

**SILVERBACK<sup>®</sup>**  
ASSET MANAGEMENT

I have been an active participant in the market for convertible securities for over 25 years, and in this time, convertibles have become an increasingly important part of our country's corporate infrastructure for raising capital. Recent developments have destabilized the market for convertible securities, and if not addressed, threaten to entirely eliminate an important source of capital for U.S. companies. It is with this in mind that I respectfully submit the following outline and proposal of possible solutions to members of the Securities and Exchange Commission, the U.S. Department of the Treasury, and the U.S. Congress.

**Proposal to Allow for the Continuing Functioning of the U.S. Capital Markets with Respect to Convertible Securities**

**Background on recent regulatory actions**

On September 18, 2008, the Board of the Financial Services Authority (FSA) announced that it would introduce new provisions to its Code of Market Conduct.<sup>1</sup> The next day, the FSA released guidance that restricts a person's ability to create or increase any "net short position" in a UK financial sector company, and requires adequate ongoing disclosure of a person's short positions in such companies if they exceed certain thresholds. The FSA specifically addressed net short positions, and the guidance makes clear that a net short position will not be created if a person takes a long position in the convertible securities of a UK financial sector company, and takes a short position in the equity of that company, as long as the economic interest in the issued capital of the convertible is greater than the offsetting short position.<sup>2</sup> By addressing net short positions, rather than short positions, the FSA has limited the disruption to bona fide investment strategies, including convertible arbitrage.

On September 19, 2008, the Securities and Exchange Commission (SEC), acting in concert with the FSA, announced that it took "temporary emergency action to prohibit short selling in financial companies to protect the integrity and quality of the securities market and strengthen investor confidence."<sup>3</sup> The SEC also announced that it would

---

<sup>1</sup> See "Press Release: FSA statement on short positions in financial stocks" dated September 18, 2008.

<sup>2</sup> See "Short Selling (No 2) Instrument 2008" as well as subsequent amendments; See "Short Selling (No 2) Instrument 2008. FAQs" as well as subsequent versions.

<sup>3</sup> See "SEC Halts Short Selling of Financial Stocks to Protect Investors and Markets" dated September 19, 2008; See Release No. 34-58592 "Emergency order pursuant to section 12(k)(2) of the Securities Exchange Act of 1934 taking temporary action to respond to market developments"; See Release No. 58611 "Amendment to Emergency



**SILVERBACK**  
ASSET MANAGEMENT

temporarily require institutional money managers to report their new short sales in such companies. **The SEC's actions specifically addressed short positions, rather than "net short" positions as addressed by the FSA.** By failing to address net short positions, the SEC has unintentionally caused significant unintended consequences in the U.S. capital markets, including the serious disruption of prices for convertible securities. This disruption has almost certainly eliminated the ability for U.S. corporations to raise capital by issuing convertible securities at a time when the need for many corporations to do so is higher than ever.

**The importance of convertible securities as an asset class**

In the last decade, America's companies have raised \$639.8 billion by issuing convertibles – a sum that nearly matches the \$997.1 billion raised by companies issuing high yield debt.<sup>4</sup> Notably, in the last twelve months, the convertible market has also provided significant fresh capital to troubled financial companies that were urged by the highest levels of the US government to raise capital. Specifically, in the last three quarters, the convertible market has made multiple investments greater than \$1 billion, including \$6.9 billion in Bank of America, \$5.9 billion in American International Group, \$4.0 billion in Lehman Brothers, \$4.0 billion in Wachovia, \$3.2 billion in Citigroup, \$3.0 billion in Prudential Financial, \$3.0 billion in Washington Mutual, \$2.6 billion in Fannie Mae, \$1.4 billion in National City, \$1.2 billion in Legg Mason, and \$1.1 billion in Fifth Third Bank. Ironically, while the US government is surely pleased that these companies were able to raise capital, convertible investors are absorbing catastrophic losses in nearly all of these investments.

