



6350 South
3000 East
Salt Lake City, UT
84121

Phone 801.947.3114

Fax 801.947.3144

VIA EMAIL AND U.S. MAIL

August 24, 2009

Mr. James Brigagliano
Mr. Daniel M. Gallagher
Co-Acting Directors, Division of Trading and Markets
Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090

Dear Messrs. Brigagliano and Gallagher,

It was with great interest that I read the July 27, 2009 press release issued by the Commission that announced the September 30, 2009 roundtable to discuss, among other topics, a pre-borrow requirement. I am pleased that part of the purpose of this roundtable is for the Commission “to solicit the views of the views of investors, *issuers*, financial services firms, self-regulatory organizations and the academic community” on “whether it would be appropriate to impose a pre-borrow or enhanced ‘locate’ requirement on short sellers, potentially on a pilot basis” (emphasis added).¹ I believe that it is important to have issuers well represented at this roundtable – since issuers are a primary victim of abusive naked short selling.

Overstock.com has been a long, and perhaps the most persistent, advocate of a pre-borrow requirement.² In addition, while Overstock.com is not currently on the Regulation SHO threshold list, Overstock.com still holds the dubious records of the issuer with both the longest number of consecutive trading days on the list (668) and the most total number of trading days on the list (867). Thus, I believe that Overstock.com is uniquely qualified to represent issuers to discuss the virtues of a pre-borrow requirement. I respectfully request that the Commission allow either Patrick Byrne (Overstock.com’s Chairman and CEO) or me to participate as a panelist in the pre-borrow portion of the September 30 roundtable.

¹ See <http://sec.gov/news/press/2009/2009-172.htm>.

² See, for example, the comments submitted by Overstock.com on June 23, 2009 at <http://www.sec.gov/comments/s7-08-09/s70809-3984.pdf>, May 29, 2009 at <http://www.sec.gov/comments/s7-08-09/s70809-2850.pdf>, August 22, 2008 at <http://www.sec.gov/comments/s7-19-07/s71907-1359.pdf>, July 23, 2008 at <http://www.sec.gov/comments/s7-20-08/s72008-179.pdf>, October 1, 2007 at <http://www.sec.gov/comments/s7-19-07/s71907-303.pdf>, September 10, 2007 at <http://www.sec.gov/comments/s7-19-07/s71907-130.pdf>, April 19, 2007 at <http://www.sec.gov/comments/s7-12-06/s71206-807.pdf>, and September 11, 2006 at <http://www.sec.gov/comments/s7-12-06/s71206-196.pdf>, and notes of meetings between Overstock.com representatives and Commission staff on September 8, 2008 at <http://www.sec.gov/comments/s7-19-07/s71907-1436.pdf>, July 11, 2008 at <http://www.sec.gov/comments/s7-19-07/s71907-682.pdf>, and November 16, 2007 at <http://www.sec.gov/comments/s7-19-07/s71907-336.pdf>.

Mr. James Brigagliano
Mr. Daniel M. Gallagher
August 24, 2009
Page 2

In addition, in preparing for the September 30 roundtable, I encourage the Commission to carefully study the study entitled “The Impact of a Pre-Borrow Requirement for Short Sales on Failures-to-Deliver and Market Liquidity” by Drs. Robert J. Shapiro and Nam D. Pham which Overstock.com has previously provided to the Commission.³ Among the findings in this study are:

1. Naked short selling and the resultant failures-to-deliver contributed to the unmanaged and widely disruptive collapse of Bear Stearns and Lehman Brothers collapse of Bear Stearns and Lehman Brothers.
2. Current regulation has not stemmed failures-to-deliver in meaningful ways and, importantly, the large scale and concentrated failures-to-deliver that occurred during Q2 and Q3 2008 could occur again under the current rules, even with the reinstatement of an uptick rule.
3. Naked short sales increased volatility in stock returns without producing more efficient prices.
4. Strict regulation of short sales in financial firms, including a pre-borrow rule, did not impair market liquidity.
5. A pre-borrow requirement for short sales would not damage market liquidity.
6. Application of a pre-borrow requirement would not entail additional costs for short sellers.
7. New regulation of short sales, including a pre-borrow requirement, should be able to effectively control naked short sales and failures-to-deliver at no appreciable cost to the liquidity or efficiency.

Given the topic and depth of this study, I believe that the Commission should have (and respectfully request that the Commission invite) Dr. Shapiro and/or Dr. Pham participate as panelists in the pre-borrow portion of the September 30 roundtable.

I look forward to hearing the Commission’s responses to these requests and suggestions.

Sincerely,



Jonathan E. Johnson III
President

cc: The Honorable Mary L. Shapiro, Chairman, Securities and Exchange Commission
The Honorable Luis A. Aguilar, Securities and Exchange Commission
The Honorable Kathleen L. Casey, Securities and Exchange Commission
The Honorable Troy A. Paredes, Securities and Exchange Commission
The Honorable Elisse B. Walter, Securities and Exchange Commission

³ See <http://www.sec.gov/comments/s7-08-09/s70809-2850.pdf>.