Members of the Commission Staff,

In consideration to rule policy changes, the SEC would be served well to review how present rules are being utilized and those who oppose it. Firms like Trillium trading oppose change but Trillium Trading has a regulatory history of ignoring rules when such gets in the way of profit.

Similarly, in digging through the regulatory activities I find that a boiler room operation in Jerico NY, Schonfeld & Co. was fined in 2003, alongside Trillium, for misusing the trading systems and the exemptions provided by regulatory law. They were fined again this past April for executing short sales for client and proprietary accounts without conducting affirmative determination and without insuring the ability to settle the trades.

And then of course there are all those regulatory cases involving the failure to properly mark short sales as short sales. Since we recognize that at best 1 in 10 failures to comply are actually picked up in a regulatory audit, the Sec should consider the accuracy of their studies recognizing that short sale data is flawed by the reporting process itself. Short sales are not always market as short sales and non-member firms do not report to the Commission or DTCC a short sale.

NASD Fines Two Firms and Eight Traders $490,000 for Misusing NASDAQ Trading System

Washington, D.C. — NASD announced today that it has **fined Trillium Trading LLC of Edison, NJ, eight Trillium traders** and Schonfeld & Company LLC of Jericho, NY, a total of $490,000 for entering improper crossed quotes during the NASDAQ Stock Market's opening. Trillium Trading was fined $225,000. Schonfeld & Company was fined $175,000. The eight traders received fines ranging from $10,000 to $20,000 as well as suspensions ranging from one to four months.

"NASD will react quickly and aggressively when market participants attempt to distort market processes," said Stephen Luparello, NASD's Senior Executive Vice President for Market Regulation.

In October 2004, NASDAQ introduced the Modified Opening Process (MOP) so that markets would be unlocked and uncrossed at the open, thereby promoting the price discovery process. An NASD investigation found that during the first week of the MOP, **eight Trillium traders and certain Schonfeld customers** devised and implemented an impermissible trading strategy that allowed them to receive favorable executions in the MOP. Specifically, under the MOP, the first eligible orders submitted after 7:30 a.m. got the first available executions at 9:25 a.m. Thus, as soon after 7:30 a.m. as possible, in order to be first in line in the queue for executions at 9:25 a.m., the Trillium traders and Schonfeld customers entered two orders, a bid and an offer, in a same security, each of which crossed the market. At the time the traders and customers entered the orders, they did not know in which direction the market would move and thus did not know whether it would be beneficial to buy or sell the security. By placing orders simultaneously on opposite sides of the market in this fashion, the traders and customers were able to position themselves to obtain favorable executions regardless of whether the market moved up or down. The Trillium traders and Schonfeld customers never intended to both buy at the bid and sell at the offer. Rather, they intended to cancel one of the orders, either the bid or the offer, and leave only the order likely to get a favorable execution at 9:25 a.m. The strategy worked

only if the traders and customers intended from the beginning to cancel one of the quotations. NASD rules prohibit the publication of non-bona fide quotations.

The non-bona fide orders - which were placed in over 1,000 different securities over two weeks - also adversely affected price discovery during the pre-open hours.

NASD also found that **Trillium did not adequately supervise the activity of its traders** during the MOP and that Schonfeld failed to supervise the activity of its retail day traders, who are not registered with NASD.

In concluding these settlements, the firms and traders neither admitted nor denied the charges, but consented to the entry of NASD's findings. The firms and individuals agreed to the following sanctions:

June 2009 FINRA Enforcement cases:

D.A. Davidson & Co. (CRD #199, Great Falls, Montana) submitted a Letter of Acceptance, Waiver and Consent in which the firm was censured and fined $40,000.Without admitting or denying the findings, the firm consented to the described sanctions and to the entry of findings that it **failed to report accurate trading information** through the submission of electronic blue sheets in response to FINRA requests for such information. Specifically, the **firm failed to include the correct buy, sale or short sale indicator for electronic blue sheets records**. **(FINRA Case #2005003313002)**

May 2009 FINRA Enforcement

Great Point Capital LLC (CRD #114203, Chicago, Illinois) submitted a Letter of Acceptance, Waiver and Consent in which the firm was censured, **fined $15,000** and required to revise its written supervisory procedures regarding NASD Rules 3350, 6130(d)(6), and SEC Rules 200(g) and 203(b)(1).Without admitting or denying the findings, the firm consented to the described sanctions and to the entry of findings that it **accepted short sale orders in an equity security from another person, or effected short sales in an equity security for its own account without borrowing the security, or entering into a bona fide arrangement to borrow the security; or having reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due;** and documenting compliance with SEC Rule 203(b)(1). The findings stated that the firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable securities laws, regulations and FINRA Rules concerning NASD Rules 3350, 6130(d)(6), and SEC Rules 200(g) and 203(b)(1). **(FINRA Case #2006005053101)**

(Note: A mandatory pre-borrow would have prevented this activity or else the trade, if executed as it was, would have been a blatant enforcement on intent to commit fraud)

First New York Securities, Four of its Former Traders Ordered to Pay Over $436,000 for Covering Short Sales with Secondary Offering Shares

Sanctions Include $265,000 in Fines, Over $171,000 in Disgorgement
The Financial Industry Regulatory Authority (FINRA) announced that it has fined First NewYork Securities L.L.C. $170,000 for **improperly covering short positions with secondary offering shares** and related oversight failures. The firm was also ordered to disgorge more than $171,000 in trading profits earned from the prohibited conduct.

