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

NIPC

National Investor Protection Coalition

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"Advocates for the Protection of Equity Securities Investors and Issuers"

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

January 22, 2009

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

Dear Ms. Harmon:

With great predictability, market participants and those representing them are misrepresenting the true situation to the Commission and the public. Chief among them is the statement that the recent ban on short selling in 2008 was not effective or even harmful. However, what was omitted was the fact that record short selling volume occurred during the ban. Thus the "ban" was not effective in stopping or even reducing short sales. The data in the chart below shows that the short selling volume in those equities covered by the ban actually increased during the ban by up to 300% over the same period from the prior year, when no ban was in effect. That massive increase in short selling in the covered securities, during a short selling ban no less, is the real reason for the fall in stock prices covered by the emergency rule.[1] The only thing this proves is that short selling does harm prices of equities.

[1] http://www.deepcapture.com/940-million-holes-in-the-wall-whither-short-sale-ban/

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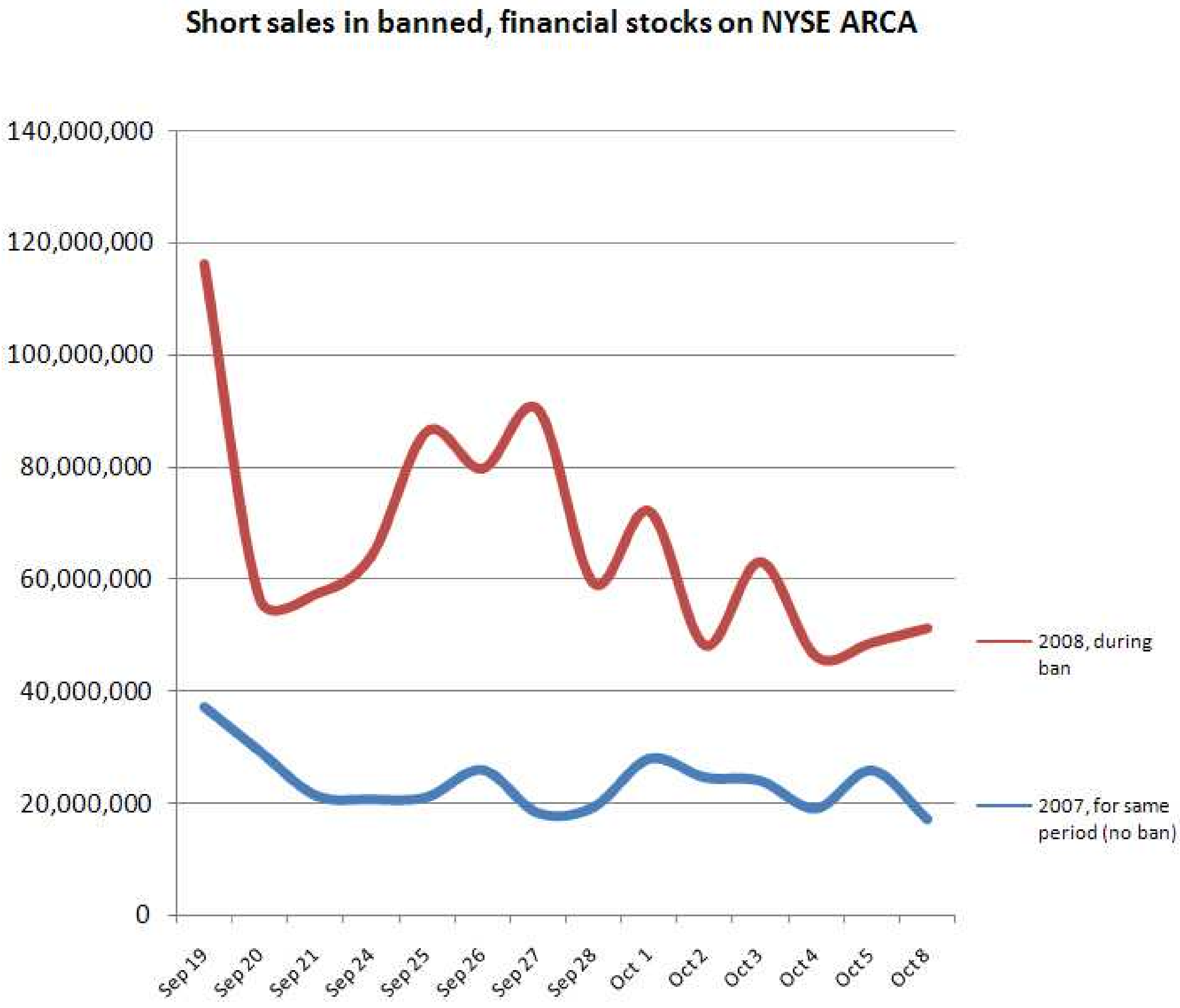

