MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

October 1, 2009

Via Electronic Mail: rule-comments@sec.gov

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

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

Dear Ms. Murphy:

Managed Funds Association ("MFA")[1] welcomes the opportunity to provide additional comments on the Securities and Exchange Commission's ("Commission" or the "SEC") proposed amendments to Regulation SHO contained in Securities Exchange Act Release No. 59748, 74 FR 18042 (Apr. 20, 2009) (the "Proposal"). This letter supplements our prior comment letter dated June 22, 2009 ("Initial Comment"), which we incorporate by reference and as an attachment, and focuses specifically on the alternative uptick rule.

In MFA's Initial Comment, we underscored our central concerns regarding the Proposal to reinstate a price test:

- First, we believe that liquidity benefits the market, and therefore investors, and that short selling is a legitimate and critical market activity that contributes such liquidity and capital formation, price discovery, and pricing efficiency.

- Second, we recognize that there has been a loss of investor confidence that is more accurately attributed to poor economic fundamentals rather than incorrectly linked to legitimate short selling, which has served as a scapegoat in the public debate. As the SEC's Office of Economic Analysis found, episodes of extreme negative returns last September were not the result of short selling activity, but from selling activity by sellers who own the stock (long sellers).[2]

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[1] MFA is the voice of the global alternative investment industry. Its members are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately $1.5 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.

[2] Office of Economic Analysis Memorandum from Daniel Aromi and Cecilia Caglio through James Overdahl to Chairman Christopher Cox, dated December 16, 2008, on the analysis of short selling activity during the first weeks of September 2008 (hereinafter "OEA Dec. 16 Memo to Chairman").

- Third, we believe, based on a wide body of empirical data, that a price test will harm markets and investors by causing liquidity to decline and bid-ask spreads to widen, and costs to increase.

- Fourth, we believe that the Commission has taken significant steps through its adoption of several important rules and short selling measures, including Rule 10b-21 (a naked short selling antifraud), Rule 204 (mandating close-out of fails on T+4), and daily publication of aggregate short sale volume in each individual equity security, that have addressed key concerns regarding illegitimate activity. We believe as preliminary data shows that these measures are proving highly effective and that a price test is not needed, nor would it be effective.

- Finally, *if the Commission determines that it must act*, we believe any price test should be triggered by a <u>circuit breaker. By using a circuit breaker, a price test restriction would continue to provide investors</u> the benefits from short selling in all but extreme market conditions. Additionally, we believe a <u>bid test</u> must be used rather than a tick test because the bid represents current market interest and is operationally more sound (given the delay between trades and trade reports). Further, we believe that market centers should implement such price test with a policies and procedures approach (rather than a prohibition) to enforce compliance at the point of execution.

<u>The Alternative Uptick Rule</u>

MFA opposes a price test that would allow short selling only at a price above the current national best bid (the "alternative uptick rule"). In short, we believe that such a test would operate as a near ban on short selling even in non-declining (neutral) markets, and further, that it would lead to unintended consequences and possible gaming, as such a price test has never been utilized in our markets.

First, as discussed in our Initial Comment, the majority of investors that use short selling use it as a risk management or hedging tool. The alternative uptick rule would constrain or limit the applicability of many trading strategies that are market neutral or rely on hedging, including long short equity strategies, convertible securities investors, and the growing number of traditional asset managers deploying hedged strategies such as the 130/30 portfolios. Limiting the ability of market participants that engage in market neutral or hedged strategies to sell securities short would limit their ability to engage in long trades. As such, we are strongly concerned that, initially, the alternative uptick rule would have a massive destabilizing effect on markets as it would cause many market participants to liquidate long positions in order to maintain and balance their market-neutral or hedged portfolios. This would likely have a severe impact on price.

Second, we are concerned the alternative uptick rule would harm investors as we believe it would impose an unreasonable constraint on normal market activity and have a negative impact on market liquidity, bid-ask spreads, stock prices and costs. Take for example, the following situations:

  - In stocks with a penny spread, short sellers would be forced to execute at the offer. The alternative uptick rule would thereby impose both an improper surtax on trading to be borne by the short seller and greater delay or no execution for the buyer. We believe this would deteriorate market efficiency, which would in turn attract fewer orders to such markets.

- Under the alternative uptick rule, market participants selling short would be required to place limit orders as they would be unable to execute marketable short sale orders. The presence of such (short) limit orders could be perceived by buyers as a negative view of a security; as a result, buyers may react by withdrawing their buying interest, thereby exacerbating a downward spiral in price.

Third, we understand that those advocating for the alternative uptick rule have argued that it would be easier and cheaper to implement, operate and enforce. However, ease of implementation is not a sufficient reason or standard in our securities laws for imposing such a dramatic rule change. We note that under Section 3(f) of the Securities Exchange Act of 1934, in considering or determining whether an action is necessary or appropriate in the public interest, the Commission must consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. While we do not support a price test, if the Commission determines to adopt a price test, we believe that compliance costs could be minimized through the use of a circuit breaker to trigger a price test, which would limit application of a price test to periods of extreme market conditions. In addition, we believe that implementation concerns would be minimized if executing market centers (or any broker using an intermarket sweep order) surveil for compliance as they could leverage existing architecture developed to comply with the order protection rule in Reg NMS (Rule 611). We note, however, that programming for Reg NMS specifically contemplated the removal of all short sale price tests, and thus, would likely take considerably longer than 2 months to develop. We believe the Commission would need to allow a minimum of 9-12 months for implementation, and the subsequent programming and testing of systems.

Finally, we refer the Commission to our discussion in the Initial Comment regarding a short sale <u>ban</u> that we fear will be analogous to the alternative uptick rule. We have strong concerns with a proposal that is akin to a ban on short selling and believe it would exacerbate market conditions and eliminate key hedging and risk management activities at potentially a very difficult time. Studies on the SEC emergency order prohibiting short selling in financial securities show that the prohibition significantly decreased trading volume and market liquidity, increased bid-ask spreads, increased volatility, decreased market efficiency and led to an estimated $4.9 billion wealth transfer from buyers to sellers. Accordingly, we urge the Commission to not adopt the alternative uptick rule.

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We would be pleased to meet with the Commission or its staff to further discuss our comments. If the staff has questions or comments, please do not hesitate to call Jennifer Han or the undersigned at (202) 367-1140.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President, Managing Director
& General Counsel

CC: The Hon. Mary Schapiro, Chairman
The Hon. Kathleen L. Casey, Commissioner
The Hon. Elisse B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy A. Paredes, Commissioner
James Brigagliano, Acting Co-Director
Division of Trading and Markets
Daniel Gallagher, Acting Co-Director
Division of Trading and Markets
James Overdahl, Chief Economist
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MANAGED FUNDS ASSOCIATION
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June 22, 2009

Via Electronic Mail: rule-comments@sec.gov

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

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

Dear Ms. Murphy:

Managed Funds Association ("MFA")[1] welcomes the opportunity to comment on the Securities and Exchange Commission's ("Commission" or the "SEC") proposed amendments to Regulation SHO (the "Release"), which proposes two approaches to restrictions on short selling—a price test that would apply on a market-wide and permanent basis ("short sale price test") or a single security circuit breaker that would apply during severe market declines in that security ("circuit breaker").[2] MFA recognizes that there has been a great deal of public focus on the role and impact of short selling, and that some investors, issuers, and legislators have urged the Commission to reinstate the uptick rule or other short selling restriction in a purported effort to address declining stock prices and restore investor confidence.

We appreciate the Commission's thorough evaluation of the request to reinstate the uptick rule by publishing an extensive and thoughtful Release that raises several short selling frameworks; by seeking public comment; and affording the public a meaningful time to comment. MFA represents the views of institutional investors, including registered investment advisers and private investment pools, whose investors are pensions, endowments, foundations, and in the case of registered investment companies, retail investors. We understand the Commission has issued the Release to address investors' perception of short selling as being the cause of recent market volatility and price declines, and accordingly, to bolster investor confidence through a short sale restriction.

Speaking as investors, we believe the deterioration in investor confidence stems from the sudden and drastic changes in economic fundamentals last year, including the appropriate valuation of securities and the solvency of certain companies, and not from short selling. As the

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[2] 74 *FR* 18042 (Apr. 20, 2009) (the "Release").

Commission recognizes, there is a wealth of academic analyses and empirical data that demonstrates that legitimate short selling provides substantial benefits to the markets, including capital formation, market liquidity, price discovery, and pricing efficiency, which benefit all investors. In addition, economic analyses, including the SEC's own, conclude that there is no empirical justification for price test limitations, and that, in fact, the Commission's July emergency order targeting "naked" short selling ("SEC Pre-borrow Order"),[3] and the Commission's emergency order prohibiting short selling of financial securities ("SEC Order Halting Short Selling"),[4] had an overwhelmingly negative impact on the markets and were harmful for investors. Further, we believe these emergency orders actually contributed to the deterioration in investor confidence as they impaired or impeded the ability of investors to hedge and manage portfolio risk. As a result of being unable and uncertain of their future ability to manage risk through the use of short sales, investors exited the markets.

As the Commission engages in rulemaking, we respectfully urge it carefully to examine all relevant facts. Rulemaking should be clearly defined and supported by empirical data. Otherwise, it can become a vehicle for costly, detrimental and unintended consequences, and can severely impair investor confidence. We also note that under Section 3(f) of the Securities Exchange Act of 1934 ("Exchange Act"), in considering or determining whether an action is necessary or appropriate in the public interest, the Commission must consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

In this case, we believe the empirical data do not support the need for a short sale restriction, and that a short sale restriction would harm investors through decreased liquidity and pricing efficiency, and greater transaction costs. However, if the Commission determines that a short sale restriction is necessary and merited, we urge the Commission to consider a single security circuit breaker that triggers a modified uptick test as it would achieve the Commission's objectives in the way least likely to cause market dislocation and other unintended consequences.

I. EXECUTIVE SUMMARY

General Comments

- After careful consideration of the academic analyses, we believe the evidence shows that short sale restrictions are more harmful than beneficial to markets and that they restrict capital formation and deteriorate market liquidity, market quality and market efficiency, thereby harming all investors.

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[3] Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, SEC Release No. 34-58166 (July 15, 2008), 73 FR 42379 (July 21, 2008) ("SEC Pre-borrow Order"). The Commission amended this Order in SEC Release No. 34-58190 (July 18, 2008), 73 FR 42837 (July 23, 2008) ("Amendment to SEC Pre-borrow Order").

[4] SEC Order Halting Short Selling in Financial Stocks, SEC Release No. 34-58592 (Sept. 18, 2008), 73 FR 55169 (Sept. 24, 2008). The Commission amended this Order in SEC Release No. 34-58611 (Sept. 21, 2008), 73 *FR* 55556 (Sept. 25, 2008).

