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VIA ELECTRONIC FILING AND OVERNIGHT DELIVERY

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

Re: *Release No. 34-58785; File No. S7-31-08*
Greenlight Capital, Inc.'s Comments on Interim Final Temporary Rule re: Disclosure of Short Sales and Short Positions by Institutional Investment Managers

Dear Ms. Harmon:

On behalf of Greenlight Capital, Inc. ("Greenlight"), we submit the following comments on the Securities and Exchange Commission's ("SEC") above-referenced Interim Final Temporary Rule (the "Rule") requiring institutional investment managers to disclose to the SEC certain information regarding their short sales and positions in securities covered by Section 13(f) of the Securities Exchange Act of 1934 ("Exchange Act").

Greenlight is in full support of responsible measures that will restore the marketplace to health, but this proposed Rule is not such a measure. It is merely a continuation of measures that have already proven unsuccessful. The Rule will neither put a stop to manipulative short selling nor aid the SEC in tracking ongoing manipulation. It will only restrict and hamper legitimate short sales, increase the possibility of issuer retaliation, and place a substantial burden on investment managers, exceeding any similar burden placed on long-side investors, at a time when such burdens are neither necessary nor beneficial to the securities markets. Because it inhibits legitimate short selling, the Rule will make markets less efficient and will artificially inflate the value of securities – effecting manipulation rather than preventing it. For these reasons, and as further explained below, we urge the SEC to rescind the Rule.

I. SHORT SELLING IS NOT THE CAUSE OF THE CURRENT MARKET CRISIS AND IS AN IMPORTANT COMPONENT OF THE SECURITIES MARKETS

A. All Available Data Demonstrate that Short Sales did not Cause the Recent Market Collapse

We begin by addressing what appears to be the primary impetus for the Rule, *i.e.*, the SEC's stated concern that "artificial price movements . . . based on unfounded rumors" regarding the stability of financial institutions and other issuers might be "exacerbated by short selling."[1] The SEC has reiterated this concern in its recent emergency orders curtailing and banning short sales.[2]

But the SEC has provided no evidence whatsoever that short sales actually caused or exacerbated any "artificial price movement" in the past several months. To the contrary, all available evidence shows that our securities markets were overvalued and that the recent declines constitute a market correction. As Chairman Cox has stated, the root of our current market crisis was "the meltdown of the entire U.S. mortgage market,"[3] prompted by the collapse of the housing bubble and the utter failure of banks, mortgage brokers, and rating agencies to accurately and appropriately measure risk. The effect of this meltdown on our securities markets was magnified because "firms and investors in every sector of the financial services industry

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[1] Disclosure of Short Sales and Short Positions by Institutional Investment Managers, SEC Exchange Act Release No. 58785, File No. S7-31-08 (October 15, 2008), at 8, available at http://www.sec.gov/rules/final/2008/34-58785.pdf.

[2] *See, e.g.*, Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, SEC Exchange Act Release No. 58591 (September 18, 2008) (first emergency order requiring disclosure of short positions), at 1, available at http://www.sec.gov/rules/other/2008/34-58591.pdf; Amendment to Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, SEC Exchange Act Release No. 58591A (September 21, 2008) (amended emergency order requiring disclosure of short positions), at 1, available at http://www.sec.gov/rules/other/2008/34-58591a.pdf; Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, SEC Exchange Act Release No. 58592 (September 18, 2008) (banning short sales in certain financial companies), available at http://www.sec.gov/rules/other/2008/34-58592.pdf.

[3] *Lessons From the Credit Crisis for the Future of Regulation: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. (2008) (testimony of Christopher Cox, Chairman, Sec. and Exch. Comm'n), available at http://www.sec.gov/news/testimony/2008/ts102308cc.htm.

have been vulnerable to the effects of the toxic mortgage contagion...."[4] Economist and Nobel Laureate Gary S. Becker explains: "Short sales did not cause the crisis, but reflect beliefs about how long the slide will continue. Trying to prevent these beliefs from being expressed suppresses useful information, and also creates serious problems for many hedge funds that use short sales to hedge other risks."[5]

Further, if the SEC wishes to act against "unfounded rumors" or "artificial short selling," it can do so without any additional rulemaking. In fact, it has been widely reported that the SEC has conducted and continues to conduct such an investigation relating to the short selling of several financial firms. To date, the SEC has not announced any findings of wrongdoing. Notably, the SEC does not appear as concerned about unfounded positive rumors promulgated by supporters of those same financial firms.

