April 2, 2009

Securities and Exchange Commission
100F Street NE
Washington, DC

RE: Release No. 34-58773; File No. S7-30-08

Ms. Florence Harmon

I would like to take this opportunity to discuss the most recent report presented by the Office of Economic Analysis (OEA)[1] and debate some of the conclusions drawn by this analysis. I believe that while there may be subsets of this analysis that may be of value, there is an equal amount of this analysis that is meaningless or worse, potentially misleading.

As is the case with any study, to place value in any specific metric it is important to understand how such metrics are being used in the real world application. Using simple calculations such as averaging can seem valuable for some solutions but in the context of the problem being analyzed it may in fact be harmful when decisions are being cast from the results of an analysis such as this one.

Today, decisions made by the SEC Staff and by members of Congress are based in part by the reported findings of the OEA. Recently, a response to the OIG from the Division of Enforcement cited just this study in rebutting the findings and recommendations of the OIG.[2] It is therefore paramount that in reaching successful solutions, the backbone used in the decision process must be above reproach.

The report released by the OEA on March 20, 2008 assessing Regulation SHO is just not that type study. It is grossly inaccurate and therefore provides opportunity for wrong conclusions to be drawn. The staff at the SEC continues to put faith in these studies and members of Congress have looked to the SEC staff assurances that progress is being made and both are being misled due to the inaccuracies in the OEA report.

Let's take a look at some of the issues with the study findings and conclusions stated.

I. Fails are Down.

In summary, the results indicate that fails to deliver decreased significantly after the elimination of the OMM exception and the implementation of the T+3 Close-out Rule.

This statement, if taken as a standalone assessment, is accurate. There has been a significant drop in fails to deliver in the marketplace between the 3Q08 and 4Q08.

* Average Monthly FTD 3Q08 1,196,924,049 shares
* Average Monthly FTD 4Q08 526,873,411 shares

What the OEA Analysis fails to address is how this reduction in fails is segregated. Is the reduction in fails being attributed to a change in the Options Market Making exemption or is it associated with

[1] OEA Summary Report of Findings Dated March 20, 2008 http://sec.gov/comments/s7-30-08/s73008-107.pdf
[2] OIG Finding Release on Naked Short Sale Complaints to the SEC http://www.sec-oig.gov/Reports/AuditsInspections/2009/450.pdf

other market affects? Was the reduction in FTD's Uniform across the markets and across public issuers or was there a shift in performance on how fails were being treated?

A deep dive into the available data suggests that while FTD's are down significantly between 3Q and 4Q08 the reduction in fails is not uniform at all.

	Average FTDs	Average Volume	Average FTDs as a % of Average Volume	Average FTDs per Security	Average FTDs Value
Q2 2004	609,623,170.14	3,812,377,937.38	15.94%	250,562.30	$ 3,578,409,243.31
Q3 2004	924,063,002.84	3,409,997,905.24	27.64%	358,139.28	$ 3,082,042,311.75
Q4 2004	757,627,959.22	4,000,496,480.60	18.95%	280,608.59	$ 3,596,645,065.02
Q1 2005 (Post Reg SHO)	**580,691,537.48**	**4,263,153,835.85**	**13.60%**	**225,824.99**	**$ 3,312,013,161.53**
Q2 2005	501,122,098.03	3,966,844,786.96	12.64%	205,962.65	$ 3,340,043,998.72
Q3 2005	444,217,381.36	3,883,219,480.68	11.46%	181,272.61	$ 2,760,067,594.78
Q4 2005	448,441,501.06	4,279,226,458.48	10.55%	192,277.40	$ 2,894,006,673.12
Q1 2006	617,451,844.57	4,817,236,746.65	12.91%	239,543.24	$ 3,558,539,065.23
Q2 2006	567,905,499.89	5,052,002,740.74	11.23%	203,794.26	$ 3,762,389,391.89
Q3 2006	569,760,768.05	4,581,635,501.71	12.45%	230,494.11	$ 2,904,074,154.83
Q4 2006	707,956,106.65	4,849,415,144.26	14.58%	271,251.49	$ 3,789,984,697.95
Q1 2007	725,191,948.68	5,562,827,500.71	13.07%	270,548.94	$ 6,300,136,922.19
Q2 2007	896,929,456.89	5,703,072,941.85	15.72%	301,866.10	$ 7,053,429,353.75
Q3 2007	1,025,736,219.96	6,577,131,074.97	15.60%	375,919.34	$ 6,722,025,904.29
Q4 2007	938,185,988.69	6,484,247,355.67	14.61%	333,182.02	$ 6,532,802,230.11
Q1 2008	1,027,529,292.47	8,090,109,735.48	12.84%	322,669.56	$ 7,584,038,007.22
Q2 2008	1,017,320,922.57	7,257,270,498.50	14.07%	320,738.03	$ 7,931,817,953.30
Q3 2008	1,196,924,049.55	9,454,891,148.62	12.97%	372,065.85	$ 7,964,682,323.14
Q4 2008 (Post Reg 204T)	**526,873,411.89**	**10,289,953,764.18**	**5.18%**	**366,780.45**	**$ 1,800,022,413.31**