- There is substantial confusion among the general public and some commentators over the role of legitimate short selling and the illegal practice of so-called "naked" short selling. The allegations of short sale critics are not based on factual data and do not match the empirical evidence. We believe the Commission should provide the public with greater aggregated market information to help dispel the public's misperception of short selling.

- In addressing market manipulation, we believe the Commission has a panoply of regulatory tools, including the SEC's general antifraud authority, the new "naked" short selling and general antifraud rules, enforcement of Regulation SHO which requires sellers locate shares to borrow in advance, and enforcement of the interim final temporary Rule 204T which penalizes sellers who fail to deliver shares. The Commission should allow time for new rules to be implemented and take effect.

<u>Concerns with a Short Sale Price Test</u>

- We believe a market-wide short sale price test would be harmful to investors and would not achieve the Commission's objectives of bolstering investor confidence. Multiple studies, including the SEC Office of Economic Analysis' ("OEA") study, show that price tests do not prevent short sales in extreme down markets, limit short selling in up markets, constrain trading volume and constitute an economically relevant constraint on short selling.

- Market structure has changed significantly with the implementation of Regulation NMS and developments in technology. Today's liquidity providers are no longer only market makers or old-fashioned floor brokers, but include buy-side firms that engage in automated, high-frequency, market-neutral or hedged trading strategies that trade on market or pricing inefficiencies. Restricting short selling would reduce overall volume on both the short and long side and would have a negative impact on market liquidity, pricing efficiency, volatility and transaction costs. Various market participants including, market centers, broker-dealers and institutional investors also would incur significant expense in implementing such a proposal.

- A market-wide short sale price test would constrain or limit the risk management tools of many trading strategies that are market-neutral or rely on hedging, which is not a desired policy outcome.

<u>Circuit Breaker/Modified Uptick Rule</u>

- To the extent the Commission finds it necessary to act on a short sale restriction, we believe a Circuit Breaker/Modified Uptick Rule would provide a more targeted approach in addressing short selling concerns in order to minimize the negative costs associated with a short sale restriction.

    - We believe the Commission should consider a higher percentage level before such a restriction is triggered, as the 10% proposal would restrict trading in too many securities, and impose, therefore, a higher cost on the liquidity of the markets with all the attendant issues outlined above. In our view, a circuit breaker should only be triggered under extraordinary market conditions, such as a 20% decline in price over one day.

- Should the Commission choose to implement the 10% threshold, we believe additional exceptions to the Circuit Breaker/Modified Uptick Rule would be needed to prevent unnecessary, negative unintended consequences.

Circuit Breaker Halt Rule

- We have strong concerns with a circuit breaker that triggers a ban on short selling and believe it would exacerbate market conditions and eliminate key hedging and risk management activities at potentially a very difficult time. Studies on the SEC Order Halting Short Selling show that the prohibition significantly decreased trading volume and market liquidity, increased bid-ask spreads, increased volatility, decreased market efficiency and led to an estimated $4.9 billion wealth transfer from buyers to sellers. We urge the Commission to not adopt such a rule.

Pre-borrow Proposals

- The Commission is also considering the imposition of a pre-borrow requirement on top of the current locate requirements and penalties for failure to deliver. A pre-borrow requirement imposes significant unjustified market costs to investors when 99.99% of the dollar value of all trades clear and settle on time. Such a requirement introduces inefficiencies into the lending process, causes significant over-borrowing, reduces security availability, increases bid-ask spreads, deteriorates market quality and market efficiency. A pre-borrow requirement would also tie up broker capital unnecessarily at a time when regulators are demanding financial firms boost their unencumbered capital to reduce systemic risk. With respect to costs, a pre-borrow requirement would impose additional financing costs, increase operational and settlement costs, as well as impose administration and record keeping costs related to corporate actions. We believe the costs associated with a pre-borrow requirement would significantly outweigh the benefits.

Exceptions to a Short Selling Restriction

- Under each short sale restriction, we believe exceptions are appropriate and necessary in order to maintain fair, orderly and efficient markets. We believe that in addition to the exceptions proposed in the Release, the Commission should provide exceptions for automated electronic buy-side trading; *bona fide* hedging transactions, including risk and statistical arbitrage; and trading in exchange-traded funds and index products. Such trading promotes market efficiency, support risk management and present little risk of abuse.

II. BACKGROUND

As the Commission recognizes, short selling provides the market with important benefits, including market liquidity and pricing efficiency.[5] The benefits of short selling are broadly

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[5] Release *at* p.18044. *See also, Exchange* Act Rel. No. 29278 (June 7, 1991), 56 *FR* 27280 (June 13, 1991); 2004 Regulation SHO Adopting Release, 69 *FR* 48008; Boehmer, Ekkehart and Wu, Julie, *Short selling and the Informational Efficiency of Prices* (Jan. 8, 2009); Arturo Bris, William N. Goetzmann and Ning Zhu, "Efficiency and the Bear: Short Sales and Markets Around the World" (Yale School of

recognized by international regulators as well.[6] Short selling is an essential method by which investors, including fiduciaries managing others' assets, can manage risk, hedge their portfolios, contribute to capital formation[7] and reflect their view that the current market price of a security is overpriced. Short selling also plays an important role in correcting upward security price manipulation and mitigating market bubbles. Moreover, as a security declines in price, short sellers purchase shares in the market to close out their positions, thereby helping to stabilize prices.

MFA fully supports the Commission's efforts to combat manipulative short selling, including strict enforcement of locate and delivery rules, and other market abuses. Congress has granted the Commission broad authority to sanction persons who engage in manipulative behavior; indeed one of Congress's central goals in enacting the Securities Exchange Act was to prevent manipulative trading and to punish those who engaged in that practice.[8] Preventing manipulative short selling and punishing those who engage in manipulative short selling, however, should not be confused with legitimate short selling. As the Commission considers rulemaking, we respectfully urge the Commission to weigh the benefits of a short sale restriction with the costs of limiting legitimate short selling.

III. THE PROPOSALS

In re-evaluating and seeking comment on the appropriateness of some form of short sale restriction, the Commission proposes the following short sale restrictions:

1. A short sale price test based on the last sale price ("Proposed Uptick Rule").
2. A short sale price test based on the national best bid ("Modified Uptick Rule").

Management, Jan. 2003), (a study of forty-seven stock markets around the world, in which the authors found that markets with active short sellers reacted to information more quickly and set prices more accurately); *and* Owen A. Lamont, "Go Down Fighting: Short Sellers vs. Firms", *available at* http://www.som.yale.edu/faculty/oa14/research/go%20down%20fighting.pdf (concluding that constraints on short selling as a result of various actions taken by firms allow stocks to be overpriced and that firms taking anti-shorting actions have in subsequent year abnormally low returns of about minus two percent per month).

[6] Regulation of Short Selling, IOSCO Consultation Report, March 2009 *at* p.5, available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD289.pdf; *and* 09/1 Short Selling Discussion Paper, UK Financial Services Authority, February 2009, *at* p. 10, available at: http://www.fsa.gov.uk/pubs/discussion/dp09_01.pdf.

[7] *See* letter to Christopher Cox, Chairman, SEC, from Richard H. Baker, President and CEO, Managed Funds Association on Oct. 1, 2008 (discussing that the SEC Order Halting Short Selling had the perverse effect of making it harder for financial companies to raise capital through convertible bond and convertible preferred securities issuances as investors were not willing to make investments without the ability to manage their risk through hedging techniques).

[8] *E.g.*, Address of Commissioner James M. Landis before the National Association of State Security Commissioners at New Orleans, Louisiana, November 12, 1934, available at http://www.sec.gov/news/speech/1934/111234landis.pdf.

3. A single stock circuit breaker that would temporarily prohibit short selling in a particular security when there is a severe decline in the price of that security ("Circuit Breaker Halt Rule").
4. A circuit breaker rule that triggers one of the above short sale price test ("Circuit Breaker/Uptick Rule" or "Circuit Breaker/Modified Uptick Rule").

The Commission requests for comment, empirical data and analyses with respect to its short sale restriction proposals.

IV. COMMENTS

A. General Comments

We believe the Reg SHO framework for short selling has worked well by implementing appropriate controls and oversight over the activity to allow markets to prosper from the benefits of short selling while minimizing the risk of market abuse. The Commission conducted extensive research and analysis through its multi-stage, seven year rulemaking process before it finally voted to eliminate the former uptick rule from Reg SHO. With respect to "naked" short selling,[9] preliminary analysis indicates that Rule 204T, which mandates a strict T+4 close-out of securities that fail to settle on settlement date, has had the effect of significantly reducing failures to deliver.[10] The number of threshold securities has also decreased significantly as compared to a year ago.

Under the existing framework, we believe the Commission could take further steps to enhance Reg SHO by requiring clearing brokers to perform daily reconciliations to identify short sales they process with respect to whether a locate was performed in advance of the trade. The Commission could also enhance market transparency by providing the public with more frequent, enhanced aggregated short sale data, as well as enhanced reports on aggregate purchases and long sales in an individual security. There appears to be substantial confusion among the general public and some commentators over the role of legitimate short selling and the illegal practice of so-called naked short selling, especially since the empirical evidence does not support the claims that short selling or naked short selling were responsible for declining stock prices. We believe greater market information would help dispel the public's misperception of short selling.

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[9] The Commission has not defined "naked" short selling but has generally referred to it as "short selling without having securities available for delivery and intentionally failing to deliver securities within the standard three-day settlement cycle." *See* Regulation SHO Final Amendments, Exchange Act Release No. 56212 (Aug. 7, 2007), 72 *FR* 45544 (Aug. 14, 2007) ("2007 Regulation SHO Final Amendments"); Regulation SHO Proposed Amendments, Exchange Act Release No. 54154 (July 14, 2006), 71 *FR* 41710 (July 21, 2006) ("2006 Regulation SHO Proposed Amendments"); Regulation SHO Adoption Release, Exchange Act Release No. 50103 (July 28, 2004), 69 *FR* 48008, 48009 n.10 (Aug. 6, 2004) ("2004 Regulation SHO Adopting Release"). We note that not all "naked" short selling is illegal.

[10] Regulation SHO, U.S. Government Accountability Office Report to Congressional Requesters, May 2009, *at* p.37, *available at:* http://www.gao.gov/new.items/d09483.pdf (hereinafter "GAO Report").

