STA
Since 1934

Security Traders Association

March 18, 2009

The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

SUBJECT: **SEC Proposal on Short Sale Price Test**

Re: **SEC Release No 34-58592/Sept. 18, 2008**
Emergency Order Pursuant to Section 12(k)(2) of The Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments.

Dear Commissioner Schapiro:

The Security Traders Association (STA) is in fundamental agreement with the Securities and Exchange Commission that short selling is a legitimate and economically important activity that fosters price discovery and provides additional liquidity to the markets. We firmly believe that the Securities Exchange Commission (SEC) bolstered the integrity of the markets when, after extensive study, it removed disparate price tests which provided an opportunity for regulatory arbitrage and had been rendered ineffective by structural changes to the markets. In the best traditions of the SEC, the agency acted in an exemplary manner when it released the Regulation SHO Concept Release and provided industry participants with an opportunity to comment on and help shape the final regulation. The SEC further promoted investor protection by implementing the new regulation as a pilot program giving participants, academia and regulators the opportunity to further study the effects of the rule change and by encouraging additional study of the proposed changes.

As securities traders, STA members are responsible for executing transactions for and providing liquidity to the American investor. The STA represents the shared interests of approximately 5200 members, all engaged daily in the purchase and sale of securities, who belong to one of our 27 national and international affiliate organizations. Our members work for broker dealers, investment managers and trading venues, virtually every business model in our industry. Each day STA members drive the economic engine of the U.S. capital markets. We are traders who take the markets and trading seriously. We are actively involved in the business of buying and selling securities and are therefore uniquely qualified to discuss the rules and regulations concerning the purchase and sales of those securities.

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The STA continues to believe that price tests (such as the “bid test” or “tick test”) have been rendered ineffective by structural changes to the markets (explained in detail below) and that price tests will be unable to dampen volatility if they are reinstituted. The markets have completed the costly transformation to “fast” markets required by Regulation NMS, the slow manual markets have gone the way of the horse and buggy and there is no going back. We caution the SEC to avoid promulgating any rules which would be very difficult for market participants to comply with, expensive to implement and unenforceable. We further caution that great harm could befall investor confidence if rules with little substance are adopted to comfort investors.

Rather than impose new, “old” regulatory restrictions like tick tests, more attention should be paid to enforcing existing regulations. Serious enforcement of the existing short sale rules would mean that the cop on the beat was looking for naked short selling, or any short selling for that matter, being used in an attempt to manipulate markets. The existing rules on short sales and market manipulation have sufficient breadth to address the legitimate questions that are being raised about possible manipulative short selling. The remedy for inadequate enforcement is not to layer additional regulations on activity that in most cases has a legitimate financial and economic purpose and is conducted in compliance with the rules that regulate it. Attention should be focused on more robust and aggressive enforcement of existing rules.

Should the SEC decide to proceed with rulemaking in this area the STA recommends that they examine any proposed new regulation using the following regimen of questions:

1) What is the desired and expected goal of this rule?
2) Will this rule produce the desired outcome?
3) Can market participants comply with this rule?
4) Can the SEC effectively enforce this rule?
5) What are the costs and benefits expected from this rule? Is there empirical data which substantiates these costs and/or benefits?
6) Do the benefits of the rule outweigh the costs?
7) Can the goals of the proposed rule be accomplished via enforcement of other existing regulations?

The STA has long held that the key to strong and efficient markets rests on the appropriate balance between regulation and competition. As regulations are developed they should be phased in to allow market participants to judge their effectiveness – how the new rules change the competitive dynamic and uncover any unintended consequences the new regulation may usher in. We further believe that it is more appropriate to attempt to accomplish the goals of regulation without disrupting the natural interaction of supply and demand or price discovery as much as possible.

> The essential debate… (is a debate) between wise regulation and counterproductive regulation. “Wise regulation helps make markets more competitive and transparent, empowers consumers with effective disclosure to make rational decisions, effectively polices markets for force and fraud, and reduces systemic risk. Counterproductive regulation hampers competitive markets, creates moral hazard, stifles innovation, and diminishes the role of personal responsibility in our economy. It is also procyclical, passes on greater costs than benefits to consumers, and needlessly restricts personal freedom.”[1]

[1] The Congressional Oversight Panel 1-2009 Special Report on Reg Reform, p. 61.

SEC Chairperson Mary Schapiro's pledge to revisit the "tick test" during her Senate confirmation hearings, the Financial Services Authority release of Discussion Paper 09/01 on short selling and some current popular press articles and programs bring out many important points on the subject of short selling, which we believe have not received proper attention. We believe that these points need to be brought to the forefront to foster an intelligent debate on the issue.