Table I Comparison of FTD by Quarter

As Table I indicates, there is a distinct change in the level of fails to deliver starting in 4Q08 as compared to 3Q08 but not as compared to the performance of Regulation SHO since its inception. Comparing 4Q08 to 1Q05 the change is not so distinct. By comparison, the average monthly fails to deliver in 4Q08 were greater than the average monthly fails in 2Q, 3Q, and 4Q05. Are we really at success if we are worse today than we were in 2005?

II. Fails may be Down but Fails per Issuer are up.

A closer look into Table I illustrates a characteristic that the OEA Analysis has ignored. That being the average number of fails per security.

According to the data obtained from the SEC website[3], the average fails per security is in fact significantly higher in 4Q08 than what was witnessed in the first 2+ years under Regulation SHO. Fails have accumulated to an average of 366,780 shares per security as compared to 225,825 shares in the first quarter of 2005.

While the level of SHO threshold securities has declined significantly, and while the level of fails has declined significantly as compared to the previous reporting quarter, the level of fails that remained

[3] Quarterly FTD Data published on the SEC website http://sec.gov/foia/docs/failsdata.htm

were being targeted to a smaller subset of companies. Figure 1 provides a visual presentation of the number of securities that were being reported out to the SEC as having fails to deliver. While the aggregate fails to deliver dropped by nearly 50%, and the number of companies reporting out with fails to deliver similarly dropped by nearly 60%, the level of fails per issuer increased by nearly 63%. More fails were being delivered to fewer companies.

Such conflicting metrics would indicate that these generations of targeted companies are those with a greater number of shares issued and outstanding. Lower threshold securities may also be explained away by a shift to a lower period of persistence in the targeted activities.

Ultimately this data subjects the integrity of the threshold list and threshold levels to a higher level of scrutiny.

The threshold list was set at an arbitrary 0.5% of shares issued and outstanding and likewise required persistence of 5 trade days before a company was included. Could the evidence we now hold be explained by the theory that a series of deceptive trading practices took hold on larger capitalized companies carrying higher share structures? With a collapsing market were the higher value stocks attacked because of little profit to be made on smaller stocks? To what explanation does the OEA offer as to why the level of fails per security has increased dramatically during this period in time where the markets have fallen bearish and where companies once considered stable were under sell side attack?

