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July 8, 2009

Via Email: rule-comments@sec.gov

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

**Re: Amendments to Regulation SHO, Release No. 34-59748;
File No. S7-08-09 (Apr. 10, 2009)**

Dear Ms. Murphy:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee") of the Section of Business Law of the American Bar Association (the "ABA") in response to the request for comments by the Securities and Exchange Commission (the "Commission") on the Commission's proposed amendments to Regulation SHO (the "Proposed Amendments") under the Securities Exchange Act of 1934 (the "Exchange Act").¹ This letter was prepared by members of the Committee's Subcommittee on Trading and Markets, with input from other members of the Committee.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, these comments do not represent the official position of the ABA Section of the Business Law, nor do they necessarily reflect the views of all members of the Committee.

The Committee would like to thank the Commission for this opportunity to comment on the Proposed Amendments. We commend the

¹ Exchange Act Release No. 59748 (Apr. 10, 2009) (referred to herein as the "Proposing Release").

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Commission and its staff for its diligence and commitment in responding to recent developments in the financial markets.

I. SUMMARY OF THE PROPOSED AMENDMENTS

On April 8, 2009, the Commission unanimously voted to publish for comment five alternatives for a short sale price restrictions (each referred to herein as a “Price Test”) and circuit breaker restrictions. Specifically, the Commission proposed: two forms of a Price Test, which would apply at all times for all equity securities:

- The “Proposed Modified Uptick Rule,” which would be a market-wide short sale price test based on the national best bid; and.
- The “Proposed Uptick Rule,” which would be a market-wide short sale price test based on the last sale price or tick.

The Commission also proposed three variations of a circuit breaker, which would apply to specific securities if certain conditions occurred:

- The “Proposed Circuit Breaker Halt Rule,” which would prohibit short selling in a specific security for the remainder of the day if there is a severe decline in price in that security;
- The “Proposed Circuit Breaker Modified Uptick Rule,” which would trigger a short sale price test for a particular security based on the national best bid for that security the remainder of the day if there is a severe decline in the price of that security; and
- The “Proposed Circuit Breaker Uptick Rule,” which would impose a short sale price test for a particular security based on the last sale price for that security for the remainder of the day if there is a severe decline in price in that security.

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The Commission also proposed to reinstate the exemptions from the original “uptick rule” that were in place when it published the release (the “Rescission Release”) rescinding Exchange Act Rule 10a-1 in 2007.²

As a general matter, the Committee determined that comments about whether and in what form to adopt a Price Test are best left to others. Rather, we have focused our comments on legal considerations and related issues that we believe are relevant to the rule proposal, and offer a few specific comments on factors that we believe the Commission and its staff should consider with respect to the proposed Price Tests.

II. A DETERMINATION TO REESTABLISH A PRICE TEST MUST SATISFY THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT

Section 10(a) of the Exchange Act authorizes the Commission to prescribe rules for the regulation of short sales of “any security registered on a national securities exchange” as necessary and appropriate in the public interest or for the protection of investors. Section 3(f) of the Exchange Act further requires the Commission to consider whether any such rule will “promote efficiency, competition and capital formation.”³

It appears that the Commission would have the same burden when reinstating a regulatory requirement as when enacting an initial rule. In a very recent case, *FCC v. Fox Televisions Stations, Inc.*,⁴ the U.S. Supreme Court rejected any notion that the Administrative Procedure Act imposes a heavier burden of justification on an agency seeking to depart from a prior position than it imposes upon an initial rulemaking:

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review [than would apply to an initial rulemaking decision]. The Act mentions no such heightened standard. And our opinion in *State Farm [Motor Vehicle Mfrs. Assn of United States, Inc. v. State Farm Mut. Automobile Ins. Co.]*, 463 U.S. 29 (1983) neither held nor implied that every

² Exchange Act Release No. 55970 (June 28, 2007).

³ See also Exchange Act Section 23(a)(2).

⁴ *Fed' Commun. Comm'n v. Fox Television Stations, Inc.*, 556 U.S. ___ (April 28, 2009).

