

Are Europeans Naked Shorting U.S. Companies and, is the United States Securities and Exchange Commission (SEC) complicit?

After dozens of Freedom of Information (FOI) requests<sup>1</sup> sent to regulators throughout Europe, the far-east and Canada this is the question that I have been left asking myself.

Freedom of information requests have long been an intrinsic part of Freedom of Expression and Speech- what good is your right to speech if you do not have accurate information. This is also an integral part of investing: you need accurate information that your investments are not being subjected to fraud and that there is an equally well-informed and competent regulator to protect your rights as an investor whilst ensuring the rule of law is applied to the broker-dealers, Central Counterparties (CCPs) and Central Securities Depositories. Certainly, “openness and transparency are key ingredients to build accountability and trust, which are necessary for the functioning of democracies and market economies”. Angel Gurria, Secretary-General of the OECD.<sup>2</sup>

### WHY DID I SEND FOI REQUESTS?

Following the international calamity that was the distribution of the GameStop/GME<sup>3</sup> share dividend and the AMC Entertainment Holdings Inc<sup>4</sup> preferred equity dividend APE (AMC Entertainment Hldg Pref Equity Units Depositary Share<sup>5</sup>, it appeared that at least overseas there was anecdotal evidence of counterfeit/naked short shares given the sheer scale of complaints from shareholders that were not receiving their dividend in the prescribed form (new shares via a dividend as opposed to their original shares being split), or in a timely manner (many complained that it was several weeks before they received their APE shares; were offered cash in lieu of deliver of dividend shares; or, when they were ‘delivered’ were set to position close only) – I also hypothesized that perhaps these overseas’ problems were confirmation of the naked short suspicion behind the events of January 2021: the so-called ‘GameStop Frenzy’<sup>6</sup>. In search of answers, I submitted dozens of Freedom of Information requests to financial regulators and central banks for “Failure to Deliver” (FTD) data across the globe, and I have been utterly shocked by the hostility, obstructiveness, secrecy and lack of information in regard to requests for FTD data in relation to these US issued securities. The information I did receive challenges the SEC’s loyalty to the rule of law; protection of investors and the public interest; its conclusions in the ‘GameStop Report’ ; and, its loyalty to the United States Constitution.

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<sup>1</sup> <https://www.justice.gov/oip/blog/foia-update-information-policy-around-world>

<sup>2</sup> “**Openness and Transparency - Pillars for Democracy, Trust and Progress**” <https://www.oecd.org/about/secretary-general/opennessandtransparency-pillarsfordemocracytrustandprogress.htm>

<sup>3</sup> <https://news.gamestop.com/stock-split#:~:text=On%20July%206%2C%202022%2C%20GameStop,record%20on%20July%2018%2C%202022.>

<sup>4</sup> [https://s25.q4cdn.com/472643608/files/doc\\_downloads/2022/AMC-Preferred-Dividend-IRS-Form-8937-Signed.pdf](https://s25.q4cdn.com/472643608/files/doc_downloads/2022/AMC-Preferred-Dividend-IRS-Form-8937-Signed.pdf)

<sup>5</sup> ISIN: US00165C2035

<sup>6</sup> <https://www.nytimes.com/2021/02/02/business/gamestop-stock-trading.html>

## WHAT ARE NAKED SHORTS AND FTDS?

“Short Sales occur when a trader/broker or market maker sell stock they don’t own (by borrowing shares<sup>7</sup>), and only later acquires them to close-out the transaction”- the idea is that the seller (short seller) anticipates that the current price will fall and when they buy to close-out (return the shares they borrowed) they will profit from the difference. Naked Shorting is when the stock is “never borrowed and never purchased in the market to properly close-out the transaction”. Where there are constraints on borrowed short selling (e.g., cost of borrowing, Shortage of shares to borrow, the risk of a forced cover, the risk of the stock jumping in price, having to use proceeds from the short sell as collateral until the position is closed), there are no constraints to Naked short selling.<sup>8</sup>

“If the seller does not purchase or borrow the securities for delivery within the normal” T+2 (sale date plus two days), they have “failed to deliver” (FTD), also known as a naked short or fraud for most people. However, the ability to sell securities and then FTD is legal for a certain type of financial institution: a market maker (including broker-dealers that register as market makers). Under REG SHO Rule 203 (b) (2) (iii) market makers do not have to deliver shares on short sales for ‘bona-fide market making activities’, including for (iv) Transactions in security futures.<sup>9</sup> Although FTDS can be indicative of naked shorting they can also be the result of innocuous administrative reasons, however where there are large and persistent FTDS red flags should be observed. The lack of FTDS does rule out naked shorting either, for instance the Continuous Net Settlement (CNS) system creates a process that accommodates settlement failures to promote market liquidity, transfers are delayed through a netting process that allows broker-dealers and the clearinghouse to offset transactions among multiple counterparties, possibly reusing of the same share for covering multiple FTDS, an effect referred to as multiplicity and conceals FTDS<sup>10</sup>; broker-dealers and clearing firms have also engaged in creative but Illegal Options Trading in the past to reset REG SHO Close-Out obligations which also has the effect of concealing FTDS in the options’ chain<sup>11</sup>;; a great deal of trading is carried out directly between broker to broker and settled via private contract

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<sup>7</sup> Short sales.

(1) A broker or dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has:

(i) Borrowed the security, or entered into a bona-fide arrangement to borrow the security; or

(ii) Reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (iii) Documented compliance with this [paragraph \(b\)\(1\)](#).

17 CFR 242.203(b)

<sup>8</sup> Pg 46-47, 2008 “The Naked Truth: Examining Prevailing Practices in Short Sales and the Resultant Voter Disenfranchisement” Robert Brooks and Clay M. Moffett

<https://csbweb01.uncw.edu/people/moffettc/about/Research%20Papers/IIJ-JOT-BROOKS.pdf>number

<sup>9</sup> pg. 47, Pg1-2, 2008 “The Naked Truth: Examining Prevailing Practices in Short Sales and the Resultant Voter Disenfranchisement” Robert Brooks and Clay M. Moffett

<https://csbweb01.uncw.edu/people/moffettc/about/Research%20Papers/IIJ-JOT-BROOKS.pdf>

<sup>10</sup>pg. 3-4, Joseph Borg, NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. <https://www.sec.gov/comments/s7-12-06/jpborg7410.pdf>; paragraph 4, pg. 52, 2008 “The Naked Truth: Examining

Prevailing Practices in Short Sales and the Resultant Voter Disenfranchisement” Robert Brooks and Clay M. Moffett <https://csbweb01.uncw.edu/people/moffettc/about/Research%20Papers/IIJ-JOT-BROOKS.pdf>

<sup>11</sup> “Strengthening Practices for Preventing and Detecting Illegal Options Trading Used to Reset Reg SHO Close-out Obligations”, <https://www.sec.gov/about/offices/ocie/options-trading-risk-alert.pdf>

which is called ex-clearing<sup>12</sup>- the NSCC facilities a maintenance service for these fails but does not disclose to the SEC amounts of FTDS included<sup>13</sup>; and, lastly of course is “Ex Parte” clearing when a market maker that may be using its ‘bona fide’ market making exemption and issuing naked shorts directly to a PFOF broker<sup>14</sup>. Obviously, FTDS are not an accurate measure of naked shorting abuse, however they are the only means an investor has to determine whether their investment is a target of it, so their disclosure is of utmost importance.

Naked shorting exposes many important questions for retail investors: what exactly have they purchased- if anything- if they don’t receive any purchased or borrowed shares. “In this case, the brokers will place a marker or pledge to deliver the shares on the investor’s account, which are made by the seller’s clearing firm”.<sup>15</sup> Abusive and unchecked naked shorting can lead to a loss of shareholder rights, including disenfranchisement by overvoting and the resulting throwing out of votes by brokers to conceal the breadth of the naked shorting problem<sup>16</sup> which could also lead to fraudulent vote results orchestrated by broker-dealers instead of shareholders; multiplicity of shares can lead to significant financial losses to investors and issuing companies because the traded float may be many times the authorised and outstanding<sup>17</sup>, which can lead to companies desperate for capital having to agree to dilute their shareholders unnecessarily, or agree to predatory debt arrangements if they could not raise the appropriate levels of liquidity via a share offering- a perfect weapon for fraud and pirating the will of investors and executives.