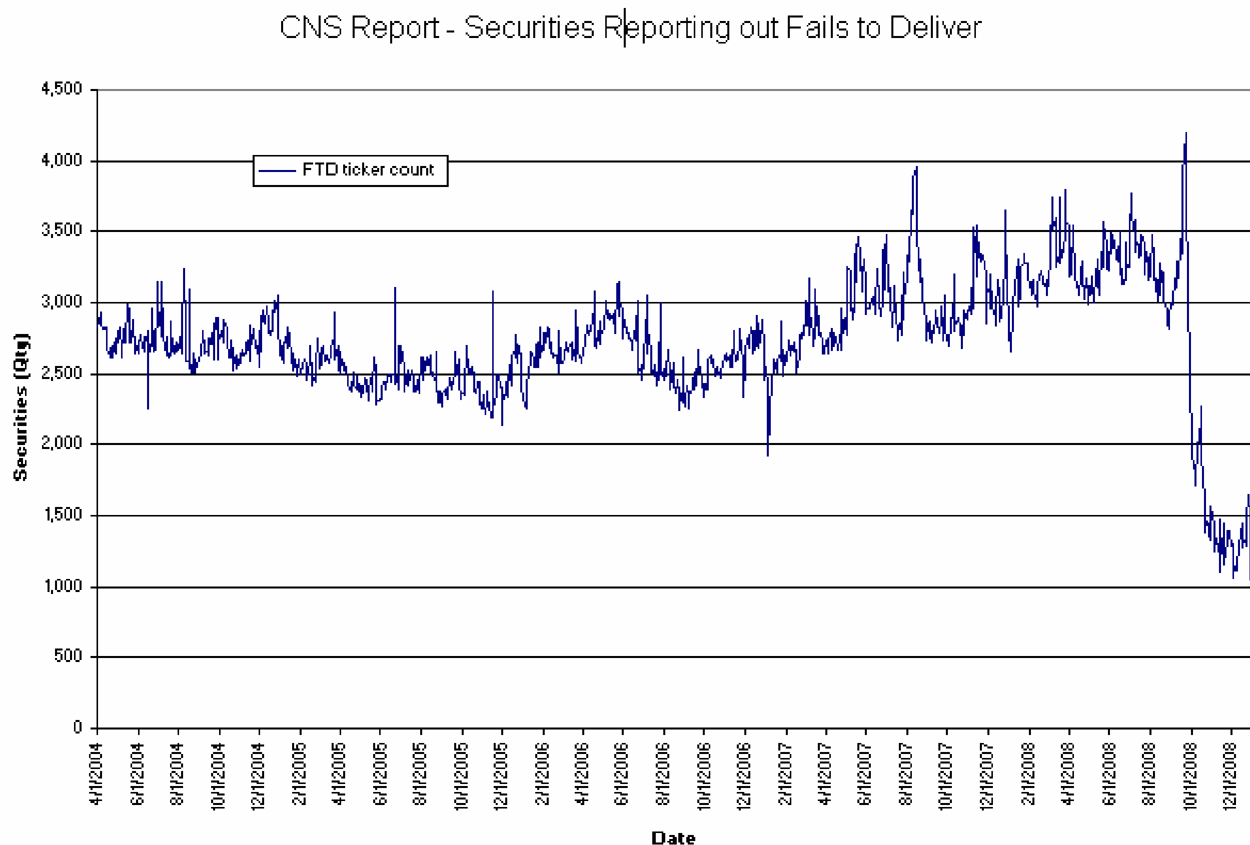

Figure 1. Securities Reported Out in CNS Report to SEC

As evidenced by the markets, the financial stocks witnessed significant volatility and significant market cap losses in such finite windows of time that it limited the exposure of these issuers to the threshold security list. Bear Stearns and Lehman fell in weeks not months. The attack on Morgan Stanley was in days. Well within the period required to create threshold status.

III. Assessment period by OEA manipulates the results significantly.

The OEA report creates a metric called Average Daily Aggregate Fails (millions) and reports out that the metric performance looks like this (from Table I of OEA report):

Measure	Pre	Post	Change	Percent
Number of Days	183	68		
Average Daily Aggregate Fails (millions)	1,103	582	**-520**	-47.2%

Regrettably this type presentation of data does not display the realities of a fluid market because market performance, and market abuse, does not report out in the averaging of data over long periods of time.

Using the CNS data reported out by the SEC, the Average Daily Aggregate Fails (Millions) for the total period representing Regulation SHO, January 2005 thru December 2008, is 739 Million shares. This average is much lower than the 1,103 million being used by the OEA in their most recent assessments which places a high margin of error in the use of their number in considering success. The OEA average value being used is a staggering 50% higher than the 3-year average and more so when the overall percent change is being reporting out at 47%.

While the OEA analysis likewise presents what would be a 47.2% improvement post rule 204T, reality is that of the 68 trade days recorded post 204T, 13 of those days (20%) had Average Daily Aggregate Fails to Deliver exceeding the 739 Million Average representing the entire Regulation SHO period under analysis.

While the OEA will rationalize this away with the argument that 11 of these 13 days occur directly after Rule 204T was imposed, two of these days occur in early December 2008 and 11 trade days after 204T is still nearly 4 times that of industry standard T+3?

What the OEA failed to correct for in their assessment was the market itself during their performance periods selected. The OEA chose to limit the Pre-period to a time when the markets were in total chaos and where the markets were in rapid decline due to a lack of investor confidence. As the markets were in one of the most severe declines in decades, the level of aggregate fails increased to levels not seen in the prior 3-years under Regulation SHO. Failing to account for this jeopardizes any use of the pre vs. post analysis provided by the OEA in their findings report.

IV. Assessing Aggregate Dollar Value as a metric, without market corrections, is misleading.

The OEA report accounts for a metric they label as Average Daily Dollar Value of Aggregate Fails ($millions). The metric presented by the OEA lists (Table I of OEA report):

Measure	Pre	Post	Change	Percent
Number of Days	183	68		
Average Daily Dollar Value of Aggregate Fails ($millions)	7,775	2,733	**-5,041**	-64.8%

Due to a lack of other viable means, let's simply look at the DOW during this qualifying period used in the OEA analysis.