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agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance. That case, which involved the rescission of a prior regulation, said only that such action requires ‘a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance.’⁵

The Court further outlined an agency’s duties in reversing a former regulatory decision:

[O]f course, the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reason for the new policy are *better* than the reasons for the old one; it suffices that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy, or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. *In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.*⁶

An *unjustifiable* departure from prior agency interpretation, however, has been held to be unwarranted and is reversible as a matter of law. In a recent case, *Goldstein v. Securities and Exchange Commission*, the D.C. Circuit Court of Appeals stated:

By painting with such a broad brush, the Commission has failed adequately to justify departing from its own prior

⁵ *Id.*, slip op. at 10.

⁶ *Id.*, slip op. at 11-12 [emphasized words in original; citation omitted; emphasis added to last sentence].

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interpretation of [Advisers Act] § 203(b)(3). See *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 12 (D.C. Cir. 2005) (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)). . . . As discussed above, the Commission does not justify this exception by reference to any change in the nature of investment adviser-client relationships since the safe harbor was adopted. Absent such a justification, its choice appears completely arbitrary. See *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005) (“A statutory interpretation . . . that results from an unexplained departure from prior [agency] policy and practice is not a reasonable one.”).⁷

If a Commission rule is challenged before a U.S. Court of Appeals, Exchange Act Section 25(b)(4) establishes a substantial-evidence test for facts identified by the Commission as the basis in whole or in part for the rule:

The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

As with any other rulemaking, if the Commission were to adopt a Price Test, it will be essential that it identify the facts and data upon which its conclusion is based. In the case of any decision with respect to a Price Test, which almost by definition is intrinsically linked to market and economic data, it will be particularly important for the Commission to publish any previously

⁷ See *Goldstein v. Secur. & Exch. Comm'n*, 451 F.3d 873, D.C. Cir. 2006 (overturned the Commission's rule that required most hedge fund managers to register as investment advisers with the Commission, holding that the Commission had failed adequately to justify departing from its own prior interpretation of the relevant statutory provision and that there was a “disconnect” between the factors the Commission cited and the rule it promulgated).

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unpublished data or studies that form the basis of its decision. Such disclosure is important to provide sunshine on the Commission's decision making process:

In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.⁸

If the Commission determines to adopt a Price Test, and should that action be taken up by a court, the Commission's action will be judged by whether it has marshaled sufficient factual support for that conclusion, buttressed by a showing that the form of Price Test adopted would reasonably be likely to address the problems identified by the Commission as the basis for its regulatory action.

If the Commission determines to adopt a Price Test, we respectfully suggest that the Commission articulate a clear nexus between the adopted test and the public interest, particularly the protection of investors. One justification could be a finding that the markets performed fundamentally differently during the recent financial crisis than did the markets referenced in the Rescission Release and the studies that were cited when the uptick rule was repealed.

III. A DECISION TO REESTABLISH A PRICE TEST SHOULD BE CONSISTENT WITH THE COMMISSION'S ECONOMIC STUDIES

A. Introduction

If the Commission determines to adopt a Price Test, it should address why it is reaching a different conclusion than it reached in 2007 in light of the same staff studies that the Commission cited in support of the rescission of Rule 10a-1 and subsequent staff studies.

⁸ *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982).

B. 2007 OEA Study

The first major hurdle the Commission must address is the original study by the Office of Economic Analysis (“OEA”) that the Commission relied on in eliminating Rule 10a-1’s uptick rule. In that study the staff examined “several aspects of market quality, including the overall effect of [short sale] price tests on short selling, liquidity, volatility and price efficiency” over a period of several months during which stock prices in general increased.⁹ Among other things, the Study examined whether price tests including the Commission’s last sale tick test for listed stocks and the NASD’s bid test for Nasdaq stocks “dampen[ed] volatility,” which the Commission took to mean whether the price test prevented short selling “from creating excessive downward price pressure.”¹⁰

The conundrum posed by this analysis is that in generally rising markets, there may be no way to determine whether a price test prevented downward pricing pressure or conversely whether this was simply a result of a generally rising market. Put another way, did the similar performance of stocks that were subject to a price test and stocks that were not the subject of a price test mean that the price test was generally unimportant, or was this simply a reflection of the fact that in rising markets a price test is unimportant?

