment letters" that they typically sign off on individually. In this particular "comment letter" solicitation process associated with 10b-21 it does not appear that any one brokerage firm cared to individually proffer <u>any</u> of the perhaps 20 or so arguments against the SEC's proposed Rule 10b-21 that their lobbying group SIFMA decided to posit. As you read the "comment letter" perhaps you'll understand why.

All of this results in the necessity to proffer some pretty interesting arguments in defense of the currently corrupt status quo. One trick of the trade I've noticed is for the "lobbyists/trade groups" making the arguments in favor of the status quo to send in their "comment letters" <u>after</u> the deadline date for submission (release date plus 60 days) has expired perhaps so that the SEC sees it but less investors see it and the chance for rebuttal is minimized. True to form <u>both</u> groups of lobbyists representing the hedge funds (MFA) and the broker/dealers (SIFMA) sent in their comment letters pushing for the maintenance of the status quo two to three days <u>after</u> the expiration date for comments. This followed approximately 400 or so comment letters perhaps 98% of which <u>angrily</u> demanded a radical change from the status quo.

Below I've copied both of these trade groups' "comment letters" in regards to the proposed Rule 10b-21's changes suggested by the SEC to address naked short selling frauds that remain pandemic in nature even after Reg SHO became effective on 1/3/05. The gist of the proposed Rule 10b-21 is incredibly simple and nearly impossible for any neutral party to find an issue with. The proposed rule simply deems it unlawful or fraudulent for sellers of securities (including b/ds trading for their own accounts) to **"deceive"** market intermediaries and purchasers of shares in regards to their ability or intent to deliver shares by settlement date or to **"deceive"** these parties in regards to the "ownership" of that which they are selling as well as the "locate" sources utilized in the short sale transaction. I've inserted my comments parenthetically and written in red to a select sample of the arguments being made.

These opportunities to get inside the heads of the secrecy-obsessed hedge funds and Wall Street community come few and far between but they do provide excellent educational opportunities and due to the heinous and obvious nature of refusing to deliver to the purchaser that which you sold them i.e. "abusive naked short selling" (ANSS) frauds and delivery failure related abuses (DFRAs), the elimination of these frauds centers around the **education** of everybody from the investors being robbed all the way up to the Congressional Oversight Committees responsible for overseeing the SEC as well as the DOJ.

From an educational point of view I've found it easiest to summarize the proposed Rule 10b-21 as follows:

It shall be deemed unlawful/fraudulent for short sellers to use **deception** associated with:

1) Their intent on delivering the shares sold short by settlement date.
2) Their ability to deliver shares sold short by settlement date.
3) Their sourcing of Reg SHO mandated "locates" or "pre-borrows".
4) Their "ownership" of the shares being sold (as it typically relates to intentionally lieing about "ownership" and labeling "short sales" as "long sales" usually in an effort to illegally circumvent expensive or unavailable "locates" or "borrows".)

As you can see below their arguments are eloquently presented and they are well-organized, well-educated and well-funded. The investors seeking relief from market abuses, however, are not well-organized, not well-educated in naked short selling matters, not well-funded and do not have equal access to the ear of the regulators and SROs.

THE SIFMA LETTER (**S**ecurities **I**ndustry and **F**inancial **M**arkets **A**ssociation)

May 22, 2008
Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303
Re: Release No. 34-57511; File Number S7-08-08
Proposed Rule 10b-21
Dear Ms. Morris:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Securities and Exchange Commission's (the "SEC" or "Commission") proposed anti-fraud rule, Rule 10b-21 (the "Rule")[2], which is intended to target: (i) short sellers who deceive certain persons, such as their broker-dealers, about the source of borrowable shares, in order to circumvent the Regulation SHO "locate" requirement; and (ii) long sellers who misrepresent to their broker-dealers that they own the shares being sold. (Comment: Actually these are "short sellers" that intentionally mislabel "short sales" as "long sales" in order to circumvent the expense or unavailability of borrows or locates especially as they pertain to the "hard to borrow" securities of the corporations typically attacked in this crime wave. Their goal is to get the resultant FTD (failure to deliver) hidden in either an ex-clearing format or at the DTCC in their "C" sub accounts where DTCC management can be 100% counted on to hide the FTD from public view and to plead to be "powerless" to buy-in the delivery failure no matter its age despite the fact that they have been delegated the SEC's congressional mandate to "promptly settle" all transactions.) Specifically, Proposed Rule 10b-21 would be violated if: (1) a seller of a security deceives a broker-dealer, participant of a registered clearing agency, or purchaser (emphasis added) (Comment: How refreshing for the congressionally mandated provider of "investor protection and market integrity" (the SEC) to finally recognize the **"purchaser"** of these bogus shares being sold i.e. the "victims" of these thefts. Note that all of the unfortunately unidentifiable "purchasers" of naked short sold shares as well as **all** current shareholders of the corporations involved are deceived and damaged by "naked short selling" unless the naked short sold shares were sold by a truly bona fide MM while acting in that capacity. This is due to the fact that the DTCC chooses to hold all shares in "street name" in an "anonymously pooled" or "fungible mass" format. Although this policy streamlines the clearance and settlement system it unfortunately precludes an investor from being able to track the whereabouts of the specific parcel of shares that he or she purchased and whether or not it was ever delivered on settlement date.

A "theoretically" bona fide MM that illegally accesses the exemption from performing "locates" and "pre-borrows" before making admittedly naked short sales i.e. he labeled the short sale "SSE" or "Short sale exempt" and that absolutely refuses to cover his pre-established naked short position as the PPS drops would obviously also be guilty of deception/fraud and causing damages as a truly bona fide MM with an outstanding naked short position in an issuer would, **by definition,** cover this "open position" as the share price of the issuer drops and buy-side liquidity is in need of being injected. Note that even if the MM didn't have a preexisting naked short position established after declaring himself as a market maker in a security he is obligated to stand ready to inject liquidity on the buy-side as the PPS drops. It is, however, totally inexcusable and fraudulent not to cover previously established naked short positions as the PPS drops. Part of the problem is associated with the lack of a "barrier to entry" to becoming a market maker. You merely need to file or piggy-back onto another b/d's 15c-2-11 and voila you're a MM capable of accessing that incredibly powerful exemption for your own predatory trading intent or for that of those with deep pockets willing to steer you order flow in exchange for your willingness to illegally access that exemption. If aiding and abetting liability were a reality then abusive MMs might think twice about prostituting themselves in search of the almighty dollar.) regarding its intention or ability to deliver the security sold on the date delivery is due; (2) the seller fails to deliver the security sold and (3) the seller acts with scienter. (Comment: Thus in the proposed Rule 10b-21 you need all 3 of the following prerequisites to be held liable for unlawful or fraudulent activity: deception, an FTD (failure to deliver) and scienter i.e. a mental state

embracing the intent to deceive, manipulate or defraud. Note that in actuality this would appear to be extremely forgiving for those involved in inadvertent delivery failures not of their own fault which is indeed appropriate. You'll see in a moment wherein the authors of this "comment letter" will attempt to obfuscate the issue and argue that one of the "unintended consequences" of this ill-conceived rule is that those making inadvertent delivery failures will get "busted" right and left.