The Average for the DOW over the 183 days of the pre period was 12,108 while the average for the DOW over the post period was 8984. Assuming all things being equal in fails, we would expect to see a 34% decline in Average Daily Dollar Value of Aggregate Fails ($million) by 34%. A single fail on the books during the entire analysis period would have decreased by 34% without any other changes.

None of the OEA analysis addresses this simple but basic point. The OEA never attempts to apply a factor to correct for general market conditions when they use dollar values. The fact that the OEA actually averages dollar values at all is questionable since the OEA has no specific data on the value of fails in the system. The OEA may have mark to market values at business close but has no data to quantify what value of shares were sold without settlement (investor cost at time of trade).

Literally hundreds of billions of dollars in market capitalization was lost in 2008 and the OEA analysis fails to recognize any of it in their cost presentation of this material.

V. Using Aggregate Trade Values as a metric of Trade Volume is inaccurate.

Now that the baseline used by the OEA in defining fails has been placed into question, and the metric displaying dollar values has been challenged for accuracy, the next logical step would be to challenge the OEA's assertions that:

> *"It is important to note that we do not attempt to adjust fails to deliver for increases in trading volume over time. Assuming everything else constant, as the magnitude of trading (settlements) increases one would expect that the magnitude of fails to deliver would also increase…During the same periods, the average monthly dollar value of trading increased 203.8% from $2.3 trillion to $7.0 trillion. Therefore, fails have increased since 2004 at a much slower rate than trading volume."*

First, there is absolutely no correlation between DTCC reported dollar value of trading and trade volume. The DTCC report does not factor in volatility in a given market and thus it is impossible to take trade dollars and correlate them accurately to number of shares traded.

Consider for example taking the average daily trade volumes for the DOW in the month of December for 2006, 2007, 2008 and multiplying that volume to the average DOW closing for those months. The Value for December 2006 is $2.94 Trillion on an average 2.4 Billion shares, December 2007 is $4.26 Trillion on an average 3.2 Billion shares, and December 2008 is $4.4 Trillion on an average 5.1 billion shares. It took almost 60% more trade volume in 2008 to equal the same trade value of 2007 trade volumes.

Table I of this report looks at the reported trade volume by the varios market centers and compares the reported FTD's to posted trade volume. What is interesting in this data is that the percentage of fails to trade volume is contained within a small deviation throughout the Regulation SHO period of January 2005 thru September 2008. With a scatter ranging between 10 and 15% of trade volume, most quarters settled out in the 11 – 12% range when comparing fails to trade volume. Only the 4Q08 deviated greatly from that relationship.

Regardless of how you view the accuracy of the trade volume data, the evidence is clear that until the 4Q08, trade volume and failed trades tracked rather closely refuting the OEA claim that "*fails have increased since 2004 at a much slower rate than trading volume.*" Even if you consider the trade volumes inaccurate as the OEA does, the data itself would be consistent in the methods of inaccuracy making the absolute number possibly erroneous but the trending pattern itself would remain accurate. The OEA attempts to correlate trade value to trade volume and yet in a daily market of extreme volatility there is no way of directly reporting out how many shares trade at each incremental price. The OEA instead uses CNS clearance values to quantify volumes.

VI. Consistency is not always good; it can actually expose wrongdoing.

"Selling stock short and failing to deliver shares at the time of settlement. This activity doesn't necessarily violate any rules. There are legitimate reasons why a seller may fail to deliver on the scheduled settlement date."

…

"There are many justifiable reasons why broker-dealers do not or cannot deliver securities on settlement date. A broker-dealer may experience a problem that is either unanticipated or is out of its control, such as (1) delays in customers delivering their shares to a broker-dealer, (2) the inability to obtain borrowed shares in time for settlement, (3) issues related to the physical transfer of securities, or (4) the failure of a broker-dealer to receive shares it had purchased to fulfill its delivery obligations. Fails to deliver can result from both long and short sales."[4]

Since January 2005 the SEC has failed to take any significant enforcement action against those involved in settlement failures citing the aforementioned rationalizations for the existence of such failures. Between January 2005 and September 2008, despite changes in regulations regarding short sale reforms, failures continued to exist and exist at a relatively stable relationship as compared to the markets overall trade volumes. The fails were mechanical failures so we were told.

And then the market approached the 4Q08.

