STANY
The Security Traders Association of New York, Inc.

71 Broadway, 2K
New York, NY 10006
P. 212.344.0410
F. 212.943.8478
www.stany.org

KIMBERLY UNGER, ESQ.
Executive Director

July 5, 2011

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

Re: Release Nos. 34–64383; File No. 4–627 Short Sale Reporting Study Required by Dodd- Frank Act Section 417(a)(2)

Dear Ms. Murphy:

The Security Traders Association of New York, Inc.[1] ("STANY") appreciates the opportunity to respond to the Securities and Exchange Commission's (the "SEC" or the "Commission") request for comments with respect to the short selling studies required by Section 417(a)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("the Act").

Specifically the Commission is seeking comment on some 23 questions concerning the feasibility, benefits and costs of

1. requiring reporting in real time either publicly or in the alternative to the Commission and the Financial Industry Regulatory Authority ("FINRA"), of short sale **positions** of publically listed securities, and
2. conducting a voluntary pilot program in which public companies would agree to have all **trades** of their shares marked "long," "short," "market maker short," "buy," or "buy-to-cover," and reported as such in real time through the Consolidated Tape.

Short sales have been the topic of discussion in the US since the 1930's. They have been studied, analyzed, and debated by the Commission, market participants, the investing public, the media and academics. History shows that market declines and periods of significant market dislocation tend to produce calls for additional regulation of short selling activity. For example, in response to market declines in late 2008 the Commission implemented Emergency Bans on short sales covering a designated

[1] STANY is the voice of the trader in the New York metropolitan area and represents approximately 1,000 individuals who are engaged in the trading of securities. As such, we are uniquely qualified to discuss proposed rules and regulations affecting trading. STANY is the largest affiliate of the Security Traders Association ("STA"), a multinational professional association that is committed to being a leading advocate of policies and programs that foster investor trust, professional ethics and marketplace integrity and that support education of market participants, capital formation and marketplace innovation.

Neither STA, nor STANY, represent a single business or business model, but rather provide a forum for traders representing institutions, broker-dealers, ECNs, ATSs and floor brokers to share their unique perspectives on issues facing the securities markets. Our members work together to promote their shared interest in efficient, liquid markets, and their concern for investor protection. We believe that strong and efficient markets require an appropriate balance between effective regulation and innovation and competition.

group of financial and finance related equities in part due to speculation and rumor that hedge fund shorting was responsible for the decline in the prices of financial stocks and concerns that further declines could undermine confidence in the financial sector. However, it has since been shown that hedge funds were most likely net long position holders of the equities prior to the ban and that the downward price pressure on this group of equities was caused by selling of long positions by individual investors and traditional investment managers.

We understand Congress's mandate that the Commission consider and study the efficacy and potential impact of additional short sale disclosure requirements, but urge the Commission to evaluate and rely upon empirical data, notwithstanding the public sentiment and political pressure associated with this issue.

STANY can appreciate that the Commission and Congress have been under pressure from the general public to review all aspects of financial services regulation. Moreover, we believe that a study of regulations affecting trading can be a useful exercise and, when done properly, can lead to improved regulation and better markets for all market participants. STANY encourages periodic review of regulations to ensure that trading rules are keeping pace with changes in the industry.

For a "study" to be valuable and used as the basis for regulation, the study needs to be thorough, and the changes recommended need to be based on analytic review and substantiated empirical data. We believe that it is incumbent upon the Commission and Congress to follow basic principles of good regulation when enacting and implementing new rules. The Committee on Capital Markets Regulation[2] (the "Committee") succinctly outlined those principals affirming that the cost benefit rule must be applied to all other principles of good regulation and that; "… a given regulation should be promulgated only when its benefits outweigh its costs. Furthermore, if different kinds of regulation can achieve the same benefit, the regulation with the least cost should be adopted."[3] We agree that good rule- making requires an analysis of the costs- both monetary and otherwise- and realistic anticipated benefits of proposed regulations.

Fortunately, there currently exists a plethora of academic, private, and regulatory driven research studies of short selling which the Commission and Congress can, and should, review. The overwhelming conclusion of these studies is that banning or deterring short sales will have negative consequences on the markets. Several of those studies are cited herein and others are known to the Commission and Congress who commissioned them.