With an FTD listed as being one of the three prerequisites one can appreciate how critical it is for the SROs and regulators truly interested in addressing this crime wave to monitor for and tally **all** FTDs wherever they occur. This especially includes those created and held in an "ex-clearing" format which has become the location of choice for perpetrating these frauds since Reg SHO only pertains to abuses occurring in a "registered clearing agency" (RCA) like the DTCC. Since the parties being damaged i.e. the deceived purchaser of the shares involving ANSS as well as all other shareholders of the corporation under attack have no clue that any of the three prerequisites have occurred then the burden would obviously fall on the SROs, the regulators or perhaps the DOJ to detect these unlawful or fraudulent behaviors by firstly recognizing and tallying all FTDs. Even the "agents" of these purchasers being defrauded, the purchasing b/ds receiving a commission and therefore owing a fiduciary duty of care to the purchaser, are blindfolded to these frauds due to how our current clearance and settlement system utilizes a "netting" procedure known as CNS "netting'. You'll notice the recurring theme in these ANSS frauds being the lack of transparency needed as a prerequisite for committing frauds as obvious as refusing to deliver that which you sell.

The obvious place to start in addressing these crimes is for these parties to have full visibility of all FTDs and then determine if the other two prerequisites have been met. This is going to necessitate the SEC taking a different attitude than turning a blind eye to the crimes being committed in the "ex-clearing" arena seen heretofore. The public disclosure of the absolute number of FTDs poisoning the share structure of a given U.S. corporation is mandated by the '33 Act-"the Disclosure Act" since this information is irrefutably of a "material" nature. In fact no information could possibly be more "material" to a prospective investor in especially thinly-traded development stage corporations particularly susceptible to these frauds. If the corporation under attack has so many preexisting FTDs poisoning its share structure that it has been effectively preordained to die an early death then that would be a "material" fact that must be made public to any prospective investor. If that policy might prove to be too embarrassing to the authorities then perhaps the excessive levels of FTDs currently damaging issuers and their shareholders should be proactively removed so that the truth can be told and so that our regulators won't be guilty of breaking the very tenets of the 7 securities acts they are commissioned to enforce.)

I. Introduction and Executive Summary

SIFMA strongly supports the SEC's stated goals of addressing potentially abusive "naked short selling" practices. Though not defined, (Comment: This lack of a formal legal definition for "abusive naked short selling" (ANSS) is itself an absurd concept that needs to be addressed before any meaningful reform can be accomplished. After all how can a regulatory authority deal with a crime that has no formal legal definition? Might I suggest: "ABUSIVE NAKED SHORT SALE" (ANSS)-the fraudulent sale of a security that involves a delivery failure, scienter and deception in regards to either the ability or the intent of the seller to deliver shares sold by settlement date, deception involved in the sourcing of the

mandated "locate" or "pre-borrow" as per Reg SHO or deception involved in the "ownership" of the securities being sold as defined by Rule 200 (b) of Reg SHO. (Note that the illegal accessing of the exemption from mandated "locates" and "pre-borrows" by market makers not acting in the capacity of a truly bona fide MM willing to inject both buy-side and sell-side liquidity when order imbalances occur would obviously qualify as a form of "Abusive Naked Short Selling" or "ANSS". It is critical for Rule 10b-21 to specifically address this point as the majority of ANSS frauds are currently being committed by "not so bona fide" market makers illegally accessing this incredibly powerful exemption to further their own "predatory" trading strategies or on behalf of others willing to direct them lucrative order flow or prime brokerage activity.)

With the above definition an "Abusive naked short sale" (ANSS) could then be equated to a "Fraudulent naked short sale" (FNSS) which could be contrasted with a "Legitimate Naked short Sale" (LNSS) performed by a truly bona fide MM while acting in that capacity. You remember these guys; they're the ones that will **both** sell when there is a preponderance of buy orders and buy when there is a preponderance of sell orders. A formal legal definition is direly needed and Rule 10b-21 seems to be a fitting location to introduce it.

Perhaps it was an oversight but the proposed formal text of 10b-21 in the release failed to mention deceitful locates and deceitful "ownership" allegations. It only mentioned the "intent" to deliver and "ability" to deliver issues. The more specific the text of the new law is the less is the need to use "Interpretive releases" which tend to dilute the deterrent effect of the law.)

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[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. (Comment: Note that the "shared interests" of these securities firms are often not "shared" by their client investors due to the existence of massive amounts of "conflicts of interest" on Wall Street. This is despite the existence of a fiduciary relationship involving "agents" being paid commissions.) SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. (Comment: While reading through this "comment letter" please keep in mind the concept of "while preserving and enhancing the public's trust and confidence in the markets and the industry" and note the balance between this concept and the "shared interests of more than 650 securities firms, banks and asset managers" expressed within the suggestions made and note the lack of balance.) SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

[2] Securities Exchange Act Release No. 57511 (March 17, 2008), 72 FR 15376 (March 21, 2008) ("Proposing Release").

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naked short selling generally refers to instances where a short seller fails to confirm that there are reasonable grounds to believe the security sold can be delivered on settlement date, which may lead to the seller's broker/dealer not being able to deliver securities within the normal three business day settlement cycle (typically referred to as a "fail-to-deliver" or "fail"). While the Commission has recognized that naked short selling and/or failing-to-deliver shares is not necessarily manipulative or violative under all circumstances,[3] it has also noted that naked short selling can cause market operational problems, and may be used as a tool for manipulation. SIFMA firms strongly support attempts to address and prevent manipulative trading activity. SIFMA also applauds and supports the Commission's stated attempts to "aid

broker-dealers in complying with the locate requirement of Regulation SHO”[4] and properly focus responsibility for potentially abusive activity on the party who is providing false information to the broker-dealer. (Comment: One must keep in mind, however, that the purchasing and selling b/ds involved in a securities transaction have a significant monetary interest in being “accidentally” deceived. This theoretical “deception” pays off very well for **both** the deceiver and those being deceived. The “deceiver” gets to bypass expensive and possibly unavailable borrows and the “deceived” selling b/d is directed order flow in exchange for playing the role of the “deceived” party. Abusive naked short selling hedge funds practicing this “deception” will go out of their way to seek out and direct lucrative prime brokerage business and order entry business to those SIFMA and DTCC members willing to knowingly be deceived especially if this abusive b/d is indemnified from being held liable for “accidentally” being deceived or aiding and abetting these thefts. It appears that the SEC is well aware of this as the proposed Rule 10b-21’s release touches on “aiding and abetting” liability. Since nothing else seems to gain the attention of these fraudsters then perhaps this will appears to be the mindset of the SEC.)

