June 23, 2011

Via E-Mail: rule-comments@sec.gov

Ms. Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2) (Release No. 34-64383)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to respond to the request for comment by the Securities and Exchange Commission ("Commission" or "SEC"), on behalf of its Division of Risk, Strategy, and Financial Innovation ("Division"), with regard to the studies required under Section 417(a)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[2] More specifically, Section 417(a)(2) requires the Commission to conduct a study of: 1) the feasibility, benefits, and costs of requiring reporting publicly, and in real time, short sale positions of publicly listed securities, or, in the alternative, reporting such short sale positions in real time only to the Commission and the Financial Industry Regulatory Authority, Inc. ("FINRA"), and 2) the feasibility, benefits, and costs of conducting a voluntary pilot program in which public companies will agree to have all trades of their shares marked "short," "market maker short," "buy," "buy-to-cover," or "long," and reported in real time through the Consolidated Tape.

The SEC's Release includes an extensive request for comment on a variety of topics involving disclosure of short sales and short positions. We strongly urge the Commission to consider the policy goals further, and engage in a thorough cost-benefit analysis, prior to adopting rules governing additional disclosure of short sales and short positions.

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1 The Securities Industry and Financial Markets Association brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA"). For more information, visit www.sifma.org.

2 Securities Exchange Act Release No. 64383 (May 3, 2011), 76 FR 26787 (May 9, 2011) ("SEC Release").

I. Introduction and Executive Summary

SIFMA firms believe that short selling is a longstanding, legitimate practice that provides numerous benefits to the market. The Commission has long recognized the value provided by short selling, noting that:

> [s]hort selling provides the market with at least two important benefits: market liquidity and pricing efficiency. Market liquidity is generally provided through short selling by market professionals…who offset temporary imbalances in the buying and selling interest for securities. Short sales effected in the market add to the selling interest of stock available to purchasers and reduce the risk that the price paid by investors is artificially high because of a temporary contraction of selling interest. Short sellers covering their sales also may add to the buying interest of stock available to sellers…Short selling also can contribute to the pricing efficiency of the equities markets. Efficient markets require that prices fully reflect all buy and sell interest…Market participants who believe a stock is overvalued may engage in short sales in an attempt to profit from a perceived divergence of prices from true economic values. Such short sellers add to stock pricing efficiency because their transactions inform the market of their evaluation of future stock price performance. This evaluation is reflected in the resulting market price of the security.[3]

SIFMA also appreciates that there may be potential abuses associated with short selling, as with many other forms of trading strategies, and thus a need for regulation designed to guard against such abuses. SIFMA notes that the Commission has taken significant action to address many of the potential abuses including, but not limited to, adopting: (i) Rule 204 of Regulation SHO under the Securities Exchange Act of 1934, as amended ("Exchange Act"), which generally requires a clearing firm participant to deliver securities sold on settlement date, or to close out any fail-to-deliver positions by borrowing or purchasing the securities in question; and (ii) Rule 10b-21 (the "naked short selling anti-fraud rule"), which is intended to target short sellers who intentionally misrepresent that they have obtained a "locate," or long sellers who misrepresent that they own the securities sold and then fail to deliver. As the Commission has previously noted, these and other actions have resulted in a number of positive impacts on the market, including drastic reductions in the number of failures to deliver overall, as well as in the number of Threshold Securities.

To that end, as described in further detail below, SIFMA believes that, when conducting the study required under Section 417(a)(2) of the Dodd-Frank Act, the Commission should consider the beneficial action that the SEC has already taken in connection with short selling, as well as the variety of unintended harmful consequences that will likely occur as a result of requiring real time public reporting of short sales and short positions, including limiting the numerous benefits that short selling provides to the market, and the overall effect that such reporting will have on firms, issuers, investors and the marketplace as a whole.