**The importance of "hedging" in convertible securities**

By most estimates, at least 75% of investors in convertible securities invest predominantly based on a "relative value" or "arbitrage" strategy. A typical investment will involve a long position in a convertible security, and a short position in the issuer's equity. While it varies for each security, a typical investment of \$1 million will often be hedged by an offsetting short of less than \$0.5 million; thus, convertible investors are still exposed to the issuer's equity and credit outlook. In other words, **typical convertible arbitrage strategies have a long economic interest in the capital securities of a company, and do not create "net short" positions.** In the last decade, the growth in the convertible market has been fueled by the investor's ability to reduce risk through hedging (shorting) the underlying equity. In fact, the market price of a convertible has become inextricably linked to an investor's ability to institute an offsetting equity short.

---

Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 taking temporary action to respond to market developments".

<sup>4</sup> Bloomberg League Tables since 1999.



SILVERBACK<sup>®</sup>  
ASSET MANAGEMENT

### **Unintended consequences of the SEC's actions: The current state of the convertible market**

The SEC's recent action to ban investors from shorting the equity of 799 companies is having disastrous consequences for the convertible market:

- Typical convertible arbitrage positions have a long-biased economic interest in the issuer, but the SEC's actions have lumped in convertible arbitrage strategies with strategies that have a short-biased economic interest in the issuer.
- The failure to include a "net short" concept similar to that of the FSA has made it illegal for an institutional money manager engaged in typical convertible arbitrage to increase its positions, or start new positions, in any company covered by the emergency order. Also, by limiting the ability to short stock, the risk to "arbitrage" investors has been magnified, and the ability to extract value from convertibles has been destroyed. This has created a situation in which investors want to sell convertibles because they cannot extract value, but it is illegal for other investors to buy these securities, even at much lower prices. As a result, prices of convertible securities have plummeted, and the fear of "What will the SEC do next?" has caused the panic to spread not just to securities in the financial sector, but across all sectors.
- Declining prices have caused losses, which are creating forced liquidations, exacerbating all investors' losses. The investor base of most convertible funds is comprised of pension funds, insurance companies, and endowments – thus, these losses will be borne not just by hedge funds, but by all Americans.
- The convertible market is typically the last capital market to close during tough times. However, it is now undeniably closed. Corporate America cannot currently raise money by issuing convertibles, and if the current SEC actions remain in effect, this important source of capital will disappear entirely.
- The collapse of the convertible market will lead to higher volatility in the equity markets, rather than the SEC's intention to lower volatility. When stocks rise sharply, convertible investors sell stock to adjust their hedges; likewise, when stocks fall sharply, convertible investors buy stock to adjust their hedges. Thus, convertible investors are a stabilizing force in today's equity market. Without them, we should see more dramatic swings both up and down in the stock market.

It is my belief that the SEC's intentions were not to cause problems in the convertible market, but rather to restore equilibrium to the markets by addressing the unbridled, aggressive, and abusive short selling that has become commonplace. I applaud the SEC for its attempt to restore and maintain confidence in U.S. financial markets, and could not agree more with the spirit of this effort. However, the situation is fluid and fast-moving,



SILVERBACK  
ASSET MANAGEMENT

and the SEC's actions have unintentionally contributed to the seizing up of liquidity in the market for convertible securities, and in fact threaten the ongoing viability of convertible securities as an important part of our capital markets. A solution to this must be reached in the near-term.

### **A solution to the unintended problem**

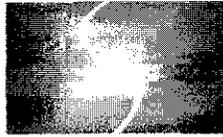
I believe that in order to insure the ongoing viability of convertibles as an asset class, the SEC should immediately institute a solution that will not only respect the spirit of the effort to restrict negative-biased short-selling, but also allow for the continuing functioning of the U.S. capital markets with respect to convertible securities.