Moreover, the available empirical evidence conclusively demonstrates that the recent market decline was not caused by short sales. *All of the major indices experienced their most rapid declines during the period when short sales of financial institutions were banned.* From September 19 through October 8, the S&P 500 dropped 21.5%. During the same period, the KBW Bank Index – which tracks many of the financial institutions that were on the SEC's "no-short list" – dropped nearly 33%.[6] The temporary ban on short sales also resulted in a decline in market quality and stock liquidity.[7] By comparison, in the two months prior to the ban, the S&P Index dropped just 4.4% and the KBW actually *rose* 15%.

In fact, it is likely that the SEC's actions against short-selling have worsened the stock market crisis and increased market volatility. For example, the ban on short-selling immediately disrupted the convertible bond market, as most investors in that market actively hedge their holdings of convertible bonds with short sales. As those investors found themselves unable to modify their hedge positions, their only choice was to sell their convertible bonds.[8] During the last recession, many companies avoided financial distress by issuing convertible bonds. But as a

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[4] Christopher Cox, Chairman, Sec. and Exch. Comm'n, Speech to the PLI 40th Annual Securities Regulation Institute: Building on Strengths in Designing the New Regulatory Structure (November 12, 2008), available at http://sec.gov/news/speech/2008/spch111208cc.htm.

[5] Gary S. Becker, Op-Ed, *We're Not Headed For a Depression*, WALL ST. J., Oct. 7, 2008, at A27.

[6] David Bogoslaw, *Short-Sellers: Unfairly Targeted in the Market Crisis?*, BUSINESSWEEK, Oct. 13, 2008.

[7] Arturo Bris, *Shorting Financial Stocks Should Resume*, WALL ST. J., Sept. 29, 2008, at A25.

[8] Tom Lauricella, *Short-Sale Ban Wallops Convertible-Bond Market*, WALL ST. J., Sept. 26, 2008, available at http://online.wsj.com/article/SB122238812195977243.html.

result of the disruption in the convertible bond market caused by the SEC's short sale ban, companies could not take similar measures during the present market crisis.

Moreover, there are many other investing strategies that require active hedging through short sales. As the SEC has shown a propensity to change the rules of short selling without notice, many investors have reduced their participation in the market due to the increased regulatory risk caused by such uncertainty. As such investors exited their short positions, many of them also sold their hedged long positions, thus reducing market liquidity. As a result, overall market volatility has increased. A recent Citigroup report noted that, since the SEC imposed its short-selling ban, there have been more days where the S&P 500 fluctuated more than 5% intraday than in the entire 50-year period between 1950-2000.[9]

B. Short Selling is an Important Component of the Securities Markets

Prior to the recent market crisis, both the SEC and the public had recognized the benefits of short selling to our securities markets. In a December 1991 study on the effects of short selling, the House Committee on Government Operations found that short selling "has an important and constructive functional [role] in the equity market," and that "the psychological environment surrounding short selling has led investors to systematically overestimate the manipulative power of short sellers."[10] Former SEC Chairman William Donaldson has publicly stated that short selling "can add important benefits to the market, such as facilitating liquidity, hedging, and pricing efficiency...."[11] Moreover, "[a]ll experts, including [the SEC's] own economists, are convinced that short selling provides the marketplace with liquidity and pricing efficiency."[12] Short selling also lowers market volatility and enhances market quality.[13] It is clear that short selling plays a vital function in ensuring accurate asset valuation.

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[9] *Motion Sickness Quantified*, Posting of Barbara Kiviat to The Curious Capitalist, http://curiouscapitalist.blogs.time.com/2008/12/02/motion-sickness-quantified, (Dec. 2, 2008, 12:09 PM).

[10] Short-Selling Activity in the Stock Market: Market Effects and the Need for Regulation, H.R. REP. NO. 102-414, at 12-15 (1991).

[11] *Investor Protection Implications of Hedge Funds: Hearing Before S. Comm. on Banking, Housing and Urban Affairs*, 108th Cong. (2003) (testimony of William H. Donaldson, Former Chairman, Sec. and Exch. Comm'n), available at http://www.sec.gov/news/testimony/041003tswhd.htm.

[12] Roel C. Campos, Former Comm'r, Sec. and Exch. Comm'n, Speech at Sec. and Exch. Comm'n Open Meeting (July 12, 2006), available at http://www.sec.gov/news/speech071206rec.htm.

[13] *See, e.g.*, Jennifer Conrad, *The Price Effect of Option Introduction*, 44 J. OF FINANCE 487 (1989) (finding stock volatility lower after reduction in short sale constraints by option introduction).