### **US LAWS TO ‘PREVENT’ ABUSIVE NAKED SHORTING: SEC REGULATION on Short Selling “Reg SHO” / close-out obligations and FTDS**

Rule 204 of Regulation SHO<sup>18</sup>

“The SEC adopted Regulation SHO to address concerns regarding persistent failures to deliver and potentially abusive “naked” short selling, e.g., the sale of securities that an investor does not own or has not borrowed. What most people consider fraud.

Accordingly, Rule 204(a) of Regulation SHO requires broker-dealers to take action to close out fail-to-deliver positions (fails or FTDS) resulting from short sales in equity securities by **borrowing or purchasing securities of like kind** and quantity by the beginning of regular trading hours on the settlement day following the settlement date.

<sup>12</sup> Paragraph, 3, pg. 5, “An undetermined amount of settlement occurs outside the NSCC. These trades are known as “ex-clearing” and are handled directly between brokers in a private contractual setting. Currently, no data are available on the magnitude or persistence of ex-clearing FTDS. SEC Regulation SHO, discussed below, does not govern non-CNS trades”

THE OPTIONS MARKET MAKER EXCEPTION TO SEC REGULATION SHO By Thomas Stratmann and John W. Welborn; No. 12-23 August 2012; Mercatus Centre or George Mason University

<sup>13</sup> <https://www.dtcc.com/clearing-services/equities-clearing-services/ow>

<sup>14</sup> “What Is Payment for Order Flow (PFOF)?”

<https://www.investopedia.com/terms/p/paymentoforderflow.asp>

<sup>15</sup> paragraph 9, pg. 47, 2008 “The Naked Truth: Examining Prevailing Practices in Short Sales and the Resultant Voter Disenfranchisement” Robert Brooks and Clay M. Moffett

<https://csbweb01.uncw.edu/people/moffettc/about/Research%20Papers/IIJ-JOT-BROOKS.pdf>

<sup>16</sup> Paragraph 4, pg. 56, 2008 “The Naked Truth: Examining Prevailing Practices in Short Sales and the Resultant Voter Disenfranchisement” Robert Brooks and Clay M. Moffett

<https://csbweb01.uncw.edu/people/moffettc/about/Research%20Papers/IIJ-JOT-BROOKS.pdf>

<sup>17</sup>

<sup>18</sup> <https://www.law.cornell.edu/cfr/text/17/242.204#>

A violation of Rule 204 of Regulation SHO is also a violation of FINRA Rule 2010, which requires members to observe high standards of commercial honour and just and equitable principles of trade in the conduct of their business".<sup>19</sup>

Bi-monthly the SEC publishes FTD (Failure to Deliver) data collected from securities clearing and settlement carried out through the National Securities Clearing Corporation (NSCC)<sup>20</sup> in the United States and Canada. The NSCC is registered with the SEC, however, was only recently exempted/granted permission to do so in the European Union<sup>21</sup>, however is minor player there. The reason the SEC requires disclosure of FTD data is to be able to monitor and enforce its rules as adopted under Regulation SHO - Regulation of Short Sales<sup>22</sup> to discover if there has been any naked short abuse, or persistent FTD that are causing significant harm to capital formation for companies and loss of capital gains by retail investors.

What the SEC doesn't publish is FTDs of US issued securities that were traded and settled abroad- where significant trading of these securities takes place.

### **CENTRAL COUNTERPARTIES (CCPs) & CENTRAL SECURITIES DEPOSITORIES (CSDs)**

Stock exchanges such as the NYSE, or NASDAQ are only venues where a sale is agreed, the exchange of cash and shares, or lack thereof (FTDs), happens behind the scenes where Central Counterparties (CCPs) and Central Securities Depositories (CSDs) facilitate the exchange of cash and securities to each party that agreed to sell and buy on the exchange<sup>23</sup>. The DTCC (which owns the NSCC and DTC, amongst others), has an almost virtual monopoly of Clearing and Settlement in United States, they settled \$152 Trillion in securities in 2021, and provided custody and asset serving for \$87.1 trillion in securities.<sup>24</sup> In order to facilitate vast amounts of trades Clearing agencies pool cash and securities of their members (broker-dealers, market makers) to fulfil the orders instantaneously whilst also spreading the risk of default of one or more members amongst them – the CCP or CSD waits for Individual members to deliver shares and cash thereafter, and when they do not, a FTD occurs. During this settlement period between the transaction and the broker-dealer fulfilling its delivery obligations is when volatility in pricing can cause potential losses to all members if the broker does not deliver. As the CCPs and CSDs in the U.S. are self-governing bodies, and the ownership and members made up of broker-dealers, market makers and exchanges, this creates an obvious conflict of interest, where members and owners of a CCP or CSD could feasibly conspire to work together to avoid or mitigate the negligence and losses of another member to protect their overall liability<sup>25</sup> or to avoid increasing collateral (margin payments, funds, or other assets)

<sup>19</sup> <https://www.finra.org/sites/default/files/2022-10/UBS-Securities-AWC-100422.pdf>

<sup>20</sup> 1 paragraph, "This text file contains 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 member"

<https://www.sec.gov/data/foiadocsfailsdatahtm>

<sup>21</sup> [https://www.esma.europa.eu/sites/default/files/library/third-country\\_ccps\\_recognised\\_under\\_emir.pdf](https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf)

<sup>22</sup> <https://www.ecfr.gov/current/title-17/chapter-II/part-242#subject-group-ECFR1607681c7b4f78d>

<sup>23</sup> <https://www.sec.gov/tm/clearing-agencies>

<sup>24</sup> <https://www.dtcc.com/settlement-and-asset-services>

<sup>25</sup> "the Commission has observed that owners and participants may have structural incentives that differ from one another, leading to differing views as to the efficacy of certain risk management tools and the potential for

requirements of all members at times of increased market volatility as seen in January 2021, when a number of brokers restricted trading in GameStop and AMC Entertainment<sup>26</sup> which shut out retail traders from the markets to nullify the volatility that was inevitably causing all members of their respective CCPs and CSDs both potential liability and increased collateral requirements.

Given CCPs and CSDs fundamental importance to the financial infrastructure of the entire U.S. financial system congress mandated that all clearing agencies must register with the SEC or seek an appropriate exemption, both of which (registration or conditional exemption) is an extremely thorough examination by the SEC and includes stress test, risk management, inspections, and a multitude of disclosures<sup>27</sup>. Section 17A of the Securities Act 1934 mandates the SEC to ensure any registration or exemptions is consistent with the public interest, the protection of investors, [...] including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds

[Section 17 A], Securities Exchange ACT 1934

(b)(1) Except as otherwise provided in this section, it shall be unlawful for any clearing agency, unless registered in accordance with this subsection, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to any security (other than an exempted security). The Commission, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any clearing agency or security or any class of clearing agencies or securities from any provisions of this section or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of this section, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds. A clearing agency or transfer agent shall not perform the functions of both a clearing agency and a

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divergent interests in the risk management of the clearing agency. For example, owners and participants may have differing views as to the scope of products cleared by the clearing agency, the minimum standards required for participation in the clearing agency, and the size, timing, and nature of financial resource requirements applied as part of the risk management framework.