Four of the firm's former traders who conducted the transactions were fined a total of $95,000. During the relevant time, the Securities and Exchange Commission—through Rule 105 of Regulation M—prohibited covering a short sale with securities obtained in secondary offerings when the short sale occurs during a specific restricted period—typically five business days—before the secondary offering is priced. "Rule 105 is designed to promote the integrity and orderliness of the secondary offering process," said Tom Gira, FINRA's Executive Vice President for Market Regulation. "This case illustrates FINRA's commitment to ensure registered firm compliance with this important rule."

April 2009 FINRA Enforcement

David A. Noyes & Company (CRD #205, Chicago, Illinois) submitted a Letter of Acceptance, Waiver and Consent in which the firm was censured and fined $12,500. Without admitting or denying the findings, the firm consented to the described sanctions and to the entry of findings that it failed to report to the NASD/NASDAQ
Trade Reporting Facility® (NNTRF) or the Over-the- Counter (OTC) Reporting Facility (OTCRF) the correct symbol indicating whether it executed transactions in reportable securities in a principal, "riskless" principal or agency capacity. The findings stated that the **firm failed to report the short sale or short exempt indicator for short sales.** The findings also stated that the firm transmitted reports to the Order Audit Trail System (OATSTM) that contained inaccurate, incomplete or improperly formatted data, in that the reports contained inaccurate timestamps, incorrect order-type codes and incorrect information for proprietary transactions in a market-making security. The findings also included that the firm failed to provide order memoranda and failed to memorialize correctly order information, order receipt time or the order type code. **(FINRA Case #2007008322001)**

Schonfeld Securities, LLC (CRD #23304, Jericho, NewYork) submitted a Letter of Acceptance, Waiver and Consent in which the firmwas censured and fined $47,500. Without admitting or denying the findings, the firm consented to the described sanctions and to the entry of findings that it accepted customer short sale orders in certain securities and, for each order, failed to make/annotate an affirmative determination that the firm would receive delivery of the security on the customer's behalf or that the firm could borrow the security on the customer's behalf for delivery by settlement date. The findings stated that in connection with orders, the **firm effected short sales in certain securities for its proprietary account(s) and failed to make/annotate an affirmative determination that the firm could borrow the securities or otherwise provide for securities' delivery by settlement date. The findings also included that the firm accepted short sale orders in an equity security from another person, or effected short sales in an equity security for its own account, without borrowing the security, or entering into a bona fide arrangement to borrow the security; or having reasonable grounds to believe the security could be borrowed so that it could be delivered on the date delivery is due;** and documenting compliance with SEC Rule 203(b)(1) of

Regulation SHO. FINRA found that the firm failed to provide documentary evidence that it performed the supervisory reviews set forth in its written supervisory procedures concerning NASD Rule 3370 and SEC Rule 203(b)(1). FINRA also found that the firm failed to timely report Reportable Order Events (ROEs) to OATS. **(FINRA Case #2005000686501)**

(Note: This is the very same Schonfeld Securities that were involved in the 2003 NASD censure for misusing trading systems alongside Trillium Trading. How many chances do regulators provide boiler room operations such as these?)

The Vertical Trading Group, LLC (CRD #104353, NewYork, NewYork) submitted a Letter of Acceptance, Waiver and Consent in which the firm was censured, fined $25,000 and required to revise its written supervisory procedures regarding the One Percent Rule; the dissemination of quotations to vendors; monthly order execution information; SEC Regulation SHO's locate requirements; the acceptance of short sale orders for threshold securities; maintaining identical quotes; market order protection; best execution for block orders, not held orders and orders with special pricing terms or conditions; reporting the capacity in which trades are executed; ensuring the accuracy of trades reported on the member's behalf; the tick test; and books and records. Without admitting or denying the findings, the firm consented to the described sanctions and to the entry of findings that it failed to properly identify orders as short sale orders and, therefore, failed to report to the NNTRF the correct symbol indicating whether transactions were buy, sell, sell short, sell short exempt or cross for transactions in reportable securities, and to properly mark the orders as short. The findings stated that the firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable laws, regulations and FINRA rules concerning the One Percent Rule; the dissemination of quotations to vendors; monthly order execution information; **Regulation SHO's locate requirements; the acceptance of short sale orders for threshold securities; maintaining identical quotes; market order protection; best execution for block orders, not held orders and orders with special pricing terms or conditions; reporting the capacity in which trades are executed; ensuring the accuracy of trades reported on the member's behalf; the tick test; and books and records.** The findings also stated that the firm failed to produce documentation that it enforced its written supervisory procedures concerning the marking of order tickets and locate requirements. The findings also included that the firm failed to report the correct symbol to the NNTRF or OTCRF indicating whether the firm executed transactions in reportable securities in a principal, "riskless" principal or agency capacity. **(FINRA Case #2006004088101)**

(Note: VERT is widely recognized by investors as a market maker who abuses their market making obligations and manipulates stock prices for profit. They are the firm the less than reputable clients trade through when they want a "job done" and this enforcement case, despite the paltry fine, illustrates their willingness to avoid the rules.)

The point to this exercise is that a considerable expense is already being paid for having poorly designed rules and regulations.

1. FINRA must expense resource to audit and bring enforcement action against firms for short sale violations taking such resource away from more pressing issues.
2. Market pricing and efficiency suffers due to the fraud committed by these "compliance" errors. Short sales executed illegally in proprietary accounts or for preferred clients distort the markets.

3. Those fined must expense capital to address supervisory systems to meet the variables existent in the present rule making. Having a hard borrow would eliminate the expense of affirmative determination and would eliminate the trade mismarking as it would be abundantly clear with the borrow that it is a short sale.
4. Finally, abuse by market makers such as VERT can be addressed by proper rule making. More clearly defined rules must be put in place to address how and when market makers inject liquidity to insure that price discovery is not being distorted for profit by these firms.

The evidence is right before your eyes. The SEC should address rules in part based on how the present rules are being violated.