Rules 15c3-3 and 15c6-1, alongside Section 17A of the Exchange Act of 1934, required the prompt and accurate settlement of trades and identified 3-days as representing such promptness. But rule changes along the way did not seem to impact the results. Settlement failures, as a relationship to trade volume, remained consistent and as trade volume increased so too increased settlement failures. If there was to be an agreed upon relationship between these metrics, a foundation of fails would exist regardless of rule changes.

The SEC chooses us to believe that today we are at that foundation; a standard of 5% of trade volume is to be expected in legitimate settlement failures.
Early indications of why failures remained high under Regulation SHO were due to the persistency of fails covered under the grandfather clause. So in 2007 the SEC removed the grandfather clause

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[4] SEC Spotlight on Short Sales http://www.sec.gov/spotlight/keyregshoissues.htm

and nothing changed from a percentage of volume standpoint. Fails and threshold companies actually accelerated after this change was made.

In September 2005 the SEC simply tweaked the rules and suddenly change appeared. But the rules they tweaked really didn't change the underlying rules that previously existed. The SEC simply repackaged them with new words.

The OEA analysis addresses Rule 204T as if the new rule held a major significance. Comments to Rule 204T were benign because as an industry it was understood that this rule really just reinforced 10b-5 violations under rule 10b-21. The members firms and their legal teams argued such in their comments leaving no need for the industry to contest the new rule. The new rule simply identified the expected responsibilities of clients and broker-dealers relating specifically to the short sale process.

It was always illegal to mislead your broker-dealer on the shares available to short. Rule 10b-21 simply put into print what everybody under the sun understood to exist.

September 2008 also brought change relative to a hard close. The rule imposed a commitment that short sales would in fact close on T+3 instead of on T+ (whenever it suits you). But Rule 15c3-3 and 15c6-1 already had that period covered as well. These rules prevented broker-dealers from entering into that contract to trade without the 'intent' on settling in 3-days. The hard close provisions merely forced those intentions to be followed through with.

So in reality, nothing really changed on the short sale settlement executions.

But change did happen. Aggregate fails reduced significantly and from the previous levels that existed just days and weeks before. The consistency of market performance was broken by a set of new rules that simply repackaged pre-existing rules and expectations.

Logically, if nothing radical changed doesn't this major shift then poke holes in the Commissions response as to why fails existed in the first place? If fails were legitimate before they would be legitimate now and no significant shift would be expected to occur.

According to the Commission trades fail to settle because of:

(1) Delays in customers delivering their shares to a broker-dealer. To what did the SEC attribute as reasonable grounds for customers delaying delivery of shares to a broker-dealer? Did rule 204T (10b-21) or the hard close requirement reduce the legal cause for delays in the customer delivery of shares? If so, please explain how.

We recognize that Rule 204T created a 10b-21 violation reiterating that it is a violation of a client to represent that they had shares available for a short sale when they in fact did not. Therefore, if the shift in failures post Rule 204T is being attributed to a reduction in frequency in these delays shouldn't the SEC be reviewing the past activities and taking enforcement actions against those that misrepresented having shares previously? Were the clients previously making false claims of shares being available and if so, wouldn't that be a 10b-5 violation prior to it being a 10b-21 violation? If not, why would the SEC be willingly to allow such violations to exist for so long, and make public excuses for them? Why did the Commission present in a public document that such excuses were legal when now the Commission is defining such activities as illegal? Who is responsible for this mischaracterization is such exists?

(2) The inability to obtain borrowed shares in time for settlement. Did Rule 204T or the hard close requirement somehow alter the borrowing process of a short sale? If so, please explain how.

Simply forcing the short seller or broker-dealer to take the act of a stock borrow more seriously would be an indication that such seriousness was not being complied with in the past, at the expense of market efficiency and at the expense of investors. The interim final temporary rule specifically avoided the provisions of a mandatory borrow so how would the borrowing of shares be more efficient under the new rules? Did the Commission alter the multiple locate flaws in the system?

(3) Issues related to the physical transfer of securities. Did rule 204T or the hard close requirement somehow alter the efficiency of the physical transfer of securities?

The OEA should provide evidence supporting the degree of physical delivery failures pre and post September 2008 to support this claim that physical transfers were a worthwhile component to their discussion on why fails exist. If the issue of physical transfers any type of a contributor to the reported settlement failures, we should see consistency in this metric regardless of any of the regulations in place.

(4) The failure of a broker-dealer to receive shares it had purchased to fulfill its delivery obligations. This really applies to long fails where a seller of a long position sells out of that position within the natural 3-day settlement period. Failures of this type taking place on a long position sold outside of 3-day ownership should not take place beyond a certain standard if all other parts of settlement system are working properly.

