The International Association of Small Broker Dealers and Advisors

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The elimination of the tick test is perhaps the most significant deregulation move in memory and should be done cautiously especially for the the smaller issuers and in light of the acknowledged current weaknesses of Reg. SHO -- *IASBDA COMMENT LETTER 12/19/06*

The Commission has proposed a reinstitution of the uptick and or circuit breaker rule 10 years from the date it first sought comments on eliminating the rule in its 1999 concept release and 2 years after it eliminated it. These rules are generally referred to as price tests. It is understandable why public pressure brings about this reversal, but we wish to focus on the uncertainty of price tests vs. the absolute certainty of a pre-borrow rule as explained in former Commissioner Campos letter of March 25,2009.The history of price tests shows that in good markets they are orphans but in bad markets they have many parents. We previously warned that the **total removal** of the tick test was neither required nor justified but our warnings were summarily rejected because in our view the policy was fixed in advance of the comments. In addition neither our comments or Amex's are referenced in the current release so we are compelled to reference them.

In response to IASBDA's comment regarding allowing issuers to have a choice as to whether or not they want their stock to be subject to a price test, we have determined not to take such action at this time. A primary goal of the amendments is to bring uniformity to, and simplify, short sale regulation. To allow issuers to have a choice as to whether or not their stock is subject to a price test would undermine this primary objective. In addition, we note that in the Proposing Release we specifically requested comment from issuers regarding their views of the impact of the proposed amendments on their securities.[62] We did not, however, receive any comments from issuers.[63]

In addition, with respect to IASBDA's comment regarding the universe of securities subject to the Pilot and, in particular, that the Pilot did not include securities quoted on the OTCBB, we note that the Pilot did not include this class of securities because securities quoted on the OTCBB are not currently subject to any price test restrictions.

Both the IASBDA and Amex suggested removing price tests from larger securities first to allow time to study the impact of the permanent removal of price test restrictions before such action is taken for smaller securities. We do not believe that such an approach would provide new results relevant to smaller securities.[64] As we noted in the Proposing

Release, while there is some evidence supporting the application of price test restrictions to smaller securities, the evidence is not strong enough to warrant the continuation of current price test restrictions to any subset of securities.[65] *Such continuation would also undermine a primary goal of these amendments of providing greater uniformity and simplicity to short sale regulation.*

Release No. 34-55970; File No. S7-21-06 at pp 18-19

We would first note that with respect to the otcbb,while there was no price test the Commission decided there could never be one for the sake of uniformity .We believe history has shown that uniformity of short sale restrictions prevented the SRO's from acting when it became clear that price tests might be more reasonable than the commission thought. Uniformity was also rejected with the emergency orders as was issuer choice when some firms voluntarily placed themselves outside the emergency orders. See AMEX REG 2008-44 SEC Emergency Order prohibiting short sales in financial firms covered securities for September 25, 2008 - **Companies included on the list may choose to opt out of the application of the short sale prohibition by informing the Amex of that determination by email to ListingQualifications@amex.com or by phone to 212-306-1331**.

We believe therefore that uniformity is not important but timeliness, consistency and effectiveness are. We are gratified to see that the current release asks for comment on otcbb restrictions and we belive they should be included.

More importantly we believe as Commissioner Campos does that a reinstatement does no harm but that it is not the complete or most advisable solution. What has not been explained is that there was a *quid pro quo* for its removal and that was a robust enforcement of Reg Sho. As indicated in the recent Inspector General's report that did not take place. We worry that the imposition of a tick test will be an excuse for not aggressively enforcing Reg.SHO. We believe that any tick test must be accompanied by a pre-borrow requirement with significant consequences such as treble damages based on the profits made. Price tests and circuit breakers are by their very nature temporary defenses because as prices moderate a short selling raid can begin again and again. Price tests similarly interfere with dynamic hedging. The STA letter makes a number of these points very well in addition to their argument that price tests are ineffective in today's fast markets. A pre-borrow test is more permanent as it limits the amount of short sales to the amount of borrowable stock and will not interfere with legitimate dynamic hedging. It is simpler and everyone admits that it works.Indeed its already in Reg Sho as the remedy for the threshold list. The only debate is how much fraud you are willing to accept for maximum liquidity? Together with a hard close and a price test you would have the first really substantive arsenal against abusive short selling. However if the commission decides to maintain the locate requirement it should make clear that its a continuing requirement. The understanding today is that once you get the locate there is no further obligation if it fails. That makes no sense and encourages soft locates as a means of opportunistic sales and commission kickbacks. See Dr. Leslie Boni's study while working at the commission.

We understand that the staff has tried to separate price tests from naked short sales and we worry that the end result is to minimize the seriousness of fails because a price test is implemented. Yet from the very beginning of Reg SHO it was assumed that both are serious issues and are intertwined. Thus they can only be attacked jointly. The release takes an abstract approach by focusing solely on volatility as opposed to illegality. Yet the tick test was originally imposed to stem illegal bear raids. Volatility down is a new justification for regulation and begs the question of why only volatility down? See David C.Worley,The Regulation of Short Sales; The Long and Short of It,55 Brook L.Rev.1255(1989-1990) which explains that the regulation grew from illegality not volatility. The assumptions in the media are that this is a political response and using volatility to justify it only encourages that assumption. We can live with volatility but we cannot live with illegality. Finally the release heavily emphasizes the need for data or extant empirical data and analysis. But that data is really only accessible by the Commission itself at NSCC.Numerous commentators have noted the need for real time seller identifiable statistics to prove the presence of abusive short selling. The burden here is on the regulators to prove it does not exist and numerous statements on current investigations have suggested they would do this. Yet this release would have us believe its a volatility issue .This is not responsive to the six senators letter which specifically mentioned both pre-borrowing and concern about the IG report.

