

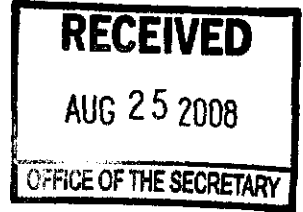


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VIA ELECTRONIC SUBMISSION AND OVERNIGHT MAIL

August 22, 2008

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



RE: Release Nos. 34-5810757511; File No. S7-19-07
Amendment to Regulation SHO

Dear Ms. Harmon:

Overstock.com commends the Commission's action to strengthen Regulation SHO through the elimination of the grandfather provision, the proposed elimination of the options market maker exemption, and the consideration of increased enforcement. It also commends the Commission's recent action implementing and then extending the July 15 Emergency Order imposing a pre-borrow and hard delivery date before shares of Fannie Mae, Freddie Mac and 17 major financial institutions could be sold short. It is pleased that Chairman Cox continues to speak about the abuses of naked short selling and the need to end this fraudulent practice.

The Commission was correct in acting to prevent manipulation and naked short selling of securities in the 19 protected companies; however, Overstock.com strongly believes that the Commission must extend the protections afforded those companies to all publicly-traded companies. All companies deserve and expect equal protection from the Commission and its rules. We object to the Commission's caste system, pointing out that the protections the Commission extended these 19 Brahmin firms were precisely the protections the Commission has withheld for years in the market for Untouchable firms. Overstock.com requests that the Commission follow through on its July 29 announcement of the Emergency Order extension by "proceed[ing] to immediately" consider a rulemaking "to provide additional protections against naked short selling in the broader market"

While Chairman Cox has publicly acknowledged on several occasions that there is a serious problem with persistent failures to deliver (FTDs), the practice continues unabated, except for in the 19 companies protected by the Emergency Order. Indeed, FTDs persist for many companies, including Overstock.com (which has now been on the Regulation SHO threshold list for 861 trading days – more than any other company). As Exhibit A to this letter shows, the data released by the Commission itself show that the total volume of FTDs throughout the market now exceeds the volume when Regulation SHO was adopted, in terms of both the volume of

Ms. Nancy M. Morris
Page 2
August 22, 2008

FTDs, and the mark-to-market dollar value of FTDs. Overstock.com believes that this issue in part to loopholes in Regulation SHO, including the options market maker exception, flaws in Regulation SHO, and the fact that the Commission has not vigorously enforced (or has been unable to enforce) Regulation SHO.

Fairness to all companies and investors requires the end of the Commission's caste system's rule of law regarding naked short selling and persistent FTDs. To that end, Overstock.com respectfully calls upon the Commission to take the following four steps:

1. Eliminate the Option Market Maker Exception

Overstock.com repeatedly commented on and provided data regarding the proposed elimination of the options market maker exception.¹ Overstock.com respectfully reiterates its position that the Commission should eliminate Regulation SHO's option market maker exception as soon as possible. Since this is the third round of public comments on this proposal, there is no need for a phase-in period, and certainly not for those companies that are persistently on the Regulation SHO threshold list. This action will provide immediate needed relief for the leading victims of naked short selling.

2. Impose Pre-Borrow and Hard-Delivery Date Requirements Market-Wide

The Commission should immediately launch and quickly complete a rulemaking proceeding to impose on a market-wide basis the same pre-borrow and hard delivery date requirements that existed in the July 25, 2008 Emergency Order – specifically, a required pre-borrow before shares can be sold short and a required hard-delivery three days after the short sale. The naked short selling and associated “short and distort” activities described by Chairman Cox over the past month continue to plague the market as a whole, notwithstanding the Commission's adoption of Regulation SHO in 2005, and its 2007 repeal of the Grandfather exception.

The current Regulation SHO's modest penalties are linked to a “reasonable belief of being able to locate shares in the future” requirement that is just fuzzy enough that proof of *scienter* is impossible as a practical matter. As a result, the Commission has never enforced the current regulation and likely never will be able to do so. Only when there is a pre-borrow requirement

¹ See September 10, 2007 letter from Patrick M. Byrne at <http://sec.gov/comments/s7-19-07/s71907-130.pdf>; October 1, 2007 letter from Patrick M. Byrne at <http://sec.gov/comments/s7-19-07/s71907-303.pdf>; November 19, 2007 memorandum from the Division of Trading and Markets Staff regarding a meeting with representatives of Overstock.com at <http://sec.gov/comments/s7-19-07/s71907-336.pdf>; July 26, 2008 memorandum from the Office of the Chairman regarding a meeting with representatives of Overstock.com at <http://sec.gov/comments/s7-19-07/s71907-682.pdf>; and July 23, 2008 submission from Jonathan Johnson at <http://sec.gov/comments/s7-20-08/s72008-179.pdf>.

Ms. Nancy M. Morris
Page 3
August 22, 2008

will the Commission's enforcement staff be able to prove violation without the impossible *scienter* requirements of the current regulation or the proposed Rule 10b-21.

3. Provide *Current* Data to the Public on the Volume FTDs

The Commission should either provide itself or direct the Depository Trust Clearing Corporation (DTCC) to provide *current* data to the public on the volume of FTDs. While the DTCC provides daily reports of this data to the exchanges so that they can prepare the daily Threshold Lists, it does not provide data on the volume of FTDs to the public. Currently, the Commission (not the DTCC) releases data on the volume of FTDs quarterly, two months after the close of each quarter. By the time of its release, this data is two to five months stale. Companies and the public deserve and need timely information.