**Fundamentally, an owner's interest in protecting the equity and continued operation of the clearing agency diverges from a participant's interest in avoiding the allocation of losses from a defaulting participant.** Paragraph 2-3 Pg.16; paragraph 1, pg. 17, Clearing Agency Governance and Conflicts of Interest, [Release No. 34-95431; File No. S7-21-22], Securities and Exchange Commission

<sup>26</sup> Pg, 26 Clearing Agency Governance and Conflicts of Interest, [Release No. 34-95431; File No. S7-21-22], Securities and Exchange Commission

<sup>27</sup> "The SEC exercises oversight in a number of ways most notable by supervising various market intermediaries, including central counterparties (CCPs), securities depositories, and other service providers that facilitate clearance and settlement, through a regulatory framework that includes registration requirements and standards for governance, operations, and risk management" Staff Report on the Regulation of Clearing Agencies, U.S. Securities and Exchange Commission, by Division of Trading and Markets, Office of Compliance Inspections and Examinations, October 1, 2020, <https://www.sec.gov/files/regulation-clearing-agencies-100120.pdf>

transfer agent unless such clearing agency or transfer agent is registered in accordance with this subsection and subsection (c) of this section.<sup>28</sup>

Irrespective of the conflicts of interest inherent in the members and owners' self-interest, CCPs and CSDs are the best placed to monitor and report FTDs to regulators and other stakeholders (investors and companies) to ensure transparency, accountability, and trust in the US financial markets – provided they are required to do so. The Regulation on Short Selling (Reg SHO) and Section 17A registration for CCPs and CSDs work together to ensure 'protection' to the U.S. issuers of Securities and their investors, albeit flimsily.

### **IS THERE CONTEMPORARY EVIDENCE OF PERVASIVE NAKED SHORTING IN THE USA?**

Absolutely - On October 3, 2022, UBS Securities LLC accepted that over a ten-year period they had not taken effective action to clear FTDs on 5300 occasions<sup>29</sup> and executed a further 71000 short sales while they already had outstanding FTDs in the securities sold short<sup>30</sup>. This is naked shorting and FTD abuse on a grand scale, involving many billions of dollars. UBS' punishment? They were fined 2.5 million dollars, accepted a 'censure' and disgorgement **was not** ordered according to the file. No compensation to the many thousands or millions of shareholders effected by the illegal dilution of their investments- nor any compensation for the share issuers. It also raises the question of how many corporate votes were rigged; how many companies had to enter predatory debt arrangements because they couldn't raise enough capital on the markets because their share price was suppressed by naked shorting and FTDS.

In another recent FINRA enforcement case "Wedbush Securities INC<sup>31</sup> failed to timely close out approximately 2056 fail-to-deliver (FTD) positions as required by RULE 204 (a), and on approximately 390 occasions failing to place securities in the 'penalty box' as required by RULE 204 (b)". Despite this being Wedbush's second offence in 5-years for naked short abuse, they were only fined \$900 000 and continued to operate as a business despite likely causing millions if not billions of damages to retail investors and US companies.

On August 5<sup>th</sup>, 2022, Gar Wood Securities, LLC<sup>32</sup> accepted it had breached Rule 203(b)(1) of Regulation SHO of the Securities Exchange Act of 1934 and FINRA Rule 2010 by accepting approximately 2,000 short sale orders without obtaining locates (borrowing) between May 2016 and May 2019- despite likely causing millions of damages to retail investors and US issuers, Gar Wood was sanctioned \$100 000.

in each of these cases of largescale fraud they took place under the supervision of the SEC and FINRA in the United States, despite the REG SHO Rules, but what if I told you the SEC and FINRA allow US securities to be traded abroad without any naked shorting or FTD protections.

<sup>28</sup> Pg 269, Securities Act of 1934 <https://www.govinfo.gov/content/pkg/COMPS-1885/pdf/COMPS-1885.pdf>

<sup>29</sup> Paragraph 1, page 3, NO. 2016050211701 <https://www.finra.org/sites/default/files/2022-10/UBS-Securities-AWC-100422.pdf>

<sup>30</sup> Paragraph 4, page 3, <https://www.finra.org/sites/default/files/2022-10/UBS-Securities-AWC-100422.pdf>

<sup>31</sup>[https://www.finra.org/sites/default/files/fda\\_documents/2019061872201%20Wedbush%20Securities%2C%20Inc.%20CRD%20877%20AWC%20lp%20%282022-1666916413754%29.pdf](https://www.finra.org/sites/default/files/fda_documents/2019061872201%20Wedbush%20Securities%2C%20Inc.%20CRD%20877%20AWC%20lp%20%282022-1666916413754%29.pdf)

<sup>32</sup>[https://www.finra.org/sites/default/files/fda\\_documents/2019061062701%20Gar%20Wood%20Securities%2C%20LLC%20CRD%20138033%20AWC%20geg%20%282022-1664065207433%29.pdf](https://www.finra.org/sites/default/files/fda_documents/2019061062701%20Gar%20Wood%20Securities%2C%20LLC%20CRD%20138033%20AWC%20geg%20%282022-1664065207433%29.pdf)

## REGULATION S EXEMPTED SHARES SOLD ABROAD

The SEC adopted Regulation S in 1990 as a safe harbour from the registration requirements of Section 5 of Securities Act 1933 for offshore offers and sales of US issued securities.<sup>33</sup> On the face of it, any reasonable person can see the value of accessing international markets and investors, however, the extent of the exemptions are not widely known to companies and investors, the truth of it is Regulation S creates an Achilles heel to transparency and most likely capital formation, the rule of law and capital gains to investors. Once Regulation S is used to issue securities, they have become exempt, they lose the thorough disclosure requirements (13d and f)<sup>34</sup> the SEC would require of Broker-Dealers, CCPs and CSDs when handling of registered US securities- including individual company FTD disclosures from the CCPs and CSDs that are required in the United States to monitor for signs of infringing Regulation SHO to ensure single companies are not the target of predatory naked short selling.

The number of entities that can rely on the Regulation S are numerous:

U.S. Issuers; Foreign Issuers; Distributors (underwriters and broker-dealers); Affiliates of the issuer (both U.S. and Foreign); Any person acting on behalf of the aforementioned persons; Non-US resident purchasers (including dealers) ; foreign CCPs and CSDs and, U.S. residents (including dealers) who are not offering participants with purchases of securities on the trading floor of an established foreign securities exchange that is located outside the United States or through the facilities of a designated offshore securities market.<sup>35</sup> Depository receipts can also be used for Regulation S offerings of which AMC Entertainment utilized for their special equity dividend (APE) via Citibank as their agent who proudly boast of their expertise in this area.<sup>36</sup>

## US SECURITIES LAWS AND RULES THE SEC HAS FAILED TO ENFORCE

The SEC is the custodian of the Securities Exchange Act 1934 and mandated to protect retail investors, the Public Interest and rule of law by enforcing the provisions of the Act such as requiring broker-dealers, CCPs and CSDs fulfil robust criteria, disclosures, and examinations to be registered with the SEC in order to conduct financial services involving U.S. issued securities or are suitable for an appropriate exemption. And, most importantly the SEC is empowered by Section 30 (a) to ensure those brokers are not permitted to circumvent the

<sup>33</sup> <https://www.sec.gov/rules/final/33-7505.htm>

<sup>34</sup> Pg 111, REGISTRATION REQUIREMENTS FOR SECURITIES

SEC. 12. (a) It shall be unlawful for any member, broker, or dealer to effect any transaction in any security **other than an exempted security** on a national securities exchange unless a registration is effective as to such security for such exchange in accordance with the provisions of this title and the rules and regulations thereunder. The provisions of this subsection shall not apply in respect of a security futures product traded on a national securities exchange.

Securities Exchange Act 1934 <https://www.nyse.com/publicdocs/nyse/regulation/nyse/sea34.pdf>

<sup>35</sup> Pg 1-2 "What's the Deal ? Regulation S", A.T. Pinedo, B.Berman, R.S. Clements, Mayer Brown.

[https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2022/03/whatsthedealregulation\\_s.pdf?la=en](https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2022/03/whatsthedealregulation_s.pdf?la=en)

<sup>36</sup> <https://www.mayerbrown.com/-/media/files/perspectives-events/events/2020/02/200225nycwebinarcapmktstdepositoryslides.pdf>

rules it makes by trading on foreign markets or engaging with foreign CCPs/CSDs, **nor should it be making rules that facilitate it.**

**SEC. 30. (a) It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this title. Securities Exchange Act of 1934<sup>37</sup>**

I was shocked to discover that not one financial regulator abroad – or at least one that will admit it and disclose under FOI- is monitoring U.S. Issued securities' FTDs on an individual company basis, which is the antithesis of open and transparent markets, because the SEC and FINRA have naively – or purposefully- absconded their duty to protect U.S. investors and markets by allowing Regulation S exempted securities to be traded with no protections against naked shorting or FTDs.