Furthermore, SIFMA notes that Section 929X(a) of the Dodd-Frank Act amended Section 13(f) of the Exchange Act to require the Commission to adopt rules requiring monthly (or potentially more

[3] Securities Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972 (Nov. 6, 2003).

frequent) public short sale disclosures by security, including the "aggregate amount of the number of short sales of each security, and any additional information determined by the Commission." SIFMA feels strongly that any actions taken as a result of the study required under Section 417(a)(2) should be considered in conjunction with these other short position reporting requirements that will be implemented under 929X(a) as well as the currently existing requirements summarized in Section II below, and other initiatives being undertaken by the Commission (*e.g.*, the Consolidated Audit Trail).

II. Current Regulatory Regime for Reporting of Short Sales and Short Positions

By way of background, as recognized in the SEC Release, there are already currently in place various mechanisms for the identification and reporting of short sales and short positions. These include the following:

- *Order Marking:* Regulation SHO under the Exchange Act imposes a requirement on executing brokers to mark all sell orders in securities as "long," "short" or "short exempt."

- *OATS Reporting:* When an order is received or generated, such order will be captured by the broker for reporting to a self-regulatory organization ("SRO"). This includes orders for Nasdaq Stock Market, Inc. ("Nasdaq") and over-the-counter equity securities which are reported to the order audit trail system ("OATS"), operated by FINRA. Orders for New York Stock Exchange ("NYSE") listed equity securities must be reported by the executing broker to the NYSE OTS, upon the NYSE's request.[4] If such order is for a short sale, the broker must record the designation of that order as "short."

- *Trade Reporting:* Upon execution of the order, a report of the transaction is submitted to an exchange (if executed on the exchange) or FINRA (if executed over-the-counter), which includes identification of whether the order was a short or long sale. Such trade reports are generally required to be submitted shortly after execution of the order (*e.g.*, to FINRA within 30 seconds of the execution).

- *Daily Aggregate Reporting:* There is also current public reporting of aggregate short sales by issuer. Specifically, based on the trade report information received from brokers in connection with short sales, the exchanges and FINRA publish on their websites information on aggregated short sale volume by security. Specifically, FINRA publishes on its website a Daily Short Sale Volume File, which provides aggregate daily short sale volume data by security for most U.S. stocks traded over-the-counter. FINRA further publishes a Monthly Short Sale Transaction File, which

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[4] The SEC recently approved a FINRA rule proposal to subject all NMS stocks to the OATS reporting requirements, including securities traded on the NYSE, NYSE Amex, and NYSE Arca, however, it has not yet become effective. *See* Securities Exchange Act Release No. 63311 (Nov. 12, 2010), 75 FR 70757 (Nov. 18, 2010). *See also* FINRA Notice to Members 11-03, *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122785.pdf. Effective July 11, 2011, FINRA will begin expanding, in three phases, the order recording and reporting obligations in the OATS Rules to include orders in all NMS stocks, in addition to OTC equity securities.

provides public access to more specific transaction data for generally every over-the-counter short sale transaction in U.S. exchange-traded stocks. Moreover, the NYSE and the NASDAQ OMX, among other exchanges, also publish for a cost short sale files based on the trading activity on each respective exchange.

- *Short Interest Reporting:* There is currently public reporting of short interest. Specifically, FINRA rules require broker-dealers to maintain and report, on a bi-monthly basis, records of aggregate short positions that a firm holds in all customer and proprietary accounts. The reporting relates only to short positions that result from short sales in stocks, and does not extend to any short positions held through derivatives or otherwise.

In this regard, there already exists a wide range of short sale and short position data available to regulators, which when viewed together with other regulatory information, provides regulators with a wide range of information to assist their understanding of marketplace trades, as well as anticipated possible market stress.

III. Section 417(a)(2)(A) of the Dodd-Frank Act

Section 417(a)(2)(A) of the Dodd-Frank Act requires the Division to conduct a study of "the feasibility, benefits, and costs of requiring reporting publicly, in real time short sale positions of publicly listed securities or, in the alternative, reporting such short positions to the Commission and [FINRA]."