4. Clarify that Regulation SHO Applies to All Trades of Publicly Registered Securities

The Commission should clarify that Regulation SHO applies to all trades of publicly registered securities, not just trades that occur within the DTCC. Trades that occur party-to-party (i.e., ex-clearing trades) must be covered by the provisions of Regulation SHO, included pre-borrow and hard delivery date requirements.

* * * * *

Serious settlement failures will persist unless the Commission implements these reforms – reforms that members of Congress, the U.S. Chamber of Commerce, other notable commentators (including former commissioners of the Commission, academics and blue-chip law firms) and other companies have repeatedly requested.

It is well past time for the Commission to take all of the steps needed to end the fraud of naked short selling for all securities. The clear record since the 2005 imposition of Regulation SHO amply demonstrates that the Commission's incremental approach to adopting a modest rule initially followed by making and proposing half-measure amendments, combined with a lack of enforcement, has failed to end the fraud and manipulation of naked short selling. The Commission's approach to date reminds me of an old joke:

Three friends visit a colleague of theirs who is dying. From his deathbed the colleague tells them, "Over the years our friendship has meant so much to me. I am going to ask one last favor of you. I am giving each of you an envelope with \$20,000 in it. I want you to throw your envelopes into my grave on my coffin as they cover it with dirt. I ask this as a sign of the great trust I have in our friendship." Days later, the man dies. At his grave all three friends throw envelopes onto his coffin as it is being covered with dirt.

Ms. Nancy M. Morris
Page 4
August 22, 2008

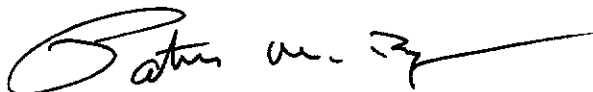
A week later the three friends meet for lunch. The first says, "I just couldn't do it. I got thinking of the wee little ones I could clothe with the money, and I replaced the cash with shredded newspaper, and gave the money to the local orphanage." The second slaps his forehead and says, "I'm so glad you told me. I got thinking about all the young children that could be educated with that money, and I, too, swapped the cash for shredded newspaper. I gave the cash to our local pre-school." The third looks at his two friends, wide-eyed, and says, "I'm shocked at both of you. I threw in a check for the whole amount!"

By its proposed half-measures, the Commission is throwing in a check for the whole amount.

Naked short selling is a significant issue. More than 7,000 securities have appeared on the Regulation SHO threshold list, and more than 800 companies have appeared for over 100 trading days. There are currently more than 500 companies on the Regulation SHO threshold list, and more than 50 of those companies have been on the list for more than 100 trading days. A conservative mark-to-market calculation of the FTD data released by the Commission shows that the total value of FTDs on one day, March 31, 2008, was nearly \$8.5 billion dollars – and that more than \$6 billion of that total reflects securities that are or have been on the Regulation SHO threshold list, and more than \$3 billion of that total reflects securities that were then currently on the Regulation SHO threshold list. These calculations, however, are overly conservative for two reasons: 1) The calculations do not include FTDs that occur outside the DTCC (until the Commission requires that FTD data include FTDs that occur outside the DTCC, companies and investors cannot know the true volume of FTDs); and 2) The mark-to-market calculation is artificially low because it is unlikely that the parties creating large volumes of FTDs in thinly traded issues could purchase shares to settle those trades without significantly moving the market.

A well functioning capital market should not have any settlement failures large enough and protracted enough to merit a firm's inclusion on the Regulation SHO Threshold List. These statistics reflect unabated illegal manipulative naked short selling. Only when the Commission has rules in place that ensure settlement of all trades (i.e., elimination of the options market maker exception, and pre-borrow and hard-delivery requirements for all short sales trades) and when the Commission vigorously enforces these rules, will scourge of manipulative naked short selling stop.