Specifically, a holder of a convertible position must be allowed to add to or create a new short position as long as the cumulative economic interest in the short position is less than the cumulative economic interest of the long convertible position, as defined by the total number of shares the holder would receive upon conversion. This simple concept prevents investors from adding to or creating new "net short" positions and accomplishes the same goal as the SEC rule without destabilizing an important part of our capital markets. This is essentially the same solution as the FSA provided.

Instituting this exception will allow convertible prices to normalize, prevent massive losses and liquidations, and re-open the market to corporate issuers. Although I believe this is an absolutely necessary action, I realize there are various ways to implement it. I present here two implementation strategies that fall on opposite ends of the disclosure spectrum.

First, for disclosure purposes, only net short positions would be disclosed; thus, typical convertible arbitrage positions would not require disclosure as long as the economic interest in the convertible is greater than the short position. This is essentially the same solution as the FSA provided.

Second, and on the opposite end of the disclosure spectrum, the SEC could create a new category of institutional money managers called Registered Convertible Market Participants (RCMP). The SEC could then maintain its existing restrictions, but allow for an exemption for persons who apply for and receive status as a RCMP. In order to be granted this status, such person must: i) be registered with the SEC, ii) agree that he will not create a "net short" position, and iii) agree to daily or weekly disclosure of short selling activity in covered equities. Such disclosures should not be made public as they would reveal a manager's proprietary trading strategies. I have included as Exhibit (A) an example of what the daily or weekly disclosure form might look like. While this would be a burdensome requirement, it is certainly better than the alternative, which is the continuation of the current state of the convertible market, and potentially being



SILVERBACK<sup>®</sup>  
ASSET MANAGEMENT

forced out of business with significant losses for investors, and lost jobs for a large number of investment professionals.

Importantly, regardless of which implementation strategy is used, the fundamental premise behind the exception to the short-selling restrictions is that the person does not create a "net short" position. As long as the person is not "net short", the SEC should not be concerned that such person is engaging in abusive short-selling aimed at undermining confidence in our financial system.

In summary, the SEC's actions have had serious unintended consequences for the market for convertible securities, and have eliminated corporate America's ability to raise capital in this market. This is contributing to losses by institutional money managers that will be felt across the country. However, the solutions to this problem are quite simple and the "net short" concept should be immediately instituted. In so doing, confidence in the long-term viability of convertibles as an asset class will be restored, and the capital markets will once again open to corporations.

I respectfully submit the foregoing and, if necessary, will make myself available to anyone who is in a position to bring about a solution to this serious problem.

Respectfully,

A handwritten signature in black ink, appearing to read "Elliot Bossen". The signature is written in a cursive, somewhat stylized font.

Elliot Bossen  
Chief Investment Officer  
Silverback Asset Management



**SILVERBACK**  
ASSET MANAGEMENT

**EXHIBIT (A)**

**Form RCMP**

Report for the Period Ended: September 26, 2008

Institutional Investment Manager Filing this Report:

Name: Silverback Asset Management  
Address: 1414 Raleigh Road, Suite 250  
Chapel Hill, NC 27517

**FORM RCMP INFORMATION TABLE**

- (a) Ticker of Underlying Common Stock (only included if security is covered by current restrictions on shorting common stock)
- (b) CUSIP of convertible (or exchangeable security)
- (c) Quantity of convertible position (expressed as notional amount)
- (d) Conversion ratio of convertible (or exchangeable security); for avoidance of doubt, manager should use the maximum conversion ratio in cases where conversion ratio may be variable
- (e) Total number of shares received upon conversion of the convertible position [ (c) \* (d) ]
- (f) Total number of shares short in the underlying common stock
- (g) Economic long or short interest in the underlying shares [ (e) - (f) ]
- (h) Existence of "net short" position (if (g) is less than zero, write "Yes"; otherwise, write "No")

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
NCC	635405AW3	\$10,000,000	52.8709	528,709	100,000	428,709	No
WB	929903219	\$10,000,000	32.0513	320,513	200,000	120,513	No
BAC	060505682	\$10,000,000	20.0000	200,000	50,000	150,000	No