## Freedom of Information Findings

### METHOD:

A concise FOI template was used identifying GME, AMC and APE by their ISIN<sup>38</sup>, not CUSIP<sup>39</sup>, and requesting anonymous (to avoid any conflict with confidence laws) fail data for approximately the last 2-years<sup>40</sup> that any reasonable person could use to identify the data

<sup>37</sup> SEC. 30. (a) It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this title. Securities Exchange Act of 1934

<sup>38</sup> All internationally traded securities [issuers](https://www.investopedia.com/terms/i/isin.asp) are urged to use the ISIN numbering scheme, which is now the accepted standard by virtually all countries. Both the United States and Canada use a similar scheme, known as a CUSIP number

<sup>39</sup> <https://www.isin.net/difference-between-isin-and-cusip/>

<sup>40</sup> To Whom It May Concern:

Re: [ Freedom of / Access to Information request: Cross-border Failed Trades / Failure to deliver of equities ]

Could I please request a copy/access to data provided to you by any Clearing and Depository Service , Broker-dealer, or other legal entity as it pertains to failed trade deliveries (FTD) of the US security listed below that were purchased by, or on behalf of [Country's nationals] , Foreign nationals, legal entities using British based or foreign based brokers or legal entities, from January 1, 2021 to present day ( November,21 , 2022) for the trade tickers AMC (AMC Entertainment Holdings Inc, NYSE,(ISIN: US00165C1045)), APE (AMC Entertainment Hldg Pref Equity Units Depository Share Rep 1 100th Int Convertible Prf Shs Series A

NYSE: APE ISIN: US00165C2035)), & GME (GameStop Corp.

NYSE: GME (ISIN: US36467W1099)).

Daily, monthly, yearly breakdown would be appreciated. I do not require personal information, only the information as to how many failed trades (FTD) there has been in the past and currently for each ticker.

I do not want the names of companies reporting the failure to deliver data, only the amount of failed trade deliveries (FTD) in summary form so the request should not be considered confidential information . Much like how the regulator in the USA publishes FTD data: just the fail numbers. <https://www.sec.gov/data/foiadocsfailsdatahtm>



requested, this request was submitted to the National Competent Authorities that supervise Central Securities Depositories (CSD) and CCPS, in addition the European Union body The European Securities and Markets Authority (ESMA).<sup>41</sup> Follow-up requests were made for historical trading volume.

Results:

**European Union (EU)** (comprised of 27 Member States: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden). The EU has its own financial regulator: **European Securities and Markets Authority (ESMA)** and each individual country has its own domestic regulators (National Competent Authorities).

FTDs in Europe are known as **“Settlement Fails”**. Two major pieces of legislation were adopted by the European Union that regulates Short-selling and Clearing and Settlement.

- Regulation 236/2012/EU - Short Selling Regulation (**SSR**)<sup>42</sup>, which is very similar to REG SHO in the United States; and,
- CENTRAL SECURITIES DEPOSITORIES REGULATION (**CSDR**)<sup>43</sup>.

### **RULES AGAINST NAKED SHORTING IN THE EUROPEAN UNION (“uncovered short sales”)**

There isn't any!!! At least for U.S. issued shares or depository receipts that are traded in the European Union. Article 16 of SSR exempts any restrictions on naked shorting where the **principal** venue for trading of shares is in a third country (outside the European Union and EEA)<sup>44</sup>.

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I'd be grateful for your assistance.

<sup>41</sup> <https://www.esma.europa.eu/about-esma/esma-in-brief>

<sup>42</sup> <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:en:PDF#:~:text=short%20positions%20in%20sovereign%20debt&text=A%20natural%20or%20legal%20person%20who%20has%20a%20net%20short,for%20the%20sovereign%20issuer%20concerned.>

<sup>43</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0909>

#### <sup>44</sup> **CHAPTER IV**

##### **EXEMPTIONS** *Article 16*

##### **Exemption where the principal trading venue is in a third country**

1. Articles 5, 6, 12 and 15 shall not apply to shares of a company admitted to trading on a trading venue in the Union where the principal venue for the trading of the shares is located in a third country.
2. The relevant competent authority for shares of a company that are traded on a trading venue in the Union and a venue located in a third country shall determine, at least every 2 years, whether the principal venue for the trading of those shares is located in a third country.

The relevant competent authority shall notify ESMA of any such shares identified as having their principal trading venue located in a third country.

Every 2 years ESMA shall publish the list of shares for which the principal trading venue is located in a third country. The list shall be effective for a 2-year period.

The European Union's justification for these exemptions is that the SSR aims at limiting the 'duplication of obligations' connected to short selling activities.<sup>45</sup> ESMA's preliminary view was that the current Article 16 of SSR still permits an adequate monitoring of the relevant shares in most cases<sup>46</sup>. How? If the SEC only monitors FTDS from NSCC members and has exempted disclosures of Regulation S issued securities, this isn't true. It gets worse.

### **SHORT INTEREST REPORTING IN THE EUROPEAN UNION OF US ISSUED SECURITIES EXEMPTION**

The exemption includes having to report short positions to regulators (Article 5); reporting short positions to the public (Article 6) but also would exempt CCP or CSD from implementing buy-ins of settlement fails (Article 15) for FTDs of U.S. companies.

Normally, significant Short-Interest-positions throughout the European Union must be reported to the National Competent Authority of each Member State where an executing trading venue exists <sup>47</sup> that includes depository receipts and derivatives <sup>48</sup>; however, once U.S. issued securities traded on these venues are admitted to the "List of exempted shares (having their principal trading venue located in a third country)" <sup>49</sup> it enables significant short positions to be opened in U.S. securities with no reporting requirement- GameStop, AMC and APE are on this list, along with most, if not all, U.S. based companies. On its own this provision is open to abuse, but given the proliferation of global trading systems and group company structures (where there are many subsidiaries of the parent company), this provision is already being abused by FINRA members in the United States otherwise it wouldn't have become a FAQ (Frequently Asked Question) and included on FINRA's website:

"Q8. Is a firm required to report short interest positions that are held overseas at a separate legal entity and are not reflected on the firm's books and records?"

<sup>45</sup> Paragraph 261, Final Report Review of certain aspects of the Short Selling Regulation, 22 March 2022 | ESMA70-448-10 [https://www.esma.europa.eu/sites/default/files/library/esma70-448-10\\_final\\_report\\_-\\_short\\_selling\\_regulation\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-448-10_final_report_-_short_selling_regulation_review.pdf)

<sup>46</sup> Paragraph 262, Final Report Review of certain aspects of the Short Selling Regulation, 22 March 2022 | ESMA70-448-10 [https://www.esma.europa.eu/sites/default/files/library/esma70-448-10\\_final\\_report\\_-\\_short\\_selling\\_regulation\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-448-10_final_report_-_short_selling_regulation_review.pdf)

<sup>47</sup> CHAPTER II TRANSPARENCY OF NET SHORT POSITIONS Article 5 Notification to competent authorities of significant net short positions in shares 1. A natural or legal person who has a net short position in relation to the issued share capital of a company that has shares admitted to trading on a trading venue shall notify the relevant competent authority, in accordance with Article 9, where the position reaches or falls below a relevant notification threshold referred to in paragraph 2 of this Article. 2. A relevant notification threshold is a percentage that equals 0,2 % of the issued share capital of the company concerned and each 0,1 % above that. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:en:PDF>

<sup>48</sup> Part 1 of Delegated Regulation No. 826/2012 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:251:0001:0010:en:PDF>

<sup>49</sup> Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March on short selling and certain aspects of credit default swaps (the Regulation) requires the relevant competent authorities to identify shares having their principal trading venue located in a third country. Under Article 16(2) of the Regulation the relevant competent authorities notify ESMA of such shares. On the basis of these notifications, ESMA publishes the compiled list of exempted shares to which provisions of the Regulation relating to net short position transparency (Articles 5 and 6), to the restriction of uncovered short sales (Article 12). [https://registers.esma.europa.eu/publication/searchRegister?core=esma\\_registers\\_mifid\\_shsex](https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_mifid_shsex)