Respectfully submitted,



Patrick M. Byrne
Chairman and Chief Executive Officer

Ms. Nancy M. Morris

Page 5

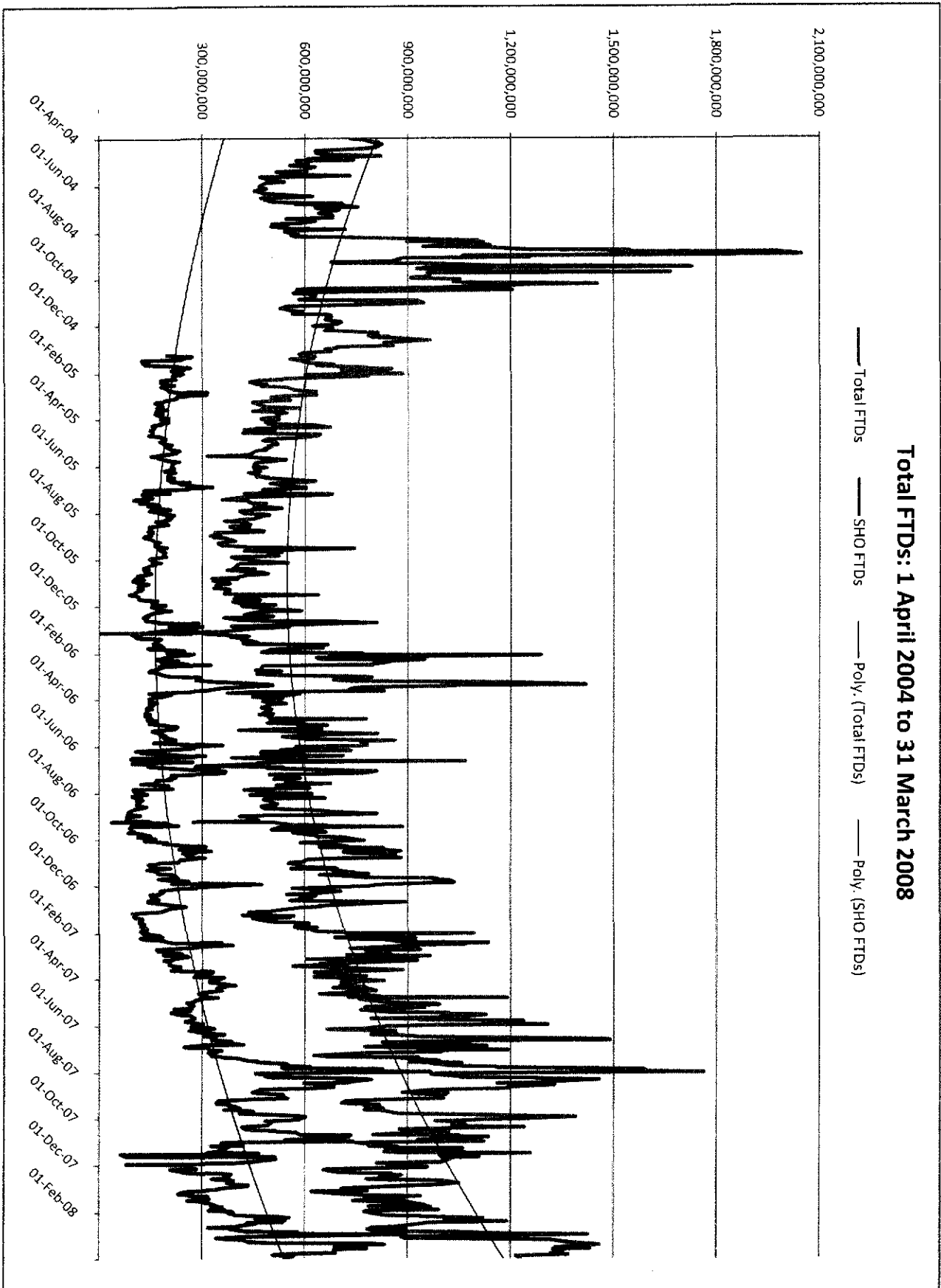
August 22, 2008

Enclosure

cc: Christopher Cox, Chairman, U.S. Securities and Exchange Commission
Kathleen L. Casey, Commissioner, U.S. Securities and Exchange Commission
Elisse B. Walter, Commissioner, U.S. Securities and Exchange Commission
Luis A. Aguilar, Commissioner, U.S. Securities and Exchange Commission
Troy A. Paredes, Commissioner, U.S. Securities and Exchange Commission
Eric R. Sirri, Director, Division of Trading and Markets, U.S. Securities and Exchange
Commission

