



October 27, 2008

The Honorable Christopher Cox
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: SEC Release No. 34-58572

Dear Chairman Cox:

On behalf of its members, the Biotechnology Industry Organization ("BIO") is pleased to provide comments on the proposed rulemaking, SEC Release No. 34-58572, by the Securities and Exchange Commission ("SEC" or "Commission") to address excessive market fluctuations of security prices exacerbated by market manipulation, including abusive naked short selling and false rumors. As a result of this market manipulation, the securities prices of many small biotechnology companies have been substantially driven down, harming overall investor confidence in biotechnology companies. Specifically, diminished investor confidence adversely impairs the liquidity and ultimately the viability of emerging biotechnology companies.

BIO represents more than 1,200 biotechnology companies, academic institutions, state biotechnology centers and related organizations across the United States and in more than 30 other nations. BIO members are involved in the research and development of innovative healthcare, agricultural, industrial and environmental biotechnologies, thereby expanding the boundaries of science to benefit humanity by providing better healthcare, enhanced agriculture, renewable fuels, and a cleaner and safer environment.

BIO agrees with the SEC's conclusion that the securities markets are substantially threatened by sudden and excessive fluctuations of securities prices and that disruption of the markets could threaten the Nation's capital markets. BIO believes that legitimate short selling is an important function of our capital markets that provides liquidity and encourages capital formation. We appreciate the SEC's intent to combat market manipulation through its recent temporary short selling ban on certain financial securities. However, market manipulation by short sellers, such as abusive naked short selling and false rumors, whether conducted by short sellers alone or groups of short sellers acting in concert, is also adversely impacting emerging biotechnology companies. BIO member companies support all appropriate SEC regulatory and enforcement actions against market manipulation and illegal short selling activities for all public companies.

1. BIO urges the SEC to aggressively use its enforcement and rulemaking authorities to combat false rumors plaguing the markets

While BIO acknowledges that legitimate short selling generally provides efficient price discovery and market liquidity, illegal short selling has been and continues to be used as a tool to mislead the market. The biotechnology industry has become increasingly vulnerable to investors who illegally spread false rumors in efforts to manipulate security prices. This type of illegal behavior is especially detrimental to emerging biotechnology companies whose value is so dependent on the results of their research and development efforts. For example, the spreading of false rumors of clinical trial results could substantially drive down a biotechnology company's stock price and it often takes a long time for the company's stock price to recover its market value. Due to the resource intensive nature of our industry and its dependency on the markets, such illegal activities can be particularly damaging to emerging biotechnology companies' efforts to attract investment. In addition to enhanced enforcement, BIO urges the SEC to consider other mechanisms within the regulatory framework in which companies are empowered to address false rumors on a case-by-case basis.

2. BIO commends the SEC's implementation of Rule 10b-21 naked short selling anti-fraud rule

BIO commends the SEC's recent action to implement Rule 10b-21 targeting fraudulent short selling transactions for short sellers who deceive broker-dealers or any other market participants. Under the rule, those who lie about their intention or ability to deliver securities in time for settlement are violating the law when they fail to deliver. While we agree that implementation of an anti-fraud rule would help curb abusive naked short selling, strict SEC enforcement of the anti-fraud rules is necessary to effectively curb such abusive behavior.

3. BIO supports a permanent new rule on "Hard T+3 Close-Out Requirement" for naked short selling and penalties for violation including a ban on further short sales without a mandatory pre-borrow

BIO commends the Commission for recognizing that it is necessary to impose a new interim rule to enhance delivery requirements on sales of all equity securities under Regulation SHO Rule 204T. The new rule is a step in the right direction to curb abusive naked short selling, particularly for thinly-traded emerging biotechnology companies. For example, if a broker-dealer were to engage in naked short selling of a biotechnology company and does not secure the securities within a specified time period, such actions would keep the short open indefinitely – resulting in dilution of the company's valuation and thus distorting the company's stock price. While a permanent "Hard T+3 Close-Out" rule could be very effective in mitigating abusive naked short selling, particularly for thinly traded companies, BIO recognizes that the SEC may need to consider appropriate exceptions to the "Hard T+3 Close Out" rule for legitimate short sellers in order for the financial markets to operate smoothly.

BIO agrees that penalties, including a mandatory pre-borrow requirement, would mitigate against abusive naked short selling. Specifically, the interim rule provides penalties for short sales that violate the “Hard T+3 close-out” requirement. These penalties would prohibit a broker-dealer from further short sales in the same stock unless the shares are not only located but also pre-borrowed. Such prohibition on the broker-dealer’s activity would not be limited to short sales for the particular naked short seller, but to all short sales for any customer.

BIO is also supportive of a mandatory buy-in requirement for naked short sales that fail to deliver securities within the three-day window (T+3 close-out requirement). Under a mandatory buy-in, the broker-dealers would be required to buy the securities in the market to ensure that the securities are no longer “naked.” A buy-in requirement would ensure a close-out requirement within three days for failed naked short sales.

4. BIO recommends that the SEC study whether a price test and/or circuit breaker rule would be an effective measure to help mitigate the negative impact of abusive short sales

BIO recommends that the SEC examine other mechanisms to curb illegal short selling activities. The SEC should study whether or not a price test and/or circuit breaker rule would be an effective measure to help mitigate the negative impact of abusive short sales. While the SEC removed the uptick rule, citing that it has been largely obsolete since 2001 when the industry went to decimalization and a tick became only one cent, the SEC could consider a modified price test that would only allow further short sales only when the stock price has reached a certain “meaningful” amount over the last trade or current quote. The SEC could also examine the effectiveness of a circuit breaker rule that would halt trading of short sales of a stock that declines by a certain percentage. If the SEC does consider implementation of a circuit breaker rule, appropriate exemptions to such a rule should be thoroughly examined in order to prevent any indirect adverse market impact.

While BIO believes that effective SEC enforcement is essential to curbing illegal short selling activities, the implementation of other effective mechanisms in conjunction with enforcement could substantially mitigate market manipulation and abusive short selling behavior.

5. BIO is concerned that the short-selling ban of financial stocks has adversely affected emerging biotechnology companies access to the convertible bond market

BIO is concerned that the SEC’s recent short-selling ban of financial securities has effectively stalled a substantial part of the convertible bond market. It is our understanding that allowing shorting flexibility and availability to borrow financial stock are crucial components of the convertible bond market. Particularly in financially stressful times, biotechnology companies have turned to convertible debt to raise capital when their stock prices decline. Convertible debt has also been a critical alternative

source of capital for biotechnology companies with commercial products or on the verge of commercialization. As the SEC considers regulatory and enforcement actions, it is crucial that the Commission consider the potential indirect adverse impact that its actions may have particularly on the convertible bond market. The SEC's recent ban of short selling of financial stocks has indirectly closed an important alternative financing source for biotechnology companies.

BIO appreciates the efforts of the Commission to combat market manipulation and looks forward to working with the Commission on a going forward basis to ensure that securities of all public companies, including the biotechnology industry, are protected against illegal, abusive naked short selling and false rumors. If you have further questions, please contact me or Shelly Mui-Lipnik, Director of Capital Formation and Financial Services Policy, at (202) 962-9200.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan F. Eisenberg". The signature is fluid and cursive, with a prominent initial "A" and a long, sweeping tail.

Alan F. Eisenberg
Executive Vice President
Emerging Companies and Business Development
Biotechnology Industry Organization (BIO)