Examples where these failures could occur is where the long investor purchased shares during a bona-fide market making activity and those shares delayed settlement. These fails would then directly fluctuate with the level of bona-fide market making activity. The OEA should assess to what extend and to the level of consistency fails across the Regulation SHO period have been fails induced by market making activity.

It appears that the consistency in performance ceased to exist after the changes of September 2008 but the reason for the change is not yet known. Certainly nothing the SEC did in September 2008 has altered the prior legal explanations argued by the Commission.

VII. Regulation Changes or Market Conditions

On July 6, 2007 the SEC officially eliminated the Uptick Rule from the short sale process. The rule change had gone through an extensive pilot program of nearly 3 years before the final change was put in place. Almost immediately the markets reacted to the new rules and chaos ensued.

What happened?

Simply put, the pilot program was flawed. It was conducted during a period in time where the market would be considered flat or even slightly bullish. Short selling was not a dominating factor in the markets and thus selling without an uptick would be less intrusive. Markets changed and by the time the Uptick rule was eliminated the markets were no longer bullish. Bear sentiment due to the housing and banking crisis put fragility into the markets. Suddenly taking out the bids in rapid succession caused panic and fear and the selloffs were exacerbated. None of this was detected by the pilot program because the pilot program never experienced this type of market.

An assessment of the present rules pertaining to short sales and settlements is no different. The assessments are being made during a bear market when selling into a fail is harmless as the cost to cover can still yield a profit. Market volatility and market fragility, topped off with no uptick rule, provides ample ammunition for a fail to settle profitably.

But what happens when these same fails occurring today can't be covered at a profit? What happens when a stock sold on T has appreciated by 10% by T+3 when the fail is recognized? Will a buy in occur immediately or will the buy in fail as they had done in the past? Will the responses again become, "There were no shares available at that price"?

To understand this dilemma, a chart of the DOW closing as compared to the settlement failures is being used. Figure 2 plots out the daily closing price of the Dow Jones and compares the closing price to the total aggregate fails in the CNS system as presented to the SEC by the DTCC.