We believe the Commission has not adequately examined the pre-borrrow requirement as an alternative to these proposals and is required by law to do so especially if it is truly interested in a cost-benefit analysis. Indeed it has not even examined a continue to locate requirement such that if the locate fails the seller must keep trying to find the stock. Since the initiation of the short sale review in 1999 ,the commission has asked only once about the pre-borrow-without proposing it- in its proposed amendments regarding the grandfather and market maker exceptions. In its 2006 proposed amendments it asked:

> Should we impose a mandatory "pre-borrow" requirement i.e., that would prohibit a participant of a registered clearing agency, or any broker-dealer for which it clears transactions, from accepting any short sale order or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security) for all firms whenever there are extended fails in a threshold security regardless of whether that particular firm has an extended fail position in that security? If so, how should we identify such securities? What criteria should be used to identify an extended fail? Should this alternative apply to all threshold securities? What are the costs and benefits of imposing such a mandatory pre-borrow requirement? What percentage of these pre-borrowed shares would eventually be required for delivery? **Release No. 34-54154; File No. S7-12-06 Dated: July 14, 2006**

But it never returned to this subject until summarily imposing it in the emergency orders of the summer of 08.Thereafter it again abandoned the concept such that there is no analysis of its impact or effectiveness or its popularity?Now years later after being asked by numerous commenters including six senators to consider it ,the Commission has again

ignored the consideration of what was apparently useful and worthy of comment in 2006, important in the summer of 08 and important to the senate.Clearly its the third rail of short sales regulation even though in the past its been sought by the industry for dividend rolls and its done today for hard to locate stocks and as the threshold list penalty.Its apparently legitimate after failing for 13 days but a big obstacle before the sale?The Commisssion needs both comments and data on this alternative in order to do a incisive cost benefit analysis.

The Commission refers often to the fact that abusive short sales or even legal short sales have not been proven to be responsible for the recent demise of Wall Street. But its the commission's duty to prove the alternative i.e. that short sales legal or illegal are not a problem when so many ceo's and former regulators believe it is a problem. The markets would regain confidence if the commission confirmed that they have thoroughly investigated and found no problems. But that's not what this release says. This release tells the public, which is without subpoena power or regulatory authority, to prove the problem does not exist. It also does not consider the pre-borrow or "continue to locate" even worthy of soliciting comments. This rationale does not inspire confidence but instead suggests foot-dragging at best or undue industry influence at worst. Finally we note that there is an urgency to this matter and the commission should not study it until the markets makes it less relevant. If a tick test/circuit breaker is deemed needed it should be imposed quickly as an interim temporary rule and the current interim rules made final along with a pre-borrow requirement. If needed the pre-borrow can be implemented on a pilot basis to determine if it works with the other remedies. But most importantly the pre-borrow requires a serious proposal because its as serious as anything else that has been proposed.

EXHIBIT A-PREVIOUS.COMMENT LETTER ON REMOVAL OF TICK TEST.

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The International Association of Small Broker-Dealers and Advisors submits the following comments on the above referenced amendments.The Staff makes a compelling case for the removal of the tick test for the Russell 3000 securities. However it fails to address whether the issuers of other securities should have some choice in whether they want their stock subject to the test.By insisting that it must be all or none the staff may unnecessarily force small issuers to accept an environment which is most unkind to their securities.While the studies seem to have found little evidence of small stock detriment, the universe did not include the otcbb stocks and may not have been inclusive of

other small stocks. The Russell 3000 is a broad based index index in terms of capitalization but there are roughly 9000 stocks in the publicly reporting universe.The Russell 3000 Index offers investors access to the broad U.S. equity universe representing approximately 98% of the U.S. market,but roughly 33% of individual stocks.The SEC's Advisory Committee Report on Small Public Companies Final report concluded there were 9,428 companies listed including the otcbb. Report at p.5 Therefore there may be an argument for phasing in the elimination by starting with the larger stocks and concluding with the otcbb and other small stock segments of the market. The proposal acknowledges at p.25 some evidence supporting the application of price test restrictions to smaller companies but (concludes) its not strong enough. For whatever reason, issuer comments have been significantly underrepresented(non-existent?) in the various short sale rule proposals. Under a phase in arrangement those issuers might focus more on the subject and eventually make a compelling argument that its not necessary to have all or none elimination. The commission might also learn something from its observance of the large stocks without a tick test. After so many years there is no compelling reason to force small companies into this environment when a phase in period has no downside.This is especially true when the commission has acknowledged that Reg SHO needs to be strengthened with additional amendments.The elimination of the tick test is perhaps the most significant deregulation move in memory and should be done cautiously especially for the the smaller issuers and in light of the acknowledged current weaknesses of Reg. SHO.

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