While we acknowledge that disclosure is not a "ban" or outright restriction on short selling, the Commission should be mindful that the preparation, filing and dissemination of disclosure is costly; and onerous disclosure requirements may deter short selling to such an extent that the impact is similar to a restriction.

---

[2] The Global Financial Crisis, A Plan for Regulatory Reform Recommendations to Reduce Systemic Risk and Make Markets More Transparent, Committee on Capital Markets Regulation (May 26, 2009) The Committee on Capital Markets Regulation is an independent and nonpartisan 501(c) (3) research organization dedicated to improving the regulation of US capital markets. Twenty-five leaders from the investor community, business, finance, law, accounting and academia comprise the Committee's membership. The Committee co-Chairs are Glenn Hubbard Dean of Columbia Business School, and John L. Thornton, Chairman of the Brookings Institution. The Committee's Director is Professor Hal S. Scott, Nomura Professor and Director of the Program on International Financial Systems at Harvard Law School. The Committee's research regarding the regulation of US capital markets provides policymakers with a nonpartisan, empirical foundation for public policy.

[3] Id, Executive Summary, p.4.

In considering whether additional disclosure of short sale information is warranted, the Commission must first consider the policy objectives disclosure would serve and tailor the specific disclosure requirements to meet those objectives.

We have considered several policy objectives that may be driving the interest in additional disclosure of short sale information. Among the primary objectives are:

1. Discouraging manipulative short sales,
2. Providing the Commission with trade information so that it can properly monitor and police abusive trading,
3. Enhancing transparency, and
4. Increasing investor confidence.

We believe that there are already sufficient regulations and regulatory requirements in place to address these objectives and/or that these objectives will not be further advanced by public disclosure of short sale information. As a result, the costs of additional disclosure will not provide any meaningful benefits to the investing public.

Short sales enhance liquidity as well as provide pricing efficiency and the Commission should not deter the legitimate use of short selling as an investment vehicle.

The Commission has consistently acknowledged that short sales benefit the markets through enhanced liquidity and pricing efficiency. "Market liquidity is often provided through short selling by market professionals who offset temporary imbalances…. Short sales effected in the market add to the selling interest of stock available to purchasers and reduce the risk that the price paid by investors is artificially high because of temporary imbalances between buying and selling interests." [4] Likewise, numerous academic studies of short selling have emphasized the benefits that short selling provides to the pricing of securities. [5]

Contrary to public perception, the majority of short sales are not "dedicated shorts" targeting anticipated declines in the price of a security. Most short sales are executed attendant to market making functions and/or complex trading and hedging strategies. They facilitate transactions by others or are part of a broader strategy based on relative prices of different securities. While "dedicated shorts" account for a small minority of overall shorting activity, they garner the overwhelming majority of attention in regulatory debates. [6]

Short selling brings benefits to the markets that cannot be obtained simply by buying and long selling. Studies have shown that "for markets to function most efficiently it is important that they be able to quickly incorporate both positive and negative information into share prices. Such participation has been shown to increase market liquidity and depth, decrease transaction costs (e.g. smaller bid-ask spreads) and provide more efficient price discovery and decreased occurrences of price bubbles/crashes."[7]

---

[4] See, Securities and Exchange Commission 74 FR 18044, (Apr. 20, 2009) 17CFR 242.

[5] See, Rodney D. Boehme, et. al. Short-Sale Constraints, Difference of Opinion, and Overvaluation, 41 J. Fin & Quantitative Analysis, 455, 485 (2006) diverse investor opinion and low restraints on short selling diminish overvaluation of stocks, Ekkehart Boehmer, et. al, Which Shorts Are Informed?, 63 J. Fin. 491,491 (2008) "Short sellers are important contributors to efficient stock prices." ; Owen A. Lamont & Jeremy C. Stein, Aggregate Short Interest and Market Valuation, 94 Am. Econ. Rev. 29, 31-31 (2004) "Aggregate short-selling tends to increase in bear markets, which perhaps makes it all the easier for people to blame the messenger. However, according to our interpretation of this evidence, the problem is not too much short selling in falling markets… but rather too little in rising markets."

[6] In 2008, Credit Suisse estimated that only 0.7 percent of hedge funds' short sales are dedicated shorts designed to profit from the anticipated decline in the price of the stock which has been shorted. See, Credit Suisse, What Happened When Traders' Shorts Were Pulled Down (2008).