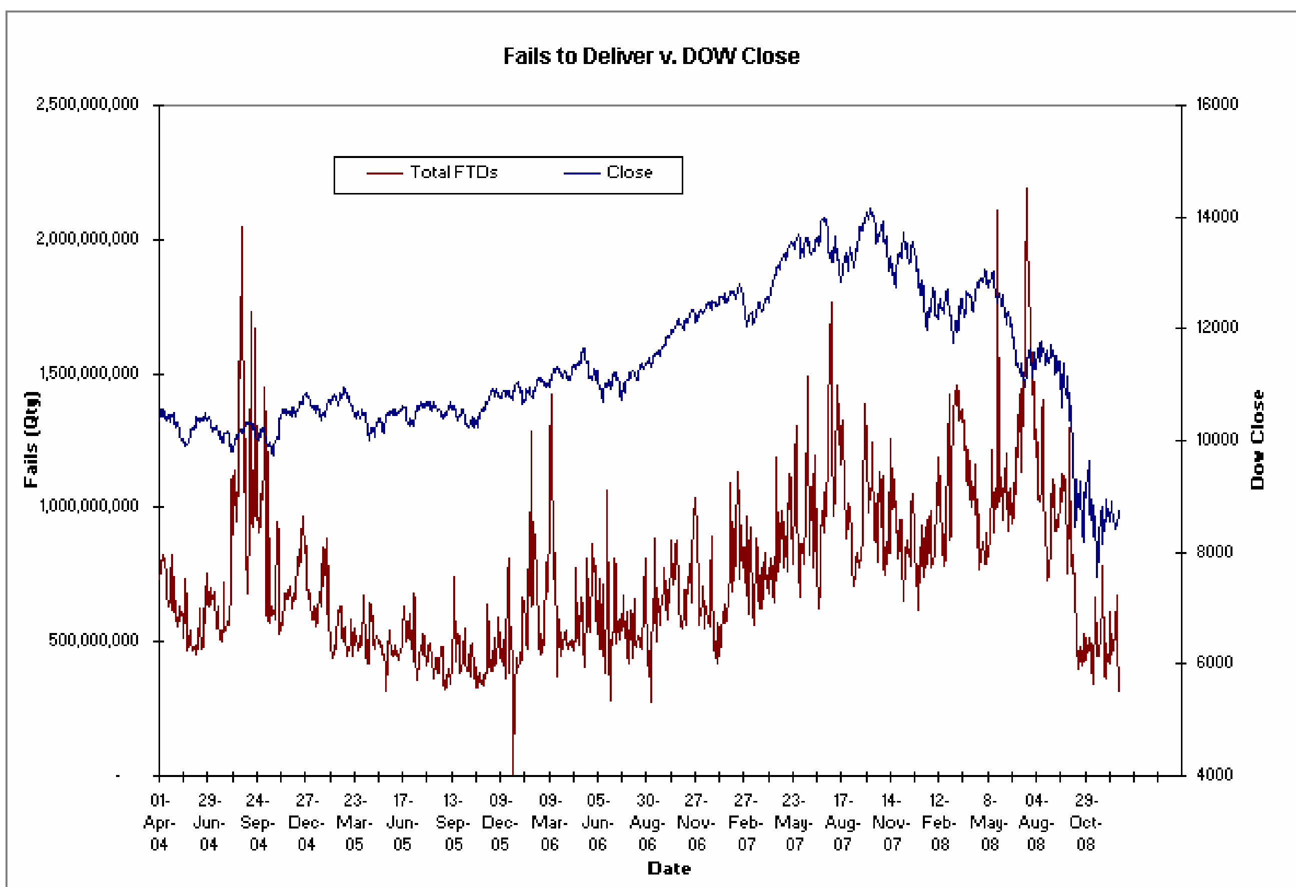

Figure 2. Dow Closing v. Aggregate Fails to Deliver

What is apparent in Figure 2 is that while the fails count were much spikier than the DOW close, smoothing the two curves would reveal extremely similar characteristics..

The greatest increase in slope in the DOW was tracked by the greatest increase in slope representing the level of aggregate fails in the system. Similarly, the greatest decline in the DOW coincided with the greatest decline in aggregate fails in the system.

Since the greatest increases coincided, and the greatest decreases coincided, what assurances does the SEC offer the public that such a trend would not again exist once our financial markets stabilize themselves and the bear turns bullish? What analysis conducted by the OEA provides insight into the repeatability of present regulation performances when investors are faced with closing out fails at a loss instead of for a profit? Will the Commission once again be caught off guard due to flawed analysis and a failure to factor in real market conditions into such analysis?

In 2007 the Commission and their hand picked set of common thinking economists all concluded that bear raids could no longer exist under today's regulatory environment. The Commission then eliminated the uptick rule and bear raids commenced. They commenced at will and they commenced using a significant level of trades that failed to settle in a timely manner.

VIII. Why 17 Days

The OEA analysis differentiates settlement performance between those trades that fail to settle within 17 days and those that fail to settle in greater than 17 days. A rational person should be asking; why 17 days? The standard for settlement under most conditions is T+3. The standard for exception to T+3 due to bona-fide market making is recognized by the OEA as T+5 although the OEA study improperly adds T+3+2 to represent T+6.[5] This standard by the way is not documented in any SEC rules or regulations. And finally, the standard term for a settlement failure due to a long fail would likewise be expected to be in the vicinity of T+6 if you assume that the long fail is associated with a loaned out share. The T+6 is derived from the premise that the long seller would have to recall the loaned shares and if a buy in were required as part of that recall a delay of as many as 2 days may be required.

Table 2 of the OEA report captures data looking at new fails pre and post Rule 204T and compares that data to fails aged over 17 days pre and post Rule 204T for threshold securities. By this data, the OEA suggests that the regulations are successful because the average aggregate number of failed shares greater than 17 days old reduced by 77% for threshold securities and in subsequent Tables 3 and 4 the OEA presented evidence that these numbers are near equally split between Optionable securities and non-Optionable securities.

Measure	Pre	Post	Change	Percent
Number of Days	183	68		
Table 1				
Total Market				
Average Daily Aggregate Fails (millions)	1,103	582	**-520**	47.2%
Table 2				
Threshold Securities Aggregate Total				
Average Daily Aggregate Fails (millions)	497	184	**-313**	-63.0%
Threshold Securities - Fails Aged More than 17 Days				
Average Daily Aggregate Fails (millions)	147	34	**-113**	-76.8%

[5] *Fail to deliver positions related to bona fide market making or long sales have an 2 additional settlement days to close-out fail to deliver positions (usually T+6).* http://sec.gov/comments/s7-30-08/s73008-107.pdf

Considering that in Table 1 of the OEA report the OEA identified that the Average Daily Aggregate Fails of all securities was 1,103 million in the pre period and 582 million in the post period, to what does the SEC attribute the continued existence of nearly 5% (34/582) of the aggregate daily average of unsettled trades are in threshold securities and carry a persistence greater than 17 days.