The Security Traders Association shares the concerns of regulators about the effects recent precipitous and rapid equity price declines have had on investor confidence. Many have commented that the re-imposition of a price test will "slow" the declines and restore investor confidence. The STA is unaware of any empirical evidence establishing this causal relationship. In fact we recently became aware of two studies conducted by the SEC that indicate: 1) that the "uptick rule was less effective when it was needed most, during panics that drive markets down and volatility up;"[2] and 2) "that short sales are more common during rallies than declines."[3] The STA is curious why these two studies have not received the attention that serious academic work should enjoy, but we remain confident that the SEC would only promote restrictive regulations when close examination of all the available facts demonstrates the regulations' need and efficacy.

The Security Traders Association would be extremely concerned if any regulatory body felt that part of their mission is to influence the direction of asset prices in the markets. We would also question the regulatory integrity of a regulation designed to slow a market especially after the promulgation of Reg NMS mandated that all trading venues must be "fast" in order to participate in the national market system.

The STA has previously applauded regulatory independence and decried intervention in the markets for political reasons:

> The SEC Commissioners are required by statute to be appointed from both sides of the political aisle, which is a deliberate attempt to minimize political influence. The STA believes that our markets also need to be shielded from political pressures and ad hoc actions that threaten to exacerbate, rather than ameliorate, market problems.[4]

The STA is very concerned that regulatory action is admittedly being initiated on the short sale issue because of popular, if uninformed, concerns on the issue and for political expediency. The STA stands ready to assist the Securities Exchange Commission educate those expressing concerns on this topic about the realities of our current market structure, the options available to industry participants to affect economically identical strategies, other regulatory options which have been enacted to stem the abuse and the effectiveness of those efforts. Wide distribution of the two recent SEC studies on short selling would be an ideal effort to launch such an educational effort. We would further encourage the SEC to conduct an extensive cost benefit analysis of any proposed short sale regulation prior to the adoption of any such proposal.

In the absence of complete information transparency on this issue the popular press has been full of articles discussing the return of the "tick test," a regulation that required short sales to be executed on an "uptick" which was repealed in 2007. This rule was only retired after extensive study by the SEC and a pilot program which revealed that the rule was ineffective and obsolete. The reasons that this rule was

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[2] Edgar Ortega, "Short Sale Rule Undermined by SEC Data as Bernanke Backs Review," Bloomberg News, March 4, 2009.
[3] Ibid., Bloomberg News, March 4, 2009.
[4] STA Due Process Comment Letter, January 12, 2009, p. 2 < http://www.securitytraders.org/file_download/176 > .

rendered obsolete lie in the changes to market structure, which have occurred over the last decade. In the STA 2008 Special Report we described those changes:

> STA has long held that short selling enhances overall liquidity and represents a valid investment alternative. Historically, short selling was much easier on the NASDAQ market because there were multiple market makers trading the security, any one of which could create an uptick at any given time. We will therefore illustrate our point using the NYSE environment. The NYSE uniquely had a specialist in command of the trading of each security listed upon the exchange, tasked with the responsibility of keeping fair and orderly markets. With the single specialist system, the exchanges dominant market share and the strict "tick test" allowed the specialist near total control of trading and thus prices. Also, equities were traded in fractions of 1/16 of a dollar, so each price increment was worth 6.25 cents.
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> The introduction of penny pricing (moving from trading in fractions of 1/16 to decimals) in 2001 reduced each price increment to only one cent, resulting in 6.25 times as many price points. The specialist had a much more difficult time controlling price and thus short sellers. The advent of Regulation NMS in 2005 and its proclamation that markets must be fast to effectively participate in the national market system further eroded the control that the specialist enjoyed. It was too difficult for a specialist to control a market when trades were occurring in sub-second intervals. The fast market requirement has also empowered NYSE competitors who have since taken a good deal of market share from the NYSE, thus fragmenting the market and further reducing the control of the specialist and allowing more short selling at more venues and price points.[5]

Trading in alternative liquidity venues or so-called "dark pools" has gained popularity since the publication of the STA 2008 Report and the total number of execution venues rose to over 50. This development further complicates compliance with and enforcement of any price test. Multiple trades occurring in sub-second time intervals at penny price variations on 50+ different venues makes benchmarking a particular price or bid on which to base a price test nearly impossible.

The view that a price test would slow selling pressure in the markets was discredited by the ineffectiveness of the recent emergency orders banning short selling of financial stocks. A review of trading patterns after the emergency order indicates that it had little impact on the prices of financial stocks. Financial stocks that were subject to the short selling ban lost 17.7% during the ban versus a loss of 18.4% for the S&P 500. If an absolute ban on short selling failed to stem the tide of selling pressure how effective could a prohibition of short selling on down ticks be?

A report in the financial press discussing recent declines concluded that sales on downticks only made up a small percentage of trades during those declines.