Short sellers also play another essential role in our securities markets: their critical analyses of companies serve as a counterbalance to the almost uniformly bullish voices of issuers and investment banks. The ongoing market crisis is a devastating reminder of the need for precisely such a voice. Over the past several years, the bubble in the housing market reached unsustainable levels, investment firms made record profits through sales of packaged and re-packaged mortgage-backed securities and other derivatives that were impossible to value, and the ratings agencies ignored the risks associated with such securities. None of these groups raised any concerns, which is no surprise, considering that each of these groups had a financial incentive to breathe more air into the bubble. There was only one exception to this uniform chorus of positive voices: short sellers.

For example, in April of this year, Greenlight voiced its concern that Lehman Brothers Holdings Inc. ("Lehman") was overvaluing its asset-backed securities ("ABS") (including sub-prime mortgage-backed securities) and was publicly underestimating its exposure to the ABS markets. Greenlight stated that the SEC should "guide Lehman toward a recapitalization and recognition of its losses – hopefully before federal taxpayer assistance is required."[14] Of course, no such recognition of losses occurred. What did occur was a public backlash against Greenlight. Lehman went even further, exploring the possibility of manipulating its own stock price to drive Greenlight out of its short position. In an e-mail to CEO Richard Fuld, a senior Lehman executive suggested that if Lehman obtained $5 billion in financing from Korean banks, "I like the idea of aggressively going into the market and spending 2 of the 5 [billion dollars] in buying back lots of stock (and hurting Einhorn bad!!)."[15] Richard Fuld's e-mail response: "I agree with all of it."[16]

But a few months later, the public, regulatory agencies and even Lehman's own trading counterparties had come to the same conclusion as Greenlight. This is only one of many such examples: short sellers such as James Chanos and David Tice exposed the problems at Enron and Tyco before regulators ever became involved. For this very reason, Chairman Cox publicly noted (as the mortgage crisis was reaching its peak) that "[s]hort selling helps prevent 'irrational exuberance' and bubbles. Continued legitimate short selling in the securities of these financial

[14] *See* David Einhorn, President of Greenlight Capital, Inc., Speech at the Ira W. Sohn Investment Conference: Accounting Ingenuity (May 21, 2008), available at http://www.foolingsomepeople.com/main/TCF%202008%20Speech.pdf.

[15] *See Causes and Effects of the Lehman Brothers Bankruptcy: Hearing Before H. Comm. on Oversight and Government Reform*, 110th Cong. (2008) (opening statement by Rep. Henry A. Waxman, Comm. Chairman), available at http://oversight.house.gov/documents/20081006101958.pdf.

[16] *Id.*

firms will act, as it is supposed to, as a way for market participants to invest in the downside and to hedge other positions."[17]

The Rule and the SEC's many recent rules restricting or hampering short selling threaten to remove the counterbalance that short sellers provide to the securities markets. Short selling is already a difficult and risky process that need not be further hindered by sudden rule changes, overheated rhetoric by government officials and unnecessarily burdensome regulation exemplified by the Rule. The Rule will discourage investors who otherwise would have sold short a security based upon their legitimate belief that the security is overvalued. By discouraging short selling, the Rule will also discourage investors such as Greenlight from voicing their critical analyses of companies or industries. This is anathema to the fundamental principle underlying our securities markets: that the price of a security should reflect what the investing public is willing to pay based on all material facts about that security. The public debate about the value of a security should therefore be robust.

II. THE DISCLOSURE RULE SUBSTANTIALLY HARMS INSTITUTIONAL INVESTMENT MANAGERS

A. Form SHs May be Subject to Public Disclosure through FOIA

Notwithstanding the SEC's promise of "confidentiality" to all Form SH filers, the Rule subjects Form SH filers' investment and trading strategies to a substantial threat of public disclosure. The SEC may exempt material from disclosure pursuant to the Freedom of Information Act ("FOIA") only if the material falls within an exemption from FOIA disclosure.[18] Even if the SEC denies a FOIA request for Form SHs, determined FOIA requesters can seek redress in the courts. Courts have overturned the SEC's FOIA decisions in the past.[19] In other

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[17] Christopher Cox, Chairman, Sec. and Exch. Comm'n, Op-Ed., *What the SEC Really Did On Short Selling*, WALL ST. J., July 24, 2008, at A15.

[18] 5 U.S.C. § 552(b); SEC Letter to Confidential Treatment Filers, June 17, 1998, available at http://www.sec.gov/divisions/investment/guidance/13fpt2.htm (noting that the Exchange Act and FOIA "set out the requirements under which the [SEC] may grant confidential treatment..." to materials).