[7] Oliver Wyman, Inc. "The Effects of Short-Selling Public Disclosure Regimes on Equity Markets: A Comparative Analysis of US and European Markets, at p. 6 (2010) available at http://www.managedfunds.org/downloads/Oliver_Wyman_Financial_Services_Report.pdf.

Consideration of additional disclosure must be viewed in light of the present disclosure regimes, which provide the Commission, SROs and the public with information about short sales, as well as the anticipated disclosure of short sale information that has been mandated by Section 929X(a)of the Dodd-Frank Act.

Although greater regulatory focus in the US has been on short sale price tests and abusive short selling, the disclosure of short sales and short positions have also been addressed by the Commission on numerous occasions with the objective of providing regulators with information to monitor and police manipulative short selling. Currently there are a number of regulations and mechanisms by which market participants are required to disclose information in connection with short sales. As the Commission notes, certain information regarding short sales is also currently available to the public.

Each of the following rules requires market participants to make disclosures of short sales from which the Commission and regulators can determine the level of short selling activity and by whom the sales have been done. Rule 200(g) of Reg. SHO requires executing broker dealers to mark sales as "long," "short" or "short exempt." A broker executing an order is also required to report the transaction to the exchange upon which it is executed or to FINRA if the order was executed other than on an exchange. When reporting a sale, the executing broker is required to identify whether the sale was a long or short sale. Trade reports are required to be submitted shortly after execution (30 seconds in the case of reporting to FINRA). Short sale transactions also must be marked "short" on Order Audit Trail System ("OATS") reports which, with the OATS CQS expansion slated for October 2011, will soon include NYSE listed securities.

Additionally, there are methodologies in place whereby information provided by broker dealers is in turn disclosed to the public by exchanges and FINRA. Currently exchanges and FINRA publish information regarding aggregate short sale volume on a security by security basis on their websites. FINRA publishes a Daily Short Sale Volume File showing aggregate daily short sale volume by security for securities traded over the counter and a Monthly Short Sale Transaction File, which shows transaction data for short sales in the majority of OTC securities. Moreover, FINRA requires that broker dealers maintain records and file bi-monthly reports of aggregate short equity positions held in customer and proprietary accounts. Information about short sale transactions executed on exchanges is also available to the public directly from the exchanges. Also available to the public on the Commission's website are reports of fails to deliver. [8]

Finally, any analysis of the benefits of additional disclosure must consider that, apart from the current mandated study under Section 417(a) (2) of the Dodd-Frank Act, Section 929X(a) amended Section 13(f) of the Exchange Act to require the Commission to adopt rules that, at a minimum, require monthly reporting to the public of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security and any additional information determined by the SEC following the end of the reporting period. [9]

[8] The date, CUSIP numbers, ticker symbols, issuer name, price, and total number of fails-to-deliver (i.e., the balance level outstanding) recorded in the National Securities Clearing Corporation's ("NSCC") Continuous Net Settlement (CNS) system aggregated over all NSCC members are reported to the SEC. Available at http://www.sec.gov/foia/docs/failsdata.htm

[9] See, Exchange Act Section 13(f) (2), as amended.

Despite data and studies demonstrating that short selling is a legitimate investment tool, "short sales" are still perceived by a segment of the public as pejorative.

A long standing, apparent confusion exists between abusive "naked" shorting[10] and the legitimate use of short selling. As the Commission has noted in the past, "It is important to recognize the distinction between market manipulation and legitimate use of short sales as an investment strategy that contributes to price discovery. Short selling is an important part of the investing, hedging and outright policing of corporate governance by the investment community. The Commission has likewise recognized that, short selling is a valuable component of risk management. Former SEC Chairman Christopher Cox noted in a CNBC interview on July 16, 2008 'if we are talking about legitimate short selling…that's *vital* to the functioning of our markets.' "[11]

While appreciating the value of short selling, trading and investment professionals have consistently supported the implementation and strict enforcement of rules targeted at abusive naked shorting[12] and fraudulent, practices[13] - such as rumor mongering - to manipulate the price of securities.