The OEA noted that the two price tests it studied, Rule 10a-1’s last sale tick test and NASD’s bid test, were quite different. Both were meant to preclude sales at prices below the last relevant price or at that price unless the last preceding different price was lower. It further noted that over time both price tests became subject to an increasing number of exceptions meant to facilitate the provision of liquidity to customer orders and to accommodate new types of trading (*e.g.*, volume weighted average price (VWAP) and exchange trade fund (“ETF”) trades) under circumstances that did not appear to implicate the purposes of short sale regulation. Finally, the OEA noted that short positions could be replicated by other means not subject to any price test. OEA’s conclusion was that, except for making it more difficult and expensive for short sellers to obtain immediate liquidity, the price tests had no

⁹ Exchange Act Release No. 54891 (December 7, 2006).

¹⁰ *Id.*

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overall discernable impact on the markets, and therefore that there was no real justification, empirically, for retaining those controls on short selling.¹¹

The Committee appreciates the challenges that the Commission faces in differentiating the conclusions drawn in its staff's prior studies should it determine to adopt a Price Test, but at the same time respectfully notes how important it will be for the Commission to do so.

C. December 2008 OEA Memoranda

The Commission has included in the comment file two memoranda from OEA reporting on short selling activity and analyzing the hypothetical application of a price test to trading activity,¹² neither of which the Commission cited in the Proposing Release. OEA did not conclude or recommend to the Commission in either memorandum on the adoption of a price test.

The OEA memoranda do not contain any data concerning any specific trading days or any specific stocks. The Committee believes that it would also be helpful for the Commission to make publicly available, on an aggregate basis so as not to divulge any particular market participant's confidential or proprietary trading information, what we understand to be considerable amounts of data that it collected from various brokerage firms and hedge funds regarding their short selling activities and the impact such activities may have had on the precipitous decline in the stocks of certain financial institutions as well as the collapse of Bear Stearns and Lehman Brothers.

The Committee recognizes the importance of maintaining the confidentiality of individual market participants' trading data, but believes that providing such data on an aggregate basis likely would be helpful to allow persons outside the Commission to evaluate the methodology and findings of the OEA memoranda that may serve as the basis for any final rulemaking. Even if provided on an aggregate basis, such information would

¹¹ See *id.*

¹² See OEA, *Analysis of Short Selling Activity during the First Weeks of September 2008* (Dec. 16, 2008) available at <http://www.sec.gov/comments/s7-08-09/s70809-369.pdf>; and OEA, *Analysis of a short sale price test using intraday quote and trade data* (Dec. 17, 2008) available at <http://www.sec.gov/comments/s7-08-09/s70809-368.pdf>.

be useful in addressing some of the questions raised by the Commission in the Proposing Release.

IV. DISCUSSION OF THE ALTERNATIVE PRICE TESTS

A. Introduction

As OEA stated in its 2007 Study:

The Commission's Special Study (1963) identified three objectives of the tick test, which the Commission has used consistently as a framework for evaluating the effectiveness of the regulation. These objectives are that the rule should:

- (1) Allow relatively unrestricted short sales in an advancing market;
- (2) Prevent short selling at successively lower prices, thus eliminating short selling as a tool for driving the market down; and
- (3) Prevent short sellers from accelerating a declining market by exhausting all remaining bids at one price level, causing successively lower prices to be established by long sellers.¹⁴

Moreover, the Committee takes no view as to any of the particular Price Tests proposed by the Commission. Instead, we discuss below the factors that we believe the Commission should consider in deciding whether to adopt a Price Test and what formulation such rule should take, if adopted. If the Commission adopts a Price Test, the rule must match its intended purpose. For example, if the Commission's primary goal is to restore investor confidence as a result of having reinstated the "tick test" or "uptick rule" that was in place from Rule 10a-1's adoption in 1938 until its rescission in 2007, a "policies and procedures" formulation would achieve this goal by looking at broker-dealers and market centers to have procedures in place to prevent the execution of short sales in violation of the price restrictions. If, however, the Commission's goal is to prohibit manipulative trading activity such as "bear

¹⁴ OEA Study at 13.

raids,” a rule that penalizes any person who executes a short sale in violation of the provisions of that rule and is not directed at the market intermediaries who receive and transmit their orders would seem more appropriate.