Deliberately Misleading

The conclusion by the market participants and those who represent them, claiming that banning short selling is detrimental to equity prices or the market, shows that they are deliberately misleading the Commission and the public by omitting the data and the reality that short selling did not stop nor diminish during the ban in the covered securities, but in fact substantially increased in those securities during the ban period compared to the same period in the prior year.

If a rule banning short selling can not be enforced, why would tweaking the rules have any effect? Market participants will continue violating laws, because the law is not enforced and market participants are not punished when they clearly violate the law. The data put forward by the market participants that show a fall in prices of securities covered by the ban during the ban period, coupled with the data showing an increase in short selling at the same time, only proves a direct correlation between short selling and a drop in equity prices. Once fail to deliver data is out, we also expect to see continued or even elevated levels of fails to deliver for these securities during that period as well. And we remind the Commission, that all "Fails to deliver" and "Fails to Receive" are a violation of rule 15c6-1.

No Enforcement of Rules

The root cause of all these issues is the fact that there is almost no enforcement of existing rules by either the Commission or the SROs. Market participants violate rules in aggregate on a wholesale basis with almost no negative consequences. Market participants know this and go on doing as they please. Any amendment to rules from here on must incorporate mechanisms and assurances of enforcement, preferably self enforcement, like mandating that the settling agents break all trades that fail to settle, regardless of how they are marked (long or short) or from whom they originate and without exception as Commission rule 15c6-1 requires. Without changes in enforcement, changes to rules will not be effective.

Enforcement of Commission Rule 15c6-1

The Commission itself, the SROs, and market participants have made a mockery of the rule of law in equity markets by ignoring rule 15c6-1. The most basic foundation of any market is delivery of goods that have been paid for and contracted. While investors prepay for the contracted for securities at least 3 days in advance, the Commission and SROs look the other way and do nothing when market participants fail to deliver the pre paid and contracted for securities. When market participants fail to deliver or receive the contracted for securities, investors are lied to by being credited the real contracted for securities via electronic book entry into their accounts after settlement date and being sent a settlement confirmation, when in reality, sufficient securities have not been obtained or are maintained in sufficient quantities for the investors. This is a Ponzi scheme and market participants are loaded with "Fail to Receive" obligations which could point to the insolvency of several market participants.

We strongly suggest that the Commission look into ways to ensure compliance with 15c6-1 as the text of the rule requires by taking into special consideration the enforcement aspect. It is a good rule, a required rule actually because it is a basic foundation of any market.

Enforcement of Commission rule 15c3-3 and Obtaining FTR Data

The Commission needs to start obtaining and reviewing "Fails to Receive" data from all market participants, as in a Freedom of Information Act request, the Commission stated to us that it does not have, obtain nor maintain this data. Yet the market participants themselves indicate in their financials that FTRs alone total many billions in mark to market obligations.