STANY has fully supported regulations enacted by the Commission to curb abusive short selling and to enhance the penalties for fraudulent short selling. Both Rule 204 of Reg. SHO [14]which required clearing firms to close out fail to deliver positions by borrowing or purchasing securities on settlement date and 10b-21 which targets short sellers who intentionally misrepresent having obtained a locate or long sellers who misrepresent that they own a security and then fail to deliver, are seen by the industry as extremely positive rules tailored to address the real issues that could attend short selling. These rules appear to have reduced fails to deliver and have had a positive impact in curbing abuses. [15] The strict enforcement of existing locate and delivery rules will continue to reap positive benefits to the markets and should remain a focus of the Commission's enforcement protocol. Any study of additional disclosure of short sales should include an analysis of the impact of these and other recently implemented regulations.[16]

Investor confidence would be better served through investor education than through public disclosure of real time short sale trading information.

Many comment letters have been submitted to the Commission in response to this release as well as to other requests for comments on short sale regulations. Quite a number of commenters have expressed

[10] "Naked short selling is not necessarily a violation of the federal securities laws or the Commission's rules. Indeed, in certain circumstances, naked short selling contributes to market liquidity. For example, broker-dealers that make a market in a security generally stand ready to buy and sell the security on a regular and continuous basis at a publicly quoted price, even when there are no other buyers or sellers. Thus, market makers must sell a security to a buyer even when there are temporary shortages of that security available in the market. This may occur, for example, if there is a sudden surge in buying interest in that security, or if few investors are selling the security at that time. Because it may take a market maker considerable time to purchase or arrange to borrow the security, a market maker engaged in bona fide market making, particularly in a fast-moving market, may need to sell the security short without having arranged to borrow shares. This is especially true for market makers in thinly traded, illiquid stocks such as securities quoted on the OTC Bulletin Board, as there may be few shares available to purchase or borrow at a given time." SEC Division of Market Regulation: Key Points About Regulation SHO available at http://www.sec.gov/spotlight/keyregshoissues.htm

[11] See, STANY letter to Hon. Christopher Cox in response to SEC Release No. 34-58592 (Sept. 20, 2008)

[12] Although abusive "naked" short selling is not defined in the federal securities law, it refers generally to selling short without having stock available for delivery and intentionally failing to deliver stock within the standard three-day settlement cycle. See Exchange Act Release No. 56212 (Aug. 7, 2007), 72 FR 45544 (Aug. 14, 2007) ("2007 Regulation SHO Final Amendments.")

[13] See, Naked" Short Selling Antifraud Rule 73 FR 61666 (Oct. 17, 2008)

[14] See, Reg. SHO 74 FR 38266 (July 31, 2009) Final Amendments

[15] See, monthly reports on fails to deliver available at http://www.sec.gove/foia/docs/failsdata.htm.

[16] Although price tests are not new to short sales, Rule 201 in its present form was implemented less than six months ago in February, 2011. In determining whether additional disclosure requirements are warranted, the Commission should analyze and study what effect Rule 201 has had on short selling. As part of the analysis, STANY recommends that the Commission consider how additional disclosure requirements, combined with the requirements of Rule 201, would potentially impact option market makers and participants in the options markets, as well as the equity markets.

heartfelt frustration with declines in stock prices that they believe are associated with short sellers' abusive activities.

We do not believe that additional disclosure of short positions would impact the abusive practices often mentioned in these letters such as manipulation via false rumors, abusive paid bloggers, and the use of the internet to drive down stock prices. Regulations already address these proscribed practices. Market manipulation will best be deterred and eliminated by strict enforcement of those rules and punishment of those who engage in the abuses.

The Commission needs to make sure that investors appreciate the difference between short sales which investors engage in for legitimate reasons and abusive naked short sales. The present confusion and lack of understanding is at the root of investor concerns regarding short selling and may be exacerbated by the disclosure of short sale information which is likely to be misunderstood by those receiving it.

The SEC's Office of Investor Education with its Investor.gov website, launched in February 2011, is in a unique position to provide information and education to the investing public about the realities of short selling. The Commission's Office of Public Affairs is tasked with making the work of the SEC open to the public and understandable to investors as well as coordinating the Commission's relations with the media and the general public. A combined effort by these two divisions of the SEC toward education of the investing public and the issuer community regarding short selling would likely be beneficial to the Commission's goals of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

The Commission must be mindful of the potential unintended negative consequence of additional public disclosure of short sale information either through public disclosure of short positions to FINRA or through a voluntary pilot program in which public companies would agree to have all trades in their shares marked "short," "market maker short," "buy," buy-to-cover," or "long" and reported in real time through the Consolidated Tape.[17]

We believe that real time reporting of short sales will produce information that will be of little use to any but the most sophisticated investors. Public disclosure of real time short trades is likely to provide little benefit to the Commission while at the same time may cause unnecessary confusion for the investing public. To be truly useful, the disclosed information would need to be effectively disseminated, understood, analyzed and acted upon in real time. We believe that the amount and frequency of information would render it virtually useless to the public.

