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Since the close of the comment period a number of additional letters have focused on the costs of the hard close rule proposals. The opposite side has argued that costs were never intended to be an excuse/exception for not closing in 3 days. We believe there is some unexamined history to suggest that the SEC's original locate rule intended a 3 day close regardless of costs or liquidity. We further believe that its requirements were never intended to be loosened by the SRO'S or REG SHO.The SEC'S proposed rule 10b-11, which is the original locate rule, had stated that in addition to borrowing or arranging to borrow, a short seller had reasonable grounds to believe that the security could be borrowed in a manner that would permit delivery on the settlement date for the short sale. Exchange Act Release No.1391.1976-77 CCH Transfer Binder par 80,837(December 28,1976).The Commission chose to withdraw this rule in October 1988 because of industry opposition and because the SRO'S adopted their own rules, which were however not as all encompassing. See The Regulation of Short Sales: The Long and Short of It,55 Brooklyn Law Review(1990).The Commission also noted that it believed the fraud rules applied to such failures. The author at that time also clearly acknowledged the need for firms to protect themselves from abusive short selling including rumors.

Because the SRO rules were considered weak and were not being enforced, the Commission proposed and adopted Reg SHO in 2005 with its famous locate requirement but the focus has been on the first part of the reasonable grounds requirement but not the last: in a manner that would. permit delivery on the settlement date for the short sale. We believe this language clearly intended that costs of delivery were not an excuse and that reasonable grounds meant the stock would be available to borrow in 3 days. Of course this mandate makes no sense when you allow short sellers to use easy to borrow or hard to borrow lists that are not decremented. The commission has in this interim rule wisely recognized that a hard borrow requirement as intended is needed. But time has shown that unless a pre-borrow is added, the reasonable grounds expectation is either hard to enforce or not intended to be enforced. It is important finally to note that the history of the locate requirement did not start in the early 90'a but in fact was watered down at that time. The Commission should therefore go back to Rule 10b-11 to understand where the requirement came from and how it was defined downward. If a 3 day settlement is intended, costs should not be a factor because allowing more time will always save costs for the seller to the detriment of the buyer and the issuer. We believe that if the Commission had held on to proposed rule 10b-11 and not allowed a history of SRO loosening, this debate would have been resolved many years ago. Today however there is

a locate history that has erroneously brought costs into the analysis and unfortunately was not clarified in Reg. SHO.The commission must therefore speak clearly to the role of costs in prompt settlement and indeed in regulation generally.Prompt settlement was not the only victim of the costs argument during this time period.It was not too long ago that regulatory costs were allegedly driving everyone to London,an argument we do not hear anymore. But as the President said it is now time to put aside such childish notions and admit that many aspects of strong regulation entail costs,but the costs of weak regulation are much greater.

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