A. Harmful Unintended Consequences of Public Disclosure

Requiring real time reporting of "short sale positions" would create a number of practical difficulties that could have harmful consequences for investors, issuers, broker dealers and the marketplace as a whole. Specifically, by requiring real time public reporting of short positions, firms could be required, directly or indirectly, to disclose their trading strategies. If short sellers are required to publicly disclose their specific positions on an immediate real-time basis, their strategies and positions will be widely known, compromising their ability to manage their market risk exposure. This raises a concern that other market participants may use this information for their own benefit and to the detriment of the reporting firm. This point was raised in SIFMA's comment letter on prior Form SH,[5] with SIFMA noting that if the information included on Form SH was made public, then such information may reveal proprietary strategies in which firms may have an intellectual property interest. We would also expect that this suggested reporting regime would lead to attributable quotations moving away from exchanges whereby the further identification of a market participant strategy could be determined. DMM and LMM models would be at a significant disadvantage as they would have little opportunity to protect themselves from the advantages competitors would obtain from real-time disclosure of positions or transactions.

With the benefit of position information, other professional market participants with sophisticated capabilities could engage in tactics that could be harmful not only to the reporting firm but also to the investing public. In this regard, market professionals would likely be the true beneficiaries of

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[5] *See* SIFMA comment letter on Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets Guidance Regarding the Commission's Emergency Order Concerning Disclosure of Short Selling, *available at* http://sec.gov/comments/s7-24-08/s72408-31.pdf

such information as they would better understand the nuances of the disclosed data better than most retail market participants, as the technology resources that such firms have can read, interpret and further utilize the information to their advantage over retail investors. This may result in investors losing confidence in the equities markets and becoming less inclined to effect short sales, which could drain liquidity from the market (on both the long and short side) and otherwise deprive investors and the market overall of the numerous benefits provided by short sellers.

In 2010, Oliver Wyman, Inc. ("Oliver Wyman") produced a study (the "Wyman Study") examining the impact of manager-level public short-selling disclosure requirements on the equity markets. The Wyman Study identifies several substantially harmful effects of short-selling public disclosure, specifically stating, among other things:

> Our analysis leads us to conclude that regimes imposing manager-level short-selling public disclosure have materially negative impacts on their markets. Investors find the information they are required to disclose to be sufficiently sensitive that they limit their activities to avoid making disclosures. As relatively substantial participants in equity markets, short sellers play an integral role in providing liquidity and maintaining market efficiency. When short sellers' level of participation decreases, markets become less liquid, more expensive and more difficult to trade. These primary impacts affect all investors equally. If markets become more expensive and difficult to trade, all investors – retail, institutional and hedge fund – will be impacted by these changes.
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> There is also a macro/systemic risk associated with implementing over-burdensome short selling regulation. As markets become less efficient and more expensive, parity among global equity markets begins to disappear. Were disclosure regulation to appreciably impair a market's ability to function efficiently, there exists a real risk that investors would invest less in affected markets and begin to allocate capital to equity markets with more palatable regulatory frameworks. If market participants begin to prefer to invest in more liberal capital markets based on their short-selling disclosure restrictions, the effects on capital formation and the ability of companies to finance themselves could be significant.
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> Due to short sellers' relatively high level of market participation, the unique benefits their liquidity provides to equity markets and the ineffectiveness of past regulatory intervention in short selling markets, it is important that regulators carefully consider all of the impacts of their actions. If and when they intervene, they should do so in a fashion that appropriately addresses their concerns.[6]

[6] *See* Oliver Wyman ,Inc., "The Effects of Short-Selling Public Disclosure Regimes on Equity Markets: A Comparative Analysis of US and European Markets," 2010, *available at* http://www.managedfunds.org/downloads/Oliver_Wyman_Financial_Services_Report.pdf.

