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The International Association of Small Broker Dealers and Advisors

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The International Association of Small Broker-Dealers and Advisors www.iasbda.com requests permission to supplement its comment letter dated March 18,2008 to address an issue that arose after the comment period expired.SIFMA's letter dated May 22,2008 continues a long standing confusion about the CNS system and broker-dealer responsibility by stating that the Commission recognizes broker-dealers cannot readily determine who failed.(LAST SENTENCE PAGE 6 AND FN 17). But as fn 17 states, the Commission only said some people argue this .The letter therefore appears to quote itself.We believe it is important for the Commission to clarify this issue by recognizing that fails may not readily be determined but must eventually be determined in order for a broker-dealer to prevent its customers from free-riding on the long side or naked shorting on the short side. If this rule is to have any meaning it can only do so by clear recognition that brokers must determine who has not delivered funds or securities. We believe that at the very least a bd must track fails for both Reg. SHO and net capital purposes and would be guilty of aiding and abetting if it deliberately ignores such fails. Indeed OCIE has specifically expressed its concern about the industry's failure to monitor its fails;

Supervisory Procedures to Ensure Compliance with Regulation SHO
*Recent examinations indicated deficiencies with respect to compliance with Regulation SHO. Specifically, many firms did not have adequate written supervisory procedures to ensure compliance with the Rule. Some of the firms examined appeared to have incorrectly marked short sales and long sales, many firms did not have procedures or a system to monitor whether long sales were resulting in fails to deliver, and some firms did not perform a locate or adequately document a locate prior to the execution of a short sale. Examiners found that many firms did not close out fail to deliver positions within thirteen consecutive settlement days (though the number of incidents found was quite small). Some firms allowed additional short sales in a security without pre-borrowing when a fail to deliver position remained for more than 13 consecutive settlement days." <http://www.sec.gov/about/offices/ocie/complialert.htm>***Compliance Alert-June 2007***

More recently, a senior large firm compliance official noted the bd's responsibility in this regard:
"The one thing to keep in mind in respect to brokers, what were really all concerned about is, one of things were concerned about I should say, is the possibility of aiding and abetting a client. As participants in the market we see a lot of this at the clearing firm, you see it come through your books and records. To the extent that we need to be aware of the problem and not having done anything about it there is exposure to aiding and abetting, hopefully with just the SEC and not the private plaintiffs bar, but that's still to be seen to know what this rule is going to look like in the final".

Its very clear that there is confusion about the bd's responsibility to track its short fails and the Commission should speak clearly and forcefully on it whether it adopts this rule or not. In this regard its more important to enforce the rules currently in place than to adopt new rules. If OCIE'S observations were correct, then the Commission and FINRA must act to enforce current rules and clarify what it expects in this area before it adopts a new rule.