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[3] “Naked short selling is not necessarily a violation of the federal securities laws or the Commission's rules. Indeed, in certain circumstances, naked short selling contributes to market liquidity. For example, broker-dealers that make a market in a security generally stand ready to buy and sell the security on a regular and continuous basis at a publicly quoted price, even when there are no other buyers or sellers. Thus, market makers **must** (emphasis added) sell a security to a buyer even when there are temporary shortages of that security available in the market. (Comment: Note the use of the words “market makers **must** sell a security”. They **must** stand ready to address order imbalances in these fast moving markets even when there are no other buyers or sellers. The other side of this coin that abusive MMs don’t like to comment on is that the “market maker **must** buy back these securities already sold” when the pendulum swings and an order imbalance involving sell orders dwarfing buy orders occurs. This is when the truly abusive MMs are nowhere to be found because selling securities even those that don’t exist makes money in our incredibly corrupt current clearance and settlement system while buying back securities previously sold costs money. **The moment of truth occurs during the first downtick in share price after a naked short position has been established.** A truly bona fide MM will earn that incredibly powerful and constantly abused exemption he previously accessed and cover the previously established naked short position. The abusive MM will either not cover or even continue to naked short sell which drives the PPS downwards further which makes his previously established naked short position and capital reserves worth more. There is no securities rule or regulation that states that a MM **must** commit securities fraud by refusing to deliver that which he sold.

Oftentimes the reality is that an abusive MM after greedily establishing a gigantic naked short position **must** (by financial necessity) continue to sell fake shares just to keep the share price pinned down so that his collateralization requirements don’t force him to dig deeply into his own cash reserves. This entire fraud is based upon the “Ultimate paradox” which involves the DTCC’s unconscionable policy of allowing the sellers of nonexistent shares to access the money of investors even while absolutely refusing to deliver that which they previously sold. Instead the DTCC management only mandates that they “collateralize” this debt on a daily marked-to-market basis in which the collateralization requirements drop as the share price predictably drops from the accumulation of all of these readily sellable IOUs serving to poison the involved corporation’s share structure.) This may occur, for example, if there is a sudden surge in buying interest in that security, or if few investors are selling the security at that time. Because it may take a market maker considerable time to purchase or arrange to borrow the security, a market maker engaged in bona fide market making, particularly in a fast-moving market, may need to sell the security short without having arranged to borrow shares.” SEC, *Division of Market Regulation: Key Points About Regulation SHO* (April 11, 2005).

[4] Proposing Release, 72 FR at 15380.

[5] *See* Memorandum from the Commission’s Office of Economic Analysis, dated August 21, 2006.

[6] Proposing Release, 72 FR at 15377.

The SEC has used its broad market authority to adopt rules and regulations governing naked short selling, chief among which is Regulation SHO ("Reg SHO"). As repeatedly noted by the Commission, overall Reg SHO appears to be having its intended effects (Comment: As SIFMA is well aware Chairman Cox has publicly stated that Reg SHO has not gone far enough in addressing these crimes which is why this rule was proposed in the first place. In the SEC open meeting approving the comment solicitation for Rule 10b-21 chairman Cox made it quite clear that Reg SHO lacked "teeth". Dr. Erik Sirri, the SEC's Director of the Division of Trading and Markets commented that the FTD problem is not getting any better.) without imposing undue impacts on the market, as evidenced by a steadily-declining level of fails-to-deliver, as well as a declining number of Threshold Securities (Comment: Absolutely not true as many academics have pointed out through Freedom of Information Act (FOIA) analyses. On the contrary one victimized corporation just "celebrated" its 800th day on the Reg SHO "threshold list".)[5] Of equal importance, and due in large measure to the market disciplines imposed by Reg SHO, the overall number of fails-to-deliver is also extremely low, with data from the National Securities Clearing Corporation ("NSCC") showing that 99% (by dollar value) of all trades settle on time (Comment: Absolutely misleading as the CNS artificially "nets" out the delivery status of 96% of all trades. See the report (which SIFMA should be intimately familiar with) of former Undersecretary of Commerce Dr. Rob Shapiro pointing out the fallacy of these NSCC statistics that are misleading by as much as a factor of 25. The mere collateralization of "open positions" has nothing to do with making "good form" delivery resulting in "trades settling on time". On the contrary it serves to obfuscate the true number of FTDs and the fact that these trades are not legally "settling". The levels of FTDs are much, much higher than the 1% figure suggested by the NSCC which doesn't even address those held in an ex-clearing format, those "netted" or "collateralized" out of existence and those erased by the DTCC's "RECAP" system.) [6] This being the case, the SEC has continued to actively monitor and interpret Reg SHO, including taking recent action to address what it perceives to be persistent fails-to-deliver in a small handful of Threshold Securities, namely by eliminating the Reg SHO "Grandfather" provision (Comment: Which was railroaded through without public comment by the SIA which later became SIFMA i.e. the authors of this "comment letter". The public uproar over the SIFMA-sponsored "grandfather clause" was so deafening that the SEC was forced to rescind this "grandfathering in" of previous acts of blatant securities fraud. Recall that the SEC admitted that the "Grandfather clause" was needed to circumvent "upward price volatility" in shares of corporations "with large amounts of preexisting delivery failures". Translation: We don't want to induce a bunch of short squeezes because the FTD problems of some corporations has gotten so far out of hand that they are not currently manageable without causing market disruptions i.e. upward share price volatility resulting in "pricing efficiency" wherein unmanipulated supply and demand variables are allowed to interact to determine unmanipulated share prices.