To that end, the Wyman Study concludes that the impacts of manager-level short-selling public disclosure requirements are two-fold. First public short-selling disclosure requirements decrease short sellers' participation in equity markets by approximately 20-25%. Second, as short selling liquidity decreases there are material impacts to the markets for the affected securities including: (i) trading volumes decrease; (ii) bid-ask spreads widen; (iii) price discovery becomes less efficient; and (iv) intraday volatility increases. According to the Wyman Study, the combined effect is that markets adopting public short-selling disclosure requirements become "more expensive and difficult venues for all investors to execute both purchases and sales of securities."

In addition to the Wyman Study discussed above, the Commission itself has expressed concerns about the effects public disclosure of short sale activity could have on the market. Specifically, in the SEC's October 2008 release extending the Commission's September 2008 Emergency Order requiring institutional investment managers to file information on Form SH, the Commission stated:

> As we explained in our October 2008 Order, we are concerned that publicly available Form SH data could give rise to additional, imitative short selling. Accordingly Rule 10a-3T states that all Forms SH filed with the Commission will be nonpublic to the extent permitted by law.[7]

As such, the SEC has explicitly recognized the potential for abusive behavior stemming from the public disclosure of short sale activity.

Additionally, real time reporting could introduce misleading or incomplete information to the marketplace, which could negatively impact investors, issuers and the marketplace as a whole. In this regard, requiring real-time reporting is likely to lead to erroneous information being distributed to the public. For example, situations may occur where a firm may initially believe they have a "short sale position," however that turns out not to be the case (*e.g.*, due to "as/of" trades, errors/corrections). If real-time reporting were required, however, the initial "short sale position" would be reported, thereby causing misleading information to be disseminated, potentially to the detriment of issuers and investors. Even if the short sale reporting was only provided to regulators (*e.g.*, the SEC and FINRA), there would be similar concerns with real-time reporting being inaccurate, although without the same harmful unintended consequences of public disclosure.

As was discussed in the SIFMA comment letter to Form SH, public reporting of "short sale position" information could potentially cause misleading or misunderstood information to be disseminated to the public and market participants. For example, there could be a situation in which a firm is effecting a large short sale in order to hedge its exposure to an equally large long position (*e.g.*, a long position in a derivative), so that the firm is overall economically flat. Further, market participants establish short positions for various reasons that may be intra-day positions that are closed out before the end of the trading day (*e.g.,* a short sale by a broker dealer to facilitate a customer purchase). Without proper context, the reported information can be misinterpreted and

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7 *See* Exchange Act Release No. 34-58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008); *see also* Exchange Act Release No. 58724 (Oct. 2, 2008) 73 FR 58981 (Oct. 8, 2008). In Release No. 58724, the SEC stated: "Also, the Commission has considered further the reasons to maintain the information as nonpublic in the current market environment, and is concerned that publicly available Form SH data could give rise to additional, imitative short selling that was not intended by the Commission's Order."

relied upon erroneously by retail investors, thus potentially harming issuers, shareholders and the marketplace in general.

B. Implementation Difficulties and Costs

In order to fully understand and assess the implementation difficulties and costs of the "short sale position" reporting regime in Section 417(a)(2)(A), SIFMA believes that the Commission would need to provide further clarity and detail on such regime, as further discussed below. Nevertheless, even without this detail, SIFMA believes that requiring changes to the method or timing of the reporting of "short sale position" information will pose significant challenges and be costly for firms and other market participants to implement. Form SH required firms to produce information on a weekly basis, which in itself proved to be extremely onerous. For example, one firm indicated that in order to comply with the requirements of Form SH, the firm had a core group of approximately 10-20 individuals across various entities, including legal, compliance, information technology, middle office and operations, working around the clock for two to three weeks to develop and implement a reporting process. This Firm further indicated that complying with Form SH also necessitated the engagement of an outside vendor to facilitate this process. Because the reporting regime under Section 417(a)(2)(A) would require reporting information on a "real time" basis, the costs (depending on how the term "real time" is defined) of complying with a "real time" reporting regime will be much more significant and burdensome for firms than the costs for complying with Form SH, which as, discussed above, were quite significant.

