NIPC

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

RE: Release No. 34-58785; File No. S7-31-08
Release No. 34-58775; File No. S7-19-07

December 18, 2008

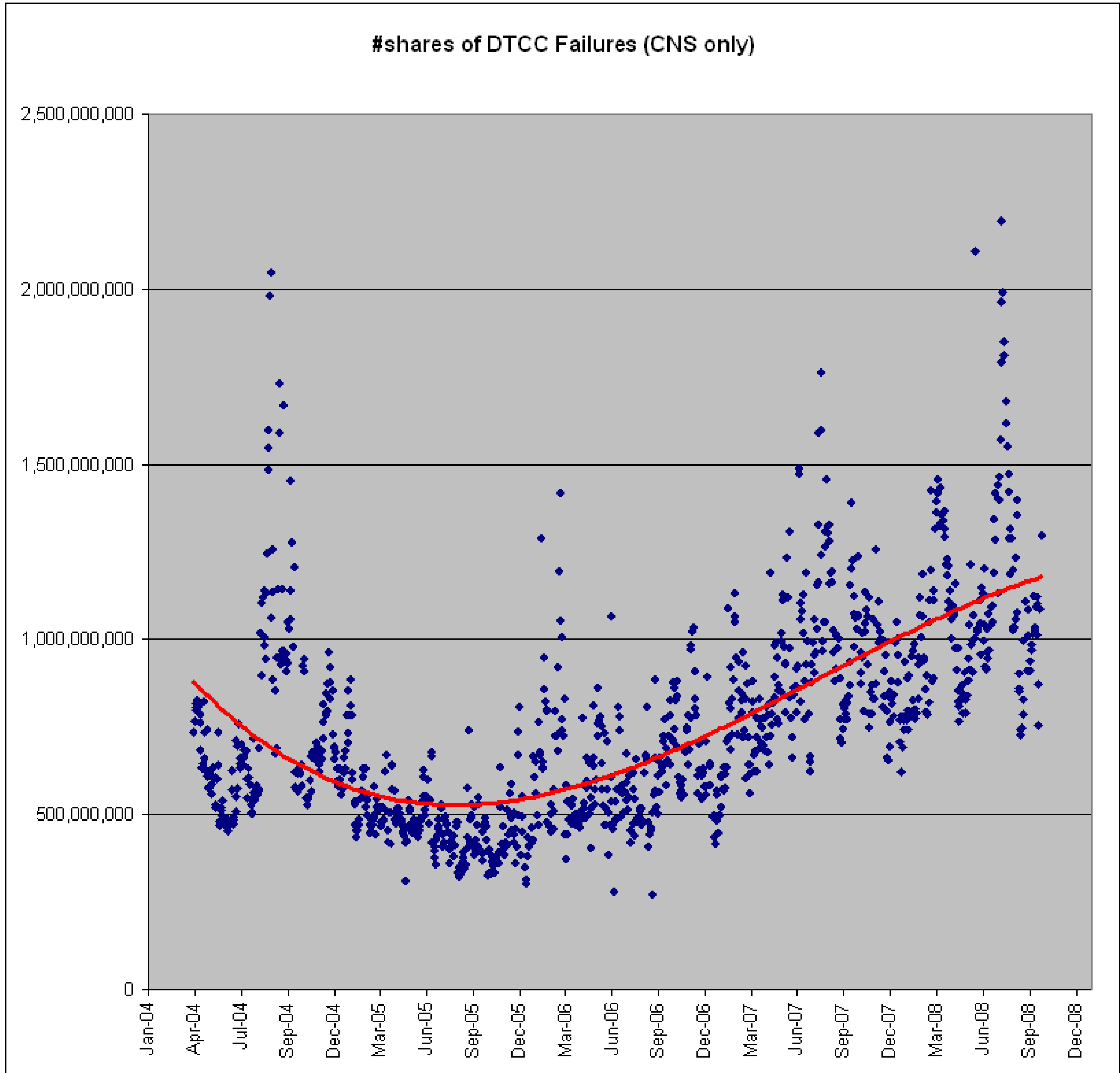
Ms. Florence E Harmon
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Dear Ms. Harmon:

We are pleased that the Commission is adopting rules 204T and 10a-3T and moving a little closer the spirit of **SEC rule 15c6-1** - settlement cycle rule, **SEC rule 15c3-3** – Customer protection rule, **Section 10b-10 of the Securities Exchange Act of 1934** - Trade Confirmations Statute, **Section 17a of the Securities Exchange Act of 1934** – accurate settlement statute, **Section 6(b)(5) of the Securities Exchange Act of 1934** – Statute Prohibiting discrimination by the SEC. The transparency provided by 10a-3T is very welcome and should be permanent.

As to 204T, just adopting a new layer of rules is not a way to enforce the repeat violation of already established rules. What is needed is enforcement of existing rules. It's like saying, "OK, if you violate the first set of rules, here is another set of rules.". This is clearly nonsensical as the firms causing "fails to deliver" are habitual rule violators and have little respect for rules.