On the contrary, it is quite possible that dissemination of short sale information would be deleterious to public confidence. Trades marked as "short" may not be fully understood by the public and could easily be misinterpreted. Seeing a report of short sales could reduce investor confidence in a security unless investors were able to understand the strategy behind the position. This could negatively color investor decisions. Investors holding stocks may sell in the face of what they perceive as an increase in short selling – taking that as a sign that prices must be going down and in effect creating a self-fulfilling prophecy. The investing public may logically read a short sale as a sign that someone believes that the current price of a stock is too high and that there is money to be made by selling now, and buying and delivering when the price goes down. But, as the Commission is aware, that is not always the intention behind, or correct message to be gleaned from, a short sale or a short position.

[17] STANY would caution that any consideration of real time reporting to the Consolidated Tape bear in mind the impact that new and proposed rules could have on Security Information Processors ("SIPs"). Limit up-limit down, single stock circuit breakers, regulatory halts, and new capacity thresholds all put capacity pressure on SIPs. As the SIPs are the source of data for vendors and, in turn, retail customers, additional pressures that could slow down the dissemination of information from the SIPs could negatively impact the flow of information used by retail customers and investors.

Likewise, real time reporting of short selling activity would provide information of the most sensitive nature. While real time reports would be of little useable value to the Commission or investing public, they could be of significant value to the most sophisticated traders who would be in the best position to use the information to their advantage. Real time information could be used to back-engineer trading strategies. Unfortunately, the people and firms that would be in the best position to use this information may include a small element of "bad seeds." Sadly, the dissemination of real time short sale information might be used by an aberrant element of parasitic market participants to the detriment of individual and institutional investors.

Although we anticipate that the most significant reason that investors and traders will be apprehensive of real time public disclosure would be the lack of privacy and reduced confidentiality of investment strategies, we can envision other reasons that investors and traders may change their investment habits if real time disclosure is mandated. Unless the identification of "short sale" as a pejorative is changed, it is possible that some investors, institutions and firms who use short sales for hedging or market making purposes will alter their trading strategies to avoid identification with something that is viewed by the public in negative terms. Likewise, firms that have other business relationships with issuer companies may fear the impact which public disclosure of short sales might have on business areas outside of trading.

Disclosure of real time short positions could change the way in which more sophisticated and informed investors and traders use short sales. Institutional investors may refrain from using short sales out of concerns that disclosure would reveal their investment strategies. There could be serious repercussions on liquidity if investors refrain from short selling to hedge long positions, decide that it is too risky to take long positions, and decline to invest at all. In these cases the markets would not only lose the liquidity provided by the initial short sale, but also would lose the liquidity of the buy side of the strategy. Some investors, especially those professionals dealing with large hedge funds and mutual funds have indicated that they will not be as willing to commit capital if they cannot adjust their risks by shorting other related securities.

Real time reporting raises issues of confidentiality for professional traders and fund managers as the dissemination of information may reveal their trading strategy. While disclosure would not prevent traders and investors from shorting, the negative perception associated with shorting as well as the possibility of public disclosure of their investment strategies may deter them from doing so.

The international management consulting firm of Oliver Wyman, Inc. recently conducted a study of the effects of manager-level public short selling disclosure requirements on the equity markets they impact[18]. After extensive review and analysis of U.S. and European equities culled from a wide variety of sources, Oliver Wyman hypothesized that, "the public nature of such requirements, depending on the thresholds and frequencies of the disclosure requirement, would negatively impact equity investors' inclination to engage in short-selling… and that such a withdrawal of liquidity would have detrimental impacts in equity markets." [19]

> Our analysis leads us to conclude that regimes imposing manager-level short-selling public disclosure have materially negative impacts on their markets. Investors find the information they are required to disclose to be sufficiently sensitive that they limit their activities to avoid making disclosures. As relatively substantial participants in equity markets, short sellers play an integral role in providing liquidity and

[18] See, Oliver Wyman, Inc. "The Effects of Short-Selling Public Disclosure Regimes on Equity Markets: A Comparative Analysis of US and European Markets, 2010 available at http://www.managedfunds.org/downloads/Oliver_Wyman_Financial_Services_Report.pdf.