To that end, in order to comply with a real time reporting requirement, systems for collecting the reportable information would have to be established, requiring significant infrastructure changes and a substantial development effort impacting many different departments and systems at substantial costs, not to mention the potential for significant changes to the current overnight batch processing presently employed by many firms to reconcile position information. Current short interest reporting to FINRA is settlement date based and for many firms short position information is sourced from books and records on a settlement date basis. Other firm systems operate on a nightly batch process to send positions to books and records. This means that real-time reporting would require that firms either update their books and records systems to real-time processing or use un-reconciled trade processing and risk systems for short position reporting. Implementing the systems necessary to be able to report "short sale position" information for large organizations will entail aggregating and sourcing position information from various firm systems. At this time, it is virtually impossible to estimate the costs such reporting would require, without, as discussed below, understanding in more detail some of the more specific requirements of the reporting requirement, including knowing how the terms "short sale position" or "real time" as used in the study would be defined.

More specifically, requiring disclosure of new information and new details with regard to "short sale positions" would likely introduce significant resource and administrative costs and burdens as well as compliance burdens. Requiring more granular details of market making accounts to be included into a real-time data stream will also introduce challenges, not only with respect to cost and administration but also market efficiencies. Potential latencies impacting execution speed could result at certain market centers with the introduction of such a real time requirement. Similarly, real-time netted positions reporting across the entire broker-dealer, as opposed to aggregation unit reporting, would introduce material costs of additional infrastructure builds and, although information regarding short positions could potentially be leveraged from the systems that calculate

aggregation unit positions for short sale marking, because of the active nature of trading activity, these positions change constantly thereby requiring a significant amount of messaging traffic to meet the real time requirements. These costs will not just impact market makers, but also, among others, the exchanges, data vendors and retail broker-dealers.

Requiring clients to effect real time reporting of short sale positions will present significant operations challenges for many clients that do not have extensive technology infrastructures. To the extent that clients are required to report their own information, an entirely new set of logic and platforms will be required. Additionally, broker-dealer reporting of customer short sale positions would naturally be expected to be limited to positions custodied at the broker. As such, because it is common that investors hold positions across multiple prime brokers, under the current regulatory framework, the reporting of aggregate client positions will likely be fragmented (and thus misleading). In this regard, given current batch processing, clearing brokers and custodians may not be able to determine positions of their customers until an overnight batch reporting cycle is completed and, therefore, the earliest positions reporting would be the evening of trade date. Typically, it is not until some time on trade date plus one that the clearing broker completes the reconciliation process of matching the trade details as reporting by the executing broker with the trade details as reported by the investor.

SIFMA recommends that, in connection with rulemaking, the Commission consider these costs and challenges against any expected benefits of such a reporting requirement. In this regard, SIFMA believes it is instructive that, although the Form SH requirements were implemented on an interim basis through an Emergency Order, and then through an Interim Final Temporary Rule, the Commission ultimately did not adopt the prior Form SH requirements on a permanent basis. SIFMA believes that this helps to confirm that such short reporting did not yield significant benefits.

C. Need for Clarification

SIFMA believes that, if the Commission does ultimately determine that additional short reporting requirements may be necessary and in the best interests of the market, and thus proceeds with rulemaking, then in order to fully evaluate the potential impacts and costs of such reporting requirements, the Commission would need to clarify certain points related to the study required under Section 417(a)(2)(A). Primarily, further detail is required around the meaning of "short sale positions" that would be required to be reported. As SIFMA previously referenced in the context of Form SH, there is a difference between "short sales" and "short positions." In this regard, the reporting of short sales vs. the reporting of short positions may not align (*e.g.*, a short sale could be covered the same day, thus resulting in there not being a short position). This lack of specificity raises a number of questions including, but not limited to, the following:

- What does the term "short sale positions" mean as such term is used in Section 417(a)(2)(A) and what information would be required to be reported in real time? How would this information be calculated (bearing in mind that short positions are not necessarily aligned with short sales)?[8]

[8] SIFMA believes that if the SEC were to go forward with rulemaking to implement the reporting regime under Section 417(a)(2)(A), the term "short sale positions" should not be defined to include any short positions resulting from derivative transaction because of, among other things, the complexity and uncertainty involved in calculating such positions. Rather, SIFMA recommends defining the term "short

- What is meant by "real time"? How frequently will reports be required?