B. Proposed Modified Uptick Rule and Proposed Uptick Rule

1. Introduction

The Commission proposes as alternatives two new price tests that would apply across all U.S. markets to securities that are “NMS stocks” under Rule 600(b)(47) of Regulation NMS, one a new last sale tick price test, the Proposed Uptick Rule, and the other a new best bid price test, the Modified Uptick Rule.

The Proposed Modified Uptick Rule, using the best (highest priced) bid published pursuant to the Consolidated Quote Plan as a reference point, would require each “market center” to adopt written policies and procedures reasonably designed to prevent the execution or display of a short sale order at a “down-bid” price (defined in a way that tracks the old last sale tick test as “a price that is less than the current national best bid or, if the last differently priced national best bid was greater than the current national best bid, a price that is less than or equal to the current national best bid”).

The Commission states that, preliminarily, it prefers this test to its Proposed Uptick Rule for a variety of reasons, including the fact that last sales are reported in a random and often out of order fashion (since reports of last sales may be submitted from the multiple market centers at any time within 90 seconds of the execution time without being untimely under applicable rules) and thus are an inferior measure of what the most current national price is from time to time than the best national bid.

A number of individual commenters, however, seem to request a reinstatement of the uptick rule as it existed in 2007, as compared to the Proposed Modified Uptick rule, which resembles the bid test previously used by Nasdaq OMX. In general, however, these commenters have not provided any analysis, data, or other information to support their recommendation.

The Committee notes that the adoption of Regulation NMS in 2005 made the original uptick rule obsolete because of the absence of a centralized trading venue and the lack of sequential trade reporting. It was for these

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reasons that the Commission provided an exemption from the uptick rule when Nasdaq registered as a national securities exchange in 2006,¹⁵ and permitted it to adopt a bid test.¹⁶ With the final implementation of Regulation NMS in 2007, equity securities generally are no longer traded in an environment where transactions are executed in one location and reported sequentially.¹⁷ Accordingly, it is the Committee's view that restoration of the uptick rule would require substantial amendments to, or elimination of, Regulation NMS, and the adoption of new trade reporting requirements to provide real-time last sale information across all markets.¹⁸

2. Direct or Indirect Application of the New Price Test.

We have considered whether a Price Test, if adopted, should apply to market centers at the time of execution, or instead to the short seller who transmits the short sale order. Although the Commission signals, without much discussion, an indifference to these two very different regulatory paths,¹⁹ we respectfully suggest that the Commission match its approach with the intent of the new requirement.

If the Commission's intent is to prevent short sellers from causing or accelerating a market decline, that objective would more likely be achieved through a direct prohibition in the Commission's rules rather than through a policies and procedures market center-based requirement. A direct prohibition would apply to all market participants in all market centers.

C. Circuit Breaker Proposals

1. Introduction

The Commission also published for comment three alternative "circuit

¹⁵ See Exchange Act Release No. 53138 (Jan. 13, 2006). See also SEC No-Action Letter to NASD, Inc., June 26, 2006.

¹⁶ Exchange Act Release No. 34277 (June 29, 1994).

¹⁷ Exchange Act Release No. 51808 (Aug. 29, 2005) 12 – 21. (Regulation NMS seeks to strike a balance between competition among markets and competition among orders.)

¹⁸ The institution of a market environment where orders are executed in one location, even a "virtual location," and reported sequentially would be a massive change in current market practice that should be developed only after careful study and a substantial period of public comment.

¹⁹ See Proposing Release.