1. Enhancing Compliance with Reg SHO

Broker-dealers are required pursuant to Reg SHO to "locate" securities prior to selling securities short.[11] We understand that beginning in 2007 staff from the Division of Trading and Markets worked with broker-dealers to update and revise the 1994 Prime Broker No-Action Letter that sets forth the responsibilities of both the executing and prime brokers for trades executed and settled on behalf of their clients.[12] The revised letter, which has yet to be finalized, addresses the current information gap in Reg SHO for prime brokerage arrangements. We believe mandating the practice of having executing brokers confirm locates with prime brokers would improve compliance with and enforcement of Reg SHO.

2. Investor Confidence and Enhancing Transparency through Aggregated Trade Reports

The Commission explains that due to extreme market conditions and the resulting deterioration in investor confidence, it is re-evaluating the need for some form of short sale restriction. Speaking as investors, we believe the crisis in investor confidence stems from the sudden and drastic changes in economic fundamentals, including the appropriate valuation of securities and the solvency of certain companies. In 2008, the world experienced a crisis stemming from the economic fundamentals of many companies. This was not a short selling problem. Therefore, introducing a short sale solution would merely avoid addressing the fundamental problems experienced last year. Investors sought to liquidate their positions from our financial markets because of uncertainty with respect to the valuation of underlying securities, the solvency of certain companies, as well as with regulation. The majority of investment strategies employed by institutional investors include risk management through hedging. With uncertainty as to the ability to sell securities short and to implement their full investment strategies, many investors chose to temporarily withdraw from the markets. Similarly, as discussed further below, we believe restricting short selling permanently would impede many investment strategies and impair market liquidity and pricing efficiency, and raise costs to investors. Such a solution would not address economic fundamentals and would likely only have a fleeting impact on investor confidence.

Many members of the public attribute the recent market volatility, including steep declines in some securities' prices to short selling. The empirical data, however, shows otherwise. For example, a third-party academic analysis on short selling activity in financial stocks leading up to the SEC Pre-borrow Order for the period January 1, 2008 through July 15, 2008 (the "sample period") found:[13]

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[11] Reg SHO Rule 203.

[12] *See* 1994 SEC No-Act. LEXIS 466 (Jan. 25, 1994). *See also,* GAO Report *at* p.11 (recommending the SEC finalize the draft revised 1994 Prime Broker no-action letter).

[13] *See* Short Selling Activity in Financial Stocks and the SEC July 15th Emergency Order, Arturo Bris, IMD, European Corporate Governance Institute and Yale International Center for Finance, August 12, 2008 (hereinafter "July 15th EO Study").

- The short selling level in the 19 securities subject to the SEC Pre-borrow Order ("G19" securities) for the sample period, on average at 12%, was lower than in comparable U.S. financial institutions, on average at 13%.[14]
- There were more convertible bond issuances for G19 securities over the sample period than for comparable firms. Many investors hedge convertible bond investments by shorting the underlying firm's stock. Consequentially, convertible bond issuances were found to be a significant determinant of shorting activity during the sample period.
- The negative returns of G19 securities cannot be attributed to short selling activities. In fact, non-G19 securities were shorted more heavily both in 2007 and 2008.

In addition, SEC staff, in its analysis of short selling activity during the first weeks of September 2008, found that:

- Episodes of extreme negative returns were not the result of short selling activity, but from selling activity by sellers who own the stock (long sellers).
- Short selling is higher during periods of extremely positive returns than in periods of extreme negative returns. The findings indicate that an important fraction of short sellers are contrarian traders, meaning that they tend to sell short when prices are high.[15]

The claims that short selling were responsible for steep price declines are simply not true and not supported by any factual evidence. We believe these concerns regarding short selling are due in part to the lack of transparency with respect to short selling activity. We believe providing the public with more frequent aggregated short sale data for individual securities, or at the very least by industry sector, would help inform the public as to a security's total level of short sales. Such information would provide the public with greater transparency and insight on "normal" levels of short selling for a security. Hong Kong, for example, beginning in October 2008, provides a weekly update on Hong Kong's short selling pattern that shows aggregate short sale levels for the overall market, certain industry sectors and the top ten securities sold short.[16]

Indeed, as a public policy matter, we believe the public would benefit from enhanced aggregate reporting of trading activity in a security, including a breakdown of aggregate purchases, long sales and short sales in a security. Aggregate reporting would bring greater transparency to trading activity and address misperceptions in a market. Such information would have demonstrated that price declines in a security during the extreme price declines last year were the result of selling activity by long sellers.[17] We believe the Commission should collect order information for all securities and provide weekly aggregated reports.[18]

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[14] The author notes that the difference is significant at the one-percent level.

[15] OEA Memorandum from Daniel Aromi and Cecilia Caglio through James Overdahl to Chairman Christopher Cox, dated December 16, 2008, on the analysis of short selling activity during the first weeks of September 2008 (hereinafter "OEA Dec. 16 Memo to Chairman").

[16] *See, e.g.,* Weekly update on Hong Kong's short-selling pattern, Hong Kong Securities and Futures Commission, *available at:* http://www.sfc.hk/sfc/html/EN/general/general/short-selling/short-selling.html (providing a weekly comparison of total aggregate short selling in Hong Kong for the whole market, certain industry sectors and the top ten securities sold short) *available at:* http://www.arturobris.com/eo/brisreportAug12.pdf.

Individual positions of market participants, however, only should be provided confidentially to regulators.[19] Public disclosure of individual market participants' trade positions could have the perverse effect of increasing market volatility, being potentially misleading to the public, and causing irreparable harm to the proprietary trading strategies of money managers and harming fund investors, such as pensions, endowments and foundations, as well as retail investors.

3. Preventing Manipulative Short Selling

After careful consideration of the empirical data to date on short sale restrictions, we believe the best method to combat manipulative short selling is through enforcement of the SEC's general antifraud authority,[20] the naked short selling and general antifraud rules,[21] Reg SHO, and interim final temporary Rule 204T.[22] We are supportive of the Commission's efforts to address market manipulation. In this case, we believe the crisis in investor confidence relates to problems with economic fundamentals and not short selling. As discussed, we believe the Commission has succeeded in developing a fair, efficient and sound framework for short selling. We also believe the Commission has a full panoply of regulatory tools to address manipulative short selling. As such, we believe that additional rulemaking is not necessary at this time; instead, the Commission should allow time for recently enacted rules to be implemented and to fully take effect.

B. Concerns with the Proposed Uptick Rule and Modified Uptick Rule

We believe a market-wide short sale price test would be harmful to investors and would not achieve the Commission's objectives of bolstering investor confidence. Multiple studies, including the Commission's OEA Study, have shown that price tests do not prevent price declines in extreme down markets, limit short selling in up markets, constrain trading volume and constitute an economically relevant constraint on short selling.[23] The Commission conducted

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[17] *See* OEA Dec. 16 Memo to Chairman; *and* Shorting Financial Stocks Should Resume, Arturo Bris, WSJ, Sept. 29, 2008 (providing that short sales in the 799 stocks amounted to a low 6% of shares outstanding prior to the short sale ban).

[18] One possibility would be for the Commission to collect information similar to FINRA's order audit trail system for the entire market.

[19] *See* letter from Stuart J. Kaswell, Executive Vice President and General Counsel, Managed Funds Association, to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, dated Dec. 15, 2008 *available at:*
http://www.managedfunds.org/downloads/MFA%20Rule%20204T%20Comments.12.15.08.final.pdf.

[20] Sections 9 and 10 of the Exchange Act.

[21] Exchange Act Rules 10b-5 and 10b-21.

[22] Amendments to Regulation SHO, Exchange Act Rel. No.58773 (Oct. 14, 2008), 73 *FR* 61706 (Oct. 17, 2008).

[23] Economic Analysis of the Short Sale Price Restrictions Under the Regulation SHO Pilot, SEC, February 2007 (hereinafter "OEA Study"); Karl B. Diether, Kuan Hui Lee and Ingrid M. Werner, 2009, *It's SHO Time! Short-Sale Price-Tests and Market Quality,* Journal of Finance 64:37-73; Gordon J. Alexander and

extensive analyses on former Rule 10a-1, the "uptick rule", and the Nasdaq bid test,[24] which are comparable to the Proposed Uptick Rule and Modified Uptick Rule. OEA found:

- No indication of an association between manipulative short selling, such as "bear raids" and price test restrictions on short selling.[25]

- Removing the uptick rule did not distort stock prices or lead to lower prices.[26]

- Price restrictions constrain trading volume and constitute an economically relevant constraint on short selling.[27]

OEA found that the empirical data indicated that the price tests may have had a larger negative than positive impact on markets.[28] After thorough consideration of the empirical data, the Commission eliminated all short sale price test restrictions.

More recently, in a December 2008 memorandum from OEA staff to then Chairman Cox, analyzing short sale price tests, OEA found that:

> Counter to the intent of such a rule, we also found that a short sale price test would be most restrictive during periods with little volatility. The rule would be less restrictive on short sale orders during periods of large positive returns and large negative returns....[29]

From OEA's findings, it appears that a price test restriction would limit beneficial, liquidity-adding short selling more than it would restrict short selling from exacerbating an already declining market in a security. The overall empirical data indicates that short sale price

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Mark A. Peterson, 2008, *The Effect of Price Tests on Trader Behavior and Market Quality: An analysis of Reg. SHO,* Journal of Financial Markets 11:84-111; J. Julie Wu, *Uptick Rule, short selling and price efficiency,* August 14, 2006; Lynn Bai, 2008, *The Uptick Rule of Short Sale Regulation—Can it Alleviate Downward Price Pressure from Negative Earnings Shocks?* Rutgers Business Law Journal 5:1-63.

[24] Former NASD Rule 3350, which specified that whenever the bid is a downtick from the previous bid, traders other than market makers may sell short only at prices one penny above the bid. NASD Rule 3350 was subsequently replaced by Nasdaq Rule 3350 for Nasdaq NM stocks traded on Nasdaq.

[25] Economic Analysis of the Short Sale Price Restrictions Under the Regulation SHO Pilot, SEC, February 2007, *at* p. 56 ("OEA Study"); (Proposed Amendments to Eliminate Rule 10a-1, 71 FR *at* 75073 (Dec. 13, 2006).

[26] OEA Study *at* p.47.

[27] OEA Study *at* p. 35 and 56.

[28] *Id. at* p.75075.

[29] OEA Memorandum from Daniel Aromi and Cecilia Caglio through James Overdahl to Chairman Christopher Cox, dated December 17, 2008, on the analysis of a short sale price test using intraday quote and trade data.

test restrictions are likely to limit the benefits of short selling by restricting legitimate short selling, and thus, impairing market liquidity and efficiency.

We believe the elimination of the uptick rule facilitated hedging by institutional investors as a risk management tool and encouraged investors to invest more heavily in the U.S. capital markets by enabling them to better hedge their investments. Similarly, removing or limiting investors' ability to hedge is likely to limit their willingness and ability to invest in these same markets.