[19] *See, e.g.*, *Feshbach v. SEC*, 5 F.Supp.2d 774 (N.D. Cal. 1997); *see also SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991) (finding SEC failed to meet burden of proving applicability of deliberative process exemption to FOIA and remanding for further proceedings).

instances, the SEC has responded to lawsuits by disclosing additional materials it had previously refused to disclose.[20]

Moreover, the SEC could change its position regarding FOIA disclosure of Form SHs at any time. Indeed, the SEC's own internal FOIA appeals process demonstrates that the SEC reconsiders and reverses its initial FOIA decisions with some regularity.[21]

We anticipate that FOIA requests for Form SHs will come from numerous sources, including the general investing public (hoping to engage in what the Commission has called "imitative short selling"),[22] reporters, and issuing companies. Many such issuing companies have publicly attacked short sellers, initiated litigation against them and lobbied the SEC to commence regulatory investigations.[23] These companies have a financial interest in aggressively pursuing FOIA requests for Form SHs before the SEC and in federal court.

Indeed, the feeding frenzy has already begun. It is now public knowledge that within six weeks of the Rule's announcement, the New York Times issued a request for *all* Form SHs filed to that point.[24] Others have filed FOIA requests for selected Form SHs.[25] We have no doubt that many of the filers of these specific requests are either members of the public hoping to capitalize on knowledge of short selling strategies or issuing companies hoping to find ammunition for their attacks on short sellers.

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[20] *See, e.g.*, *Gavin v. SEC*, No. 04-4522, 2007 WL 2454156 (D. Minn. Aug. 23, 2007) ("Gavin's vigorous and persistent prosecution of the action – not the mere passage of time – forced the SEC to release the documents and comply with FOIA").

[21] *See* SEC Freedom of Information Act Annual Report for Fiscal Year 2007, available at http://www.sec.gov/foia/arfoia07.htm (noting that, out of a total of 160 appeals decided between October 1, 2006, and September 30, 2007, 27 initial decisions were partially reversed and 29 were completely reversed). The evolution of the SEC's position on public disclosure of Form 13F is also instructive. *See* Edward Pekarek, *Hogging The Hedge? "Bulldog's" 13f Theory May Not Be So Lucky*, 12 FORDHAM J. CORP. & FIN. L. 1079, 1125 (2007) (noting that after 1998, SEC changed course and regularly denied requests for confidential treatment of Form 13Fs).

[22] Rule at 23.

[23] *See* Owen A. Lamont, *Go Down Fighting: Short Sellers vs. Firms*, Yale Sch. of Mgmt. & NBER, July 14, 2004 (working paper), available at http://ssrn.com/abstract=566901 (listing the methods used by companies to attack short sellers).

[24] *See* Ropes & Gray LLP, "FOIA Requests Seek Release of All Forms SH Filed with the SEC" (November 21, 2008), available at http://www.ropesgray.com/foia_requests_seek_release_of_all_forms_sh_filed_with_the_sec/.

[25] *Id.*

B. Public Disclosure of Form SHs Would Cause Substantial Harm to Legitimate Investors and the Securities Markets

Public disclosure of Form SHs would be disastrous to investors and counter-productive to the SEC's purpose for issuing the Rule in the first place. Because the Rule requires short sellers to submit detailed descriptions of their short positions and transactions on a daily basis, disclosure of this information would enable the public to decipher investors' trading strategies. This would cause the greatest harm to long-term, value-oriented investors such as Greenlight.

Because Greenlight holds its positions for months or years, its Form SHs would give a clear and complete picture of Greenlight's strategy, not just for one security but also for numerous comparable companies. Greenlight's Form SHs would tell the public: (1) when Greenlight first opened a short position; (2) when, how, and in what increments it built up its short position over time; (3) how long it held that investment; and (4) how and in what manner it unwound that position. This information would allow the public to recreate Greenlight's investment strategy with little effort. Moreover, because Greenlight often analyzes entire industries and sectors before selling short a single stock, the public disclosure of Greenlight's Form SHs would also enable the public to anticipate what other companies Greenlight might sell short in the future and how it will do so. Thus, disclosure of Greenlight's Form SHs would substantially impair both the value of Greenlight's current investments and its ability to make future investments.

C. Public Disclosure of Form SHs Would Lead to the Freezing Out and Intensified Intimidation of Short Sellers by Issuers

Moreover, by collecting the information required on Form SHs, the SEC risks becoming a resource for companies that would attempt to "freeze out," intimidate and "short squeeze" short sellers to improperly prop up their stock price. Disclosure of Form SHs to these companies would cause substantial harm to short sellers.