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breaker” proposals. In its proposing release, the Commission stated that “[a] short selling circuit breaker rule would be designed to target only those securities that experience rapid severe intraday declines and, therefore, might help to prevent short selling from being used to drive the price of a security down or to accelerate the decline in the price of those securities.”²⁰

Each of the three circuit breaker proposals would impose conditions on the short selling of an individual security that had experienced an intra-day price decline of 10% or more, and those conditions would remain in effect for the remainder of the trading day. Two of the alternatives would also impose either the uptick or the modified uptick requirements on short sales of the particular security. The third alternative would halt short selling in a particular security, with exceptions similar to those included in the Commission’s temporary halt on short selling certain securities imposed in September 2008.²¹

2. Analysis of the Impact of a Circuit Breaker Test

In considering the circuit breaker proposals, we are concerned that the Commission may not have fully examined the implications of this form of Price Test, and we believe that prior to adopting a circuit breaker Price Test, the Commission should conduct a more detailed and substantive analysis to provide a sound reasoning for such a requirement and to understand the market impact of such a rule. Certainly, we understand the Commission’s concern, as stated in the Proposing Release, that “investors have become increasingly concerned about sudden and excessive declines in prices that appear to be unrelated to issuer fundamentals.”²² In addition, we support the Commission’s efforts to develop a narrowly-tailored solution to the issue of unexplained sudden and excessive price declines. However, we have concerns with certain aspects of the Commission’s stated reasoning for the circuit breaker proposals.

²⁰

Id.

²¹

See Exchange Act Release No. 58611 (Sept. 21, 2008).

²²

See Proposing Release.

a. The Commission Has Not Sufficiently Addressed the Consequences of Market Closings and Market Impediments That Would Result From Imposition of Circuit Breakers.

In our view, the Commission has not provided sufficient support to justify adopting regulations that could close markets or create impediments to trading. We note that the Commission's has stated in connection with the circuit breaker proposals that it does not favor market closings as a general matter and that market impediments should be minimized. In this regard, we believe the Commission has not set forth a sufficient basis for imposing the significant market impediments that would result from the circuit breaker rules for short sales. Among other things, we question whether the Commission has adequately set forth a basis for determining that a 10% intraday price decline in a security, in and of itself, supports the imposition of a circuit breaker restriction on short selling in that security, thereby interfering with the market's ability to reflect the perceived value of the security, whether due to factors relating only to the issuing company or to the markets as a whole. By applying regulatory brakes, circuit breakers have the potential for interfering with market forces and causing buyers to overpay. Prior to adopting any final release, we believe that the Commission should more fully address these issues and the costs and benefits they present.

b. The Commission's Comparison with SRO Circuit Breakers is Inapposite to Issues Arising with Short Sale Regulation.

In large part, the Commission's stated reasoning for proposing a circuit breaker approach for short sales is based on the circuit breakers that have been adopted by self-regulatory organizations ("SROs").²³ However, we question the Commission's use of the SRO circuit breaker rules as a basis for its current proposal because we view the circumstances to which the SRO rules are addressed as inapposite to the circumstances behind the Commission's current proposal. More specifically, the SRO circuit breaker rules are designed to address market-wide price declines that could indicate larger systemic concerns. In our view, a 10% intraday decline in the price of a

²³ See, e.g., NYSE Rule 80B; see also Exchange Act Release No. 39846 (Apr. 9, 1998). As the Commission noted, the SROs' circuit breaker procedures call for cross-market trading halts when the Dow Jones Industrial Average declines by 10 percent, 20 percent, and 30 percent from the previous day's closing value.

single security does not raise the types of systemic concerns that informed the adoption of the SRO circuit breaker rules. We respectfully recommend that the Commission to conduct a broader analysis of the potential issues before adopting any circuit breaker requirements.

- c. The Commission Should Provide Additional Support and Analysis for any Circuit Breaker Requirements.

Following on our discussion above suggesting that the Commission make publicly available the January 2009 and December 2008 staff reports, we believe the Commission should conduct an analysis of the effect and success of its previous regulatory actions in connection with short selling activity, and make such analysis publicly available, before adopting any circuit breaker requirements. We note that, as support for the circuit breaker proposals, the Commission refers to previous regulatory actions taken, including the adoption of the SRO circuit breaker rules and the 2009 temporary ban on short sales in certain financial industry stocks. The Commission, however, has not made available to the public any of the information obtained through its prior experience. In particular, we believe the Commission should determine and publish whether any evidence suggests that the triggering of the SRO circuit breakers in October 1997 or the 2009 temporary short sale ban were effective in addressing the regulatory problems they were designed to address.