Credit Suisse forecasts a drop in overall market volume by 10-50% as a result of re-instituting a short sale price restriction; and attributes "the phenomenal volume growth [since the elimination of the uptick rule to] long/short traders that invested heavily in technology and built successful electronic market-making systems."[30] This reduced liquidity will likely have a direct impact on bid/ask spreads and price discovery which will harm all investors. The U.S. consolidated volume more than doubled in less than two years since the rescission of the uptick rule: in the first half of 2007, total volume averaged 5.5 billion shares per day, and in May of 2009, it averaged about 12.5 billion shares per day.[31]

In addition, reintroducing a price test restriction would be hugely disruptive to markets. Significant changes in market structure have resulted since 2007 from the repeal of short sale price tests, the implementation of Regulation NMS and developments in technology. The number of trading centers in the U.S. has grown from ten in 2007 to over forty trading centers today, including exchanges, alternative trading systems, and electronic communication networks, which, as discussed further in-depth by the broker-dealer community, may make implementation of a tick sequence impractical. Moreover, the sources of liquidity have evolved away from NYSE specialists and Nasdaq market-makers to buy-side firms and other institutional traders. These investors have invested heavily in technology and trading systems, and are responsible for more than 50% of trade volume.[32] These investors include electronic buy-side traders that engage in automated, high-frequency, market-neutral trading strategies that trade on market or pricing inefficiencies. These investors provide as much liquidity as more traditional market-makers and their trades contribute to pricing efficiency, reduce volatility, and help lower costs for other investors through narrower bid-ask spreads.

The Proposed Uptick Rule and the Modified Uptick Rule would constrain or limit the applicability of many trading strategies that are market neutral or rely on hedging, including long short equity strategies, convertible securities investors, and the growing number of traditional asset managers deploying hedged strategies such as the 130/30 portfolios. Limiting the ability of market participants that engage in market neutral or hedged strategies to sell securities short would limit their ability to engage in long trades. In the new electronic market regime, where

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[30] Letter to Elizabeth Murphy, Secretary, SEC, from Dan Mathisson, Managing Director, Credit Suisse Securities USA, LLC, on March 30, 2009 (hereinafter "March Credit Suisse Letter"); *and* letter to Elizabeth Murphy, Secretary, SEC, from Dan Mathisson, Managing Director, Credit Suisse Securities USA, LLC, on June 16, 2009.

[31] March Credit Suisse Letter.

[32] March Credit Suisse Letter *at* p. 5.

liquidity is provided equally by buy-side firms as sell-side firms, we are concerned that the Proposed Uptick Rule and Modified Uptick Rule would have a negative impact on market liquidity, pricing efficiency, volatility and transaction costs. We believe a buy-side electronic trader exception to a price test restriction would be appropriate for the same reasons the Commission proposes a market-maker exception: both contribute to market liquidity and market efficiency.

As seen during the SEC Order Halting Short Selling, prohibiting short selling on approximately one-fifth of all U.S. stocks, discussed further in section III.D, a significant drop in trading volume would negatively impact both retail and institutional investors through higher costs in the form of wider bid-ask spreads, a greater likelihood that large market orders would impact the market, and decreased market quality and efficiency. The dramatic decrease in market liquidity and other negative effects occurred despite the Commission's exception to the SEC Order Halting Short Selling for market-making and a few other activities. We believe such market conditions are unlikely to improve investor confidence in the long run.

Should the Commission choose to adopt a market-wide price test restriction, we believe it would be imperative for the Commission to provide an exception for *bona fide* hedging activities related directly to hedging long economic exposure. Also, to address the realities of today's market structure and the liquidity providing or market-making functions that electronic traders fulfill, we believe the Commission should consider a new exception to a short sale restriction for automated, electronic buy-side trading. As discussed further in section IV.F, we believe it is appropriate and necessary to provide these exceptions in order to maintain efficient, orderly and fair markets; because these exceptions provide the same benefits as the exceptions stated in the Release which the Commission is already contemplating; and because short selling subject to these exceptions are not subject to the same potential for abuse.

With respect to the proposition of the Proposed Uptick Rule versus the Modified Uptick Rule, we believe the Modified Uptick Rule provides a more accurate reflection of the direction of the market and current prices. We concur with the Commission's analysis that a price test based on the last sale price, such as the Proposed Uptick Rule, is likely to be less accurate and more difficult to implement.[33] We recommend that the Commission carefully review and consider the comments from market centers and the broker-dealer community with respect to the expense and time constraints involved with implementation of a price test.

C. Circuit Breaker/Modified Uptick Rule

To the extent that the Commission finds it necessary to act on a short sale restriction proposal, we believe the Circuit Breaker/Modified Uptick Rule would provide a more targeted approach in addressing concerns regarding the possibility that short selling could unduly exacerbate a declining market in a security. Such approach would allow investors and markets to enjoy the benefits of short selling during "normal" market conditions, and only go into effect during extreme market conditions. Studies show that short sale restrictions, such as the uptick rule and Nasdaq bid test, and more recently, the SEC's 2008 emergency orders restricting short selling, are more harmful than beneficial to investors and markets in terms of liquidity, pricing

[33] Release *at* p. 18043.

efficiency, transaction costs, market quality and market efficiency.[34] These impediments ultimately translate into greater costs for investors. Thus, we believe the Circuit Breaker/Modified Uptick Rule should only be triggered under extraordinary market conditions and should allow for appropriate exemptions to minimize market disruptions and harm to investors. For the same reasons articulated above, we believe that a circuit breaker that triggers the Modified Uptick Rule is preferable to the Proposed Uptick Rule.

1. Extraordinary Market Conditions

The Commission proposes that a Circuit Breaker/Modified Uptick Rule be triggered by a 10% decline in a security's price as measured from the prior day's closing price, as reported in the consolidated system.[35] We believe a 10% threshold is too low and would likely capture security price declines in response to legitimate business developments, such as lower than expected earnings announcements. Again, we believe a short sale price restriction should only be triggered under extraordinary market conditions to minimize potential negative impacts and disruptions to investors and markets. We believe a 20% circuit breaker threshold would be more appropriate. From the OEA Study, we can conjecture that the Modified Uptick Rule is likely to act as an economic constraint on short selling and negatively impact liquidity. Thus, we believe that the cost from imposing a Modified Uptick Rule must be carefully balanced with the need for a circuit breaker. We believe a circuit breaker trigger that is too low would have a greater negative impact on investors, including pension funds and mutual funds, through decreased liquidity and greater bid-ask spreads—which would mean greater market impact on their orders, and higher administrative costs.

In determining "extraordinary" market conditions, we compared several circuit breaker thresholds for securities in the Russell 3000 over the past ten years from October 1, 1998 through September 30, 2008 ("full sample period").[36] From our study, we found that for the full sample period:

[34] *See* discussion pertaining to n.16 and n. 28.

[35] Release *at* p. 18069.

[36] Source: proprietary research, Renaissance Technologies LLC.

Threshold: Percentage Price Decline Over No. Of Days						Event Triggering Circuit Breaker/Modified Uptick Rule (CBMU)
10%/1 Day	**15%/1 day**	**20%/1 day**	**20%/2 days**	**20%/3 days**	**30%/5 days**	
154	55	25	49	72	34	Avg. # of stocks under CBMU at any one time over 10 years.
5%	2%	1%	2%	3%	1%	Avg. % of stocks under CBMU at any one time over 10 years.
13%	5%	3%	5%	8%	4%	Avg. % of internet stocks under CBMU at any one time over 10 years.
85%	60%	35%	70%	83%	70%	% Internet stocks under CBMU in April 2000 (after collapse of tech bubble).
80%	55%	28%	60%	70%	60%	% Internet stocks under CBMU in January 2001.
8%	3%	1%	3%	4%	2%	Avg. # of airline stocks under CBMU at any one time over 10 years.
100%	100%	100%	100%	100%	94%	% Airline stocks under CBMU after September 11, 2001.
30%	17%	10%	28%	30%	28%	% Airline stocks under CBMU in the end of June 2008.
3%	1%	0%	1%	2%	1%	% Asset Mgmt stocks under CBMU at any one time over 10 years.
4%	2%	1%	2%	2%	1%	% Fin. Svcs stocks under CBMU at any one time over 10 years.
62%	22%	9%	16%	26%	15%	% Asset Mgmt stocks under CBMU at the end of September 2008.
44%	20%	7%	12%	16%	10%	% Fin. Svcs stocks under CBMU at the end of September 2008.
1091	361	137	319	589	260	# of Russell 3000 stocks under CBMU on October 7, 2008.

* Internet, Airline, Securities Asset Management and Financial Services companies, all as classified by Barra.

Our concern with a circuit breaker threshold that is too low is that such a rule would frequently interfere with legitimate market operations. Based on the data provided above, we believe that a 10% threshold captured too many stocks, many of which were trading down appropriately based on important corporate announcements or investor concerns relating to economic stress for a company or sector. For instance, under a 10% threshold in our study, we found that, on average, 154 securities would have been operating under the Circuit Breaker/Modified Uptick Rule at any one time during the full sample period, in contrast to 25 securities under a 20% price decline over one day threshold. We believe with more securities operating under a Circuit Breaker/Modified Uptick Rule at any one time, the more likely such rule would negatively impact the rest of the market in terms of market liquidity and pricing efficiency.

If the Commission were to adopt a 10% price decline threshold, we believe additional exceptions to the Circuit Breaker/Modified Uptick Rule would be needed to prevent unnecessary, negative unintended consequences. At a lower threshold level, the Circuit Breaker/Modified Uptick Rule becomes a greater constraint during "normal" trading periods and would further limit the benefits from legitimate short selling. Please see our discussion in section IV.4. below on exceptions to short sale restrictions.

D. Concerns with the Circuit Breaker Halt Rule

We have strong concerns with a Circuit Breaker Halt Rule—a circuit breaker that triggers a ban on short selling. As supported by multiple subsequent studies on the SEC Order Halting Short Selling, we believe a short selling ban would likely exacerbate market conditions at a time when the market is already down.

Up until the SEC Order Halting Short Selling, the restricted financial securities were actually performing better than the market.[37] Subsequent studies show that the SEC Order Halting Short Selling severely degraded the market quality of the subject securities as it:

- Significantly decreased trading volume and market liquidity;
- Increased bid-ask spreads from a "normal" average of 17 basis points in 2008 to 60 basis points by October 8, 2008;
- Increased volatility;
- Decreased market efficiency.[38]

The SEC Order Halting Short Selling may also have had the unintended consequence of causing substantial price inflation in securities subject to the SEC Order Halting Short Selling by creating a bias toward long sellers.[39] One study analyzes that buyers overpaid for securities subject to the SEC Order Halting Short Selling, and that the order led to an estimated $4.9 billion wealth transfer from buyers to sellers.[40] We believe such a result is inconsistent with the notion of "fair markets".

