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Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Via email: rule-comments@sec.gov

Re: Release No. 34-60509; File No. S7-08-09; Amendments to Regulation SHO

Dear Ms. Murphy:

The Capital Markets platform of RBC Capital Markets Corporation ("RBCCMC")[1] submits below its comments to Securities Exchange Act Release Number 34-60509 (August 17, 2009) (the "Release") regarding proposed amendments to Regulation SHO. These comments should be read in conjunction with RBCCMC's previous submission to the Securities and Exchange Commission ("SEC" or "Commission"), dated June 19, 2009, with respect to Securities Exchange Act Release Number 34-59748, (the "June Comment Letter").[2] We appreciate the opportunity to submit further comments on the Commission's most recent proposed amendments.

The Commission requests comment on a proposed "alternative uptick rule" which would allow short selling only at a price above the current national best bid. The request for comment is in addition to, and supplements, the Commission's previous release, dated April 10, 2009, in which five alternative short sale price restrictions were proposed: a (i) market-wide price test based on the national best bid (similar to the former NASD "bid test" - the "modified uptick rule"); (ii) market-wide price test based on last sale price (similar to former Securities Exchange Act Rule 10a-1 - the "uptick rule"); (iii) circuit breaker triggering a halt on short sales of a particular security (the "circuit breaker halt

[1] RBCCMC is a full-service broker-dealer with approximately 7,000 employees working across its Wealth Management and Capital Markets platforms. The wealth management business provides investment services to retail customers from 261 branch office locations. The platform also includes a fully disclosed correspondent clearing business. The Capital Markets platform, among other things, engages in fixed-income and equity sales and trading, investment banking and research activities. These comments are provided on behalf of the Capital Markets platform.

[2] RBC Capital Markets Corporation Comment Letter: Amendments to Regulation SHO, *available at* http://www.sec.gov/comments/s7-08-09/s70809-3800.pdf.

rule"); (iv) circuit breaker triggering a bid test restriction on short sales of a particular security (the "circuit breaker modified uptick rule"); and (v) circuit breaker triggering a price test on short sales of a particular security (the "circuit breaker uptick rule").[3]

The proposed new alternative uptick rule is similar to the proposed modified uptick rule, contained in the April Release, in that both would use the current national best bid as a reference point for short sale orders. Unlike the modified uptick rule, however, the alternative uptick rule would not allow short selling at the current national best bid. Instead, the rule would only permit short selling at an increment above the current national best bid irrespective of whether the market was advancing or declining.[4] Because it would not require firms to monitor the sequence of bids or last sale prices, the Commission argues that the alternative uptick rule would be easier to implement and constitute a less costly alternative for market participants.[5]

While simplifying the application of any short sale price restriction is a worthy goal, the highly restrictive nature of the alternative uptick rule is problematic. Indeed, the Release acknowledges that the alternative uptick rule would restrict short selling to a greater extent than the proposed modified uptick rule in that it would not allow short sales to get immediate execution, even in an advancing market. This fact alone renders the alternative uptick test the most restrictive of all the SEC's proposed alternative short sale price restrictions to date. The Release correctly notes that under the proposed rule quote depths and spread widths could be impacted, and execution and pricing inefficiencies could arise.

As stated in our June Comment Letter, we are opposed to the restoration of ***any*** price restriction in connection with the short sale of securities. We believe that any restriction on short selling would inherently interfere with the operation of a free and open market and thereby impinge on legitimate short selling and the benefits that result from such activity: market efficiency, price discovery, increased liquidity and protection against upward price manipulation. Because of its more restrictive nature, the alternative uptick rule would undermine the benefits of legitimate short selling to a far greater extent than any of the Commission's prior proposals. For example, some market participants submit bids based on their ability to short an index or basket of stocks as a hedge. Market participants may be less willing to engage in such buying activity where their ability to establish a hedge is restricted (e.g., as a result of the alternative uptick rule), which will,

[3] *See* SEC Release No. 34-59748 (Apr. 10, 2009) (the "April Release").
[4] The Release provides certain exceptions to the alternative uptick rule restrictions. These and other exceptions are discussed further on in this letter.
[5] Short sale regulation is exceedingly difficult and complex, as illustrated by the Commission's "FAQ's" on Regulation SHO, which have now reached 23 pages in length. Both the current Release and the April Release are lacking in important details, hindering the comment process and firms preparation for any resulting final rule. We urge the Commission to provide a greater level of specificity to its proposed alternatives. For example, the "increment" above the current national best bid is undefined. Because there are certain market places, such as dark pools, where pricing in sub-penny increments is acceptable, this term should be clarified.