A8. No. FINRA member firms only are required to report all short positions that are held in each individual firm or customer account, including the account of a broker-dealer, that are reflected on the firm's books and records, as described in Rule 4560"<sup>50</sup>

This exemption may have significant corollary effects on the SEC's REG SHO regulations in conjunction with Section 30 (a) of the Securities Exchange Act<sup>51</sup> given FINRA has told its members that using separate legal entities to execute short positions negates any requirement of their US based affiliate or parent company to report short interest.<sup>52</sup>

Ominously a great number of American market makers and dealer-brokers use separate European legal entities (e.g., **Citadel Securities (Ireland) Limited, Goldman Sachs International Bank, Goldman Sachs Bank Europe SE, Morgan Stanley Europe, Susquehanna International Securities Limited, Virtu Financial Ireland Limited...**) to conduct business in the European Union and have registered with the EU to rely on these specific exemptions.<sup>53</sup> **Virtu Financial Limited, Susquehanna International Securities Limited, Interactive Brokers and Citadel Connect Europe are also being listed as systematic internalisers.**<sup>54</sup> FINRA has even gone as far as punishing firms that have reported their overseas' short positions in the United States- UBS Securities LLC<sup>55</sup> was punished for not ensuring offshore short positions were kept separate from its US reporting obligations.

Given the exemptions for naked short selling and short interest reporting, the FOI requests for FTD in Europe became even more important for transparency's sake.

### **European Securities and Markets Authority (ESMA)**

A request was made to the **European Securities and Markets Authority (ESMA)**.

<sup>50</sup> <https://www.finra.org/rules-guidance/rulebooks/finra-rules/4560>

<sup>51</sup> SEC. 30. (a) It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this title. Securities Exchange Act of 1934

<sup>52</sup> **Q8. Is a firm required to report short interest positions that are held overseas at a separate legal entity and are not reflected on the firm's books and records?**

A8. No. FINRA member firms only are required to report all short positions that are held in each individual firm or customer account, including the account of a broker-dealer, that are reflected on the firm's books and records, as described in Rule 4560.

<https://www.finra.org/filing-reporting/regulatory-filing-systems/short-interest/faq>

<sup>53</sup> [https://www.esma.europa.eu/sites/default/files/library/list\\_of\\_market\\_makers\\_and\\_primary\\_dealers.pdf](https://www.esma.europa.eu/sites/default/files/library/list_of_market_makers_and_primary_dealers.pdf)

<sup>54</sup> According to Article 15(1) of Regulation (EU) No 600/2014 (MiFIR) ESMA shall establish a list of all systematic internalisers (SIs) in shares, depository receipts, ETFs, certificates and other similar financial instruments in the Union. According to Article 18(4) of MiFIR ESMA shall establish a list of all SIs in bonds, structured finance products, emission allowances and derivatives in the Union. The list contains in addition some information on the type of asset classes in which the investment firm is a systematic internaliser, but does not include information on an instrument-by-instrument basis. [https://registers.esma.europa.eu/publication/searchRegister?core=esma\\_registers\\_upreg#](https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_upreg#)

<sup>55</sup> [https://www.finra.org/sites/default/files/fda\\_documents/2017053779201%20UBS%20Securities%20LLC%20CRD%207654%20AWC%20geg%20%282022-1667434817512%29.pdf](https://www.finra.org/sites/default/files/fda_documents/2017053779201%20UBS%20Securities%20LLC%20CRD%207654%20AWC%20geg%20%282022-1667434817512%29.pdf)

ESMA disclosed that they do not hold any settlement fail data on specific companies,<sup>56</sup> as all fail data is aggregated and reported as whole as opposed to specific companies.

### **GERMANY (Relevant Competent Authority in Europe for APE is BaFin)**

In Germany GameStop has been registered to trade on 12 different trading venues (MIC CODE: STUB, BERB, FRAB, HAMB, XETB, XETV, XGAT, DUSD, MUNB, DUSB, MUND, HAMN, DUSD); AMC 12 trading venues (STUB, BERB, FRAB, HAMB, XETB, XETV, DUSD, MUNB, DUSB, MUND, HAMN, DUSD, STUD); and, APE 10 trading venues (STUB, BERB, FRAB, XGAT, DUSD, MUNB, DUSB, MUND, HAMN, DUSD, STUD).<sup>57</sup>

Germany is also home jurisdiction for Deutsche Borse Group which owns Luxembourg based Clearstream Banking S.A. a major CCP and CSD in Europe and DBG also owns several trading venues.<sup>58</sup> Clearstream was never granted permission to offer clearing and settlement for U.S. issued securities (equity) from the SEC, only U.S. government securities<sup>59</sup>; however, registration or an exemption wasn't needed with Regulation S, as Clearstream proudly boasts of its services available for Regulation S shares "Reg S & Rule 144A securities to global investor base Clearstream's AA-rated infrastructure is best placed to support the issuance of Regulation S (Reg S) and Rule 144A securities and ensures direct access to a wide range of global intermediaries while enhancing the scope of post trade connectivity, securities lending and collateral management opportunities".<sup>60</sup>

<sup>56</sup> Freedom of information response from ESMA: "We would like to refer to the request you sent to ESMA on 22 September 2022 relating to "[Failed Trades / Failure to delivers]". In particular you requested the following: "[...] a copy/access to data provided to you by any Clearing and Depository Service and or Broker-dealer as it pertains to failed trades of the US securities listed below that were bought by EU nationals, foreign nationals & companies using EU member state or EEA based brokers or corporations - from January 1, 2021 to present day (September, 20, 2022) for the trade tickers AMC (AMC Entertainment Holdings Inc, NYSE,(cusip: 0001411579)), APE (AMC Entertainment Hldg Pref Equity Units Depository Share Rep 1 100th Int Convertible Prf Shs Series A NYSE: APEcusip : 00165C203) & GME ( GameStop Corp. NYSE: GME (cusip : 36467W109) ). Daily , monthly, yearly breakdown would be appreciated. I do not require personal information, only the information as to how many fails there has been & continues to be for each ticker.". "Against this background, please note that ESMA does not hold this level of data granularity (ISIN based) from the reports it receives pursuant to Regulation (EU) No 909/2014. Consequently, ESMA does not possess the requested information"

We trust this response addresses your request in full. With kind regards Enrico Gagliardi

<sup>57</sup> Use ISIN to search on UK FIRDS : <https://data.fca.org.uk/#/viewdata>

<sup>58</sup> <https://deutsche-boerse.com/dbg-en/our-company/deutsche-boerse-group>

<sup>59</sup> Paragraph 5 , Pg 9231, "Securities Covered by the Exemption, In its application for exemption, Cedel requested that it be permitted to provide clearance and settlement, securities lending, and GCSS services for transactions involving all U.S. securities, including equity and debt. As the comment letters generally indicated, the ability to provide clearance, settlement, and collateral management services for transactions involving U.S. Treasuries appears to be the most critical element of Cedel's proposed services, especially GCSS. In addition, at this time Cedel has linkages with U.S. entities necessary to provide services for transactions involving U.S. government securities but has not yet developed the necessary linkages that would enable to provide for clearance and settlement of all U.S. debt and equity securities. Based on these considerations, this Order grants Cedel authority to provide clearance, settlement, and collateral Fedwire-eligible U.S. government securities and (ii) mortgage backed pass-through securities that are guaranteed by the Government National Mortgage Association ("GNMAs") (collectively, eligible U.S. government securities") **The Commission believes that this limitation is necessary and appropriate because it will facilitate operation of the GCSS system and permit Cedel to offer securities processing services for very liquid U.S. government securities and will provide Cedel with the opportunity to request that the exemption be broadened when it develops the necessary linkages and facilities to provide securities processing services for other U.S. securities"** Clearstream Banking S.A. exemption (Deutsche Borse Group) <https://www.govinfo.gov/content/pkg/FR-1997-02-28/pdf/97-5027.pdf>

<sup>60</sup> <https://www.clearstream.com/clearstream-en/newsroom/200724-2128140>

**Volume is not insignificant** in Germany, across ten exchanges where data could be obtained, in the month of January 2021, approximately 58 500 000 million shares were traded of AMC and 28 500 000 million of GameStop.<sup>61</sup>

The German Federal Financial Supervisory Authority, BaFin<sup>62</sup>, disclosed that they follow the minimum standard EU model: only monitoring FTDS (settlement fails) on an aggregate basis of all fails, not individual<sup>63</sup>, therefore cannot provide any information on FTDS for a specific company. Although Germany's Central Bank, Deutsche Bundesbank has dual oversight responsibilities of their CSD<sup>64</sup>, they also reported having no company specific settlement fail data.