> When Citigroup plunged 26 percent on Nov. 20, the steepest drop on record for the New York-based bank, downticks represented 7.1 percent of trades, according to exchange data compiled by Bloomberg. On Oct. 9, as both Morgan Stanley and Merrill Lynch & Co. shares had record declines, trades on a downtick represented 16 percent and 11 percent of transactions, respectively. "That suggests that the price is collapsing not so much because sellers are hitting progressively lower bids, but because there are effectively no bids," said Frank Hathaway, chief economist at New York-based Nasdaq.[6]

The STA agrees with this assessment and believes that current price declines are more a function of investors current passion for cash and liquidity during this period of uncertainty and difficult economic times than of sellers hitting bid after bid in a security.

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[5] Special Report: The STA's Perspective on U.S. Market Structure, May 2008, p. 18 <http://www.stauniversity.com/content/SpecialReport_FIN_5.08.pdf>.

[6] Edgar Ortega & Jesse Westbrook, "Uptick Rule May Fail to Lift Stocks, Curb Volatility," Bloomberg News, 12-09-08.

Many of the strongest criticisms of short selling and the proponents of the most draconian proposals for limiting short selling come from corporate managers looking for scapegoats to blame for inadequate earnings performance at their company. Unfortunately, their allegations of conspiracy and market manipulation have been noticeably unsupported by evidence of any improprieties in the equity markets. The burden of proof in this case should be on those who would restrict the legal personal freedom of short selling. This is particularly true when, assuming only for this discussion, there was evidence of manipulation. The remedy might only require active enforcement of existing rules. The burden should be substantial upon those who would impose potentially market disrupting and unquestionably expensive requirements like the tick test. The question the SEC should be asking is not: "Why shouldn't we impose a tick test?" but rather: "Has the case for a tick test been made? Has a problem been identified that a tick test will remedy?" and finally: "Is there a less market intrusive and less expensive remedy than a tick test?"

We would also urge the Commission to educate those concerned about the short sale issue on the fact that market participants have the ability to execute economically identical strategies via several different investment vehicles traded in markets other than the cash equities markets (some of which are not under SEC jurisdiction). When one Googles "synthetic short sale" over 242,000 hits are returned. Interestingly, in what is called a conversion trade where an investor buys a put option, sells a call option with the same expiration and strike price and buys an equivalent amount of stock to replicate the payoff of a short sale, the only leg of this trade involving common stock is the purchase of shares.

Jim Cramer, of CNBC's "Mad Money," one of the most visible and vocal supporters of the return of the "tick test," acknowledges that derivatives, not common stock, are now used to establish large short positions. During a discussion about reinstituting the tick test on the CNBC "Stop Trading" segment Tuesday, December 9, 2008, Jim is heard saying: "They're only looking at common stocks and that's not the best way to knock down a stock." CNBC's Erin Burnett attempts to tell Jim that the "tick test" only applies to common stocks but Jim goes on to say: "Well, no, but I'm saying you can take stocks down a lot of different ways and that's what people do."[7] Calling for a tick test on common stocks to curb abuses while acknowledging that manipulators use other investment vehicles to establish their positions and wreak havoc does not make a coherent argument for reestablishment of a tick test.

More recently strategist Mike O'Rourke of BTIG gets right at the point saying:

> Over the past year, throughout the financial sector, the market has witnessed a self-reinforcing process where the Credit Default Swaps of an institution would rise, prompting short sellers to pile in, and spooking long sellers as panic erupted in the common shares. Essentially, it is widely believed that the CDS market has been used to launch "Bear Raids" on common shares.[8]

And Barron's columnist Michael Santoli provides this analogy:

> LIQUIDATION. A GOOD SOAKING. PLENTY OF TEARS. It is real wet out there in the markets.
>
> Aside from getting washed out to a new 12-year low, the Dow has five of its 30 members bobbing below $10, a level under which more than a fifth of Standard & Poor's 500 members reside.

[7] CNBC, "Stop Trading" Segment, December 11, 2008.
[8] Michael O'Rourke, "Bedtime with BTIG - Market Observations," March 4, 2009.

> Given all the known big-picture reasons for this drenching, does it make sense to continue enabling the folks who make and sell umbrellas to force it to rain at will? The people with a stake in umbrella prices who are able to trigger a downpour are the traders who bid up credit-default swaps on individual companies, whether they own their debt or not, and short the stock.
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> In combination, these actions feed signals into the market that companies are at risk of default -- often true, sometimes not, never a certainty. The mix of ballooning CDS premiums and collapsing share prices is a factor that can force credit agencies to issue debt downgrades, make real creditors nervous and scare would-be "real money" buyers away from the shares and bonds of the affected companies.[9]

The STA would tend to agree with these comments and point out that once the scare mongering commences it is the panicked LONG sellers that overreact pushing the targeted security too excessively low valuations. A price test would have no effect on buyers holding off on their purchases or the long seller making repeatedly lower sales and thus not solve the problem of spiraling price declines. The STA has repeatedly suggested non-trading related regulations could be helpful in reducing abusive short selling. We would recommend that efforts to ferret out those responsible for the scare mongering be stepped up and rules prohibiting manipulation and rumor mongering be beefed up and aggressively enforced.