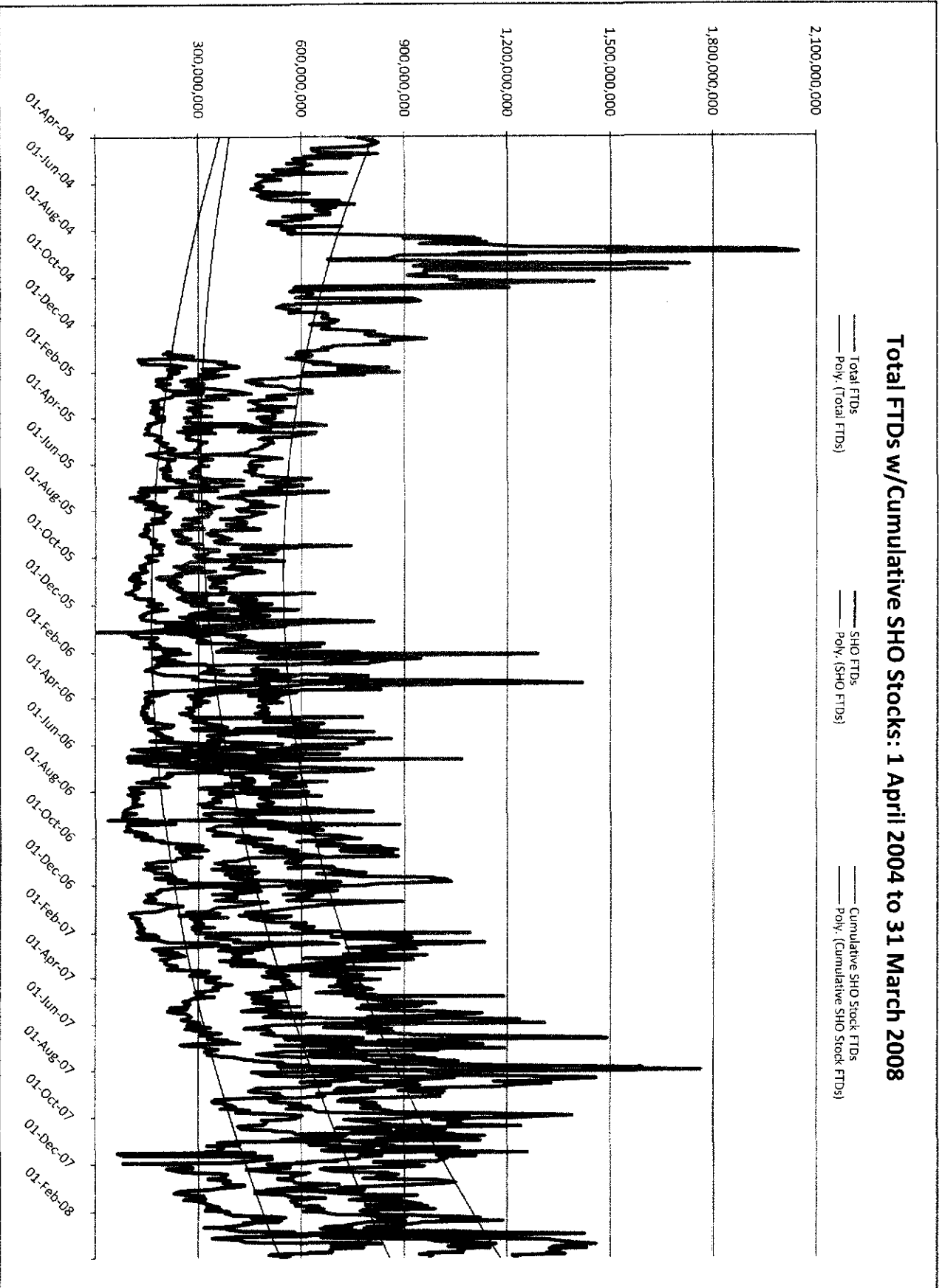
Exhibit A

Total FTDS: 1 April 2004 to 31 March 2008



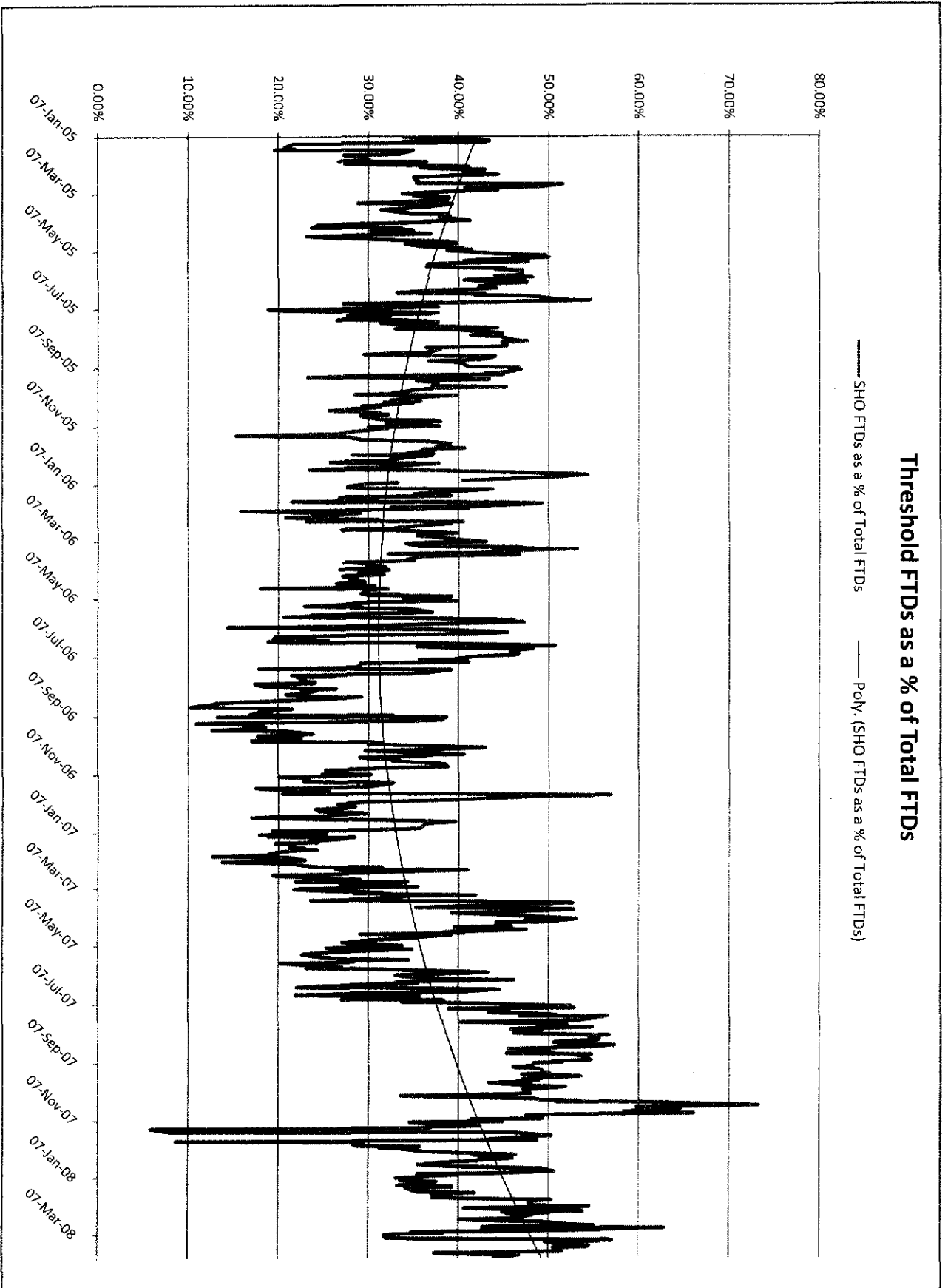
SOURCE: SEC FOIA Office, Bloomberg, CSI Data, FinancialContent, MarketWatch and Dow Jones.