Once issuers learn that an institution has sold short the company's stock, the issuers are less likely to give that institution access to company management. It is already commonplace for investors known to have sold short a company's shares to be blocked from asking questions on investor calls or from meeting with management. Greenlight has had this experience. This behavior effectively silences those ready to ask pointed and critical questions. Abetting these companies in restricting the access of independent analysts who may be critical is precisely the opposite of what the SEC should be doing. Indeed, it was only a few years ago that an investigation by the SEC and the New York Attorney General's Office revealed the conflicted nature of most Wall Street analysis.[26] It would be ironic and counter-productive if, just five years later, the SEC muzzled the few remaining independent, critical voices.

Even worse, it is not hard to imagine an issuer using the information in a Form SH to intimidate a short seller. Issuers have a long history of publicly attacking short sellers and intimidating short sellers through litigation.[27] Not surprisingly, such attacks have only increased during the recent market crisis. It seems like every financial company caught up in the aftermath of the mortgage meltdown has publicly attacked short sellers in an effort to distract the public from its own wrongdoing and incompetence.[28]

Greenlight has often been on the receiving end of such attacks. In the past few years, companies in which Greenlight took a short position have: (1) illegally accessed Greenlight's phone records and the personal phone records of its employees; (2) publicly attacked Greenlight in the news media; (3) successfully lobbied the SEC and other regulatory agencies to open investigations into Greenlight's actions, only to have the regulators conclude that Greenlight had done nothing wrong; (4) attempted to intimidate others from publishing Greenlight's criticisms; and (5) attempted to purchase large amounts of their own stock in an effort to "squeeze" Greenlight's short position.

By requiring short sellers to disclose their identities and their entire short portfolio every day on the Form SH, the SEC is greatly increasing the opportunity for issuers to target and

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[26] *See* SEC Litigation Release No. 18118 (April 28, 2003), available at http://sec.gov/litigation/litrelease/LR18118.html (announcing settlement of research analyst conflict of interest investigations with ten Wall Street investment banks). As the SEC discovered, several of these investment banks had tied the compensation of their research analysts to the analysts' success in generating investment banking revenue from public companies. *Id.*

[27] *See, e.g.*, Lamont, *supra* note 23 (noting approximately 250 instances in which issuers used extreme measures, such as false public statements, litigation or threats of litigation, to retaliate against short sellers).

[28] *See* Heidi N. Moore, "If You Can't Save the Stock, Blame the Shorts," WALL ST. J., November 20, 2008, available at http://blogs.wsj.com/deals/2008/11/20/citigroup-if-you-cant-save-the-stock-blame-the-shorts/ (Citigroup); Joseph A. Giannone, "Morgan Stanley CEO blames rout on short sellers," REUTERS, September 18, 2008, available at http://www.reuters.com/article/bankingFinancial/idUSN1753528220080918 (Morgan Stanley); Andrew Ross Sorkin, Ed., "SEC Should Investigate Bear Collapse, JP Morgan CEO," N.Y. TIMES, July 8, 2008, available at http://dealbook.blogs.nytimes.com/2008/07/08/sec-should-investigate-bear-collapse-jp-morgan-ceo (JP Morgan Chase and Bear Stearns); Louise Story, "Tough Fight for Chief at Lehman," N.Y. TIMES, September 10, 2008, available at http://www.nytimes.com/2008/09/11/business/11fuld.html (Lehman). As Greenlight directly experienced, some of these efforts to attack short sellers have extended beyond public statements to direct manipulation of its own stock price. *See supra* at Section I(B) and n. 15 and n.16.

retaliate against short sellers. The SEC should not adopt a Rule that can be used to marginalize, intimidate, and harass legitimate investors.

III. THE RULE DOES NOT PREVENT MANIPULATIVE SHORT SALES OR ACCOMPLISH ANY OTHER REGULATORY PURPOSE

The SEC issued the Rule to address "possible unnecessary or artificial price movements that may be based on unfounded rumors and may be exacerbated by short selling."[29] But the Rule will not in any way eliminate the *source* of the manipulation that the SEC claims was responsible for the recent market downtown – specifically, the "unfounded rumors" that the SEC claims led to the "artificial" price movements. The Rule does not target or impact the spreading of false rumors. In other words, even if rumors were the cause of the market collapse, which they were not,[30] and the Rule had been in place at the beginning of this year, it would have done nothing to prevent the downturn.

As the SEC and the courts have repeatedly acknowledged, short selling in itself is not manipulative.[31] Although a short position can be part of a manipulative strategy, any otherwise legitimate market activity – including the taking of a long position – can serve the same reprehensible purpose. Short sales are no more likely to serve as the basis of market manipulation than any other market activity.