Not only does a large number of FTRs indicate a violation of 15c3-3, but it can also indicate a Ponzi scheme in that it could exceed the financial ability of certain market participants to clear those FTR liabilities. This could lead to a cascading event where companies fail, ultimately ending at settlement firms, who also would not have enough financial power to handle the liabilities, bring the entire financial system crashing down. We urge the Commission to start focusing on Fails to Receive and using them as a tool to enforce 15c3-3.

Enforcement of REG T

It is immediately obvious to anyone who has access to fail data in Pink Sheet and other non NMS securities, that market participants must be violating REG T on a massive scale. REG T requires market participants to treat all Pink Sheet and other OTC securities as fully paid for securities in every respect. This makes holding "Fails to Receive" securities in lieu of the fully paid for OTC securities illegal. It also makes hypothecating these fully paid for securities from investors without specific written advanced consent illegal. However, the data suggests that both are routinely done in OTC securities. The Commission must enforce this provision to ensure the integrity of the markets. This is another reason for the Commission to obtain "fails to receive" data, review it, use it as an enforcement tool and make it public.

Lack of Trust

The equity, fixed income and derivative markets are based on trust and self regulation. The lack of trust towards the Commission, market participants and the entire financial system in general by investors and issuers around the world has now reached a critical low point and must be restored for the benefit of the entire country. Market participants continue to violate the rules and statutes and complain when anyone tries to hold them accountable to the law by saying it is too expensive or cumbersome to comply and would have negative consequences for the entire market, etc…or similar such nonsense. Neither the public at large nor our members trust market participants anymore, but restoring trust is vital if the financial system in this country is not to atrophy further.

It's also time for the Commission to stop having people from the securities industry like Bernard Madoff write rules for the Commission, like the "Madoff Exemption" – which excuse and benefits the authors of the rules.

Cost

Cost is an important aspect to consider for any rule making by the Commission and the APA requires the Commission to consider costs in any rule making. However, the Commission has only looked at the cost to market participants as "cost" and omitted the cost to other affected parties such as investors and issuers. The Commission should always consider the costs and effects to all affected parties in rule making which usually include investors and issuers. It is clear that many rules adopted by the Commission in the past severely harm investors and issuers for the sole benefit of market participants. This is against the directive the Commission is asked to follow in **Section 6(b)(5)** of the Securities Exchange Act of 1934 and against the rule making process required by the APA. We ask that in the future, the Commission take a comprehensive look at costs and benefits to all affected parties in any new rule making, not just the very limited scope of looking at the costs to Wall Street firms.

Self Regulation

While the regulatory structure of the financial markets relies on self regulation, SRO rules must be approved by the Commission. We ask that any future rules proposed by the SROs be given a hard look and take into consideration enforcement issues, the protection and cost to investors and issuers and that SRO proposed rules not be approved automatically. What the SROs and market participants say can not be taken at face value.

In particular, the Commission needs to add some rules regarding clearing and settlement firms and SROs involved in settlement of trades, in order to authorize and mandate that settling firms break or buy in any failed trades. If the settlement firms are to make good on guaranteeing trade settlement, then they need to be mandated to actually do so. To date, settlement firms say that trade failures and trade irregularities are to be rectified by the market participants themselves. The settlement firms need to guarantee trade settlement as they bill themselves to do, as one of the most dangerous problems in the creaking financial construct of this country is settlement failure and the Commission's unwillingness to address that problem, despite all the rules and laws seeking to ensure that settlement failures do not occur. Not only does the Commission fail to enforce its own rules, but it has failed to act in accordance with the directive of the Securities Acts in this regard.

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Conclusion

It is clear that the trust in our markets has been badly damaged worldwide. Market participants can not be trusted in aggregate as they continue to violate the existing rules on a wholesale basis and misrepresent the truth to the Commission and the public for their own interests and the Commission and the SROs do almost nothing in regards to enforcement. The key to restoring market efficiency, transparency and most importantly, trust, is to ensure that enforcement of existing rules and statutes occurs without fail. More than anything, it's an enforcement issue.

Sincerely,

T. Vallarino

Thomas Vallarino

President, National Investor Protection Coalition