[19] Although the Oliver Wyman study was commissioned by the Managed Funds Association, we have no reason to believe that the results were influenced by the MFA or were anything other than independent as noted by Oliver Wyman, Id at p. 2

> maintaining market efficacy. When short sellers' level of participation decreases, markets become less liquid, more expensive and more difficult to trade. These primary impacts affect all investors equally.…
>
> There is also a macro/systemic risk associated with implementing over-burdensome short selling regulation. As markets become less efficient and more expensive parity among global equity markets begins to disappear. Were disclosure to appreciably impair a market's ability to function efficiently, there exists a real risk that investors would invest less in affected markets and begin to allocate capital to equity markets with more palatable regulatory frameworks. If market participants begin to prefer to invest in more liberal capital markets based in their short-selling disclosure restrictions, the effects on capital formation and the ability of companies to finance themselves could be significant. [20]

Oliver Wyman found that the overall effects of short sale disclosure requirements include: 1. Impairment of liquidity due to the combined effects of a lack of willingness of investors to disclose short interests and a reduction of the lending supply by beneficial owners ; 2. Widening of bid-ask spreads; 3. Increases in intra-day volatility and 4. Impairment of price discovery. These negative consequences would impact all market participants, including those whose investment strategies were limited to purchases and sales of long positions.

Mandatory disclosure of real time short trades and positions will unfairly disadvantage short sellers.

Starting with the premise, supported by economists, regulators and the Commission, that short sales are a valid and important investment tool, we question why short selling should be treated any differently than any other equity transaction. Short sales are inherently riskier than purchases or long sales of securities and should not be unfairly disadvantaged by requiring public disclosure that could increase the risks even more.

Purchasers of a $20 stock have a downside risk of losing a maximum of $20 if the stock price goes to zero. Their potential for gain is however "unlimited" as the stock price could theoretically rise to infinity. An investor or trader who shorts a security with a present value of $20, however; takes on the potential of an unlimited loss. Since the stock price could move upwards without any limit his or her loses is effectively unlimited. Meanwhile, the potential gain is capped at $20- minus transaction costs. Moreover, the risks associated with holding a short position could be exacerbated in instances of rapidly increasing prices as it may be more difficult for the short seller to unwind the transaction.

Put another way, a short sale is in effect an open position carrying virtually unlimited risk to the seller. When a market participant sees sales in the market they can infer that holders have elected to dispose of securities at the price reported. With enough sales investors can draw conclusions about the appropriate price for the securities. The same can be said for numerous buy orders. Others could choose to follow along and sell or buy; each is taking some sort of "bet" on future prices. No other equity trade carries with it the same level of risk. That risk can be exacerbated if information about the open position is disseminated to the public in real time because other traders may seek to make it difficult to close out the short position, placing the short seller in a "short squeeze."

[20] Id, p. 29

At the time of a sale the long seller realizes his profit or loss and his "interest "in the security ends. At the time of a short sale, the short seller becomes "invested" in his decision and takes on a risk as well as the possibility of a future reward. Unlike, a purchaser of securities who takes on an interest with a known down-side risk at the time of a purchase, the risks to the short seller are infinite.

While there are legitimate public policy reasons for holders of securities to disclosure their financial and ownership interests in a public company when that interest reaches a significant level, those reasons do not exist for holders of short positions. Owners of equities have a stake in public companies through ownership and voting rights. Short sellers have no similar interest in a company that would warrant disclosure to companies of their net positions- holders of short positions do not have equity stakes and do not have voting rights.

In 2008, the Commission implemented Interim Temporary Rule 10a 3-T and Temporary Form SH [21] under the Securities Act of 1934, requiring investment managers to report short positions in publically listed companies. The rule remained in effect from October 2008 until July 31, 2009 when the Commission permitted the rule to expire. The Commission's experience with this temporary rule should be evaluated when considering any similar approaches to disclosure of short positions going forward.

If the Commission concludes after study and analysis that it would be in the best interests of the markets to institute additional reporting of short positions, we should suggest that it consider whether the requirements of reporting on Forms 13D and 13F should be revised to update the requirements for disclosure of both long and short positions on a more frequent and timelier basis.