Total FTDS w/Cumulative SHO Stocks: 1 April 2004 to 31 March 2008



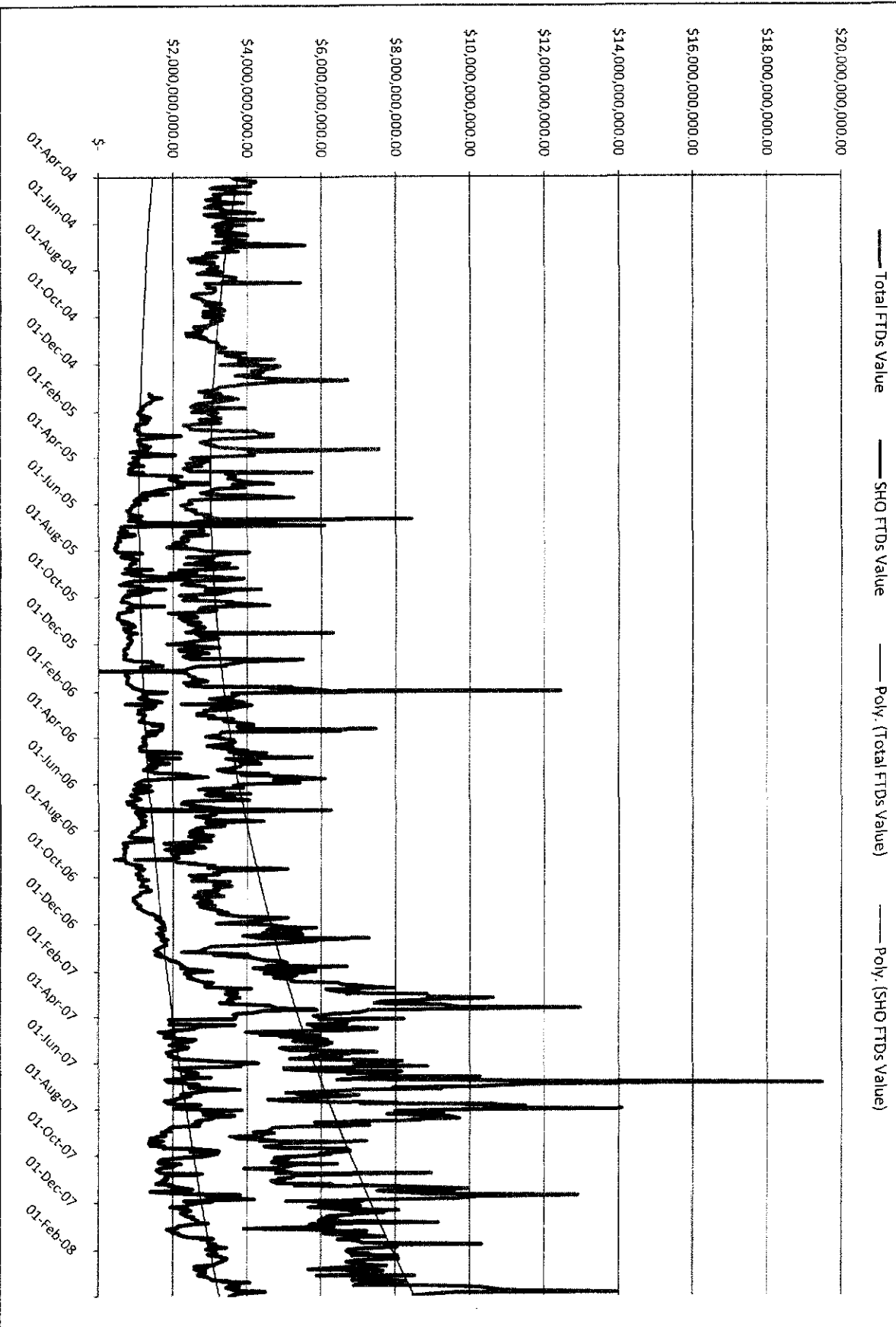
SOURCE: SEC FOIA Office, Bloomberg, CSI Data, FinancialContent, MarketWatch and Dow Jones.