The question then is, how is the Commission going to enforce 204T if the Commission doesn't enforce the 1st set of rules contained in 15c6-1, etc….which are already being violated wholesale by the securities industry day in and day out. To date, to our knowledge the Commission has not prosecuted a single market participant for violating the settlement cycle , rule 15c6-1, despite the fact that the fails to deliver data is reported to the SEC daily. To make it visual, here's a chart of only a fraction of fails, which are all violations of 15c6-1, as reported by the NSCC on a CNS netting basis only, through Q3 2008:



So much for respecting rules, especially 15c6-1. So much for enforcement.

The settlement date delivery requirement of 15c6-1 (the settlement cycle rule) still applies to all as it was never amended or exempted in any way. 15c6-1 also does not contain any exemption or provision for intent or "locates". Securities must simply be delivered. Period. And REG SHO nor 204T contain language that exempts or pre-empts 15c6-1 in any way. This means that "intent" or "locate" (or not) is not a defense for violating the settlement date delivery requirements of rule 15c6-1. The plain text of the rule is clear. Delivery is mandatory.

However, the fact that the Commission and the rest of the world see the high number of FTDs month after month, year after year and thus rule violations to 15c6-1 - published by the SEC itself - shows that the Commission is deliberately not enforcing settlement per 15c6-1 and deliberately allowing 15c6-1 to be violated wholesale, repeatedly, day in and day out by the securities industry.

No Solution Without Enforcement

To enable the enforcement of 15c6-1, and the settlement of trades, we suggest the Commission adopt new enforcement provisions, namely

a) **The automatic breaking of all failed trades and returning all purchase money to the original buyers promptly and automatically, and**
b) **The revocation of securities licenses of habitual violators of 15c6-1 who cause fails.**

This way, the Commission could ensure compliance with 15c6-1 with very few resources as it would be self enforcing and those who repeatedly breach the public trust and disregard the law would be removed from the securities industry.

Problems with 204T

While we are happy that the Commission is adopting more restrictive rules, it is not near enough as this is yet another layer of rules without enforcement. Something is better than nothing. But:

1. It is yet another layer of rules trying to deal with habitual rule violators of 15c6-1 and others.
2. It allows the "close out" of fails to deliver by borrowing stock, rather than by buying stock. This pushes the liability of possibly not receiving stock on demand onto the lender of securities. The failing party still is liable to deliver the stock to the lender. It only moves the fail around.
3. It treats market makers differently with exemptions only for them, violating Section 6(b)(5)
4. It does not force anyone to close out fails nor does it stop new fails, as the only "penalty" is a mandatory pre-borrow applied **only** to those who have open fails.
5. REG SHO has shown that more regulation does not affect fails. Only enforcement does.

Conclusion

The securities markets in the U.S. have become a house of cards shaking precariously due to the persistent fail obligations and price manipulations of individual securities via fails. Prompt and accurate settlement of trades is the most basic function in any market. This is not something investors or issuers should have to beg for. Deliberately not enforcing settlement as required by federal statute makes the Commission look like securities industry lap dogs.

Our member Bob O'Brian, describes fairly accurately how our members view the Commission:

> *So, you have these cops, see? They patrol the neighborhood where all the cocaine gets sold, and yet for all their hard work, the coke problem spirals out of control. Many, when they choose to leave the force, get massive pay increases by going to work for some of the private security firms long linked to the coke dealers. They will occasionally bust small time dealers, or new entrants into the market, however the very visible kingpins in the neighborhood, who drive Bentleys and have their own planes, never get looked at. In fact, should anyone suggest that a Colombian with a 4th grade education not be a legitimate multi-million dollar business owner, they will get investigated. The town's awash with coke and coke profits, but according to the cops, nobody knows where it all comes from, who is trafficking in it, or anyone that's dirty. Everyone is mystified by the coke deluge.*
>
> *Sound farfetched? That's the SEC for the last decade. Scandal after scandal reveals a corrupt agency that is incapable of doing the most rudimentary diligence when it comes to investigating prominent crooks, and whose alumni routinely go to work for the same Wall Street predators they're chartered with policing.*
>
> …………
>
> *So what IS the SEC capable of doing right, if they can't spot a $50 billion dollar ponzi scheme in full roar? I mean, that's kind of a big rhino in the room to ignore and be blind to, correct? If they can't spot the BIGGEST FINANCIAL FRAUD IN HISTORY, what are they equipped to do? Why aren't they all being thrown out on their behinds, and their job handed to the DOJ?*

The Securities Exchange Act of 1934 explicitly directs the Commission regarding implementing prompt and accurate settlement of trades in the Commission's regulatory scheme. Many suspect the Commission's failure to implement the will of the U.S. Congress and the people of the United States is done deliberately and at the bidding of firms in the securities industry. Just enforce settlement of trades as federal statutes already require. It's not hard.

The next major crack in the system will come at the DTCC. Their stock borrow program and other settlement policies have made them the final bag holders and counter parties for the "fails to deliver" and "fails to receive" that now defunct companies have caused. Those fails are all still there, in the NSCC system, but the companies that caused them are gone. It's not all cookies and cream at the DTCC and we strongly encourage the Commission to aggressively audit the DTCC to ensure that they have enough reserves to cover those possible settlement obligations.

Sincerely submitted,

Thomas Vallarino
President, National Investor Protection Coalition