BaFin provided the legal basis for not providing the data, [Pursuant to Article 7 (1) of Regulation (EU) 909/2014 (CSDR)<sup>65</sup> in conjunction with Article 14 (1) of Regulation (EU) 2018/1229 (Settlement Discipline)<sup>66</sup>, a Central Securities Depository (CSD) shall, inter alia, report the number of failed settlements to the competent authority on a monthly basis. However, the failed settlements are not reported for each ISIN (Company), but aggregated for the respective type of financial instrument (e.g. for all transferable securities within the meaning of Article 4 (1) no. 44 (a) of Directive 2014/65/EU<sup>67</sup> (Article 13 (1) (c) no. i of the Settlement Discipline)) ] so there is no way to request FTD data for specific companies as private companies (CSDs) are not obligated to respond to freedom of information requests.

However, after further analysis these are minimum standards the EU passed for reporting of settlement fails (FTDs) from member state CSDs, there is nothing precluding member states from implementing far more robust disclosures to ensure basic transparency and fraud prevention standards. According to Paragraph 14 of DelReg 2018/1229, National Competent Authorities are entitled to request additional information on settlement fails or more frequent reporting as necessary to perform their tasks.<sup>68</sup> Under Article 13 (1) of the same DelReg 2018/1229 Depositories are already required to collect detailed information on each fail, how long it lasted and the known reason.<sup>69</sup> This aggregate reporting of settlement fails

<sup>61</sup> [https://www.ariva.de/gamestop-aktie/kurse/historische-kurse?go=1&boerse\\_id=131&month=2021-06-30&currency=&clean\\_split=1&clean\\_bezug=1](https://www.ariva.de/gamestop-aktie/kurse/historische-kurse?go=1&boerse_id=131&month=2021-06-30&currency=&clean_split=1&clean_bezug=1)

<sup>62</sup> [https://www.bafin.de/EN/DieBaFin/AufgabenGeschichte/aufgabengeschichte\\_node\\_en.html](https://www.bafin.de/EN/DieBaFin/AufgabenGeschichte/aufgabengeschichte_node_en.html)

<sup>63</sup> "BaFin does not receive any information on failed settlements of individual financial instruments from the CSDs subject to reporting requirements, so there is already no official information that I could provide to you.

Pursuant to Article 7 (1) of Regulation (EU) 909/2014 (CSDR) in conjunction with Art. Article 14 (1) of Regulation (EU) 2018/1229 (Settlement Discipline), a CSD shall, inter alia, report the number of failed settlements to the competent authority on a monthly basis. However, the failed settlements are not reported for each ISIN, but aggregated for the respective type of financial instrument (e.g. for all transferable securities within the meaning of Article 4 (1) no. 44 (a) of Directive 2014/65/EU (Article 13 (1) (c) no. i of the Settlement Discipline))" Translation from German to English. Freedom of Information request response, 27 October 2022 from BaFin, Federal Financial Supervisory Authority

<sup>64</sup> <https://www.bundesbank.de/en/tasks/payment-systems/oversight/central-securities-depositories-626478>

<sup>65</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0909>

<sup>66</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.230.01.0001.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.230.01.0001.01.ENG)

<sup>67</sup> <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32014L0065>

<sup>68</sup> Paragraph 14 "CSDs should send monthly reports on settlement fails to their competent authorities and relevant authorities. Competent authorities should also be entitled to request additional information on settlement fails or more frequent reporting as necessary so that they can perform their tasks. Such additional information or reports should be shared by the requesting competent authorities with the relevant authorities without undue delay." [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.230.01.0001.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.230.01.0001.01.ENG)

<sup>69</sup> Article 13- Details of the system monitoring settlement fails

is very opaque and leaves one to ask many questions, in particular what safeguards are in place to ensure that one or more companies are not the victims of predatory short-selling and persistent FTDs that are hidden in the aggregate data. When an investor researches an investment, they're hardly going to be interested in the aggregate amounts of fails for all securities, they want accurate information specific to the company they're investing in, so too do CEOs and CFOs when they want to raise capital via a share offering without needlessly diluting shareholder value. I followed up with BaFin.

I asked them specifically what safeguards there are, if any, to ensure that the aggregate data did not hide excessive FTDs in regard to one or more companies that may be subject to predatory short-selling. Verbatim response:

*“although the number of settlement fails are being reported in aggregate on the level of the financial instrument, the CSD has to identify and report the top 10 participants with the highest rates of settlement fails (see Art. 14(1) DelReg 2018/1229 in connection with Annex I). According to Art. 13(2) DelReg 2018/1229 the CSD shall establish working arrangements with those top 10 participants to analyse the main reasons for the settlement fails.*

*According to Art. 22 Reg. 909/2014 the CSDs NCA can conduct audits to ensure CSDR-compliance”*

Let's be clear the top ten participants are brokers and market makers, in other words, there isn't any safeguards to protect individual companies or their investors from excessive and persistent FTDS that may be indicative of naked shorting. There is no way for investors, no way for the companies potentially targeted to carryout due diligence to determine whether this is a problem or not. This is not in the public interest, not to benefit of capital formation, not in the best interests of investors – it certainly doesn't warrant a continued Section 5 Securities Act 1933 Exemption for registration of the securities when the EU and Germany are not carrying out sufficient protections of investors and companies while supervising their Broker-Dealers, CCPs and CSDs.

## REPUBLIC OF IRELAND

There are 3 (MIC CODES: LEUE, XPOS, XPAC) trading venues in Ireland that are registered to trade GME and AMC, one of those registered to trade APE (LEUE). XPAC and XPOS are owned operated by **Virtu Financial the other by TP ICAP**. FOI was issued to the Central Bank of Ireland<sup>70</sup> where they stated they could not locate any records of settlement fails of any of the securities. Given that all three have had significant FTDs in the U.S., I followed up with the

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CSDs shall establish a system that enables them to monitor the number and value of settlement fails for every intended settlement date, including the length of each settlement fail expressed in business days. That system shall, for each settlement fail, collect the following information:

the reason for the settlement fail, based on the information available to the CSD;

any settlement restrictions such as the reservation, blocking or earmarking of financial instruments or cash that make those financial instruments or cash unavailable for settlement.

<sup>70</sup> <https://www.centralbank.ie/regulation/industry-market-sectors/investment-firms/regulated-markets/supervision-process>

Irish Central Bank and requested the daily volume of trading of each of the securities. The Bank refused the request although admitted they had the data. Publishing daily volume is the minimum transparency you could expect from a market, and it is available across the EU for most other trading venues, it's highly irregular that the Irish Central Bank would not release it- I have subsequently appealed.

### **UNITED KINGDOM (Relevant Competent Authority for GME and AMC in Europe: Financial Conduct Authority)**

GameStop is registered to trade on one exchange (MIC CODE: XLOM) and AMC on another (MIC CODE: IMCE). FOI requests were issued to both the Financial Conduct Authority (FCA)<sup>71</sup> and Bank of England<sup>72</sup>. The FCA informed me that had no information and that it is was the Bank of England that monitored FTDS.

The Bank of England “confirm[ed] that the bank holds certain information provided by Bank-regulated financial market infrastructures (such as central securities depositories) which may relate to trading in US securities. Such information comprises daily reports in relation to ‘trades’ in securities”<sup>73</sup> that may include FTDS but would not disclose it because it would take them too much time (more than 18 hours). I appealed it on the grounds that they're digital records, easily disseminated by someone competent with software and felt their response was an attempt to obstruct the FOI request. The internal review was denied again on costs, they stated it would take them 70 hours to complete the task, much more than the 18 hours allowed under the FOI ACT.