in turn, impact market liquidity. Neither the Commission nor those critics who have publicly demanded a return to short sale price regulation as a means to combat abusive short selling should operate under the misapprehension that an alternative uptick rule would affect a limited number of transactions. As illustrated by exchange data disseminated since the Commission began to require daily reporting of short sales in early August, sales that are marked "short" can constitute 40% to 50% or more of daily trading volume in actively traded securities.[6] Given the proliferation of hedging and related strategies, not all, or even a substantial portion of "short" sales exert downward pressure on prices; yet, without clear and comprehensive exemptive treatment, that substantial volume of sell orders would potentially be subject to price adjustment and the delays and uncertainty of execution attendant to the proposed alternative uptick rule.

The elimination of the short sale price restrictions in 2007 was the culmination of a "careful, deliberative" process that involved the collection and analysis of data over a seven-year period from 1999 through 2006. As we noted in our June Comment Letter, there is no empirical evidence to support the proposition that any short sale price restriction will advance the Commission's objectives of (i) preventing potentially abusive or manipulative short selling from being used as a tool for driving down the market, or to accelerate a declining market; (ii) helping restore "investor confidence" and "market stability"; and (iii) not harming an already fragile market by shrinking liquidity and impeding price discovery. We reiterate our prior assertion that the restoration of any short sale price test restriction at this time, without the benefit of a thorough considered analysis, would be premature.

Notwithstanding, it is impossible to determine whether or how the restoration of short sale price restrictions would help restore investor confidence. Indeed, as market conditions have continued to stabilize a strong argument can be made that investor confidence has been restored.[7] In the absence of any empirical data, and based solely on subjective perceptions of transitory investor sentiment, we seriously question the wisdom of adopting a permanent rule to restrict a free and unfettered market, especially when such a decision would fly in the face of exhaustively gathered empirical data supporting the 2007 decision to lift lesser price restrictions. As stated above the Commission began to require the tracking and reporting of certain short sale market data in August.[8] This data can serve as basis upon which the Commission can analyze the necessity (and impact) of any short sale price restriction.

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[6] Tennille Tracey, *New Short Stats Speak Volumes. That's It,* WALL ST. J., Sept. 17, 2009, at C5.

[7] In the August 2009 Consumer Confidence Survey, published by The Conference Board, it was reported that the Conference Board Consumer Confidence Index stood at 54.1 (1985 = 100), up from 40.8 in April. It was also reported that the Expectation Index improved considerably and was at its highest level since December 2007. The Conference Board, August 2009 Consumer Confidence Survey Press Release ¶ 1, *available at* http://www.conference-board.org/economics/ConsumerConfidence.cfm.

[8] A copy of the related July 27th SEC press release entitled "SEC Takes Steps to Curtail Abusive Short Sales and Increase Market Transparency" is available at http://www.sec.gov/news/press/2009/2009-172.htm

As we have stated previously, it is questionable whether short sale price restrictions in fact relieve downward pressure on the price of securities over an extended period of time. Downward price pressure can be exerted in a variety of ways that would not be prohibited under any of the Commission's current price restriction proposals, including under the new alternative uptick rule proposal. For example, sales of calls and purchases of puts would not be subject to the short sale price restrictions set forth under the proposed rules, nor would short selling in security futures, which can be implemented using either single stock futures and/or futures on narrow-based stock indices.

We believe the SEC already has in place appropriate measures to address abusive and manipulative short selling activity and has continued to take steps to address such activity. Short sale price restrictions are, therefore, unnecessary. Current short sale regulation, in addition to the anti-fraud and anti-manipulation provisions of the securities laws, is sufficient to address the abuses articulated by the Commission in the April Release. Rule 204, which requires market participants to close-out fail to deliver positions no later than the beginning of regular trading hours on the settlement day following the settlement date was adopted on a permanent basis at the end of July 2009. SEC Rule 10b-21[9] has signaled to market participants the seriousness with which the SEC views abusive short sale practices. The Commission has also recently brought significant enforcement actions targeted at naked short selling abuses.[10]