Some form of additional private disclosure to regulators of short sale trading information may be appropriate if studies show that the information disclosed will be necessary to the Commission's ability to monitor and police illegal manipulative trading activity and if the Commission is able to demonstrate that it has adequate security in place to protect confidential trading data.

STANY agrees with William J. Brodsky, who ,when he was Chairman of the World Federation of Exchanges ("WFE"), questioned the recommendation of market disclosure of short sale positions by the International Organization of Securities Commissions ("IOSCO"), stating: [22]

> Reporting regimes should be based on material benefit to fair and orderly markets with due consideration being given to the costs, complexity, enforceability and market impact of implementing a reporting regime. The primary objective of any short selling reporting regime should be to supplement efforts to deter market abuse… Data on all, or a majority, of short positions is not regarded as a prerequisite of a fair, efficient and orderly market. WFE would note that the primary objectives can be achieved via private disclosure to the regulator rather than public disclosure to the market…. regulatory commitment to "fairness" and "transparency" does not equate to giving any participants or investors a free ride on the proprietary information or investment strategies of others. A more realistic expectation of the regulatory framework's contribution to "fairness" and "transparency" is that sufficient information will be available to enable all market users to be confident that prices obtained on the market are a reflection of genuine supply and demand. (*Emphasis added*)

[21] See, SEC Release No. 34-58785; File No. S7-31-08 (Oct. 15, 2008)
[22] See, Letter from William J. Brodsky, WFE Chairman to Greg Tanzer, IOSCO Secretary General (May 7, 2009)

If the Commission determines that additional disclosure of short sale activity is warranted, such disclosure should be made to regulators only, on a confidential and non-real time basis.

Investors with legitimate confidentiality concerns should be protected. Non-public reporting and confidential treatment of information reported to the Commission would protect investor confidentiality, and minimize the effects that have been shown to accompany public disclosure.

Real time reporting of short selling activity would provide information of the most sensitive nature that would be of little useable value to the Commission or investing public and be of significant value to only the most sophisticated traders who would be in the best position to use the information to their advantage.

We would also suggest that the Commission implement only those disclosure requirements that are reasonably calculated to advance the objectives of the Commission's oversight and enforcement responsibilities. STANY believes that the Commission's objectives would be best served by analysis of currently available market data on both the long and short side of the market for patterns of suspicious behavior rather than by review of reports of short positions.

The Commission should review and consider the approach to short selling being taken by European Markets. In this regard, the Commission should consider whether the U.S. markets would benefit by elimination of current short sale restrictions and replacement of them with a disclosure regime.

On May 17th of this year, the Council of The European Union ("the Council") agreed to legislation proposed last year by the European Commission (the "EC") to implement a pan-European short selling disclosure regime in an effort to replace the disparate national rules governing short selling in European markets with a single set of disclosure requirements that would be applicable in all covered markets. [23] The goal of the legislation was summarized as … "To set an end to the current fragmented situation in which some Member States have taken divergent measures and to restrict the possibility of divergent measures being taken by competent authorities it is important to address the potential risks arising from short selling…. The requirements to be imposed should address the identified risks without unduly detracting from the benefits that short selling provides to the quality and efficiently of markets." [24]

STANY is not aware of the efficacy of the approach to short sales proposed by the EC and supported by the Council, but believes that it would be advisable for the Commission to review the EC' approach in connection with the study of U.S. short sale disclosure requirements mandated by Dodd-Frank.

The goal of the European proposal is to replace a wide range of inconsistent rules[25] relating to short sales in the European Union ("EU") with disclosure related rules [26].

> The proposal covers all types of financial instruments, providing for a response that is proportionate to the potential risks posed by short selling of different instruments. In particular, for shares of companies listed in the EU, it creates a two-tier model for

[23] Proposal for a Regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps, 6823/3/11 REV 3, Interinstitutional File No: 2010/0251 (COD) (May 6, 2011) available at http://register.consilium.europa.eu/pdf/en/11/st06/st06823-re03.en11.pdf

[24] Id, p. 3

[25] See, Proposal for Regulation on Short Selling and credit default Swaps- Frequently asked questions (Sept. 15, 2010) available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/409&format=HTML&aged=0&language=EN&guiLanguage=en for an outline of the various rules across the EU and a comparison of those rules with short sale regulations in the US and Hong Kong.