I subsequently spoke to several family members and other investors who thought it was outrageous, each of them became personally incensed and also wanted to know what is happening in our financial markets. They each sent in a FOI request, 5 in total including myself, which would have allowed each request to come under the 18-hour requirement set by the Bank of England as each request was 1/5 of the data requested.

Although there is significant Public Interest in GameStop and AMC, the subject of two US government reports, and countless international media stories, the Bank of England has declared that the 5 different (from separate people) requests are working in concert and denied the request on costs again. They have not even offered a way forward. For my part I have requested an internal review and appealed the original request to the Information Commissioner. I will add that of the dozens of FOI requests I have made to over 30 different countries, not one regulator has ever denied a request because of costs. The SEC in the United States also releases FTDS for thousands of companies every two-weeks, my request consisted of three tickers, one of which, APE, has only been trading since August 2022 and is not registered to trade in the UK so there were likely no records to begin with.

The lack of willingness to provide transparency by the Bank of England, should be viewed as a denial of transparency to every U.S. company and investor. Why should the British be

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<sup>71</sup> <https://data.fca.org.uk/#/homepage>

<sup>72</sup> <https://www.bankofengland.co.uk/payment-and-settlement>

<sup>73</sup> Michael Salib, Deputy Secretary at the Bank of England, 21 November 2022

allowed the privilege of access to the U.S. Markets if they're not prepared to offer the simplest form of transparency to ensure accountability and that the rule of law is being observed.

## **BULGARIA**

One exchange in Bulgaria has registered to trade AMC (MIC CODE: JBUL), the regulator there, Financial Supervision Commission disclosed they had no records of FTDs for AMC and were reluctant to provide daily volume figures for AMC for every day since it started trading there.

## **FRANCE**

One exchange (MIC : TPIR<sup>74</sup>) has registered to trade GameStop in France. FOI was made to both the Banque De France<sup>75</sup> and The Autorité des Marchés Financiers (AMF)<sup>76</sup>. Banque De France responded "Unfortunately, we are unable to answer your request",<sup>77</sup> no letter outlining why, or an appeals' process was offered. The Autorité des Marchés Financiers (AMF) responded with simply "We are unable to provide you with this information", again no official letter outlining why they were not able to or any appeals' process. Are these responses indicative of an open and transparent government that adheres to the rule of law, what confidence can anyone have that these regulators are sufficiently monitoring Brokers, CCPs and CSDs to protect US investors and companies- very little in my opinion, and certainly not worthy of an exemption from the SEC.

## **AUSTRIA**

AMC and GME have only recently (December 21, 2022) been admitted to trading in Austria (MIC CODE: WBDM<sup>78</sup>). A FOI was submitted to the Austrian regulator, Finanzmarktaufsicht (FMA) for FTDs, they were hostile to providing any financial data given their draconian financial secrecy laws.

## **Other European Member States**

There have been multiple cases of AMC and GME investors based in other EU Member States (Italy, Netherlands, Poland, Czech Republic, Slovenia, Malta, Cyprus, Croatia, Finland, Spain, Portugal) that complained of not receiving their dividend in the prescribed form or at all. As neither GME and AMC are registered to trade in those states, presumably their trades are being routed through other trading venues based in Europe or OTC via intra-broker trading: "ex-clearing" or "ex parte clearing". I sent FOI requests to all the regulators in those countries, each disclosing that they had no records of settlement fails for GME, AMC and APE. Another example of little to no oversight of intra-broker trading.

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<sup>74</sup> <https://tpicap.com/tpicap/>

<sup>75</sup> <https://www.banque-france.fr/en/financial-stability/market-infrastructure-and-payment-systems/oversight-tasks/oversight-financial-market-infrastructures>

<sup>76</sup> <https://www.amf-france.org/en/amf/our-missions>

<sup>77</sup> Nous ne sommes malheureusement pas en mesure de répondre à votre demande.

Cordialement,

L'équipe en charge du support sur le périmètre et la méthodologie données publiées par la Banque de France

<sup>78</sup> <https://www.wienerborse.at/>



§ [REDACTED]

## CANADA

FOI requests for FTD data was made to the Bank of Canada, Ontario Securities Commission, British Columbia Securities Commission and the Autorité des marchés financiers (AMF) in Quebec. The AMF seemingly confirmed what many suspected that in the case of the GameStop dividend the DTCC may have committed securities' fraud in instructing their members to facilitate a forward split instead of a split via dividend.

The AMF confirmed that the DTCC was the competent authority when issuing the GME dividend to Canadians "The issuances [GME, AMC and APE] specifically mentioned in your previous correspondence are listed solely in the US and as such, would be cleared through a US clearing house, in this case through The Depository Trust & Clearing Corporation ("DTCC), irrespective of the residence of the end client. DTCC is the parent company of The Depository Trust Company (DTC) and the National Securities Clearing Corporation (NSCC). It is also noted that CDS [Clearing and Depository Services Inc.] offers a link service to DTCC, which is called the New York Link Service.... Through the New York Link Service, CDS does not substitute itself to the clearing and settlement functions of DTCC. DTCC effectively clears and settles the trades submitted through New York Link Service"<sup>79</sup>.

In emails from a broker in Canada, Wealthsimple<sup>80</sup> to its clients, Wealthsimple said they get "processing information from our clearing brokerage on how to execute corporate action"; "our brokerage is CDS"; "To add more context as to why it was processed as a stock split, well there was no capital increase or change on the company's retained earnings to treat the event as a stock dividend. Moreover, with the split, the original shares were split into four but it did not change the fundamentals of the company".

We now know that those instructions more than likely came from the DTCC, in contravention of a duly taken corporate action as approved by the GameStop board and implemented under U.S. and Delaware Securities law, where GameStop is based. WealthSimple's bizarre and illegal explanations for why they were not delivering the new shares owed to its clients is a brazen example of securities' fraud perpetrated by either the DTCC, the CDS, Wealthsimple or a conspiracy between them- perhaps an effort to conceal previous naked shorting of GameStop in the past and mitigate liability to the DTCC's owners and members, which brings up a question that could bring the markets into disrepute entirely: if the instructions did come from the DTCC, how regularly is the DTCC providing fraudulent instructions in regard to share dividends and how long has it been happening? The SEC could easily subpoena the instruction records from the DTCC to brokers and other clearing agencies.

## JAPAN

There were many complaints in Japan regarding not receiving their APE dividend and being offered cash in lieu, or only being allowed to sell the APE shares on their account, not buy.

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<sup>79</sup> Autoite des marches financiers,

<sup>80</sup> <https://www.wealthsimple.com/en-ca>

§ [REDACTED]

FOI was sent to the FSA<sup>81</sup> and SEC<sup>82</sup> in Japan, each of which disclosed they had no records of FTDs for GME, AMC or APE. Presumably the trading of U.S. Stocks in Japan is done OTC and intra-broker without any oversight of the local regulators.

## AUSTRALIA AND NEW ZEALAND

Presumably the trading of U.S. Stocks in Australia and New Zealand is also done OTC and intra-broker without any oversight of the local regulators. Central Banks and regulators were contacted in both countries, none of which had any FTD data, despite numerous complaints of Aussies and Kiwis not receiving their dividends properly.

## Conclusions

There can be no justification for naked short and short interest reporting exemption of U.S. issued securities in Europe. Transparency rules already exist in Europe where significant short positions must be disclosed to the regulator and public<sup>83</sup>, and naked shorting of European stocks is forbidden - why are American companies not offered the same protections? There is huge and deleterious scope of potential abuse and harm to U.S. investors, companies and unpopular as it may be, the US government's ability to raise tax dollars for many of its programs, especially as we have seen colossal abuse of naked shorting and FTDS by UBS Securities LLC, Wedbush Securities LLC and Gar Wood Securities LLC in United States while forbidden to do so. To protect U.S. companies, economy, investors, and national security the SEC should immediately demand that the European Union scrap this exemption and require National competent authorities in Europe to report Net-Short positions, prohibit the naked shorting of U.S. companies' stocks in Europe and report publicly the FTDs of U.S. companies held by European Union CCPs and CSDs.<sup>84 85</sup> SEC should also ensure that FINRA imposes on its members with foreign subsidiaries or parent companies to report all short positions of U.S. issued securities (whether they are Regulation S issued, or not) within the group structure no matter where they were traded.