Threshold FTDs as a % of Total FTDs



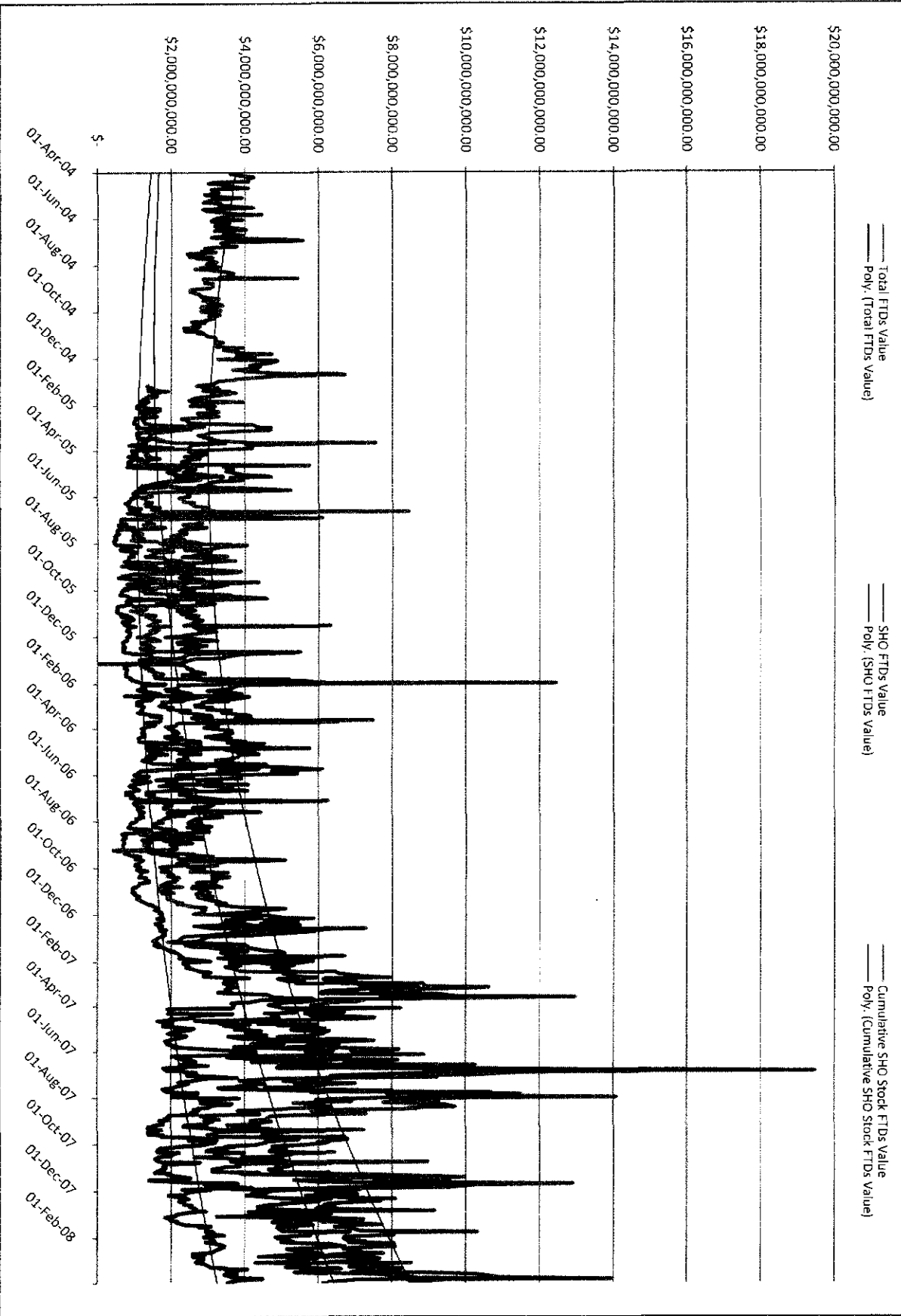
SOURCE: SEC FOIA Office, Bloomberg, CSI Data, FinancialContent, MarketWatch and Dow Jones.

Aggregate Mark-to-Market Value of FTDs: 1 April 2004 to 31 March 2008



SOURCE: SEC FOIA Office, Bloomberg, CSI Data, FinancialContent, MarketWatch and Dow Jones.

