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VIA ELECTRONIC SUBMISSION AND OVERNIGHT MAIL

December 16, 2008

Ms. Florence E. Harmon
Acting Secretary
Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090

Re: File No. S7-30-08, Release No. 34-58773, Amendments to Regulation SHO

Dear Ms. Harmon:

Overstock.com commends the Commission's recent action to strengthen Regulation SHO through the elimination of the options market maker exemption, the adoption of Rule 10b-21, and adoption of Interim Final Temporary Rule 204T ("Rule 204T"). Overstock.com believes, however, that more needs to be done to correct the problem of naked short selling and to prevent more companies from being taken down by those that use it as a tool for manipulation. Specifically, Overstock.com requests the Commission take the following actions:

A Mandatory Market-Wide Pre-Borrow Requirement

The current rule that a short seller only have a "reasonable belief of being able to locate shares in the future" is so fuzzy that as a practical matter *proof of scienter* (even under the newly adopted Rule 10b-21). The Commission should immediately launch a rulemaking proceeding to impose on a market-wide basis the same pre-borrow requirement that existed in the July 15 emergency order – specifically, a required pre-borrow before shares can be sold short.

The T+3 Hard-Delivery Requirement

The Commission's adoption of Rule 204T which (temporarily) puts in place a T+4 hard-delivery requirement is a nice start. It seems obvious that what one sells, one should deliver. Overstock.com is pleased that the Commission has recognized this principle of settlement. Overstock.com does note that, given our modern electronic markets, four trading days seems like an inordinately long time to allow for trades to remain unsettled, especially for a good that has largely been dematerialized. After all, we are not talking about shipping a refrigerator from Long Beach to Miami: we are talking about electrons moving around in a computer.

Overstock.com emphasizes that the T+4 hard-delivery requirement by itself will not stop naked short selling because it implicitly allows for a 4-day continuance of the practice – a period which

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is long enough to do significant damage to a company. The Commission itself recognized this when in its July 15, 2008 emergency order it imposed a pre-borrow requirement (along with a hard-delivery requirement).

A Mandatory Buy-In Requirement

If a naked short seller fails to deliver at T+4, the broker-dealers should have the obligation (not just the right) to force a mandatory buy-in (as is the rule in Canada). Right now, while this right exists, it is rarely enforced. Making this a mandatory requirement would be a natural enforcement mechanism for the hard-delivery requirement. The Commission should immediately launch a rulemaking proceeding to impose on a mandatory buy-in requirement for any trades that are not delivered on T+4.

Tracking Trades from Inception to Settlement

The Commission should immediately launch a rulemaking proceeding that will require that all trades be tracked cradle-to-grave (i.e., from inception to settlement), rather than the current practice of netting large blocks of trades against each other. This will provide the necessary transparency regarding who has failed to deliver and the total amounts of their failures to deliver, and will allow the Commission to see who has failed to meet the T+4 hard-delivery requirement.

Provide Current and Complete Data to the Public

The Commission should either provide itself or direct the Depository Trust Clearing Corporation (DTCC) to provide *current and complete* data to the public on the volume of failures to deliver and the identity of those failing to deliver.

While the DTCC provides daily reports on the volume of failures to deliver to the exchanges so that the exchanges can prepare the daily Regulation SHO threshold lists, the DTCC does not provide to the public data on the volume of failures to deliver. Currently, the Commission (not the DTCC) releases data on the volume of failures to deliver quarterly, two months after the close of each quarter. By the time of its release, this data is two to five months stale. Companies and the public deserve and need timely information.

Further, neither the Commission nor the DTCC ever provide the identity of those failing to deliver. Why not? One can only surmise: either the Commission does not have it or the Commission does not deem it important. Neither seems likely given the Commission's obligation to police and stop manipulative activity.

The Commission should also clarify that Regulation SHO applies to all trades of publicly registered securities, not just trades that occur within the DTCC or its Continuous Net Settlement System. Trades that occur party-to-party (i.e., ex-clearing trades) must be covered by the

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provisions of Regulation SHO. Overstock.com believes that ex-clearing failures to deliver in its stock are often larger than the failures to deliver being reported by the Commission.

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Chairman Cox has on several occasions publicly acknowledged that there is a serious problem with persistent failures to deliver, but the practice continues. Despite the Commission's recent rule making, failures to deliver persist for many companies. A well functioning capital market should not have any settlement failures large enough and protracted enough to merit a firm's inclusion on the Regulation SHO threshold list. Only when the Commission has rules in place that ensure settlement of all trades (including pre-borrow and mandatory buy-in requirements on all failed trades), when the Commission provides current and complete data to the public regarding the volume of failures to deliver and those that are failing to deliver, and when the Commission vigorously enforces these rules (which should include significant penalties), will scourge of manipulative naked short selling stop.

Overstock.com earnestly hopes the Commission will consider the points enumerated in this letter as real, achievable solutions that will bring openness, trust and transparency to the market.

Respectfully submitted,



Patrick M. Byrne, Ph.D.
Chairman and Chief Executive Officer

Enclosure

cc: The Honorable Christopher Cox, 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
Andrew J. Donohue, Director, Division of Investment Management
Erik R. Sirri, Director, Division of Trading and Markets
John W. White, Director, Division of Corporation Finance