Threshold securities, as a group, account for only 32% of all aggregate daily average fails during the post analysis period defined and thus nearly 19% (34/184) of all unsettled trades in threshold securities exist for greater than 17 days. The 19% is equally split between Optionable and non-Optionable markets. Does the 19% in fails greater than 17 days carry across the entire aggregate daily fails in the market?

Are these persistent fails due to options exemptions or 144 exemptions? Doesn't the post period represent a period where the Options Market Making exemption has been eliminated? If these fails are not 144 related, what legal argument remains for these fails to exist for nearly 3 times longer than the OEA's own identified accepted standards? Could these fails be revealing the existence of future problems in the regulations, problems identified in section VII of this document? Could the persistence of these failures be directly attributed to the inability to close out these fails due to factors of cost?

Conclusions and Recommendations

Based on the limited data available to me as a member of the public, I can not come to the same conclusions as those drawn by the SEC's Office of Economic Analysis. This report, as has been the case with each report submitted previously, has taken the data available and packaged it in a convenient way so as to make the numbers show progression. If we look back historically, the first study conducted by the OEA had concluded SHO a success despite a near tripling of fails in the system.

Today we all recognize that fails as an aggregate number have dropped substantially from a period only months before and a period where aggregate fails were at their highest. We can also agree on the fact that the number of companies on the Regulation SHO threshold list have dropped substantially since July 2008. (NOTE: No changes to regulations were initiated in July 2008).

For the OEA to accurately present the facts they must make the effort to break down the components and analyze the data. To date the data under analysis is too top level and is mere window dressing. The OEA fails to segregate out fails attributed to short sales, long fails, and market making. To what extent are fails being attributed to 144 stock releases or lost certificates? By breaking down the fails the OEA can better distinguish what factors play into a reduction in fails.

Why did the improvement in threshold securities start to improve in July 2008? Why is the number of companies reporting fails down by more than 50% from a 2.5 year average but the average number of fails/company at near high levels?

Without the analysis that provides evidence that the condition of the market itself is not a factor in change the OEA study is unfinished.

Without having the evidence before me to convince me otherwise, I can only recommend that the Commission act in favor of change that guarantees success this time around.

1. The SEC must incorporate a mandatory pre-borrow on all short sales being executed. The mandatory pre-borrow will reduce significantly fails attributed to both long and short sales and will guarantee settlement where a hard close only guarantees a buy-in will occur.

2. The SEC must modify the rules pertaining to bona-fide market making to limit the persistence of any fail created by the exemption. Bona-Fide market making must define a firm settlement period instead of making it arbitrary. That period should be defined as T+5.

3. The SEC must place hard requirements on the stock lending system to mandate a delivery period on stock recalls. In the event that a long sale is executed and the shares held in that account have been loaned out, the recall and delivery of shares must be completed by T+5. This allows the short seller a few extra days to either borrow shares for delivery of go into the open market and purchase shares under guaranteed delivery.

4. The SEC must draft language that defines the requirements of a buy-in including the definition of buy-in and settlements. Buy-ins must be at guaranteed delivery and not to simply roll fails. Penalties must be identified for those that do not buy in with the intent on meeting guaranteed settlement.

5. Uptick Rule. The SEC must reinstitute a viable uptick rule that restricts all short sales from being executed into the bids. This would include short sales executed by market makers on behalf of bona-fide market making activities.

6. I further recommend that the Division of Enforcement and the Office of Compliance and Inspections pursue detailed investigations into exactly why trading continues to prevail into settlement failures for greater than 17 days (better yet 6 days). The two divisions should work together to identify patterns of potential abuses by individuals or firms including market makers, hedge funds, or other trading parties. It is unclear at this time that this effort has even been conducted to a level adequate to ferret out the fraud.

In the response to the OIG the Division of Enforcement staff cited a lack of resource as cause for not investigating the 5000 complaints received in 2007 relating to naked short selling. Lack of resource is an excuse comprised out of inefficiencies. To date, the SEC Division of Trading and Markets has handled short sale reforms inefficiently and it has drained the staff of opportunity to work on other pressing issues. It is now time to stop this circus and move on. This round of rules must meet the standards of finality and that means meet the standards of success against any type of market we are up against.

I hope that the Commission has learned enough from past mistakes and is willing to accept the opinions of others beyond those self-serving members of the industry. The markets can no longer endure a continued lack of confidence set forth by regulatory screw ups like the uptick rule and the temporary emergency orders. It is time to set aside ego and do what has been right all along.

David Patch