D. OTHER INSTRUMENTS

In its request for comment, the Commission specifically asks commenters to address the extent to which derivative products such as options, futures, contracts for differences, warrants, credit default swaps or other swaps or other instruments such as inverse leverage exchange traded funds undermine the efficacy of the proposed rule's price tests.²⁴ This question is particularly important since the Commission currently lacks the legislative authority to regulate short selling of securities futures products²⁵ and has no jurisdiction over non-standardized swap agreements.²⁶

²⁴ See *Proposing Release* (Section IV Request for Comment, Number 15).

²⁵ See Exchange Act Section 10(a)(2).

²⁶ See Exchange Act Section 3A. Because of the way the term "swap agreement" is defined in Section 206B of Gramm-Leach-Bliley Act, standardized swap agreements are not included within the prohibitions of Section 3A.

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The Committee has determined that the issue of extending price tests to derivative products requires economic and trading analysis that is best left to market participants and others with the necessary expertise in this area. We have, however identified the following points that we believe the Commission should consider in approaching this question. First, we believe the Commission should look at the extent to which synthetic short sales through products such as options, swaps and single stock futures represent the economic equivalent of short selling, and may have the same impact on the market for the underlying instrument as actual short sales of the underlying security. Among the factors that we believe should be considered in determining the potential market impact of a synthetic short sale are whether the transaction is privately negotiated and whether either side of the transaction is publicly reported.. Second, we believe that the Commission should consider whether narrow-based and broad-based ETFs should be treated in the same manner. For example, are there instances where a narrow-based ETF that is dominated by a handful of public companies can be used for the same purposes as shorting an individual stock by means of shorting the index and buying (*i.e.*, hedging) only some of the components of the ETF?

The third factor is the size of the market for the particular derivative instruments and whether trading volumes are of such significance that synthetic short sales by means of such instrument are likely to impact the price of the underlying security. A final factor that we believe should be considered is the correlation between the synthetic short sales and cash short sales.

V. EXCEPTIONS

If the Commission adopts the Proposed Modified Uptick Rule or Proposed Uptick Rule, the Committee would support inclusion of the exceptions proposed by the Commission, and ask that the Commission also include the exceptions described below.

A. High Frequency Trading

We commend the Commission for addressing the compliance issue of flickering quotes, which can present challenges for complying with marking requirements if a short sale order would comply with the relevant Price Test at

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the time a broker-dealer transmits an order to a market center for execution, but not comply at the time of the order's execution.²⁷

There are other trading scenarios that routinely occur in today's market that make compliance with market requirements difficult, particularly in times of high volatility and especially for high frequency traders. For example, there has been and will remain, absent Commission guidance, confusion about whether a market participant who is long 500 shares may send out more than five 100 share sell orders marked as long. The Financial Industry Regulatory Authority (FINRA) provided guidance in 1997 that a broker-dealer can send 500 shares to every market, but provided no clear indication about whether the broker-dealer should cancel its outstanding orders after selling the first 500 shares, or whether it can net outstanding buy orders at the same time.²⁸ Similarly, it is unclear whether a broker-dealer may cancel all outstanding orders after 500 shares (*i.e.*, 5 round lots) are executed.

The Committee respectfully suggests that the Commission clearly delineate the marking requirements when a firm transmits multiple buy and sell orders from a single aggregation unit.

B. Aggregation Units

Paragraph (f) of Rule 200 of Regulation SHO allows a broker-dealer to disaggregate positions of independent trading units, subject to the conditions set forth in the Rule. The Committee respectfully requests that the Commission extend the aggregation unit exception to non-broker-dealers who satisfy the conditions of Rule 200(f). We believe that recognizing aggregation units of non-broker-dealers is consistent with the Commission's recognition of separate accounts in paragraph (b)(2) of Rule 105 of Regulation M. Specifically, Rule 105 allows disaggregation of accounts for which decisions regarding securities transactions are made separately and without coordination of trading or cooperation among or between accounts.

²⁷

See proposed Rule 201(c).

²⁸

See Head Trader Alert Nos. 1997-34 (April 8, 1997) and 1997-38 (April 18, 1997).

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VI. CONCLUSION

The Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet and discuss these matters with the Commission and its staff and to respond to any questions.

Respectfully Submitted,

/s/ Keith F. Higgins

Keith F. Higgins,
Chair, Committee on
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