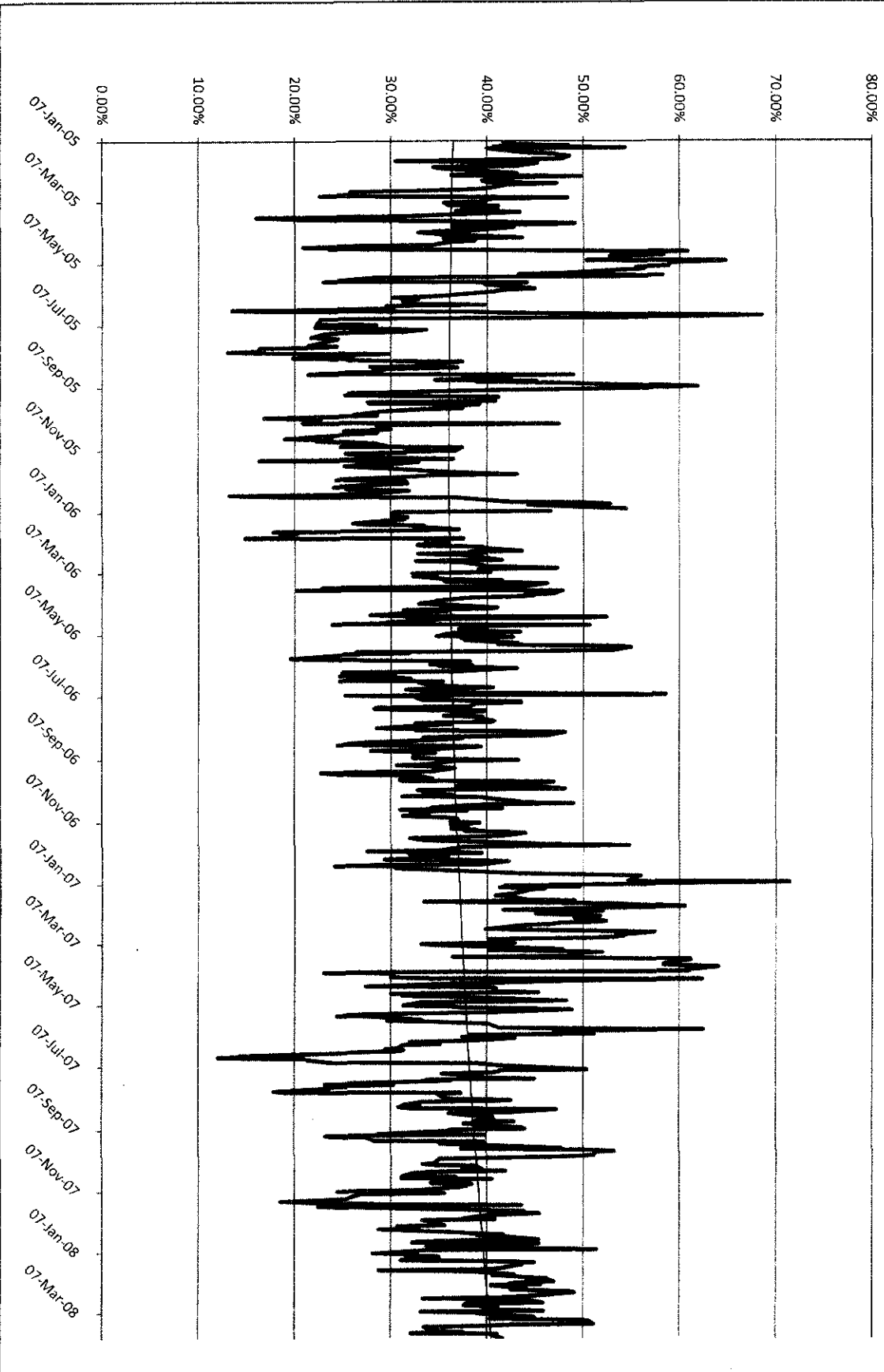
Aggregate Mark-to-Market Value of FTDs w/ Cumulative SHO Stocks: 1 April 2004 to 31 March 2008



SOURCE: SEC FOIA Office, Bloomberg, CSI Data, FinancialContent, MarketWatch and Dow Jones.

Mark-to-Market Value of Threshold FTDs as a % of Total Value of FTDs

— SHO FTDs Value as a % of Total FTDs Value



SOURCE: SEC FOIA Office, Bloomberg, CSI Data, FinancialContent, MarketWatch and Dow Jones.

Peak FTDs and FTD Dollar Value Days Across All Markets

Q2 '04	29-Jun-04	\$5,577,176,767							
Q3 '04	17-Aug-04	\$5,440,813,390							
Q4 '04	22-Dec-04	\$6,718,581,803							
Q1 '05	22-Mar-05	\$7,557,927,560	\$1,217,975,735	16.12%	\$3,475,608,887			45.99%	
Q2 '05	21-Jun-05	\$8,442,478,743	\$1,139,398,242	13.50%	\$7,093,831,472			84.03%	
Q3 '05	20-Sep-05	\$4,367,847,046	\$1,786,508,560	40.90%	\$3,170,640,331			72.59%	
Q4 '05	16-Nov-05	\$6,316,617,910	\$1,034,322,029	16.37%	\$1,993,022,595			31.55%	
Q1 '06	31-Jan-06	\$12,427,219,751	\$1,842,307,158	14.82%	\$3,448,084,502			27.75%	
Q2 '06	24-May-06	\$6,103,420,040	\$1,608,932,325	26.36%	\$4,355,252,698			71.36%	
Q3 '06	05-Jul-06	\$6,257,848,281	\$3,662,802,142	58.53%	\$4,718,868,171			75.41%	
Q4 '06	19-Dec-06	\$7,280,874,770	\$1,759,217,926	24.16%	\$5,836,666,454			80.16%	
Q1 '07	20-Mar-07	\$12,961,947,696	\$4,719,666,198	36.41%	\$11,494,496,282			88.68%	
Q2 '07	27-Jun-07	\$19,478,624,808	\$2,355,541,740	12.09%	\$17,348,522,042			89.06%	
Q3 '07	31-Jul-07	\$14,075,137,615	\$2,638,863,763	18.75%	\$11,420,014,977			81.14%	
Q4 '07	21-Nov-07	\$12,894,293,922	\$2,895,180,783	22.45%	\$10,249,059,239			79.49%	
Q1 '08	26-Mar-08	\$13,949,640,820	\$4,477,260,022	32.10%	\$10,470,026,409			75.06%	

08-Apr-04	826,445,950								
30-Aug-04	2,047,769,844								
07-Oct-04	1,452,578,505								
01-Feb-05	885,321,877	237,218,660		26.79%	324,424,955			36.64%	
11-Apr-05	672,809,608	159,984,741		23.78%	463,421,352			68.88%	
16-Sep-05	743,547,552	173,304,105		23.31%	282,011,315			37.93%	
23-Dec-05	809,894,157	289,825,132		35.79%	685,123,052			84.60%	
13-Mar-06	1,418,758,666	505,729,304		35.65%	1,012,627,076			71.37%	
20-Jun-06	1,067,376,722	272,878,148		25.57%	514,333,299			48.19%	
14-Sep-06	884,839,905	96,984,932		10.96%	779,701,828			88.12%	
27-Nov-06	1,035,876,800	212,086,601		20.47%	713,540,014			68.88%	
13-Feb-07	1,133,708,473	357,090,513		31.50%	646,940,780			57.06%	
19-Jun-07	1,480,067,146	328,514,423		22.05%	780,382,456			52.37%	
31-Jul-07	1,763,238,616	966,766,668		54.83%	1,326,104,330			75.21%	
15-Nov-07	1,257,665,858	464,025,263		36.90%	1,019,691,622			81.08%	
13-Mar-08	1,458,587,318	831,785,260		57.03%	1,167,348,044			80.03%	

