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September 30, 2009

**Via Email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)**

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

**Re: *Amendments to Regulation SHO*, Release No. 34-60509;  
File No. S7-08-09 (August 17, 2009)**

Ladies and Gentlemen:

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 alternative uptick rule amendment to Regulation SHO (the "Proposed Amendments") under the Securities Exchange Act of 1934 (the "Exchange Act").<sup>1</sup> 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. The Committee previously submitted a comment letter on the Commission's earlier proposal concerning short sales to impose either an uptick rule or modified uptick rule, and/or one of several possible circuit breaker

<sup>1</sup> Exchange Act Release No. 60509 (Aug. 17, 2009) (referred to herein as the "August Proposing Release").

rules.<sup>2</sup> The Committee's earlier letter, from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, to Elizabeth M. Murphy, Secretary of the Commission, dated July 8, 2009 ("our July Letter"), is available at <http://www.sec.gov/comments/s7-08-09/s70809-4021.pdf>. We will not repeat all of the points made in our July Letter; but we believe that they are equally applicable to the Commission's current proposal. The Committee continues to believe, as we expressed in our July Letter, that comments as to whether to adopt a Price Test and what form it should take, are best left to others. And, as we did in our July Letter, we commend the Commission for its request that commenters submit data in support of their views on short sale regulation.

We write primarily to underscore a point made in our July Letter - that data concerning short sales, and in particular the effect of short sales on the market dislocations of 2008, is uniquely within the possession of the Commission. We believe that this data is critical to allowing the public to fully understand and analyze the Commission's objectives and concerns in proposing to reinstate short sale price restrictions generally, as well as the current proposal. We therefore urge the Commission to make that data available to the public so as to better inform the notice and comment process.<sup>3</sup> Although the Commission's April Proposing Release discussed two studies from its Office of Economic Analysis, which it has included in the administrative record, neither the April Proposing Release nor the August Proposing Release explains whether or why the Commission believes those studies support any of its various regulatory proposals. Only the Commission has full access to data about the volume and effect of short sales in current market conditions and during the market dislocations of 2008. Because we believe providing that data to the public would allow for a better informed notice and comment process, we encourage the Commission to consider making such data available, and extending the comment period with respect to the August Proposing Release until such information has been made available and commenters have had an opportunity to evaluate that data. The release of such data may also provide an administrative record that would assist the Commission's effort to support its rulemaking in the face of any potential legal challenge.

We note that, after the submission of our July Letter, the U.S. Court of Appeals for the District of Columbia Circuit decided *American Equity Inv. Life Ins. Co. v. SEC*, No. 09-1021 (D.C. Cir., July 21, 2009). The Court held that while the Commission had legal authority to adopt Securities Act Rule 151A defining indexed annuities as securities, the Commission had not

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<sup>2</sup> Exchange Act Release No. 59748 (Apr. 10, 2009) (referred to herein as the "April Proposing Release").

<sup>3</sup> The Commission gathered data about short selling subject to requests for confidentiality from securities firms which provided that data. We suggest that the data be made available only an aggregate, security-by-security basis, to protect the legitimate confidentiality interests of the submitters and their clients.

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September 30, 2009  
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adequately considered the effects of the rule on efficiency, competition and capital formation. If a price rule is adopted, we respectfully suggest that the Commission consider the implications of that decision in preparing any adopting release.

Once again, 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/ Jeffrey W. Rubin  
Jeffrey W. Rubin  
Chair, Committee on  
Federal Regulation of Securities

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