[26] European regulators are also considering some sort of restrictions on abusive naked short sales, but appear to be moving slowly on any such measures.

transparency of significant short positions: While at a lower threshold, notification of a position must be made privately to the regulator, at a higher threshold; positions must be disclosed to the market. [27]

In exceptional situations that threaten financial stability or market confidence in a member state or the EU, the draft regulation provides that competent authorities have temporary powers to require further transparency or to impose restrictions on short selling and credit default swap transactions or to limit individuals from entering into derivative transactions. [28]

The proposal contemplates that:

A natural or legal person who has a net short position in relation to the issued share capital of a company… shall notify the relevant competent authority whenever the position reaches of falls below a relevant notification threshold – defined as a percentage that equals 0.2% of the issued share capital of the company and each 0.1% above that.

A natural or legal person who has a net short position in relation to the issued share capital of a company… shall disclose details of that position to the public whenever the position reaches or falls below a relevant publication threshold – defined as a percentage that equals 0.5% of the issued share capital of the company concerned and each 0.1% above that.

It further provides that any notification or disclosure shall set out details of the identity of the natural or legal person with the relevant position, the size of the position, the issuer, and the date on which the relevant position was created, changed or ceased to be held. Calculations of net short positions shall be made at midnight at the end of the trading day and disclosure shall be made not later than 15:30 on the next trading day. The notification of information to the regulators shall ensure confidentiality of the information. Public disclosure shall be made by posting the information on a central website operated or supervised by the relevant regulatory body who shall communicate the address of the website to EMSA, which, in turn shall put a link to all such central websites on its own website.

Although STANY does not see the need for additional disclosure requirements *on top of the current disclosure requirements and restrictions on short sales in the US markets*, we believe that the Commission should explore the benefits and costs of *replacing current rules governing short selling with solely a disclosure regime*. The Commission should explore whether disclosure would lessen public and political pressure surrounding the issue of short sales, as well as avoid the necessity for the restrictive, and arguably uncompetitive, regulations currently in place.

The European Parliament and the European Council are currently debating the European Commission's proposal. They are likely to be looking to the U.S. to see what additional regulations, or changes to existing regulations, the SEC will implement in response to Dodd-Frank. The SEC should likewise consider how the EU and other non-U.S. financial markets are addressing short sales. The European markets are the principal competitors of the U.S. capital markets. The Commission should consider whether its current short sale

[27] For sovereign debt…significant net short positions relating to issuers in the EU would always require private disclosure to regulators. The proposed regime also provides for notification of significant positions in credit default swaps that relate to EU sovereign debt issuers.
[28] See, Press Release of the Council of the European Union (May 17, 2011) available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/122043.pdf

restrictions are placing the U.S. capital markets at a competitive disadvantage to European and Asian markets. Including a study of short sale practices and the impact of short sale regulation in non-U.S. markets will provide valuable information which the SEC can use in determining what, if any, additional disclosures should be required in the U.S. and whether other current restrictions on short sales should be amended or eliminated.

Conclusion

If a thorough analysis and study show that additional disclosure of short selling activity would be in the best interests of the markets, STANY would suggest that the Commission consider disclosure time-lines that would properly balance the interests of transparency with the need to preserve the confidentiality of legitimate trading strategies and not deter the legitimate use of short selling. In this regard we would recommend some sort of two tiered approach, under which, more immediate- perhaps end of day- information about short sales could be made available to regulators on a confidential basis and public disclosure of additional information along the lines required by Section 929X of Dodd-Frank could be made on a monthly or bi-monthly basis.

As always, STANY supports the efforts of the Commission to improve the U.S. capital markets. We believe that the review being undertaken by the Commission is an important one. It is imperative that the Commission, together with the industry and Congress, promote a disclosure regime that recognizes the value of short sales, thoroughly weighs the benefits and costs of disclosure, and frames disclosure time-lines and the information disclosed in such a way as to minimize costs and negative consequence while ensuring that the information provided to the Regulators and/or to the public is understandable and meaningful.

STANY is available to assist and consult with the Commission in any way that it deems helpful. Please do not hesitate to call or e-mail us at 212.344.0410 or kimu@stany.org with any questions about the comments and opinions in this letter.

Respectfully submitted,

Kimberly Unger, Esq.
Executive Director