Notwithstanding, if the Commission determines that some form of price restriction is necessary, we continue to advocate that the "circuit breaker modified uptick rule" (revised as discussed in our June Comment Letter), or a similar narrowly tailored alternative, be adopted. Relatively speaking, it would have the least deleterious impact on the marketplace as only those securities in fact experiencing material downward price pressures would be subject to the price test upon the triggering of the circuit breaker. It would have far less impact than the alternative uptick rule (were that rule to be adopted in a circuit breaker form) in that the modified uptick rule would allow short sales at the best bid as opposed to the alternative uptick rule, which would permit short sales only at a price above the best bid. The limited duration of the price test following the triggering of the circuit breaker (the remainder of the trading day) would focus the impact of the rule on those stocks that are potentially subject to "abusive" short selling without impinging on the market more broadly. In addition, we further advocate that any restriction be implemented initially on a pilot program basis.

The alternative uptick rule proposal identifies seven types of transactions that would be excluded from the short sale price restrictions in the event the circuit breaker is

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[9] 17 C.F.R. 10b-21 (2008).

[10] On August 5, 2009 the Commission announced settlements of its first "naked" short selling enforcement actions relating to alleged violations of Rule 203(b)(1) and (3) with respect to the locate and close-out requirements of Regulation SHO. A copy of the related SEC press release entitled "SEC Charges Options Traders and Broker-Dealers for 'Naked' Short Sale Rule Violations" is available at http://www.sec.gov/news/press/2009/2009-179.htm.

triggered.[11] In furtherance of the Commission's goal to create a "narrowly tailored" approach and to minimize the impact of the short sale price restrictions on legitimate market activity, we continue to believe that several additional exceptions should also apply to the alternative uptick rule (or any other short sale price restriction adopted by the Commission). These include: transactions involving errors in marking a short sale; electronic trading systems; trade throughs; facilitation of customer buy orders; market makers and options market makers engaged in bona fide market-making activities; bona fide market-making in derivatives; options and futures contract expiration; block positioning; ETF sales; market on open/market on close transactions; program baskets/re-weighting of baskets; index arbitrage trading; exchange for physicals; swap hedging/OTC option hedging/index reconstitution/index re-weighting; assignment to call writers upon exercise of an option; and, to the extent not already enumerated, any other exceptions set forth under Regulation NMS.[12]

Notwithstanding the Commission's position that the alternative uptick rule would be easy to implement and less costly to the market participants, we believe that the Commission continues to underestimate the time and expense that will be required for market participants to comply with the rule (or any other of the proposed alternatives). These costs will include expenses not only for the initial implementation of any restriction, but for its ongoing "administration" (*e.g.*, testing, surveillance, evaluation and responding to internal and external inquiries) as well.

We believe that the proposed two-month implementation period would be utterly insufficient for market participants to implement the alternative uptick rule. We continue to estimate that given all the systems changes and attendant testing protocols required to comply with even the most basic short sale price restrictions, market participants would require an implementation period of at least nine months to a year.

As stated, RBCCMC opposes the reinstatement of ***any*** form of short sale price restriction, including the alternative uptick rule. There is no empirical data linking the elimination of short sale price restrictions in 2007 with the increased volatility in the marketplace. Likewise, there is no evidence to support the proposition that the alternative uptick rule, or any of the other restrictions proposed by the Commission, would fulfill the Commission's objectives to "restore investor confidence" or "promote market stability." Indeed, recent market stability strongly suggests that investor confidence has been restored. Given the recent lack of volatility in the marketplace, we believe that the urgency of imposing a price restriction on short sales of securities is not as great as the need to conduct the appropriate due diligence to arrive at a carefully deliberated long-term solution. It is clearly premature for the Commission to require market participants to expend the substantial time and resources that would be necessary to implement the

[11] The seven exceptions are for transactions involving seller's delay in delivery, odd lots, domestic arbitrage, international arbitrage, over-allotments and lay-off sales, transactions on a VWAP basis, and riskless principal transactions.

[12] As noted above, in order to avoid confusion and potential market abuses we urge the Commission to provide additional specificity with respect to each of its proposed exceptions.

alternative uptick rule, or any other short sale price restriction without the benefit of a thorough market analysis. Current short sale regulation is obviously sufficient.

Sincerely,

Richard T. Chase