<sup>81</sup> <https://www.fsa.go.jp/en/>

<sup>82</sup> <https://www.fsa.go.jp/sesc/english/>

<sup>83</sup> CHAPTER II TRANSPARENCY OF NET SHORT POSITIONS

Article 5 Notification to competent authorities of significant net short positions in shares 1. A natural or legal person who has a net short position in relation to the issued share capital of a company that has shares admitted to trading on a trading venue shall notify the relevant competent authority, in accordance with Article 9, where the position reaches or falls below a relevant notification threshold referred to in paragraph 2 of this Article. 2. A relevant notification threshold is a percentage that equals 0,2 % of the issued share capital of the company concerned and each 0,1 % above that.

Article 6 Public disclosure of significant net short positions in shares 1. A natural or legal person who has a net short position in relation to the issued share capital of a company that has shares admitted to trading on a trading venue shall disclose details of that position to the public, in accordance with Article 9, where the position reaches or falls below a relevant publication threshold referred to in paragraph 2 of this Article. 2. A relevant publication threshold is a percentage that equals 0,5 % of the issued share capital of the company concerned and each 0,1 % above that.

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:en:PDF>

REGULATIONS REGULATION (EU) No 236/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 March 2012 on short selling and certain aspects of credit default swaps

<sup>84</sup> [https://www.esma.europa.eu/sites/default/files/library/ccps\\_authorized\\_under\\_emir.pdfprinter](https://www.esma.europa.eu/sites/default/files/library/ccps_authorized_under_emir.pdfprinter)

<sup>85</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-155-11635\\_csds\\_register\\_-\\_art\\_21.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-155-11635_csds_register_-_art_21.pdf)

If the SEC refuses to carry out its duties to protect U.S. investors and markets, U.S. companies and their investors can contact the National Competent Authorities where they are traded to demand they use their powers under Article 18, SSR, Chapter V, POWERS OF INTERVENTION OF COMPETENT AUTHORITIES AND OF ESMA, and express that the total lack of transparency in regard to naked shorting, FTDs and short interest is “serious threat to financial stability and market confidence” as there is no supervision by the SEC or FINRA in regard to U.S. securities trading in Europe, therefore the threat and size is unknown, but given that U.S. firms abuse naked shorting and FTDS on such a grand scale in the U.S. it’s inevitable that they are doing so without supervision in the European Union. They can also request that the National Competent Authority freeze further shorting until transparency in the markets is achieved.<sup>86</sup>

The SEC should also immediately move to remove the broker-dealer exemptions of disclosure regarding the intra-broker dealings and holdings of Regulation S - U.S. issued securities, move to ensure FTDS are also disclosed on an intra-broker basis and end the absurdity that FTDS accumulated at the Obligations Warehouse at the NSCC are not disclosed publicly. It goes without saying that the lack of transparency regarding naked shorting and FTDs brings the entire system of security-based swaps into total disrepute. The SEC needs to move with expediency to investigate whether the DTCC is embezzling the share dividends of investors, such as the GameStop share dividend where they allegedly passed fraudulent corporate-action-instructions to a Canadian dealer-broker. Is this a standard business practice by the DTCC to cover-up and mitigate the naked shorting and FTDS of its members? U.S. companies should think twice about any type of split (reverse, forward or share dividend) if the DTCC is in fact routinely carrying our securities fraud when they’re issued.

The exemption of Regulation S securities without any protections or transparency by the SEC is abhorrent to rule of law, to the democratic principle of transparency, abhorrent to the protection of investors, abhorrent to free markets and fatal to companies that are targeted by naked shorting and FTDs. Why has this been allowed to go on, are company CEOs, General Counsels and CFOs also complicit in this? Or were they hoodwinked by their agents that handled their share offerings? If company officers were not complicit before, they certainly will be once notified of this and do nothing to protect their companies and shareholders.

Companies and Shareholders could unite and seek a writ of mandamus from the courts, which would compel the SEC to do their jobs and restore transparency, the rule of law and protection of investors to the markets.

### **GameStop Report**

That not one single record of settlement fail/FTD was produced for the 2-years of records requested is hugely troubling given that in the United States the events of January 2021

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<sup>86</sup> Under Article 20 of SSR, RCAs can prohibit or impose conditions to natural or legal person entering into short sales or increasing their NSPs where: a) “there are adverse events or developments which constitute a serious threat to financial stability or **to market confidence** in the Member State concerned or in one or more other Member States; and b) the measure is necessary to address the threat and will not have detrimental effect on the efficiency of financial markets which is disproportionate to its benefits”

resulted in a Congressional enquiry and report <sup>87</sup> and an official SEC report, the so-called 'GameStop report' <sup>88</sup>. It is equally as troubling that when the SEC was tasked with investigating the events of January 2021 and whether there was significant naked short positions by analysing the failed to deliver data, the SEC only analysed failed to deliver data provided from the NSCC<sup>89</sup>, which doesn't account for any of the trading, additional borrowing and failed to delivers during this period in the European Union when the NSCC was not approved to operate there<sup>90</sup> or intra-broker in the many countries that GameStop is traded- a flawed and negligent analysis at best, if not purposefully misleading.

During Covid Retail investors started to educate themselves and discovered overleveraged short positions by the institutions in companies that seem to have been specifically targeted because they had to shutter their doors during the pandemic. This research to identify opportunities to profit is not dissimilar to identifying arbitrage opportunities or activist short-seller opportunities to publish 'alleged' illegality or impropriety at a public company and then profit of the ensuing share price plunge<sup>91</sup>. What retail investors discovered was predatory short selling on a scale that was highly irresponsible and likely illegal. Instead of being rewarded by the market for discovering this, they were shut out and punished.

The truth of why the buy button was removed for retail on January 28, 2021 has more than likely been obscured by the fact that these lax rules in regard to naked shorting and FTDs has created an infinite amount of liability for the members of certain CCPs and CSDs, and they participated in the removal of the buy button in a co-ordinated effort to manipulate the market to mitigate their collective negligence and liability.

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<sup>87</sup> "Game Stopped: How the Meme Stock Market Event Exposed Troubling Business Practices, Inadequate Risk Management, and the Need for Regulatory and Legislative Reform." [https://financialservices.house.gov/uploadedfiles/6.22\\_hfsc\\_gs.report\\_hmsmeetbp.irm.nlrf.pdf](https://financialservices.house.gov/uploadedfiles/6.22_hfsc_gs.report_hmsmeetbp.irm.nlrf.pdf)

<sup>88</sup> Staff Report on Equity and Options Market Structure Conditions in Early 2021 <https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf>

<sup>89</sup> See footnote 81, pg. 29, "Staff conducted this analysis using data provided by the NSCC" "Staff Report on Equity and Options Market Structure Conditions in Early 2021" <https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf>

<sup>90</sup> Entry 22, NSCC first authorised to operate in the European Union on March 8, 2022, [https://www.esma.europa.eu/sites/default/files/library/third-country\\_ccps\\_recognised\\_under\\_emir.pdf](https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf)

<sup>91</sup> "DOJ Investigates Short-Sellers For Potential Trading Abuses Including 'Spoofing' And 'Scalping'" S. Klebnikov, February 16, 2022 <https://www.forbes.com/sites/sergeiklebnikov/2022/02/16/doj-investigates-short-sellers-for-potential-trading-abuses-including-spoofing-and-scalping/amp/>



European Union Securities Markets Regulator (ESMA): @ESMAComms

Bank of England: @bankofengland

Financial Conduct Authority UK: @TheFCA

Irish Central Bank: @centralbank\_ie

Bundesanstalt für Finanzdienstleistungsaufsicht (German Regulator) BaFin: @BaFin\_Bund

Bank of France: @banquedefrance

The Autorité des Marchés Financiers (French Regulator): @AMF\_actu