In addition, the SEC Order Halting Short Selling froze the ability of financial companies, and eventually all companies, to raise vital capital through convertible bond and convertible preferred security ("Convertibles") issuances.[41] Most investors in securities that convert into

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[37] Examining the Wake of the Short Sale Restriction, AES Analysis, Credit Suisse, Oct. 13, 2008.

[38] *Id.*; Shorting Financial Stocks Should Resume; Shackling Short Sellers: The 2008 Shorting Ban, Boehmer, Jones and Zhang, November 18, 2008; The Undesirable Effects of Banning Short Sales, Abraham Lioui, EDHEC Business School, Risk and Asset Management Research Centre, April 2009; The Blame Game: What Caused Spreads to Widen, AES Analysis, Credit Suisse, Nov. 12, 2008; *and* The Effect of Short-selling Restrictions on Liquidity: Evidence from the London Stock Exchange, Matthew Clifton and Mark Snape, Capital Markets Cooperative Research Centre, Dec. 12, 2008.

[39] Price Inflation and Wealth Transfer during the 2008 SEC Short-Sale Ban, Lawrence E. Harris, Ethan Namvar and Blake Phillips, April 30, 2009, *available at:* http://www.nber.org/confer/2009/mms09/namvar.pdf.

[40] *Id.*

equity seek to hedge their market risk by shorting the related equity. As the price of both securities fluctuates, there is a need to adjust the hedge regularly, a practice known as dynamic hedging or delta hedging. Without a *bona fide* hedge exemption to the SEC Order Halting Short Selling, investors in outstanding convertibles were unable to properly hedge, suffered losses, and were unable to continue to purchase Convertibles and provide financing to these companies without the ability to hedge these investments. The SEC Order Halting Short Selling also destabilized the option value of all Convertibles due to the uncertainty of regulatory activity by causing a significant decline in the option value of Convertibles issued by financial services companies—in some cases by one-third or more since the order became effective.

We believe a ban on short sales, even temporary, would negatively impact liquidity and efficiency and be disruptive to markets. Short sale bans undermine the *bona fide* hedging strategies that are a critical risk management tool of investors and enable them to make investments in the long side of the market. As discussed, the majority of short sales are paired with a similar long trade as part of a market neutral or hedging strategy. It is estimated that only 0.7% of all hedge fund strategies are dedicated solely to short selling.[42] The remaining 99.3% of strategies involve shorting as part of a hedging strategy. Thus, a ban on shorting would impair capital formation and reduce purchasing overall, thereby lowering volume and liquidity with the already mentioned negative consequences. We believe such a proposal would also undermine confidence in our markets, particularly from the broad base of global institutional investors and traders who are large scale, daily participants in the markets.

If the Commission determines that the Circuit Breaker Halt Rule is appropriate, we believe exceptions to the rule would be critical in order to maintain normal market functions that would be necessary to help provide liquidity to the market. These exceptions are further discussed in section IV.F below.

E. Concerns with Pre-borrow Proposals

Recently, some market participants have raised the proposal of a circuit breaker triggering a pre-borrow requirement ("Circuit Breaker/Pre-borrow).[43] We are concerned that a pre-borrow requirement, even as part of a Circuit Breaker/Pre-borrow solution, imposes significant unjustified market costs to investors. Recent experience from the SEC Pre-borrow Order, requiring an investor engaging in a short sale of G19 securities to borrow, arrange to borrow, or have the security available to borrow in its inventory prior to effecting a short sale, shows that a pre-borrow requirement deteriorates market quality and market efficiency.[44]

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[41] SHORT SALE BAN WALLOPS CONVERTIBLE-BOND MARKET, WSJ, September 26, 2008. Prior to the SEC Order Halting Short Selling the estimated issuance of Convertibles for 2008 was about $60 billion, of which $39 billion was issued by financial companies.

[42] Ticking off the Shorts, AES Analysis, Credit Suisse, Apr. 23, 2009.

[43] *See* letter to Mary L. Schapiro, Chairman, SEC, from Peter J. Driscoll, Chairman, and John C. Giesea, President & CEO, Security Traders Association, on May 4, 2009.

[44] July 15th EO Study.

The effect of the SEC Pre-borrow Order provides a good example of the costs associated with a pre-borrow measure taken purely to address investor confidence concerns. SEC staff stated that they did not see evidence of naked short selling or increased failures to deliver in G19 securities prior to the issuance of the SEC Pre-borrow Order, but that the order was implemented as a measure to restore investor confidence.[45] The premise behind a pre-borrow requirement is to prevent a broker-dealer from providing locates for more shares than they have available, which could cause settlement failures. SEC staff and broker-dealer industry officials, however, believe it is unlikely that broker-dealers provide locates for more shares than they have available, because only a small percentage of locate requests result in short sales.[46] Indeed, a pre-borrow requirement is unnecessary and harmful as it seeks to address a problem that doesn't exist.

As a result, the SEC Pre-borrow Order caused massive over-borrowing, increased bid-ask spreads, deteriorated market quality and market efficiency in these securities as compared to comparable financial securities.[47] Take for example, the pre-borrowing activity in the securities below for July 14, 2008, the day before the announcement of the SEC Pre-borrow Order, and July 21, 2008, the day the order went into effect. The quantity of shares on loan at a broker-dealer and the quantity of available securities on loan in securities lending programs for the G19 securities are provided in Appendix A.

Security	*Quantity of Shares on Loan on 7/14/08	**Total Volume of Shares Traded on 7/14/08	*Quantity of Shares on Loan on 7/21/08	**Total Volume of Shares Traded on 7/21/08
Bank of America	77,231,128	102,861,100	168,766,368	163,781,600
Citigroup	54,063,452	118,738,800	159,744,352	117,006,900
Goldman Sachs	10,869,703	15,944,800	38,464,328	8,841,300
J.P. Morgan	48,514,668	50,370,200	105,028,392	41,354,400
Morgan Stanley	30,584,950	23,739,900	82,864,016	22,337,200

*Source for quantity of shares on loan: Data Explorers.
**Source for total volume of shares: Yahoo! Finance.

We believe the uniform procedures for all short sellers to locate securities for borrowing, mandated by Reg SHO, and Rule 204T have been successful in substantially reducing fails to deliver without disruption to the markets. As the Commission recognizes, 99.99% of the dollar value of trades clear and settle on time.[48] In complying with Reg SHO, market participants made significant investments in technology to build their operating systems. Sell-side firms invested in technology to automate the process of inventorying, compiling and sending lists of securities available to borrow throughout the day and sending automated confirmations to the borrowing market participant and clearing broker once it located a security. Buy-side firms invested in technology to receive automated lists from the sell-side, to systematically compare the list of

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[45] GAO Report.

[46] GAO Report *at* p. 8.

[47] July 15th EO Study.

[48] Regulation SHO Proposed Amendments, Exchange Act Release No. 56213 (Aug. 7, 2007), 72 *FR* 55126 (Sept. 28, 2007); Regulation SHO Final Amendments, Exchange Act Release No. 58775 (Oct. 14, 2008), 73 *FR* 61690 (Oct. 17, 2008); GAO Report.

securities available to borrow with the firm's short interest list, to identify hard-to-borrow securities and to automate their process to locate securities to borrow.[49]

For an easy-to-borrow security, many buy-side firms employ an automated system that works overnight with similar systems at the major custodial banks to electronically locate shares that institutional investors such as pension plans and insurance companies hold. The so-called "locate numbers" are then attached to any actual short sales that are carried out in the subsequent day's trading. For a hard-to-borrow security, the buy-side firm must manually locate the security, by calling their broker and securing a locate number, before placing the trade order to comply with the regulations and thereby minimize the likelihood of a failure to deliver the security. Many prime brokers build in the added step of performing daily reconciliations to identify short sales that they process and confirm whether a locate was performed in advance of the trade. Such practices instill discipline into the trading process and are responsible for the extremely low level of delivery failures, less than 1/100th of a percent.

Each day, buy-side firms estimate the number of shares for a security they are likely to sell short, then locate the maximum number of shares they could possibly sell short for that day to ensure that the shares are available should they need them. Consistent with SEC staff and broker-dealer industry observations, only a small share, typically less than 10%, of locate requests result in short sales. As seen from the SEC Pre-borrow Order, a pre-borrow requirement causes massive over-borrowing of security shares—oftentimes more than the total volume traded in the security. A pre-borrow requirement causes over-borrowing for a variety of legitimate reasons, namely that investors generally do not know at the time that they must pre-borrow, the number of shares they will ultimately borrow by the end of the day. Pre-borrowing creates inefficiencies in the lending system and imposes burdensome, economic costs to market participants, including to institutional investors who lend securities. These costs include pre-borrow financing costs, operational and settlement costs, as well as administration and record keeping costs related to corporate actions since so few of the potential sales are actually completed.

Generally, in the settlement of a short sale, a broker-dealer transfers securities borrowed from a custodian to the purchasing party for clearance and settlement on settlement date (T+3). Under a pre-borrow requirement, a broker-dealer must transfer borrowed securities from a custodian to the broker-dealer account by the day the securities are pre-borrowed (T). On settlement date, the broker-dealer settles and clears the fraction of securities sold short by transferring the borrowed securities from its account to the purchasing party. The broker-dealer may then return the outstanding shares of securities borrowed to the original custodial owner or continue borrowing them, as necessary.

In order to borrow securities for its securities lending program, a broker-dealer must deposit collateral with a custodian; and as soon as a broker-dealer borrows securities from a custodian, it begins to incur borrowing costs. As such, a pre-borrow requirement would tie up broker capital unnecessarily and increase costs at a time when regulators are demanding financial firms boost their unencumbered capital to reduce systemic risk. Along with the transfer of

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[49] Many buy-side firms have made considerable investments in their systems to automate the locate process. By automating the locate process, firms are effectively able to contact various lenders to confirm the availability of securities to settle trades. This has enhanced competition and lowered the cost of borrowing.

securities to a broker-dealer's account is the transfer of title, or ownership. Such ownership may provide the broker-dealer with voting rights, the legal right to dividends, and other shareholder benefits, but also introduces a new set of administration costs. Also, a pre-borrow requirement would likely increase costs for customers as broker-dealers cover their costs for the additional operational, settlement, administration and record keeping costs. Specifically, if a broker-dealer has to borrow higher quantities of securities, tie-up greater levels of capital in doing so, and incur more borrowing costs, it will pass these costs down to customers.