True to form in their comment letter addressing the "proposed amendments" to Reg SHO which included the SEC's suggested rescinding of the "grandfathering in" of preexisting fails SIFMA once again fought bravely to keep the "grandfather clause" intact but the public uproar wouldn't allow it. They also fought bravely to keep the options market maker exception alive which is still yet to be addressed. SIFMA is also fighting the SEC's proposal to make those labeling sales as "long sales" to annotate the location of these shares that they theoretically "own". They argue that this "Long sale documentation requirement" is "impractical" and that it would "unnecessarily delay speed of execution of customer orders,

thereby exposing customers to market risk while their order is pending". Just how "burdensome" would it be to annotate the location of shares being sold on a sell ticket whether electronic or paper? If the intentional mislabeling of "short sales" as "long sales" done to circumvent expensive or unavailable borrows has been abused as the SEC asserts then what in the world is wrong with forcing the seller of shares that he claims he "owns" to note where these shares are currently being held especially when they're not being held at the selling firm? Besides people abusing these policies who would have a problem with incorporating this safeguard? If you really do "own" the shares you are selling then you must be housing it somewhere if it's not currently in the account of the selling b/d.)
While SIFMA firmly supports the Commission's attempts to address and prevent manipulative activity, SIFMA does not believe that enactment of a new anti-fraud rule that might have unintended consequences (Comment: especially if the "unintended consequences" include finally being forced to deliver that which you have previously sold and possibly being held liable for aiding and abetting in the selling of astronomic amounts of "pseudo-shares" and refusing to deliver that which you sold) is the most efficient means available to the Commission to achieve its goals. Rather, SIFMA believes that the better approach to address concerns about sellers engaging, or attempting to engage, in naked short selling through misrepresenting information is for the Commission to act upon the proposed amendments to the 1994 Prime Broker No-Action Letter ("Prime Broker Letter"). These amendments have been the subject of numerous discussions with the Staffs of both the

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7 *See*, *e.g.*, *Sandell Asset Management Corp. et. al.*, Securities Exchange Act Release No. 8857 (October 10, 2007).

8 The SEC had stated as follows in the Reg SHO Adopting Release: "A broker-dealer may obtain an assurance from a customer that such party can obtain securities from another identified source in time to settle the trade. (Comment: In other words an abusive hedge fund can cite that a 3rd party, undoubtedly beholden to the hedge fund for previous or future "kickbacks" or "back-scratches", has come forth and stated that it is in possession of shares that can serve as a "locate" and that they can be successfully delivered by settlement date. How many "3rd parties" on Wall Street might be willing to "serve" the hedge funds with their $10 billion in annual "juice" to spread around Wall Street in this capacity even though they have no shares whatsoever in the issuer involved? If this insanity is allowed then the checks and balances of tallying exactly what percentage of the "locates" provided by "X" 3rd party or received by "Y" short seller have resulted in FTDs is necessary. **Until** those safeguards are in place then "customer assurances" are no more than an invitation to defraud investors and easily bypass lending fees. This tallying process might be tough to do due to the obfuscatory role that the CNS "netting" process provides in identifying the exact account that fails to deliver originated in. Yet once again we see the need for darkness to commit frauds this obvious and this heinous. If our clearance and settlement system had one scintilla of **transparency** then what could possibly be more obvious of a crime than refusing to deliver that which you sell?) This may provide the 'reasonable grounds' required by Rule 203(b)(1)(ii). However, where a broker-dealer knows or has reason to know that a customer's prior assurances resulted in failures to deliver, (Comment: If something as subjective as "reasonable grounds" is allowed then the SEC must see that all FTDs are tallied and that all of the involved parties must be made aware of the FTDs.) assurances from such customer would not provide the 'reasonable grounds' required by 203(b)(1)(ii). The documentation required by Rule 203(b)(1)(iii) should include the source of securities cited by the customer. The broker-dealer also should be able to demonstrate that there are 'reasonable grounds' to rely on the customer's assurances, *e.g.*, through documentation showing that previous borrowings arranged by the customer resulted in timely deliveries in settlement of the customer's transactions." Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48014 (August 6, 2004). (Comment: How many market intermediaries were "busted" for these transgressions over the last 3 years? Note that the absurdity here is the failure to keep in mind that abusive b/ds ("3rd parties") will do anything in their power to access the $10 billion annually that hedge funds provide to those order executing b/ds and prime brokers willing to break the most amount of laws on behalf of the financial interests of the hedge fund manager. This obviously includes the provision of "DLs" ("Deceitful locates") or "DBs" ("Deceitful borrows"). A "deceitful locate"

or "deceitful borrow" is now a potent form of "currency" used on Wall Street because they result in the illegal circumvention of perhaps billions of dollars of borrowing and rental fees which serve as a natural built-in market deterrent to these abuses. "Deceitful locates" are as good as cash and should be treated similar to illegal bribes and/or "kickbacks". Do the practitioners of these crimes think of themselves as being involved in racketeering-related ("RICO") activities i.e. a form of "organized crime"? I don't think so. Somehow they assume that operating on Wall Street provides insulation from liability which is incurred in every other form of business excepting Wall Street. Mark Mitchell's treatise at deepcapture.com illustrates the ubiquitous nature of organized criminal activity found on Wall Street today. It's odd but there's just something about it occurring on Wall Street that makes it permissible. It probably has to do with the sparse nature of referrals from the SEC to the DOJ. Regulators don't seem to like other enforcement agencies operating on their "turf". As far as damages go note that those wishing to lend out their shares are also damaged by all of this fake supply of lendable shares which drives down the lending rates for legitimate shares. The "demand" variable for share lending is artificially manipulated downwards due to the circumvention of the need to borrow shares before short selling.

This isn't that complex; a party does something illegal/fraudulent in the form of providing DLs and DBs to an affiliated party. Its co-conspiring firm (perhaps a hedge fund) saves a fortune in stock loan fees. The hedge fund then directs lucrative prime broker business and order executing business as a way to say thanks for the illegal savings. The investors incur damages from about 10 different directions three of which are the diminishing share price, the voting power diminution associated with the back office cancellation necessary to cover up these frauds and the decreased potential income and opportunities from "renting" out their shares to others like legitimate short sellers.

I have the distinct feeling that the aiding and abetting as well as the racketeering aspect of these crimes are not very well appreciated by the perpetrators and enablers of these frauds, the regulators, the SROs and the DOJ. But shouldn't one intuit that being a part of a fraud based upon the refusal to deliver that which you sell would be associated with liability and the potential to be held accountable for acting as an accessory to a fraud this heinous and obvious. Common sense might dictate this in every form of business except perhaps that done on Wall Street where powerful people have a tendency to not be held accountable. Perhaps we saw this in the "Aguirre/Mack" case.

