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July 1, 2009

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

Re: Amendments to Regulation SHO; File No. S7-08-09; Release No. 34-59748, 74 Federal Register 18042 (April 20, 2009).

Dear Ms. Murphy:

The American Bankers Association[1] appreciates the opportunity to comment on the two approaches to restricting short selling recently proposed by the Securities and Exchange Commission (Commission). In 2007, the Commission, after much study, determined to eliminate the uptick rule which generally provided that a listed security could only be sold short at a price above the price at which the immediately preceding sale was effected (plus tick), or (ii) at the last sale price if it was higher than the last different price (zero plus tick). In light of recent market turmoil, the Commission has determined to revisit the issue and has proposed to implement a price test, based on either a national best bid or last sale price or, alternatively, to apply a circuit breaker on a particular security during a severe market decline in that security.

The ABA recognizes that short selling can be a legitimate and important financial tool. Legitimate short selling can operate as a mechanism for generating market liquidity, securing price discovery, and facilitating important risk management activities. The ABA is, however, unalterably opposed to short selling practices that distort the markets through manipulation and abuse. Over the course of the last year or so, our members, both large and small, have told us that short sellers were taking advantage of the uptick rule's absence; that their stock prices were experiencing excessive downward pressure unrelated to actual conditions of the firm; that there were excessive fails to deliver (FTDs) in bank stocks; and that measures needed to

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the national's banking industry and strengthen America's economy and communities. Its members—the majority of which are banks with less than $125 million in assets—represent over 95 percent of the industry's $13.6 trillion in assets and employ over 2 million men and women.

be taken, including reinstating the uptick rule in some format, to reduce the avenues for abusive trading practices and to restore investor confidence.

The ABA recognizes that the market events of the last year have been trying for the industry, investors and the regulators, and that the Commission has done much to address abusive distort and short campaigns. It has been widely recognized that naked short selling has a higher risk of settlement failure and may distort the operations of financial markets by causing price volatility and potentially facilitating market manipulation. The Commission's interim final Rule 204T has had a salutary effect on reducing FTDs and we strongly encourage the Commission to make Rule 204T permanent.

Many of our members believe more can and should be done, however. Our members come at this issue from several vantage points. Those of our members that have relatively small market capitalizations, are thinly traded and have little to no analyst coverage believe that reinstatement of the uptick rule, in some format, is extremely important. Through the comment process, these banks have provided the Commission with empirical data demonstrating the impact the lack of a price test has had on the level of short interest in their firms' stock.[2] Other banks with more actively traded stocks also support reinstatement despite the fact that the proposed approaches, if adopted, would introduce inefficiencies, such as lower volume, to the market. These banks see this speed bump as a small price to pay in order to shore up investor confidence that our markets are, indeed, fair and orderly.

We are strongly supportive of the reasoned and deliberative process the Commission has undertaken through this rulemaking and encourage the Commission to continue to work with all market participants to arrive at a result that prevents the destabilizing effect that significant downward stock price spirals can wreak on the market and, at the same time, does not undermine the benefits short selling brings to the market. In this same vein, we would also encourage close consultation on this matter with international securities regulators. The events of the last year demonstrated clearly that international cooperation and coordination is important.

DISCUSSION

Price Test Based on National Best Bid

Of the several proposals suggested, the ABA believes that prohibiting all persons from effecting short sales under a price test that references the national best bid is the most appropriate method to ensure that abusive and manipulative short selling strategies are not used as an accelerant to drive down markets. An across-the-board prohibition applicable to all covered securities, wherever traded, is the easiest for market participants to understand and to implement. We also agree with the

[2] See, e.g., Letter from John Kozak, CFO Park National Bank, dated May 19, 2009; Letter from Dennis Nixon, CEO and Chairman of International Bancshares Corporation, dated June 9, 2009.

Commission that a best bid price test is preferable to a last sale price test because changes in the national best bid are sequenced across trading centers and the national best bid reflects current information regarding interest in buying and selling stocks, whereas the last price test is released on a 90 second delayed basis and published in reporting sequence, not trade sequence. Finally, the national best bid test, unlike the last price test, would accommodate automated trade matching systems.

The ABA does not support the circuit breaker approach. As proposed, the circuit breaker, once triggered, would ban all short selling in a particular stock or, alternatively, impose a price test, based on either the national best bid or last sale price, in that stock. Attracted by the notion that the circuit breaker approach would have more limited application than a price test, several commentators have expressed support for the circuit breaker approach should the Commission determine to take action in this area. The ABA believes that the circuit breaker approach could have a magnet effect on those stocks that are nearing the circuit breaker's trigger, i.e., higher volumes and volatility in the affected stock up until the trigger point is reached. The stigmatizing effect on stocks subject to the breaker coupled with the temporal nature of the ban is, in our opinion, unlikely to improve investor confidence in the markets. Finally, the circuit breaker accompanied by a short selling ban would deprive the markets, at least temporarily, of the benefits of short selling.

Trading centers should be required to establish, maintain and enforce written policies and procedures reasonably designed to prevent short sales in violation of the national best bid price test. Trading centers are already familiar with this type of trading related policies and procedures approach under Regulation NMS. In addition, a policies and procedures approach will allow trading centers to address appropriately technology and other limitations associated with a price test.

As an alternative to a full scale implementation of national best bid price test, some have suggested that the test be implemented through a pilot program. Our members have expressed concern that the program costs to implement the test on a pilot basis may outweigh the benefits.

Implementation Period

The Commission has suggested that a three month implementation period would be sufficient to provide trading centers with adequate time in which to modify their systems and procedures in order to comply with the requirements of the national best bid price test. While three months may be sufficient time for the trading centers themselves to comply with a policies and procedures enforcement approach, some of our members have suggested that a three month implementation period may not be feasible for their firms, given the IT demands associated with the overhaul of options symbology currently scheduled to be fully implemented by February 2010. Once the price test is, in fact, implemented, we would encourage the Commission to monitor the rule's effectiveness in addressing abusive and manipulative short selling.

Exemptions

On June 19, 2009, The Technical Committee of the International Organization of Securities Commissioners (IOSCO) published a final report entitled *Regulation of Short Selling*. That document listed several high level principles for effective regulation of short selling, one of which was that short selling regulation should allow appropriate exceptions for market making activities in order to allow for efficient market functioning and development. The International Banking Federation, of which the ABA is a charter member, fully supported this principle. The ABA would encourage the Commission to take a similar approach. It is our experience that market makers are unlikely to engage in transactions that would have a destabilizing effect on the market.

CONCLUSION

The ABA appreciates the opportunity to offer comments to the Commission on the various options it is considering to address those short selling activities that are harmful to our markets and investor confidence. We strongly support a modified uptick rule that prohibits all persons from effecting short sales in violation of a price test based on the national best bid. Trading centers should be required to establish, and monitor compliance with, policies and procedures designed to prevent the execution or display of short sale orders at a down-bid price. Where appropriate, exceptions, including those applicable to market makers, should be adopted. Rule 204T should be made permanent. Finally, we would strongly encourage the Commission to consult and coordinate with international counterparts on this important issue.

Sincerely yours,

Sarah A. Miller