Even a partial pre-borrow requirement would create additional costs for broker-dealers and their customers by requiring broker-dealers to tie-up unnecessary capital and incur greater borrowing costs in operating a securities lending program. We agree with statements by SEC staff that the costs of a pre-borrow requirement might outweigh the benefits because failures to deliver represent 0.01% of the dollar value of trades.[50] We are strongly concerned that a pre-borrow requirement would introduce unnecessary inefficiencies and costs into the lending process and would reduce the supply of available securities for borrow, increase overall costs associated with short selling, which could impede securities lending and legitimate short selling. We respectfully urge the Commission to not adopt any form of a pre-borrow requirement.

F. Exceptions to a Short Sale Restriction

Under each of the short sale restriction proposals, we believe exceptions are appropriate and necessary in order to maintain fair, orderly and efficient markets. We support the exceptions proposed in the Release, such as for short sales that arise from market-making activity, options and futures contract expiration, and assignment to call writers upon expiration of an option, among others. As discussed earlier, the implementation of Regulation NMS and advances in technology have reshaped market structure and led to new sources of market liquidity. The exceptions under the SEC Pre-borrow Order and the SEC Order Halting Short Selling did not account for these changes, which we believe partly contributed to the significant negative impact these orders had on market quality, market liquidity, pricing efficiency, and bid-ask spreads.

Automated Electronic Buy-Side Trading

The Commission provided *bona fide* market-making exceptions under the SEC Pre-borrow Order and the SEC Order Halting Short Selling to "permit market makers to continue to provide liquidity to the markets."[51] The Commission, however, did not provide an exception for electronic buy-side traders, who are responsible for more than 50% of trade volume. As evidenced, we believe the restriction on trading by electronic buy-side market participants had a severe impact on market liquidity and other associated benefits, and that the *bona fide* market-making and other exceptions provided by the Commission were not able to provide sufficient liquidity, so as to not harm markets. Automated, electronic buy-side trading promotes market efficiency and minimal risk for abuse. Accordingly, we recommend the Commission provide an exception to any short sale restriction for automated, electronic buy-side trading.

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[50] GAO Report.

[51] *See* Amendment to SEC Pre-borrow Order; *and* Amendment to SEC Order Halting Short Selling.

Bona Fide Hedging Transactions

The Commission proposes to provide domestic and international arbitrage exceptions under various proposals because these activities promote market efficiency. By the same rationale, we believe the Commission should broaden the exception for domestic arbitrage transactions to include *bona fide* hedging transactions, such as risk arbitrage (also known as "merger arbitrage" or "event-driven investing") and statistical arbitrage transactions.

Bona fide hedging strategies are a critical risk management tool for investors and enable investors to make investments on the long side of the market. These strategies are based on hedging long economic exposure through off-setting short positions and contribute to both market liquidity and efficiency. Limiting investors' ability to engage in *bona fide* hedging transactions would likely decrease trading volume and market liquidity, increase bid-ask spreads, increase volatility and decrease market efficiency.[52] Further, short positions relating to *bona fide* hedging activities are not subject to the same potential for abuse, as these strategies are focused on eliminating pricing inefficiencies in the market.

We respectfully request the Commission to include a provision that excepts a short sale in a security effected as part of a *bona fide* hedging strategy related directly to hedging long economic exposure arising from (i) options, warrants, convertible securities, index products or other derivatives held by such person or (ii) equity securities issued by a counterparty to an announced but not yet consummated or cancelled corporate transaction (e.g., merger, acquisition, exchange offer, spin-off, split-off, recapitalization or other corporate reorganization), or options, warrants, convertible securities, or derivatives relating to such equity securities, which equity securities, options, warrants, convertible securities or derivatives are held or are being simultaneously purchased by such person.

ETFs and Index Products

ETFs and index products should be excepted from a short sale restriction, as these products are not susceptible to manipulation by short selling, and widely used as risk management tools. These products are based on a portfolio of stocks that seek to provide investment results that correspond generally to the price and yield performance of a specified foreign or domestic stock index. Shares of ETFs and index products rise and fall based on changes in the net asset value of the component stocks of the particular index and supply and demand. For the same reasons the Commission granted an exception for ETFs and index products from the former uptick rule, we believe the Commission should grant an exception for these products from any contemplated rule.[53]

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[52] *See infra* n. 31.

[53] *See* letter from Racquel L. Russell, Esq., Branch Chief, Office of Trading Practices and Processing, Division of Market Regulation to George T. Simon, Esq., Foley & Lardner LLP (June 21, 2006); letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Claire P. McGrath, Vice President and Special Counsel, AMEX (August 17, 2001).

V. CONCLUSION

MFA recognizes the growing pressure the Commission faces in addressing short selling through some form of short sale restriction to bolster investor confidence. We believe the economic analyses and empirical data surrounding short selling do not support the need for a short sale restriction, and that a short sale restriction could be more harmful than beneficial to investors and markets. We encourage the Commission instead to improve investor confidence by enhancing compliance with the Reg SHO locate requirement; and providing the public with more frequent aggregated short sale information, as well as aggregate reports on purchases, and long sales for individual securities.

To the extent the Commission feels compelled to adopt a short sale restriction, we recommend the Commission adopt a Circuit Breaker/Modified Uptick Rule. We also recommend that the Commission include exceptions to a short sale restriction for automated, electronic buy-side trading, *bona fide* hedging activity and trading in ETF and index products.

We would be pleased to meet with the Commission or its staff to further discuss our comments. If the staff has questions or comments, please do not hesitate to call Jennifer Han or the undersigned at (202) 367-1140.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President, Managing Director &
General Counsel

CC: The Hon. Mary Schapiro, Chairman
The Hon. Kathleen L. Casey, Commissioner
The Hon. Elisse B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy A. Paredes, Commissioner
James Brigagliano, Acting Co-Director
Division of Trading and Markets
Daniel Gallagher, Acting Co-Director
Division of Trading and Markets
James Overdahl, Chief Economist
Office of Economic Analysis

dataexplorers

ticker		Instrument name	Lendable Quantity[1] 8/15/2008	8/14/2008	8/13/2008	8/12/2008	8/11/2008	8/8/2008	8/7/2008	8/6/2008	8/5/2008	8/4/2008	8/1/2008	7/31/2008
BNPQy	TICKER	Bnp Paribas Adr	158,306	201,406	151,349	201,349	181,406	201,349	201,406	201,406	201,406	201,349	201,349	201,349
BAC	TICKER	Bank Of America Corp	1,079,510,400	1,072,922,304	1,071,980,544	1,071,272,256	1,068,312,832	1,065,080,640	1,065,080,832	1,066,783,040	1,067,003,776	1,067,584,320	1,069,142,464	1,071,587,840
BCS	TICKER	Barclays Adr	7,657,730	7,785,422	7,737,252	7,866,200	7,872,314	7,844,011	7,835,082	7,825,552	7,841,884	7,508,074	7,824,576	7,514,627
C	TICKER	Citigroup Inc	1,284,955,264	1,286,350,464	1,285,968,896	1,287,261,056	1,281,078,656	1,279,397,760	1,280,179,456	1,280,213,760	1,276,945,152	1,269,458,560	1,260,759,040	1,266,866,432
US2254011081	ISIN	Credit Suisse Grp Adr Reptg One Ord	6,252,014	6,227,111	5,995,658	6,334,840	6,321,944	6,326,260	6,377,902	6,397,438	6,387,979	6,303,462	6,402,240	6,349,920
DSECY	TICKER	Daiwa Sec Group Adr	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339
2803025	SEDOL	Deutsche Bank Ag	1,248,058	1,247,991	1,238,391	1,239,312	1,238,386	1,222,386	1,238,077	1,237,845	1,237,940	1,237,874	1,237,727	1,237,806
AZ	TICKER	Allianz Akting Adr Rep One Tenth Ord	1,559,691	1,559,691	1,530,291	1,542,391	1,456,991	1,542,391	1,542,391	1,540,379	1,325,779	1,540,379	1,276,779	1,546,879
GS	TICKER	Goldman Sachs Group Inc	112,770,560	111,449,408	111,673,160	111,285,848	111,204,272	110,035,144	110,988,656	110,909,472	110,737,448	110,789,960	109,560,064	108,796,544
US7800976893	ISIN	Royal Bank Scotland Adr Rep 1 Ord	4,983,011	4,953,550	4,760,350	5,439,761	6,053,463	6,051,480	5,922,322	6,039,808	7,089,547	7,087,217	7,085,219	7,083,092
HBC	TICKER	Hsbc Holdings Adr	8,453,252	8,076,932	8,232,581	8,085,937	8,456,130	8,431,271	8,409,265	9,084,119	9,296,918	8,929,270	9,130,955	10,047,790
JPM	TICKER	Jpmorgan Chase & Co	917,129,792	915,365,568	916,476,864	912,963,776	910,820,736	910,573,376	910,809,728	909,341,824	910,907,008	911,318,144	904,936,320	906,541,888
LEH	TICKER	Lehman Brothers Holdings Inc	188,121,872	184,631,584	186,394,576	187,516,160	187,506,704	187,234,848	185,416,256	187,693,328	186,599,184	184,898,864	185,379,392	179,116,016
590188108	CUSIP	Merrill Lynch & Co Inc	271,651,200	267,885,280	266,362,624	265,180,928	263,562,240	260,876,160	268,176,992	265,181,872	263,583,360	260,722,448	243,621,200	223,749,312
MFG	TICKER	Mizuho Financial Group Adr Rep 2 Ord	3,996,585	3,494,706	3,494,706	3,759,048	3,759,048	3,759,048	3,759,048	3,736,370	3,736,370	3,336,170	3,040,183	2,902,753
MS	TICKER	Morgan Stanley	295,825,728	296,528,960	296,254,176	296,030,016	297,369,760	292,571,392	292,544,352	294,526,816	293,639,104	291,644,128	289,379,072	290,591,872
UBS	TICKER	Ubs Ag	12,701,368	12,012,361	12,083,033	11,963,290	11,922,218	11,922,218	11,800,549	12,008,283	12,130,553	12,167,601	12,167,210	12,118,780
FRE	TICKER	Freddie Mac	222,085,968	222,304,496	222,578,512	224,079,456	226,294,800	223,311,472	228,987,616	229,885,824	234,611,504	237,454,208	235,695,696	236,054,272
FNM	TICKER	Federal National Mortgage Association (Fannie Mae)	307,369,088	306,654,656	307,326,464	309,134,720	307,736,544	305,035,648	305,754,336	305,142,912	304,363,328	305,323,328	300,225,728	297,653,312