One would think that the supervisory procedures mandated by Reg SHO would be taken seriously by the Wall Street b/ds if for no other reason than to avoid aiding and abetting implications. Market participants are supposed to be keeping track of FTDs regardless of how the DTCC's CNS "netting" process works. Rule 10b-21 might prove to be the source of the heretofore missing meaningful deterrence to these crimes because the OCIE (Office of Compliance Inspections and Examinations of the SEC) reports that a lot of firms are simply not following the supervisory precepts of Reg SHO.) --------------------
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SEC and FINRA, and have been pending with the SEC for some time. Additionally, SIFMA believes that Section 10(b) of the Exchange Act and Rule 10b-5 thereunder already provide the Commission with ample authority to address manipulative or fraudulent trading activity. The Commission has, in fact, already utilized such authority to address naked short selling abuses.7 (Comment: Out of one side of their mouths the brokers and hedge funds say that the regulators are all over these crimes and no new rules are needed then out of the other side of their mouths (as you'll see in a moment) they'll claim that the SEC has only listed in the proposing release 3 cases that they aggressively pursued and thus the levels of these crimes must be nearly nonexistent and thus no new rules are necessary.)

To the extent the Commission still believes that a specific anti-fraud rule addressing naked short selling is necessary, SIFMA urges the Commission to provide clarification and address certain inconsistencies in the current language of proposed Rule 10b-21, as identified herein. SIFMA's comments, recommendations and responses to questions are provided in greater detail below.

II. Primary Recommendations to Address Naked Short Selling Concerns

a. Amend the Prime Broker Letter
Proposed Rule 10b-21 seeks to target situations where a customer misrepresents to its executing broker that it has obtained an away locate, or is a "long" seller. As the Commission is aware, in the prime brokerage context it is generally **"industry practice"** (emphasis added) for an executing broker to reasonably rely on a customer's representation that a locate on a "short" sale has been obtained with the customer's prime broker (*i.e.*, an "away locate"). This arrangement is not only expressly permitted under Reg SHO,[8] it is perfectly logical, since the prime broker generally bears responsibility for settlement of the customer's short sale. (Comment: In today's markets nobody is predictably being held "responsible" for FTDs and that's the crux of the issue) It is also **"industry practice"** (emphasis added) in the prime brokerage context for an executing broker to reasonably rely on a customer's representation of a "long" sale, in that the customer's positions are held away at the prime broker. (Comment: Note the argument being built to allow this **"industry practice"** of creating a daisy chain of hedge funds feeding business to order entry b/ds (OEBDs) or "executing" b/ds that are allowed to "assume" that the prime broker involved has taken care of any "locates", "pre-borrows" or "ownership" issues. Why should these fraud-promoting and fact obfuscating daisy chains of "assumptions" be allowed to persist? It's because they are **"industry practice"** silly. True, but issuers remaining on the "Threshold list" for over 800 days is also **"industry practice"** but that doesn't make it legal. (Recall that Reg SHO left it up to the OEBDs to determine "reasonable grounds" to believe delivery would be made by T+3. Reg SHO unfortunately allowed "customer assurances" from the short sellers to qualify as "reasonable grounds". It also allowed the presence of the issuer on unregulated "easy to borrow" lists to qualify for "reasonable grounds". The flimsy wording of Reg SHO in these instances is why Rule 10b-21 is even necessary.) In other words let's just put everybody on the "honor system" and everything will be OK. Each member of the "daisy chain" is bequeathed with "plausible deniability" that circumvents "scienter" such that they have the ability to point fingers and say "Well, I assumed the prime broker or executing b/d or hedge fund took care of the locate". After all it's **"industry practice".**

The problem the SEC is trying to deal with is that for many abusive SIFMA and DTCC members "abusive naked short selling" has also become **"industry practice".** Abusive hedge fund managers need market intermediaries like OEBDs and prime brokers to be willing to act oblivious to this "deceit" in exchange for order flow. That's why aiding and abetting crimes need to be a part of the overall regulatory structure to deter this type of behavior. That's what an uncompromised congressionally-mandated provider of investor protection and market integrity (the SEC) does on behalf of the U.S. investing public they serve. The brokerage firms and the hedge funds have their "SIFMAs" and "MFAs" to present their cases to maintain the corrupt status quo. All the investors have is the SEC to provide investor protection and market integrity as the foundation for a fraud-free status quo.) SIFMA strongly encourages the SEC to continue to allow executing brokers to be able to reasonably rely on such customer representations, as prohibiting such reasonable reliance would adversely affect and needlessly **delay** (emphasis added) the executions of clients' legitimate orders. (Comment: Translation: "Let's maintain the corrupt status quo for illegitimate sell orders in order to avoid **"delays in the execution of legitimate orders".** What constitutes "reasonable reliance" on customer representations? It would obviously be anything that has become **"industry practice"** silly! How does one "reasonably rely on customer representations" when the "customer representation" involves the mere submission of a sell order that history has proven is chronically abused? What was Reg SHO all about?

How does putting on a blindfold to these crimes jive with SIFMA's mission statement of "preserving and enhancing the public's trust and confidence in the markets and the industry." Here arrives the much anticipated "This is the efficient way to do it" because the trading on Wall Street moves so fast and sometimes there just isn't time for the provision of investor protection and market integrity. The goal is not to "needlessly delay the executions of clients' legitimate orders."[9] The goal is to address the illegitimate orders that have now become **"industry practice"** due to the existence of the "ultimate paradox".) Furthermore, a prohibition on away locates would be severely detrimental to

[9] The SEC specifically asked about such reliance, stating as follows in the Proposing Release: "In the 2004 Regulation SHO Adopting Release, the Commission stated that a broker-dealer could satisfy the locate requirement of Regulation SHO by obtaining an assurance from a customer that the customer can obtain securities from another identified source in time to settle the trade, provided the broker-dealer reasonably believes the customer's assurance. Proposed Rule 10b-21 is aimed, in part, at sellers who make misrepresentations to their broker-dealers about their locate sources. Should we instead no longer permit a broker-dealer to rely on such customer assurances in satisfying the locate requirement of Regulation SHO? (Comment: Absolutely yes when prior FTDs were the result of prior "customer assurances". Is anybody keeping a tally on which "customer assurances" have been proven to be bogus or is it **"industry practice"** not to keep a tally?) What would be the costs and benefits of removing the ability of broker-dealers to rely on such customer assurances? (Comment: Benefit-a less corrupt status quo) What would be the impact on market participants (such as broker-dealers, stock lenders, investors)? (Comment: The corrupt ones are going to be selectively affected and might have to learn how to make a living without committing fraud.) Would smaller entities be affected more or less adversely than larger entities?"