Observations that short selling abuses could and should be addressed by concentrating on the enforcement of rules on the clearing side of the business have clearly been validated. After the SEC strengthened the clearing rules via the T+3 penalty, the NASDAQ "threshold list" went from 367 names prior to the order, to 95 names in late October, to a list of less than 40 names currently (only two of that 40 are NASDAQ issues). Overall short selling has been declining since July, before the first emergency order, and this trend will likely continue as hedge funds and other alternative investment providers rebalance their portfolios due to fund redemptions and deleveraging.

In its Discussion Paper on short selling, The Financial Services Authority (FSA) in London recommends public disclosure of positions in specific stocks by individual position holders to the market as a whole. The STA has long supported market transparency and believes that such disclosure may help regulators detect abusive patterns before they can harm the targeted security. While some trading entities will complain that disclosure would expose their positions and create a 'herd' mentality with others copying their trading strategies, we believe that quite the opposite would take place, trading entities would adjust their strategies to avoid disclosure. As the FSA puts it:

> …disclosure obligations can also act as potential decelerators and/or deterrents to those considering aggressively taking large short positions, which might contribute to disorderly markets, particularly in times of market turbulence. They would encourage market participants engaging in significant short selling to review their trading strategies as their positions approach the applicable disclosure threshold and would discourage further short selling by those market participants reluctant to disclose their positions.[10]

This would result in smaller short positions being held in particular securities and thus diminish at least some selling pressure. We agree with the FSA's analysis that "the benefits of public disclosure obligations outweigh the costs." We also agree that private disclosure would not accomplish the objective of rooting out abusive short selling practices. Sunlight is the best disinfectant.

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[9] Michael Santoli, "Streetwise, Where Pricing Anomalies Abound," Barrons, March 9, 2009, p. 9.
[10] Financial Services Authority, Discussion Paper, 09/01 at 5.10.

Discussion Paper 09/01 also brings to light some of the costs and benefits of direct constraints on short selling stating:

> …we share the view that tick rules provide limited protection against the negative effects of short selling, at most acting to temporarily decelerate share price declines. What does seem clear is that tick rules come at substantial cost if none of the necessary infrastructure is already in place.[11]

We completely agree that a tick test would have limited and very temporary effects in the current market structure. Assuming that a benchmark price could be efficiently identified, the volatility of the current markets would allow short sellers to execute their orders at an uptick with little or no deceleration of the market. Even if the tick interval was ratcheted to 5 ticks or a nickel price, fluctuations of this size occur regularly in the current markets and a tick test would have little or no appreciable slowing effect. Indeed the SEC's own economists believe that the tick test would be least effective when it is needed the most. Presenting such a rule to investors in an attempt to restore investor confidence would certainly backfire and destroy any remaining investor confidence as investors quickly identify the ineffectiveness of this type of regulation.

Conclusion

The Security Traders Association shares the concerns of regulators about the effects recent precipitous and rapid equity price declines have had on investor confidence. We have long been supporters of efforts to build investor confidence and protection. The imposition of a price test in the current market structure will do little to boost investor confidence and may well have long-lasting negative consequences that could erode investor confidence even more. A price test in today's markets would be very difficult to comply with and is virtually unenforceable. The STA believes that the costs of implementing such a regulation, both in monetary terms and market liquidity far outweigh the benefits that some perceive. We are in complete agreement with the Financial Services Authority when they state: "We do not think that any direct constraints on short selling are currently justified." Non-trading restrictive solutions should be pursued and strictly enforced.

The STA understands that any proposal in the area of short sales will be subject to the regular notice and comment procedures for rule making. We want to stress the importance of these procedures, as we commented in our January 12, 2009 comment letter on Due Process: "This required comment period permits the collection of informed opinions regarding how the proposed regulation might work and also serves as a cooling off period, allowing for deliberative review and limiting political influence. The notice and comment process improves regulations by testing them "by exposure to diverse public comment," and by providing "fairness to affected parties.""[12]

As we stated earlier, the STA stands ready to be of service in any efforts to educate investors on the issues and hopes that such efforts begin posthaste.

Sincerely,

Peter J. Driscoll
Chairman

John C. Giesea
President & CEO

[11] Financial Services Authority, Discussion Paper, 09/01 at 4.34.
[12] STA Due Process Comment Letter, January 12, 2009, p. 3 <http://www.securitytraders.org/file_download/176>.

cc: Hon. Luis A. Aguilar
Hon. Kathleen L. Casey
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