ticker		Instrument name	Quantity On Loan[2] 8/15/2008	8/14/2008	8/13/2008	8/12/2008	8/11/2008	8/8/2008	8/7/2008	8/6/2008	8/5/2008	8/4/2008	8/1/2008	7/31/2008
BNPQy	TICKER	Bnp Paribas Adr	195,200	438,800	455,800	829,100	944,200	1,004,200	1,003,700	1,003,700	981,600	981,600	1,041,000	1,061,500
BAC	TICKER	Bank Of America Corp	89,467,936	96,024,560	98,103,328	116,529,600	114,706,896	110,416,592	115,697,024	116,190,736	112,579,648	114,524,104	120,844,736	119,429,848
BCS	TICKER	Barclays Adr	9,181,781	9,053,923	9,092,619	9,581,576	9,728,800	9,311,100	9,250,120	9,171,920	9,180,487	9,078,787	9,298,950	9,353,209
C	TICKER	Citigroup Inc	155,842,912	160,445,136	158,687,264	171,150,416	162,663,520	176,615,120	175,642,208	166,128,480	184,399,840	186,638,576	181,959,408	173,493,536
US2254011081	ISIN	Credit Suisse Grp Adr Reptg One Ord	1,519,199	2,304,799	2,958,899	4,705,018	4,662,438	5,069,438	5,122,938	5,098,108	5,111,577	5,534,478	6,162,498	6,577,128
DSECY	TICKER	Daiwa Sec Group Adr	700	9,600	15,600	25,700	25,700	25,600	25,600	41,800	50,500	55,500	56,800	56,600
2803025	SEDOL	Deutsche Bank Ag	1,775,232	1,922,232	1,890,332	2,655,432	2,671,205	2,611,205	2,663,232	2,660,432	2,703,132	3,246,351	3,244,405	3,406,805
AZ	TICKER	Allianz Akting Adr Rep One Tenth Ord	661,634	680,634	882,134	1,749,700	1,801,800	1,985,400	2,043,400	1,963,400	2,058,700	2,265,300	2,033,500	2,446,900
GS	TICKER	Goldman Sachs Group Inc	15,660,143	16,515,176	17,681,592	22,688,250	22,649,402	23,544,902	21,737,308	21,517,120	22,935,216	23,149,244	23,380,668	24,135,680
US7800976893	ISIN	Royal Bank Scotland Adr Rep 1 Ord	4,213,791	5,170,783	5,446,591	7,493,774	7,556,774	7,337,986	7,046,200	7,358,100	7,671,682	7,871,809	7,862,809	7,880,709
HBC	TICKER	Hsbc Holdings Adr	8,418,739	9,694,588	11,376,792	12,534,650	12,833,179	13,004,379	13,388,315	13,271,278	13,444,025	12,713,424	12,807,258	13,237,523
JPM	TICKER	Jpmorgan Chase & Co	26,867,450	29,295,980	32,903,768	39,303,516	35,951,132	33,983,816	33,427,464	31,207,414	31,855,848	32,675,776	39,380,352	42,356,880
LEH	TICKER	Lehman Brothers Holdings Inc	79,923,248	85,597,112	84,434,840	100,931,600	106,577,864	106,779,536	108,193,168	109,376,768	104,432,296	103,971,680	106,150,312	107,038,248
590188108	CUSIP	Merrill Lynch & Co Inc	40,361,432	46,567,844	48,652,112	71,560,608	74,313,584	74,462,264	81,273,856	84,850,456	88,972,800	100,099,296	110,252,416	125,077,840
MFG	TICKER	Mizuho Financial Group Adr Rep 2 Ord	7,858,270	8,592,150	8,892,350	9,026,250	8,963,350	8,994,650	8,805,900	8,455,900	8,293,800	8,379,000	8,163,600	7,668,750
MS	TICKER	Morgan Stanley	34,258,976	37,471,180	39,227,972	42,699,688	40,511,016	40,879,388	39,994,136	38,808,432	38,615,992	37,083,412	36,024,104	36,102,492
UBS	TICKER	Ubs Ag	3,249,671	6,261,731	5,795,814	7,399,531	9,360,956	9,430,556	9,603,326	9,687,326	9,856,458	10,224,449	10,111,190	10,160,151
FRE	TICKER	Freddie Mac	128,337,712	128,207,528	143,065,200	165,854,752	171,426,656	176,727,744	171,463,488	172,620,512	167,077,808	179,835,440	180,956,128	184,140,736
FNM	TICKER	Federal National Mortgage Association (Fannie Mae)	153,400,656	159,849,200	160,199,712	181,564,144	185,268,800	186,977,872	189,369,344	185,137,088	180,545,552	178,481,072	184,874,992	185,038,240

About Data Explorers: Data Explorers has a unique insight into the world of short selling drawing upon a database that encapsulates over 75% of U.S. stock lending and borrowing transactions. Securities lending is recognized to be the best proxy for short selling. In U.S. public companies, there is a 75% correlation between the data captured by Data Explorers on a daily basis with what is published semi-monthly by the U.S. stock exchanges as short interest.

Data Explorers has a "give to get" business model such that any prime broker or Custody bank wishing to see their trade flow has to input their own transactions. This way, DXL receive daily files from over 70 Agent Lenders and over 30 prime brokers.

On a daily basis, this currently translates as $9 trillion of shortable supply and $3 trillion of demand to cover shorts and other hedging transactions.

[1]Lendable Quantity: The total amount of shares available in the securities lending programs reported to Data Explorers.

[2]Quantity On Loan: The amount of shares in the securities lending programs reported to Data Explorers that are on loan.

MANAGED FUNDS ASSOCIATION
APPENDIX A

dataexplorers

Lendable Quantity[1]

Instrument name	7/30/2008	7/29/2008	7/28/2008	7/25/2008	7/24/2008	7/23/2008	7/22/2008	7/21/2008	7/18/2008	7/17/2008	7/16/2008	7/15/2008	7/14/2008
Bnp Paribas Adr	198,506	178,506	198,449	198,506	198,449	198,506	198,506	198,449	204,791	204,791	204,791	204,791	204,791
Bank Of America Corp	1,072,472,768	1,071,958,272	1,066,108,096	1,067,313,792	1,061,495,872	1,060,922,304	1,056,730,304	1,081,937,152	1,079,518,208	1,082,902,784	1,087,744,128	1,082,892,416	1,081,298,816
Barclays Adr	7,519,702	7,661,549	7,621,877	7,603,558	7,514,225	7,371,744	7,372,206	7,693,911	7,683,365	7,687,383	7,804,670	7,873,497	8,004,524
Citigroup Inc	1,271,128,064	1,278,653,824	1,278,878,592	1,274,384,128	1,283,948,544	1,283,534,976	1,254,319,616	1,255,725,568	1,258,428,672	1,262,579,456	1,268,820,608	1,265,701,760	1,264,877,184
Credit Suisse Grp Adr Reptg One Ord	6,301,022	6,393,293	6,472,776	6,219,493	6,473,900	6,349,161	6,383,202	6,606,854	6,407,271	5,053,993	4,884,719	4,911,662	4,895,660
Daiwa Sec Group Adr	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339
Deutsche Bank Ag	1,263,361	1,256,308	1,261,070	1,261,217	1,261,217	1,261,217	1,261,204	1,261,204	1,254,972	1,260,215	1,260,086	1,270,686	1,198,886
Allianz Akting Adr Rep One Tenth Ord	1,546,879	1,503,727	1,447,027	1,264,827	1,547,027	1,434,961	1,433,461	1,433,461	1,554,410	1,554,410	1,495,710	1,554,410	1,554,410
Goldman Sachs Group Inc	108,946,272	109,316,936	109,427,808	109,184,912	109,594,232	110,108,248	110,028,784	109,618,480	110,461,464	110,283,224	109,440,472	108,996,720	109,685,672
Royal Bank Scotland Adr Rep 1 Ord	6,984,151	7,064,598	7,075,754	7,059,897	7,090,282	7,090,282	7,133,014	7,106,812	5,883,975	5,901,559	6,266,041	6,259,041	6,288,495
Hsbc Holdings Adr	10,039,585	10,031,439	9,992,093	9,909,893	10,005,242	10,179,444	10,068,786	10,072,731	10,107,817	10,909,198	10,398,682	9,971,088	9,983,070
Jpmorgan Chase & Co	907,800,064	910,240,064	909,285,440	907,650,112	911,059,904	911,534,976	911,590,272	923,783,424	918,361,792	921,121,664	928,710,784	926,224,000	925,456,832
Lehman Brothers Holdings Inc	179,921,184	178,555,024	180,621,872	178,730,048	181,579,216	180,832,160	181,647,744	181,796,704	182,276,496	178,014,944	179,570,384	177,597,792	181,428,864
Merrill Lynch & Co Inc	225,672,416	223,942,432	220,559,616	219,554,176	226,115,840	246,750,880	225,350,864	249,392,976	231,747,968	233,246,016	232,225,936	232,009,872	232,179,920
Mizuho Financial Group Adr Rep 2 Ord	3,327,283	3,331,197	3,301,427	3,009,367	3,291,744	3,291,797	3,291,797	3,299,297	3,308,322	3,239,322	3,306,614	3,322,232	3,273,519
Morgan Stanley	291,883,552	294,640,576	295,820,128	295,366,976	294,658,304	299,379,072	296,132,128	305,639,968	295,180,352	298,274,208	300,158,944	298,343,552	297,998,336
Ubs Ag	12,133,131	12,170,066	12,143,625	12,156,828	12,250,917	12,261,829	12,261,829	12,376,129	14,418,767	14,590,804	14,615,505	14,650,393	14,677,370
Freddie Mac	237,993,136	236,665,760	234,493,680	234,581,376	234,416,384	237,686,208	236,568,464	246,393,104	249,376,256	248,439,456	239,601,456	246,138,480	237,339,536
Federal National Mortgage Association (Fannie Mae)	297,925,504	297,748,128	301,413,216	300,773,952	304,487,136	304,619,744	306,601,024	303,091,520	304,496,320	306,745,344	306,280,288	301,789,696	310,347,296

Quantity On Loan[2]