- Would the "short sale position" information being reported be based on trade date or settlement date? Will the reporting be an "as of" snap shot of the position, or will there be an obligation to report any and all adjustments to previously reported information (*e.g.,* as of trades related to corporate events, adjustments for errors, etc.)

- What is the scope of the information that is to be provided? Would it cover short sale positions of broker-dealers' only, or would it also include customer positions (retail and institutional)?

- For broker-dealers, will the reporting require short positions to be reported at the holding company level, legal entity level or aggregation unit level?

IV. Section 417(a)(2)(B) of the Dodd-Frank Act

Section 417(a)(2)(B) of the Dodd-Frank Act requires the Division to conduct a study of "the feasibility, benefits, and costs of conducting a voluntary pilot program in which public companies will agree to have all trades of their shares marked "short," "market maker short," "buy," "buy-to-cover," or "long," and reported in real time through the Consolidated Tape."

As an initial matter, SIFMA believes that whether or not "public companies will agree" to such marking should not be the basis for determining whether the voluntary program should be adopted. Rather, the determination should be based on whether the program would provide benefits to investors or the marketplace. In this regard, SIFMA would like to raise certain issues regarding certain of the unintended consequences that are likely to occur if such a program is implemented, and the potential implementation difficulties for firms in connection with the proposed pilot program (or any long term plan, for that matter).

As discussed above, firms are currently required to mark orders "long," "short," or "short exempt" in accordance with the requirements of Regulation SHO. Such marking however, does not flow through for purposes of marking "trades" as reported on the Consolidated Tape. While perhaps it could theoretically be feasible for trades to be reported to the tape as "short," "market maker short," "buy," "buy-to-cover," or "long," firms believe that a variety of harmful and unintended consequences could occur as a result of this information being required to be reported in real time and publicly disseminated which could prove to be harmful to firms, investors, issuers and the marketplace.

A. Harmful Unintended Consequences

SIFMA believes that requiring trades that are marked in the manner discussed in Section 417(a)(2)(B) to be reported to the Consolidated Tape could prove harmful not only to individual firms, but also to issuers and the marketplace. Similar to the discussion above, as a result of requiring this type of information to be reported to the Consolidated Tape, firms would essentially be required to publicly disclose their proprietary trading strategies, in which firms may have an

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sale positions" to include only short positions that are deemed to result from physical short sales, and not include any short positions from any synthetic exposure.

intellectual property interest. Requiring public disclosure raises a concern that other market participants may use this information for their own benefit and to the detriment of the firm required to report such information as well as the investing public. To that end, as noted above, the technology resources that professional market participants have can read, interpret and further utilize the information to their advantage over retail investors. In this regard, a stream of real time information is more susceptible to misuse by professional market participants using opportunistic trading strategies to the detriment of firms reporting the information, issuers and the marketplace as a whole, rather than such information being useful for investors. Stated another way, SIFMA believes that such short sale disclosure is likely more detrimental to retail investors than beneficial, as retail investors will not have an opportunity to use such information in the same manner that a professional investor or proprietary trading firms can.

The impact of signaling trading strategies to the marketplace is detrimental to the liquidity providers and will have negative consequences to the marketplace. This could especially be the case with marking orders as "market maker short." In effect, such regulations would place short sellers at a significant disadvantage to other market participants without advancing, in any meaningful sense, the SEC's objectives of identifying and eradicating manipulative activity. SIFMA expects that these harmful consequences will result in investors being less inclined to effect short sales, thereby depriving investors and the market overall with the numerous benefits provided by short sellers, as recognized by the Commission.