Nor does the Rule assist the SEC's efforts to combat market manipulation in general. To begin with, the SEC already possesses a formidable arsenal of weapons in the fight against manipulation, whether through short sales or any other method. Short sales are subject to all of the manipulation/fraud provisions of the securities laws, including Sections 9 and 10(b) of the Exchange Act,[32] Sections 17(a) and 17(b) of the Securities Act of 1933 (the "Securities Act"),[33]

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[29] *See* Rule, *supra* note 1, at 8.

[30] Similar to its conflation of manipulation based on unfounded rumors and short selling generally, the SEC has conflated its concerns about unfounded rumors and naked short-selling. These are two separate topics and the SEC has failed to show any evidence of an actual connection between them.

[31] *See supra* at Section I(A) and (B); *see also ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 101 (2d Cir. 2007) ("short selling - even in high volumes - is not, by itself, manipulative"); *GFL Advantage Fund v. Colkitt*, 272 F.3d 189, 211 (3d Cir. 2001) ("short selling is lawful, and courts have held that short selling, even in massive volume, is neither deceptive nor manipulative when carried out in accordance with SEC rules and regulations"); *Sullivan & Long, Inc. v. Scattered Corp.*, 47 F.3d 857, 860 (7th Cir. 1995) (persons who engage in short sales "bet on a declining market, trusting that they have better information or better instincts than other traders").

[32] 15 U.S.C. §§ 78i & 78j(b).

and – if the investment manager is registered under the Investment Advisers Act of 1940 – Section 206(4) thereof.[34] The SEC also recently issued Rule 10b-21, which specifically targets fraud through "naked" short selling.[35]

The SEC claims that Form SHs will "provide useful information to the staff to analyze the effects of our rulemakings relating to short sales and in evaluating whether our current rules are working as intended...."[36] We are not sure what the SEC means by this. If the SEC had hoped its various restrictions on short sales would somehow stabilize the markets, then the available data strongly suggest that the SEC's rules actually had the opposite effect. As noted above, the market experienced its most violent correction during the period when the SEC temporarily banned trading in financial stocks.[37] Moreover, the evidence shows that the SEC's prior July 15, 2008 order (requiring anyone shorting certain securities to pre-borrow and deliver such securities at settlement) had the same negative effect on the securities markets.[38] Enacting a more permanent rule to assess the efficacy of similar previous interim rules is simply circular.

If the SEC seeks simply to collect data relating to short sales, whatever the purpose, we respectfully submit that such a purpose is insufficient to justify the Rule. Under normal circumstances, any intrusive regulation instituted for the purpose of collecting data, without an immediate tangible benefit to our securities markets, should be very carefully considered. But such a regulation is completely inappropriate today, when investors in the securities markets are hard-pressed even without the imposition of additional, unnecessary regulation. Moreover, the SEC can access data regarding short selling from several other sources without imposing such a burden on investment managers:

- Both the New York Stock Exchange and NASDAQ keep detailed records regarding short positions in securities traded on their exchanges, based upon information

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[33] 15 U.S.C. § 77q(a)-(b).

[34] 15 U.S.C. § 80b-6.

[35] Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, SEC Exchange Act Release No. 58572 (September 17, 2008).

[36] *See* Rule, *supra* note 1, at 8.

[37] *See supra* at Section I(A).

[38] *See* Arturo Bris, *Short Selling Activity in Financial Stocks and the SEC July 15th Emergency Order*, August 12, 2008, available at http://www.imd.ch/news/upload/Report.pdf.

submitted to them by all member organizations.[39] Both exchanges publish semi-monthly reports describing the short interest overall as well as short interest in individual securities, both at the end of the period and on an average daily basis.[40]

- Many institutional investment managers are registered under the Investment Advisers Act, and are therefore already required to keep substantial books and records, including records of all securities transactions.[41] Moreover, even those managers who are exempt from registration under the Investment Advisers Act still keep records of all transactions for years.[42]

- Broker-dealers are required to keep complete records of all securities transactions and positions, including short positions, for a period of three years pursuant to SEC Rule 17a-3.[43] The SEC could easily audit or review such existing records from prime brokers (including details regarding which funds are shorting a particular security under investigation by the SEC for potential manipulation), rather than generating a new rule requiring redundant disclosure.

IV. THE SEC'S FAILURE TO OFFER ANY FACTUAL BASIS FOR THE RULE CAUSES THE RULE TO BE ARBITRARY AND CAPRICIOUS

For the reasons stated above, the SEC lacks any legal authority to issue the Rule. Any rule promulgated by the SEC must be supported by substantial evidence, may not be in excess of statutory authority, and may not be arbitrary and capricious.[44] In other words, the agency action must be supported by substantial evidence,[45] and be rationally related to the ultimate factual

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[39] *See, e.g.*, N.Y.S.E. Rule 421 (requiring all member organizations to submit periodic reports "with respect to… short positions in securities").