Instrument name	7/30/2008	7/29/2008	7/28/2008	7/25/2008	7/24/2008	7/23/2008	7/22/2008	7/21/2008	7/18/2008	7/17/2008	7/16/2008	7/15/2008	7/14/2008
Bnp Paribas Adr	911,800	911,700	961,500	926,500	265,278	264,978	279,178	187,278	156,200	69,600	19,400	19,400	19,400
Bank Of America Corp	125,734,512	124,367,344	128,163,216	136,931,872	137,784,704	151,368,496	151,879,616	168,766,368	164,671,280	133,321,496	109,309,832	73,753,840	77,231,128
Barclays Adr	9,595,509	9,400,815	9,842,334	10,029,534	10,024,546	10,210,638	10,351,800	10,122,800	9,052,734	8,102,134	8,413,400	8,862,721	8,774,508
Citigroup Inc	128,964,192	123,923,096	103,841,504	110,929,456	117,676,736	132,032,864	140,411,760	159,744,352	170,897,600	115,694,968	99,219,352	60,111,916	54,063,452
Credit Suisse Grp Adr Reptg One Ord	6,352,878	6,858,578	7,265,648	7,647,348	7,889,048	7,858,848	6,332,448	6,057,184	3,330,248	2,542,348	2,168,978	1,724,124	1,912,264
Daiwa Sec Group Adr	56,600	56,600	64,100	63,200	63,200	57,900	83,200	43,200	43,100	24,100	23,700	23,700	26,700
Deutsche Bank Ag	3,933,505	4,165,005	4,060,832	2,985,332	2,774,332	2,381,332	2,391,732	1,754,292	1,498,032	1,482,932	1,098,932	1,026,432	1,097,900
Allianz Akting Adr Rep One Tenth Ord	2,711,300	2,558,450	2,481,750	2,230,750	3,412,950	3,932,112	4,280,250	3,061,950	1,342,300	858,000	404,600	465,200	383,200
Goldman Sachs Group Inc	24,559,640	24,828,276	25,527,716	23,835,748	29,712,754	32,483,184	36,159,392	38,464,328	25,240,780	16,080,279	12,744,618	11,529,667	10,869,703
Royal Bank Scotland Adr Rep 1 Ord	8,468,568	8,228,384	11,345,143	10,618,409	11,487,209	10,533,309	9,403,509	9,315,768	8,183,165	7,165,312	6,615,647	6,718,668	7,032,912
Hsbc Holdings Adr	13,241,146	12,626,559	13,005,226	13,230,526	13,640,080	12,963,040	12,137,260	11,365,260	9,600,560	8,523,120	7,045,751	6,553,526	6,494,937
Jpmorgan Chase & Co	45,200,488	45,440,004	46,980,908	53,302,708	64,415,992	81,122,400	95,633,160	105,028,392	94,692,472	72,683,928	56,032,848	50,895,204	48,514,668
Lehman Brothers Holdings Inc	112,382,936	113,713,344	124,919,616	127,593,720	139,755,760	136,682,512	152,065,168	147,416,688	130,678,568	127,851,696	108,539,400	91,912,248	93,511,560
Merrill Lynch & Co Inc	136,056,544	131,977,448	118,149,504	119,085,240	125,744,720	136,080,320	140,812,144	136,345,584	127,432,416	81,842,640	69,906,520	60,083,672	59,882,432
Mizuho Financial Group Adr Rep 2 Ord	8,819,650	8,902,950	8,653,950	9,971,250	11,900,450	12,435,150	11,698,150	11,496,350	11,420,050	10,822,350	11,737,750	11,641,650	11,046,250
Morgan Stanley	38,001,616	40,019,420	43,544,816	39,081,012	51,132,280	65,976,720	71,670,056	82,864,016	73,230,752	46,524,264	26,840,776	20,533,898	30,584,950
Ubs Ag	10,452,647	10,440,947	9,713,956	10,510,384	12,513,508	12,247,608	12,166,636	11,250,461	7,286,131	6,384,569	5,086,530	5,071,786	4,962,477
Freddie Mac	196,354,176	197,652,544	194,362,464	198,958,768	217,422,688	210,323,712	209,338,016	207,243,696	180,479,552	177,192,800	157,065,120	149,404,976	121,333,384
Federal National Mortgage Association (Fannie Mae)	188,821,088	198,836,272	210,692,800	223,540,064	261,818,768	258,302,688	253,306,304	239,639,040	218,486,528	216,842,032	198,468,304	184,521,584	162,641,408

[1]Lendable Quantity: The total amount of shares available in the securities lending programs reported to Data Explorers.

[2]Quantity On Loan: The amount of shares in the securities lending programs reported to Data Explorers that are on loan.

dataexplorers

Lendable Quantity[1]

Instrument name	7/11/2008	7/10/2008	7/9/2008	7/8/2008	7/7/2008	7/4/2008	7/3/2008	7/2/2008	7/1/2008
Bnp Paribas Adr	204,791	204,791	204,791	204,791	181,691	204,791	204,791	162,091	203,791
Bank Of America Corp	1,061,302,592	1,061,182,016	1,055,500,864	1,061,541,056	1,063,215,168	1,062,568,128	1,058,816,704	1,122,014,208	1,052,500,800
Barclays Adr	7,471,977	7,681,522	7,471,994	7,135,465	7,449,473	7,487,040	7,365,481	7,555,938	7,247,741
Citigroup Inc	1,240,648,960	1,244,365,056	1,238,164,096	1,244,862,336	1,247,633,664	1,255,305,856	1,253,748,352	1,255,636,992	1,257,710,592
Credit Suisse Grp Adr Reptg One Ord	4,982,267	4,849,555	4,774,955	4,789,665	4,819,107	4,833,816	4,833,816	4,832,170	4,756,233
Daiwa Sec Group Adr	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339	37,339
Deutsche Bank Ag	1,216,868	1,216,868	1,216,868	1,216,868	1,211,897	1,211,897	1,214,359	1,220,381	1,220,381
Allianz Akting Adr Rep One Tenth Ord	1,549,310	1,548,010	1,549,410	1,537,910	1,547,110	1,549,510	1,549,510	1,555,510	1,540,010
Goldman Sachs Group Inc	107,768,968	107,722,368	107,764,320	107,967,376	107,605,120	107,997,888	107,651,704	107,872,776	107,511,208
Royal Bank Scotland Adr Rep 1 Ord	6,285,415	6,288,639	6,136,550	6,282,316	6,218,105	6,274,475	6,274,475	6,062,475	5,337,375
Hsbc Holdings Adr	9,962,543	9,894,076	9,992,182	9,957,711	9,995,686	9,987,599	9,989,099	9,968,015	9,776,588
Jpmorgan Chase & Co	912,297,280	915,638,976	916,333,120	917,541,120	917,046,272	928,413,632	926,592,768	922,844,416	924,875,456
Lehman Brothers Holdings Inc	182,309,424	186,120,880	185,561,952	188,874,848	192,071,520	189,188,960	188,619,104	188,226,016	188,253,328
Merrill Lynch & Co Inc	229,212,512	228,674,048	227,359,936	228,869,824	229,727,664	228,753,616	228,610,816	228,476,448	229,657,760
Mizuho Financial Group Adr Rep 2 Ord	3,274,426	3,281,026	3,281,026	3,281,026	3,279,460	3,279,460	3,279,460	3,276,724	3,258,317
Morgan Stanley	290,810,848	290,416,864	290,165,280	292,912,672	293,112,384	303,304,800	302,901,760	303,607,008	303,951,712
Ubs Ag	14,679,691	14,573,205	15,017,327	14,935,364	14,936,022	14,685,289	14,615,971	14,615,971	14,640,772
Freddie Mac	238,669,984	243,867,536	245,428,208	247,840,800	245,323,712	247,277,552	245,159,760	245,765,392	247,440,704
Federal National Mortgage Association (Fannie Mae)	306,502,464	313,745,312	312,379,200	321,072,064	319,490,688	318,882,176	318,080,896	319,905,984	321,018,592

Quantity On Loan[2]

Instrument name	7/11/2008	7/10/2008	7/9/2008	7/8/2008	7/7/2008	7/4/2008	7/3/2008	7/2/2008	7/1/2008
Bnp Paribas Adr	19,400	19,400	19,400	19,400	19,400	45,800	49,800	49,800	92,780
Bank Of America Corp	70,543,576	76,743,256	70,996,112	72,841,856	78,858,480	80,463,904	81,306,072	87,766,360	67,325,104
Barclays Adr	8,730,608	9,140,459	8,956,125	8,736,087	9,107,123	8,461,603	8,243,837	8,286,337	7,876,603
Citigroup Inc	58,665,960	57,961,820	56,859,792	52,295,264	53,920,740	59,699,224	61,505,336	52,802,592	56,333,388
Credit Suisse Grp Adr Reptg One Ord	1,745,864	1,880,474	1,940,774	2,002,774	2,077,074	1,665,212	1,665,312	1,839,712	1,434,212
Daiwa Sec Group Adr	26,700	26,700	26,700	26,700	26,700	25,900	25,900	24,100	24,100
Deutsche Bank Ag	1,202,025	1,193,143	1,213,903	1,161,200	1,234,600	1,222,400	1,259,700	1,265,600	1,291,500
Allianz Akting Adr Rep One Tenth Ord	390,200	376,700	337,500	237,200	225,000	235,000	235,000	230,400	304,700
Goldman Sachs Group Inc	10,541,821	11,180,964	11,881,210	11,759,665	12,311,762	12,838,616	13,421,401	12,257,298	12,165,664
Royal Bank Scotland Adr Rep 1 Ord	7,112,016	6,543,216	6,183,243	6,610,243	6,227,043	5,978,739	5,978,739	8,167,326	10,302,561
Hsbc Holdings Adr	6,502,888	6,215,616	6,216,122	5,473,214	5,483,066	5,531,660	5,326,386	5,235,818	4,777,730
Jpmorgan Chase & Co	51,238,444	52,657,968	64,859,888	63,509,240	71,694,688	63,833,796	67,411,104	54,048,284	43,752,312
Lehman Brothers Holdings Inc	96,331,464	92,922,112	88,077,616	81,829,720	76,662,344	75,897,440	75,138,568	76,520,080	71,599,968
Merrill Lynch & Co Inc	60,041,152	59,316,592	61,388,844	61,417,064	62,661,112	61,244,440	61,785,052	60,412,528	61,528,024
Mizuho Financial Group Adr Rep 2 Ord	11,166,650	11,420,150	11,690,050	11,980,819	11,892,219	11,938,619	11,906,319	11,901,819	11,890,188
Morgan Stanley	28,735,252	21,040,546	26,116,660	27,816,546	21,683,666	27,377,504	27,754,616	24,105,582	19,551,492
Ubs Ag	5,383,431	4,776,852	4,942,728	5,083,613	4,785,915	4,667,422	4,764,222	4,646,422	4,899,122
Freddie Mac	116,978,224	90,566,600	79,474,464	79,141,696	80,823,840	75,520,448	75,078,720	80,340,976	77,958,064
Federal National Mortgage Association (Fannie Mae)	143,435,552	107,911,224	86,299,424	88,439,080	89,042,504	93,103,240	94,156,544	93,205,704	90,189,792

[1]Lendable Quantity: The total amount of shares available in the securities lending programs reported to Data Explorers.

[2]Quantity On Loan: The amount of shares in the securities lending programs reported to Data Explorers that are on loan.