SIFMA further believes that more detailed reporting regarding short transactions to the public will not meaningfully serve the SEC's policy goals. In this regard, SIFMA is not convinced that the average investor will derive any material and legitimate benefit from real time disclosure of short transactions. Additionally, as discussed above, requiring real time public reporting of short sale transactions to the Consolidated Tape will likely lead to the same danger of misleading information discussed earlier (*i.e.,* the public perceiving a short sale as a speculative short when it was actually a hedging short sale). Moreover, if the marking is based on orders submitted, it is highly likely that when looking at all open orders, there will be more trades marked short than will result in an actual short position as of the end of the day (*e.g.,* a seller cannot be sure that shares will be delivered on contractual settlement date because of processing delays to remove restrictions or because of offsetting buy to cover transactions entered into on the same day). To that end, the amount of short selling will be overstated to the detriment of issuers, and the marketplace as a whole.

B. Implementation Difficulties and Costs

As discussed above, the introduction of new details with regard to short positions will introduce resource/administrative and cost burdens. For example, requiring more granular details of for accounts, which are not currently captured for any regulatory purpose, to be included in a real-time data stream, could introduce challenges not only with respect to cost and administration but also market efficiencies. Additionally, the introduction of "buy-to-cover" and "market maker short" indicators to order marking and trade reporting would require very significant changes to a variety of firm and industry systems, whether applied broadly or in connection with a limited pilot, which include, but are not limited to, the following:

- All firm and client order handling systems would need to be updated to use the new flag on firm orders and to capture the new value from client orders.

- All firm trading and order routing systems would need to be updated to include the new value on routed orders and on trade reports.

- Exchanges and other market centers would need to be updated to capture the new details and include them on trade reports.

- FIX protocols and other similar communication standards would need to be updated to allow for the new value.

Trade and transaction reports (ex. OATS, Blue Sheets, ACT, etc) may need to be updated to allow for the consumption of these new indicators.

C. Need for Clarification

Similar to the discussion above regarding Section 417(a)(2)(A), SIFMA believes that, if the Commission were to decide to go forward with rulemaking with respect to the type of marking discussed in Section 417(a)(2)(B), then in order to fully evaluate the potential impacts of such reporting requirements, the Commission would need to clarify certain points, including but not limited to, the following:

- Section 417(a)(2)(B) references the marking of "trades." It is therefore presumed that this term would be meant to cover executions, and not orders (which raises the question of how one effectively marks an execution that occurs on an exchange away from the firm's systems).

- Which side of the "trade" would be required to report the "trade"? More specifically, transactions, of course, consist of two sides: (1) a buy side, and (2) a sell side. If the marking is based on executions, in a situation in which one party sells "short," and the counterparty "buys to cover," which side would take precedence for purposes of reporting the transaction to the Consolidated Tape?

- How would the term "market maker" as such term is used in Section 417(a)(2)(B) be defined for purposes of the "market maker short" marking?"[9]

- How would non-tape trades associated with riskless principal transactions be treated?

[9] SIFMA would recommend that market makers be exempt from any marking or reporting regime. In connection therewith, SIFMA would recommend that the Commission interpret the term "market-maker" broadly, recognizing the market making activity extends beyond exchange specialists and Nasdaq market makers to include other types of activities, such as marking making in over the counter ("OTC") derivatives. *See e.g.,* Exchange Act Release No. 58592 (Sept. 18, 2008). SIFMA notes that the current EU proposal would exempt market makers from reporting requirements, and defines market makers broadly, generally covering a firm that: (a) posts firm, simultaneous two way quotes of comparable size and at competitive prices, with the result of providing liquidity on a regular and ongoing basis to the market; (b) as part of its usual business, fulfils orders initiated by clients or in response to clients' requests to trade, and by hedging positions arising out of those dealings.