[40] These reports are available to the public for a fee. *See, e.g.*, NYSE Short Interest, available at http://www.nyxdata.com/nysedata/default.aspx?tabid=748.

[41] 17 C.F.R. § 275.204-2.

[42] They do so for a variety of reasons, including (1) to allow their investors, often sophisticated funds or institutional investors, to conduct necessary due diligence; (2) because their investors and auditors require them to do so; and (3) so that they can confirm transactions and short or long positions with counterparties, broker-dealers and the exchanges.

[43] 17 C.F.R. § 240.17a-3.

[44] 5 U.S.C. § 706.

[45] *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005).

findings of the agency.[46] Evidence utilized by the agency that does nothing more than create a suspicion upon which the agency's action is based is insufficient to support valid agency action.[47] An agency's speculation is also insufficient evidence to support valid rulemaking.[48]

The SEC's failure to provide *any* factual basis for the Rule falls far short of the "substantial evidence" necessary to justify the Rule. Although the SEC claims that the Rule will prevent manipulative short sales, the SEC cites no evidence supporting its claim. In fact, for the reasons stated above, the Rule not only would fail to prevent manipulation, but would actually have a manipulative effect on the market by artificially reducing short selling.[49] In the end, the SEC cites to nothing more than its unsupported "concern" that short selling "may" be disrupting the orderly functioning of the markets. Mere concern, suspicion, or speculation is not enough to support this type of regulatory action.[50]

Furthermore, the proposed Rule also conflicts with Section 13(f) of the Exchange Act, which clearly evinces Congress's decision to limit the SEC's authority to require disclosure by institutional investment managers. Section 13(f) provides the Commission with authority to require institutional investment managers to "file reports with the Commission in such form, for such purposes, for such periods, and at such times after the end of such periods as the Commission, by rule, may prescribe."[51] Section 13(f) states, however, that "*in no event* shall such reports be filed for periods longer than one year or shorter than one quarter."[52]

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[46] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[47] *Hoxie v. DEA*, 419 F.3d 477, 482 (6th Cir. 2005).

[48] *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1227 (5th Cir. 1991).

[49] *See supra* at Section II(A) and (B).

[50] *See, e.g.*, *Hoxie,* 419 F.3d at 482; *New Valley Corp. v. Gilliam*, 192 F.3d 150, 156 (D.C. Cir. 1999); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1227 (5th Cir. 1991).

[51] 15 U.S.C. § 78m(f)(1).

[52] *Id.* (emphasis added). For the same reason, the suggestion made by a prior commenter that the Rule merely equalizes the filing requirements between investors who take short and long positions is incorrect. Form 13Fs are filed only once per quarter, are not due until 45 days after the calendar quarter has ended, and require only information about holdings as of the end of the quarterly period, not daily positional information. 17 C.F.R. § 240.13f-1.

In doing so, Congress clearly intended that institutional investment managers not be required to report more frequently than on a quarterly basis.[53] Both Congress and the SEC expended substantial time and energy to determine the impact of Section 13(f) *prior* to its passage, a fact that should inform the SEC's effort to shape disclosure requirements for short sales. Prior to passing Section 13(f), Congress charged the SEC with the responsibility to "consider the cost and burden to such smaller institutional investment managers of preparing such reports."[54] The SEC did so, and after reviewing extensive comments from numerous concerned parties, ultimately decided upon a quarterly reporting requirement because "requiring the filing of Form 13F on a quarterly basis will not significantly burden competition."[55]

The Rule, which was not preceded by any comprehensive study or examination, obliterates the careful balance struck by Congress and the SEC through Section 13(f). The SEC apparently recognizes this conflict, because – unlike its previous emergency orders, which specifically relied upon Section 13(f) – the Rule does not specifically cite to Section 13(f) as a basis for its authority. But the Commission may not overrule Congress through omission. Instead, each section of the Exchange Act must be read in light of the other sections of the Exchange Act to give effect to the true meaning of the overall statutory scheme.[56] Any statute conferring general rulemaking authority on the SEC must yield to the specific limitation on such reporting contained in Section 13(f).[57]

Moreover, Congress instituted Section 13(f) of the Securities Act largely out of concern that institutional investors were taking increasingly large ownership positions in public companies, which in turn implicated corporate governance issues and the voting and ownership rights of other investors.[58] Congress therefore required institutional investors to publicly

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[53] *See* S. REP. NO. 94-75, at 86-87 (1975) ("It is expected that the Commission would require by rule that institutional investment managers file reports quarterly....").