Peak FTDs and FTD Dollar Value Days For Threshold Securities

Q1 '05	03-Mar-05	\$4,569,710,362.83	\$2,211,996,554.95	48.41%
Q2 '05	29-Jun-05	\$6,101,128,949.74	\$3,166,315,631.63	51.90%
Q3 '05	06-Sep-05	\$3,918,737,091.54	\$2,426,296,510.17	61.92%
Q4 '05	12-Oct-05	\$3,713,389,330.20	\$1,763,105,493.44	47.48%
Q1 '06	31-Jan-06	\$12,427,219,751.15	\$1,842,307,158.11	14.82%
Q2 '06	22-May-06	\$5,559,505,695.57	\$2,946,868,038.36	53.01%
Q3 '06	05-Jul-06	\$6,257,848,281.33	\$3,662,802,142.32	58.53%
Q4 '06	20-Dec-06	\$6,082,802,409.45	\$1,858,545,833.40	30.55%
Q1 '07	22-Mar-07	\$9,625,922,081.61	\$5,882,850,833.73	61.11%
Q2 '07	31-May-07	\$6,889,285,635.93	\$4,305,585,107.82	62.50%
Q3 '07	01-Aug-07	\$10,331,100,091.07	\$3,851,289,677.35	37.28%
Q4 '07	26-Nov-07	\$9,570,580,051.94	\$4,194,998,920.94	43.83%
Q1 '08	25-Mar-08	\$11,961,625,507.26	\$4,490,707,226.14	37.54%

25-Feb-05	609,846,859	314,680,488	51.60%
28-Jun-05	602,622,675	329,186,829	54.63%
02-Aug-05	483,288,966	216,690,722	44.84%
28-Dec-05	554,781,870	301,457,753	54.34%
13-Mar-06	1,418,758,666	505,729,304	35.65%
30-May-06	781,541,128	360,002,799	46.06%
03-Jul-06	808,962,549	369,859,585	45.72%
29-Nov-06	833,634,172	473,602,994	56.81%
16-Feb-07	950,159,493	389,619,311	41.01%
25-Jun-07	1,081,464,423	420,329,081	38.87%
31-Jul-07	1,763,238,616	966,766,668	54.83%
31-Oct-07	1,121,602,703	741,357,524	66.10%
29-Feb-08	1,425,124,024	894,749,553	62.78%

Peak FTDs and FTD Dollar Value Days For Cumulative Threshold Securities

Q1 '05	22-Mar-05	\$7,557,927,559.84	\$3,475,608,886.92	45.99%
Q2 '05	21-Jun-05	\$8,442,478,742.96	\$7,093,831,472.13	84.03%
Q3 '05	20-Sep-05	\$4,367,847,046.42	\$3,170,640,330.96	72.59%
Q4 '05	20-Dec-05	\$5,509,638,514.12	\$4,365,436,356.03	79.23%
Q1 '06	21-Mar-06	\$7,471,023,796.74	\$6,393,156,550.82	85.57%
Q2 '06	23-May-06	\$5,734,603,954.81	\$4,401,395,702.11	76.75%
Q3 '06	05-Jul-06	\$6,257,848,281.33	\$4,718,868,171.29	75.41%
Q4 '06	19-Dec-06	\$7,280,874,769.87	\$5,836,666,453.74	80.16%
Q1 '07	20-Mar-07	\$12,961,947,696.19	\$11,494,496,282.02	88.68%
Q2 '07	27-Jun-07	\$19,478,624,807.65	\$17,348,522,042.11	89.06%
Q3 '07	31-Jul-07	\$14,075,137,615.39	\$11,420,014,977.28	81.14%
Q4 '07	21-Nov-07	\$12,894,293,922.44	\$10,249,059,238.66	79.49%
Q1 '08	26-Mar-08	\$13,949,640,819.56	\$10,470,026,408.50	75.06%

28-Feb-05	633,601,875	455,435,886.00	71.86%
11-Apr-05	672,809,608	463,421,352.00	68.88%
26-Jul-05	518,641,121	371,228,244.00	71.58%
23-Dec-05	809,854,157	685,123,052.00	84.60%
03-Feb-06	1,287,666,744	1,126,838,360.00	87.51%
15-May-06	812,416,492	586,531,086.00	72.20%
14-Sep-06	884,839,905	779,701,828.00	88.12%
27-Nov-06	1,035,876,800	713,540,014.00	68.88%
20-Mar-07	884,684,337	740,051,247.00	83.65%
25-May-07	1,235,734,023	983,388,269.00	79.58%
31-Jul-07	1,763,238,616	1,326,104,330.00	75.21%
15-Nov-07	1,257,665,858	1,019,691,622.00	81.08%
13-Mar-08	1,458,587,318	1,167,348,044.00	80.03%