V. Overall Cost/Benefit Analysis

SIFMA notes that a study conducted by Commission's Office of Economic Analysis ("OEA") examined the extent to which short selling appeared to drive prices downward during the first weeks of September 2008, and whether there existed an association between measures of short selling activity and stock returns.[10] In particular, this study examined whether periods of negative returns are associated with unusually high short selling activity. The results of the study were inconsistent with the notion that episodes of negative returns are the result of short selling activity, and found that, on average, short sale volume as a percentage of total volume was greater for periods of positive returns than for periods of negative returns. Further, the study found that, during periods of extreme negative returns, sell pressure was more intense for long sales, thus indicating that short sales put less pressure on prices than did long sales during periods of extreme negative returns. In fact, the study found that the short sale ratio is mostly higher during periods of positive returns than during periods of negative returns, which is consistent with a finding that short sales are, in part, a tool of price discovery; in other words, higher intensity of short selling is associated with higher returns. The results of this OEA study thus suggest that a substantial fraction of short sale volume is not associated with negative returns and that short selling is not merely a tool for driving prices down.

To that end, SIFMA requests that the Commission perform a full cost/benefit analysis in connection with: (1) requiring firms to mark trades as "short," "market maker short," "buy," "buy-to-cover," or "long," and requiring the reporting of such trades on a real-time basis through the Consolidated Tape, and (2) requiring real time reporting of short positions publicly, or reporting such short positions in real time only to the Commission and FINRA. Specifically, the Commission should consider the benefits of requiring such reporting and the cost to the industry, the exchanges and the marketplace as a whole of implementing these new reporting regimes.

Additionally, the Commission should also consider the harmful effects such reporting regimes would have on the marketplace and investors, including, among other things: (1) causing investors to be less inclined to effect short sales, thereby depriving investors and the marketplace with the numerous benefits provided by short sellers as recognized by the Commission; (2) causing misleading information to be disseminated to the public and market participants to the detriment of, among others, issuers; and (3) negatively impacting competition and market efficiency. Additionally, SIFMA believes that the Commission should consider these harmful effects in connection with the overall lack of benefits that retail investors could be expected to gain from such reporting regimes without sophisticated technological resources.

VI. Alternatives to Real Time Reporting of Short Sale Positions

If, after conducting a full cost/benefit analysis, the Commission concludes that further regulation is warranted in this area, SIFMA would support disclosure if access to such information was limited to regulators on other than a real-time basis, who are mandated to safeguard the integrity of the markets and, therefore, have a compelling public policy need for such information. Further, SIFMA would support disclosure if careful consideration is given to the type and scope of information required to be reported to ensure that it is designed to meet the SEC's stated policy goals.

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[10] OEA Study: "Analysis of Short Selling Activity during the First Weeks of September 2008," December 16, 2008, *available at* http://www.sec.gov/comments/s7-08-09/s70809-369.pdf.

Section 929X of the Dodd Frank Act already requires the SEC to prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security and any additional information determined by the SEC following the end of the reporting period. At a minimum, this public disclosure would be required to be made on a monthly basis. While SIFMA will respond more fully with comments upon the Commission initiating rulemaking with respect to Section 929X, SIFMA feels strongly that such rulemaking should be coordinated with the Rule 417(a)(2) studies, in order to avoid duplicative requirements and/or disparate interpretations.

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SIFMA greatly appreciates the Commission's consideration of the issues raised above, which are intended to ensure that any further reporting of short sale information may be accomplished in a logical and efficient manner, and without requiring firms to incur extensive costs which are not commensurate with the benefits to be derived from such disclosure. SIFMA would be pleased to discuss these comments in greater detail with the Commission and the Staff. If you have any questions, please call me at 202-962-7373 or Melissa MacGregor at (202) 962-7385 or at mmacgregor@sifma.org.

Sincerely,

/Ira D. Hammerman/

Ira D. Hammerman
Senior Managing Director and
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