[54] *Id.* at *86.

[55] Filing and Reporting Requirements Relating to Institutional Investment Managers, SEC Exchange Act Release No. 15461, January 5, 1979, available at http://sec.gov/rules/final/34-15461.pdf.

[56] *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2335 (2008) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.")).

[57] *See Gonzales v. Oregon*, 546 U.S. 243, 262-263 (2006) ("In light of these specific grants of * * * authority, we are unwilling to construe the ambiguous provisions... to serve this purpose [of creating further authority].") (brackets in original) (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 744 (1973)).

[58] S. REP. NO. 94-75, at 78-79 (1975).

disclose their ownership positions, so that the investing public could use information about institutional investors' holdings in making their own investment decisions.[59] Short sales do not implicate any such concern.

In short, the Rule is both unsupported by any factual evidence, thus rendering it arbitrary and capricious, and exceeds the SEC's authority to issue disclosure requirements under the Exchange Act. Such ill-considered rules will not withstand later scrutiny.[60]

V. PROPOSED ALTERNATIVE TO THE DISCLOSURE RULE

For the reasons stated above, we believe that a rule requiring disclosure of short positions is neither necessary nor helpful, either to the SEC or to our securities markets, and exceeds the SEC's legal authority. However, if the SEC determines that some recordkeeping requirement is in fact necessary, we propose the following alternative to the Rule, which will minimize the burden to institutional investment managers, while retaining records that may assist in any subsequent anti-fraud investigation without impacting legitimate short selling in general.

As noted above, many institutional investment managers currently retain complete records of their securities transactions going back several years, either because they are registered under the Investment Advisers Act[61] or because they voluntarily keep such records. The SEC could require all investors to retain relevant records of short transactions, including locates and borrows, for a minimum of three years. The SEC could then review such records when appropriate or necessary for investigative purposes even though, as previously noted, such records exist and *are currently available* to the SEC through the recordkeeping requirements of the regulated broker dealers that act as prime brokers to such short sellers.

We believe that this alternative is far less burdensome to investment managers, while still accomplishing the same purposes for which the Rule was intended. This alternative would eliminate the necessity and cost of preparing voluminous and repetitive filings and would minimize the risk of public disclosure of the information. To the extent the SEC believes that disclosure of short positions will discourage abusive short selling, having to retain such records

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[59] *Id.* at 82-83.

[60] *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (noting that courts will not defer to agency rules that are "arbitrary or capricious in substance," or "contrary to the statute.")

[61] *See* 17 C.F.R. § 275.204-2.

would be an equally effective deterrent when combined with the knowledge that the SEC could request those records at any time.[62]

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Only two years ago, in a statement to the United States Senate, current SEC Chairman Christopher Cox publicly counseled against exactly the type of regulation now proposed by the SEC:

> As a general principle, which I would apply both to the Commission's future regulatory actions in this area as well as to any potential legislation, I would counsel that to the maximum extent possible our actions should be non-intrusive. There should be no interference with the investment strategies or operations of hedge funds, including their use of derivatives trading, leverage, and short selling. Nor should the federal government trammel upon their creativity, their liquidity, or their flexibility. The costs of any regulation should be kept firmly in mind. Similarly, there should be no portfolio disclosure provisions. A hedge fund's ability to keep confidential its trading strategies and portfolio composition should be protected.[63]

The Chairman's words apply with particular force now, when the securities markets are struggling to regain their footing even in the absence of unnecessary and burdensome new regulation. Although we understand the reasons why the SEC issued the Rule, we believe the Rule itself does not further those goals and merely places substantial burdens on investors. We hope that the above comments are helpful in shaping the SEC's decision on whether to withdraw or amend the Rule. We would welcome the opportunity to further discuss these issues with the SEC.

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[62] This suggestion is somewhat similar to the SEC's suggestion that short sellers be subject to the Rule 17a-3. 17 C.F.R. § 240.17a-3(5). However, we do not believe that the more extensive recordkeeping required by Rule 17a-3 makes sense in this situation. If any new disclosure requirement is imposed, which it should not be, the disclosure currently required under Rule 13F is more than sufficient.

[63] *The Regulation of Hedge Funds: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 109th Cong. (2006) (testimony of Christopher Cox, Chairman, Sec. and Exch. Comm'n), available at http://sec.gov/news/testimony/2006/ts072506cc.htm.

Yours truly,

Richard B. Zabel

cc: The Honorable Christopher Cox, Chairman
The Honorable Kathleen L. Casey
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes

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