[10] With respect to "long" sales, the proposed new Prime Broker Letter generally places an obligation on the prime broker to determine whether a customer owned securities that were executed "long" at an executing broker, and advise the executing broker, through the Omgeo system, on situations where the customer did not in fact own the securities sold. With respect to "short" sales, the new Prime Broker Letter generally places an obligation on the prime broker to review information received from the executing broker regarding a customer short sale. If the prime broker does not have a record of providing a locate to the customer, and cannot borrow the security, then the prime broker must contact the customer to determine the source of the locate, and also contact such source to confirm that a locate was provided to the customer and attempt to borrow such security. In the event that the source identified by the customer does not have a record of providing a locate to such customer, or does have such a record but does not deliver the shares on settlement date, then the prime broker is required to advise the executing broker of this fact, again through the Omgeo system.

small executing brokers that may not have comparable access to a large stock loan supply. (Comment: Translation: Let's throw out any integrity to the clearance and settlement system because small b/ds have a tougher time finding stock loans and we wouldn't want to put them at a disadvantage. Note the fishing expedition for access to the "Adverse effects on small entities issues" that the SEC is mandated to monitor. We can't have investor protection, market integrity and a noncorrupt status quo because it wouldn't be fair to the smaller broker/dealers.)

This being the case, SIFMA believes that the Commission already has in its possession sufficient means to address potential customer misrepresentations to executing brokers in the form of the revised Prime Broker Letter. As the Commission is aware, the industry, through the SIFMA Prime Brokerage Committee, has engaged in extensive collaborative efforts with the Staffs of both the SEC's Division of Trading and Markets and FINRA regarding revisions to the Prime Broker Letter. These revisions are intended to enhance communications between the prime broker and executing broker and to help ensure that the customer is providing accurate information to the executing broker.[10]

While implementing the requirements of the new Prime Broker Letter will necessitate both executing brokers and prime brokers engaging in extensive systems modifications, SIFMA firms generally support the clarity and guidance that it will provide on the application of Reg SHO in the prime brokerage context. Specifically, the revised Prime Broker Letter will create a mechanism for prime brokers and executing brokers to seamlessly communicate such information concerning customer "long" sales and "short" sales, through the Omgeo system. (Comment: The SEC should obviously be a little suspicious of the reaching out to access the DTCC-associated Omgeo system.)This mechanism is otherwise not presently available.

b. Utilize Existing Authority Under 10(b) and Rule 10b-5

While clearly well-intentioned, SIFMA believes proposed Rule 10b-21 is unnecessary because the Commission already has ample existing authority, under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, to prosecute manipulative and/or fraudulent activity, including the type of activity that proposed Rule 10b-21 seeks to address. (Comment: Perhaps, but when scienter is mandated to create liability then specific delineations of what exactly is to be deemed as being "unlawful" is necessary so that abusers can't respond that they had no idea that this behavior was unlawful. After all who'd have ever thought that selling securities to unknowing investors, taking their money, merely collateralizing the debt and then refusing to deliver that which you sold could be deemed unlawful?)

Moreover, creating a new anti-fraud rule specifically targeted at naked short selling may create uncertainty and confusion (Comment: I really don't see the "uncertainty and confusion" associated with market professionals that after inordinate amounts of time constantly refuse to deliver that which they sell.) For example, market participants would

[11] Specifically, Exchange Act §§ 2, 3(b), 6, 9(h), 10, 11A, 15, 15A, 17, 17A, 19 & 23(a), 15 U.S.C. §§ 78b, 78c(b), 78f, 78i(h), 78j, 78k-1, 78o, 78o-3, 78q, 78q-1, 78s & 78w(a).
[12] "Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us. Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries. . . . It is appropriate for us to assume that [when it enacted the Private Securities Litigation Reform Act of 1995], Congress accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008).
[13] *Id.* at 768. *See also United States v. O'Hagan*, 521 U.S. 642, 651 (1997) ("Liability under Rule 10b-5 . . . does not extend beyond conduct encompassed by § 10(b)'s prohibitions."); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 175, 177 (1994) ("[T]he statutory text controls the definition of conduct covered by § 10(b) . . . [it is] inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text."); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473-74, 475 n. 14 (1977) (a "complaint states a cause of action under any part of Rule 10b-5 only if the conduct can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute.").
[14] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-214 (1976).
[15] *Id.* at 213-14. The Court reaffirmed this conclusion in *Aaron v. SEC*, 446 U.S. 680, 690, 695-97 (1980), which held that scienter is not required under §§ 17(a)(2) & (3) of the 1933 Act – while those statutes use the same language as Rule 10b-5(b)&(c), the Court reached a different outcome than in *Hochfelder* because the language was contained in the statutes themselves.
[16] *See*, *e.g.*, *Arst v. Stifel, Nicolaus & Co.,* 86 F.3d 973, 977 (10th Cir. 1996) (claim under Rule 10b-10 dismissed for failure to meet statutory "in connection with" requirement); *Angelastro v. Prudential-Bache Secs., Inc.*, 764 F.2d 939, 946 (3d Cir. 1985) (Rule 10b-16 claim must meet statutory "in connection with" requirement); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 540 (9th Cir. 1984) (claim under Rule 10b-16 must satisfy statutory scienter requirement). *See also Morris v. Wachovia Secs., Inc.*, 277 F. Supp. 2d 622, 638 n. 9 (E.D. Va. 2003) (dismissing Rule 10b-10 claim for failure to allege statutory elements of reliance and loss causation); *Bissell v. Merrill Lynch & Co.*, 937 F. Supp. 237, 245 (S.D.N.Y. 1996) (dismissing Rule 10b-16 claim for failure to allege statutory "in connection with" requirement and statute of limitations), *aff'd on other grounds*, 157 F.3d 138 (2d Cir. 1998); *Levitin v. PaineWebber, Inc.*, 933 F. Supp. 325, 330-31 (S.D.N.Y. 1996) (dismissing Rule 10b-10 and 10b-16 claims for failure to allege statutory "in connection with" requirement), *aff'd on other grounds*, 159 F.3d 698, 707 (2d Cir. 1998). *Cf. Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1358 n. 8 (11th Cir. 1985) (noting that any cause of action under Rule 10b-16 would need to meet statutory elements). (Comment: Note above that somebody put in a lot of legal hours just to make the argument that "highlighting the liability" of behavior already deemed to be unlawful is not necessary. Just how much money is at stake here if these abusive naked short positions might need to be covered or if future thefts might be reduced?)

not only need to consider the parameters and interpretations of new Rule 10b-21, but new questions might also be raised whether other types of activity might be actionable under the general provisions of 10(b), given that the Commission has not decided to address such activity in a separate 10(b) rule. (Comment: Now we're cutting to the chase and the need for SIFMA to file this "comment letter" while proffering some of these incredible arguments in favor of what most would deem to be grossly fraudulent activity. Note all of a sudden there is concern that "other types of activity" associated with abusive naked short selling (ANSS) and delivery failure related abuses (DFRAs) might now be considered "actionable" wherein the victims (perish the thought) of this theft might have access to private rights of action. We sure wouldn't want that after decades of this behavior being **"Industry practice".)**

SIFMA is also concerned that the creation of the proposed new anti-fraud rule might create uncertainty as to whether courts would similarly interpret in the Rule 10b-21 context the precedent that has been established with respect to Section 10(b) and Rule 10b-5 thereunder. For example, although the Proposing Release does not specifically address private rights of

action for violation of proposed Rule 10b-21, a question on this point was raised at the Commission's Open Meeting on the Rule. SIFMA notes, in this regard, that Congress has not provided any express cause of action for private citizens to sue for civil damages for violation of proposed Rule 10b-21, nor for violations of any of the provisions of the Exchange Act cited by the Commission as authority for the Rule.[11] Accordingly, any authority for a private right of action must be found in the judicially implied right of action under Section 10(b) but, as the Supreme Court has emphasized, that right of action cannot be expanded without authorization from Congress. [12]

As the Court has repeatedly emphasized, "Rule 10b-5 encompasses only conduct already prohibited by Section 10(b)."[13] The Court has expressly held that the Commission lacks authority to expand the scope of the private right of action when it held that scienter is required for all Section 10(b) private actions even though the language of subparts (b)&(c) of Rule 10b-5 "could be read as" imposing liability "whether the wrongdoing was intentional or not."[14] "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law . . . [t]hus, despite the broad view of the Rule advanced by the Commission in this case, its scope can not exceed the power granted the Commission by Congress under Section 10(b)."[15] (Comment: You can see that the legal arguments have already been drawn up in regards to private rights of action for this crime wave.)

Following this guidance, the courts have repeatedly held that, because any implied right of action under Rules 10b-10 and 10b-16 would have to arise from Section 10(b), it must satisfy all of the elements of the Section 10(b) implied right of action.[16] Because proposed Rule 10b-21 similarly depends upon the implied Section 10(b) cause of action as authority for the imposition of private civil liability in the absence of express authorization by Congress, it should similarly be expressly subject to all of the requirements of a Section 10(b) claim and the PSLRA, including pleading and proof of reliance, scienter, materiality, loss causation, damages, standing and a manipulative or deceptive device employed in connection with the purchase or sale of securities. (Comment: As opposed to worrying about private rights of action and aiding and abetting issues wouldn't it be easier to just deliver that which you sell in a timely manner? The monetary rewards for this fraudulent behavior apparently is so great that the risk/reward analysis dictates it prudent to not refrain from these activities but instead to mitigate the risk variable via thwarting the introduction of new laws expressly deeming these activities as being "unlawful". Besides the perpetrators of these frauds who else would show so much concern for the mere "highlighting the liability" of this behavior which is already forbidden by 10b-5? I told you that you can learn a lot about the mindset of the brokerage industry from these "comment letters" that need to be made public.)

III. Secondary Recommendation – Adopt Modified Version of Anti-Fraud Rule

To the extent the Commission still believes that an anti-fraud rule addressing naked short selling is necessary, SIFMA encourages the SEC to resolve to address certain inconsistencies in the current form of proposed Rule 10b-21, as well as clarify related issues, as identified below.

a. Amend Rule's Current Focus on "Seller's Fail"

Proposed Rule 10b-21, as drafted, would be violated if the following occurred: (1) a seller of a security deceives a broker-dealer, participant of a registered clearing agency, or purchaser regarding its intention or ability to deliver the security sold on the date delivery is due; (2) *the seller fails to deliver the security sold*; and (3) the seller acts with scienter. As the Staff is

1) Allowing order executing b/ds to execute short sales by merely having something as subjective as "reasonable grounds" to believe that delivery would occur by settlement date.
2) Allowing "customer assurances" from the short sellers themselves i.e. "away locates" to qualify as being "reasonable grounds" to believe that delivery would occur by settlement date provided that the b/d has a "reasonable basis" for believing the "customer assurance". Subjective terms like these are predestined to massive abuses.
3) Allowing the mere presence of securities on easy to manipulate and unregulated "easy to borrow" lists to qualify as being "reasonable grounds" to believe that delivery would occur by settlement date.
4) Allowing brokers to enter into poorly defined "bona fide arrangements to borrow" securities to qualify as a "pre-borrow".

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Abusive hedge funds should indeed be very appreciative for this "streamlining" of "locate" requirements. In reality the very predictable abusing of these glaring loopholes is what necessitated the proposed Rule 10b-21. The net effect was the allowance of yet a couple of more years of rampant abuses to occur due to the lack of **specificity**. Criminal aspects of civil law needs to be very, very specific just like it is in criminal law.

and significantly reduced the average daily number of fails to deliver.[2] (Comment: Note the citation of the same Office of Economic Analysis statistics that were easily discredited by academics. In the SIFMA "comment letter" it was cited as footnote #5. Note the tendency of both lobbying/trade groups to cite deeply-flawed statistics. The DTCC's contention that less than 1% transactions result in an FTD while refusing to remove non-equity transactions that can't fail in delivery, not citing that CNS "netting" removes 96% of transactions from having the ability to technically "fail" is typical and not addressing FTDs held in ex-clearing arrangements is disingenuous at best.) We believe the locate requirement has also had a strong impact discouraging naked short selling. (Comment: Just the opposite; its subjective wording has invited abuses as proven by the need for Rule 10b-21.) MFA also supports the Commission's efforts to prosecute fraud. We are concerned, however, that the Proposed Rule may have the unintended consequence of deterring legitimate short selling (Comment: Only if the referred to "legitimate short selling" regularly employs **"Industry practices"** involving the "intentional deceit" of the market intermediaries or purchasers of that being short sold; which in turn wouldn't make it very "legitimate" even though it may be the status quo on Wall Street. "Legitimate" short selling, by definition, does not involve deceit, FTDs and scienter. Nobody that makes a legitimate borrow before short sales will be "deterred" in the least.)
MFA regards short selling as an essential method by which investors, including fiduciaries managing others' assets, can manage risk, hedge their portfolios, and reflect their view that the

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[1] MFA is the voice of the global alternative investment industry. Our members include professionals in hedge funds, funds of funds and managed futures funds. Established in 1991, MFA is the primary source of information for policymakers and the media and the leading advocate for sound business practices and industry growth. MFA members represent the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately $2 trillion invested in absolute return strategies. (Comment: When victimized investors write "comment letters" to the SEC they state their case and sign their names individually. Why would individual hedge funds that "manage a substantial portion of the

approximately $2 trillion invested in absolute return strategies" prefer to hide behind the moniker of one "of the vast majority of hedge fund groups in the world who manage…..? If as a hedge fund you stand behind the iterations being presented then proudly sign your name. Is it because when you perpetrate a fraud as obvious as refusing to deliver that which you sell then operating in the dark is preferable?)

MFA is headquartered in Washington, D.C., with an office in New York.

[2]Fails to Deliver Pre- and Post-Regulation SHO, Office of Economic Analysis, SEC (Aug. 21, 2006) *available at* http://www.sec.gov/spotlight/failstodeliver082106.pdf (providing that the average daily aggregate fails to deliver declined by 34% after the effective date of Regulation SHO).

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current market price of a security is higher than it should be. (Comment: There is a difference between that valid concept and being able to easily manipulate downwards the share price to any level you desire. The difference involves deceit, FTDs and scienter.) The benefits of short selling to the broader market are well known.[3] Short selling provides liquidity to the market and makes markets more efficient. (Comment: No argument there but again legitimate "short selling" does not involve "intentional deceit" upon market intermediaries or the purchasers of short sold securities. This is the topic being discussed here; namely whether to deem this behavior as being "unlawful" or "fraudulent" or not. "Legitimate" short selling is indeed a wonderful thing but that's not the topic of discussion here.)

We believe that the Proposed Rule, as constructed, is unnecessary and overbroad. The impetus for the proposal is the Commission's concern with abusive naked short selling, which involves an intentional failure to deliver securities within the standard settlement timeframe. As noted by leading scholars from academia and industry at the SEC's Roundtable on the Regulation SHO Pilot,[4] however, there is no persuasive evidence that short selling in general is more frequently abusive than other types of transactions. (Comment: So what possible harm is there in deeming "intentional deceit" upon market intermediaries and purchasers during the course of short sales as being unlawful? The evidence of pandemic levels of ANSS and DFRAs is readily available via FOIA analyses and SEC Chairman Cox is on the record as stating that Reg SHO was inadequate in addressing these crimes because it had no "teeth" which is why Rule 10b-21 was proposed in the first place and approved for "comment" solicitation on 3/4/08.) Indeed, manipulative purchases—for example, so-called pump-and-dump schemes, appear to be far more common than abusive short sales. (Comment: Absolutely incorrect as abusive naked short selling occurs nonstop all day long in the markets of typically defenseless development stage issuers.) Historically, there have been far more market manipulation enforcement cases against pump-and-dump boiler room operations than short sellers. (Comment: this is true and consistent with the thesis that the SEC and SROs have been "captured" by the interests of those that they are supposed to be regulating.) Thus, we question the need to single out naked short selling from other transaction types. (Comment: The victimized authors of the thousands of comment letters condemning this practice over the last several years would beg to differ. Why would the addressing of any "single" type of crime like abusive naked short selling bother your organization enough to compel you to submit this comment letter? Except for those with a financial interest in allowing naked short selling frauds to thrive who in the world would "question the need to single out naked short selling from other transaction types"? Shouldn't all forms of criminal behavior be firmly dealt with? Again, as mentioned at the outset you can learn a lot about market participants via public "comment letters" when those content with the corrupt status quo are given the unenviable task of making their case to keep the corrupt status quo. At one point in time legislators "singled out" the crimes of bank robberies and murders also; perhaps every crime has its day to be "singled out" via "highlighting the liability" for perpetrating these frauds.)

9) "SIFMA believes that Section 10(b) of the Exchange Act and Rule 10b-5 thereunder already provide the Commission with ample authority to address manipulative or fraudulent trading activity." (No new laws "highlighting the liability" of those perpetrating certain behaviors as being deemed unlawful are necessary especially if aiding and abetting crimes come into play as well as private rights of action.)
10) "SIFMA strongly encourages the SEC to continue to allow executing brokers to be able to reasonably rely on such customer representations, as prohibiting such reasonable reliance would adversely affect and needlessly delay the executions of clients' legitimate orders." (Please don't do away with this gigantic loophole; an unregulated hedge fund perhaps out of the reach of the SEC and DOJ would never fib about the source of a "locate" to save a fortune in lending fees.)
11) "Furthermore, a prohibition on away locates would be severely detrimental to small executing brokers that may not have comparable access to a large stock loan supply." (Let's not tighten up the laws because small b/ds would be at a disadvantage.)
12) "Moreover, creating a new anti-fraud rule specifically targeted at naked short selling may create uncertainty and confusion". (Anarchy will result!)
13) "SIFMA notes, in this regard, that Congress has not provided any express cause of action for private citizens to sue for civil damages for violation of proposed Rule 10b-21." (Whatever you do don't let the victims of this thievery sue us.)
14) "Proposed Rule 10b-21 specifically applies to sellers, who are best postured to know their own obligations and ensure compliance therewith. While SIFMA recognizes that broker-dealers cannot turn a blind eye to illegal activities by their customers, broker-dealers should not be held responsible for policing their customers' compliance with their own legal requirements." (Yeah, Dear SEC: Let's let secrecy-obsessed hedge funds based in the Cayman Islands that are the "sellers" regulate themselves. Let's let them provide "investor protection and market integrity" on your behalf.)
15) "Furthermore, because proposed Rule 10b-21 contains as a key element the fact that the seller deceive the broker-dealer, it is unclear in what situations a broker-dealer would know of, and aid and abet a violation." (How about if the last 20 times this seller sourced his own "locate" 90% of the trades resulted in FTDs? The necessity for the visibility of FTDs all throughout the system is of paramount importance especially for prospective investors in a corporation with so many unaddressed FTDs within its share structure that it may be preordained to die an early death regardless of its merits.)
16) "SIFMA is concerned that the extension of proposed Rule 10b-21 to "purchasers" may subject broker-dealers to meritless civil litigations that would impose tremendous costs to defend. The end result could be a chilling effect on legitimate short selling". (Imagine that, a purchaser of shares in which the seller refused to deliver that which he purchased having a cause of action. (More anarchy!)
17) "We appreciate the guidance in the Release about the use of "Easy to Borrow" lists in connection with short sales." (Thanks for the gaping loophole since no regulator is monitoring for the integrity of "easy to borrow" lists.)

THE HEDGE FUNDS (MFA)