STOECKLEIN LAW GROUP, A PROFESSIONAL CORPORATION

PRACTICE LIMITED TO FEDERAL SECURITIES

EMERALD PLAZA
402 WEST BROADWAY
SUITE 400
SAN DIEGO, CALIFORNIA 92101

TELEPHONE: (619) 595-4882
FACSIMILE: (619) 595-4883
EMAIL: DJS@SLGSECLAW.COM
WEB: WWW.SLGSECLAW.COM

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Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
100 F. Street, NE
NW, Washington, DC 20549-6561

RE: FILE NO. SR-NASD-2004-044-Short Selling Rule Change

Dear Mr. Katz:

This letter is submitted in response to the SEC's request for comments in Release No. 34-52752, dated November 8, 2005, regarding proposed rule changes relating to Short Sale Delivery Requirements.

We concur, and in fact commend the NASD for proposing new Rule 3210 which would apply the Regulation SHO delivery framework to non-reporting OTC equity securities. That being said, we do not believe the proposed thresholds are an accurate indicator of non-reporting OTC equity securities with excessive fails to deliver, in that we do not believe that adding the $50,000 threshold level is appropriate. Additionally, we have serious concerns for the staff's ability pursuant to Rule 9600 to grant exemptions from the provisions of the proposed rule, "either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities, or to any person or class of persons, if such exemption is consistent with the protection of investors and the public interest."

Our concerns are founded upon the basic premise that Strategic Fails to Deliver appear to be difficult to control because of the market-maker exceptions to the normal restrictions on short selling, including permitting naked short selling in the course of bona-fide market-making activity. Keeping in mind that these transactions stem from a standard basis of 3-day trade settlement.

The SEC’s recent adoption of Regulation SHO has drawn attention to the potentially disruptive impact of manipulative short selling, and in particular, naked short sales masquerading as routine fails to deliver.

In order to fully understand the significance of providing exceptions to the rule when dealing with short sales, it is imperative to understand the historical basis of allowing short sales to begin with. More importantly, the impact of short sales on the non-reporting threshold securities theoretically being protected by the proposed rule by NASD.

As referenced in your release on SHO, a short sale is the sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller. Naked short selling is selling short without borrowing the necessary securities to make delivery, thus potentially resulting in a “fail to deliver” securities to the buyer.

Your Staff has drawn attention to the negative impact of the naked short. In effect the naked short seller unilaterally converts a securities contract (which should settle in three days after the trade date) into an undated futures-type contract, which the buyer might not have agreed to or that would have been priced differently. Amongst other negatives, the seller’s failure to deliver securities may also adversely affect certain rights of the buyer, such as the right to vote. However, we believe most importantly, the naked short sellers enjoy greater leverage than if they were required to borrow securities and deliver within a reasonable time period, and they use this additional leverage, which in some cases is no delivery, to engage in trading activities that deliberately depress the price of a security, and in particular this has a greater impact on the securities of the non-reporting threshold securities being addressed in the proposed Rule.

Most of us have difficulty in understanding how short sales occur in the first place, yet alone naked short sales. Naked short selling could not occur, or at lease persist, if the stock purchaser or the clearing house insisted on taking delivery of the shares. Most common stock transactions in the United States clear through the National Securities Clearing Corporation (NSCC). The NSCC is a subsidiary of the Depository Trust and Clearing Corporation (DTCC). Another subsidiary of DTCC, the Depository Trust Company (DTC), is the world's largest securities depository and serves as the clearing house for most trades of registered shares in the United States. DTC was formed about 30 years ago to eliminate the need for physical delivery of securities to settle trades. DTC retains physical custody of stock certificates on behalf of its members, which include all the major broker-dealers. Stock certificates for registered securities are deposited with the DTC and are held in the name of Cede & Co., DTC's nominee name. DTC records the transfer of securities by book entry; electronically it debits the seller's DTC account and credits the buyer's DTC account. No physical transfer of the certificate ever occurs. This is all highly efficient, if the share transfer actually takes place.

The NSCC was created in 1976 through the merger of three major clearing corporations (NYSE, AMEX, and NASD), NSCC works in conjunction with the DTC to provide centralized clearance and settlement for broker-to-broker stock trades in the United States. The NSCC clears and settles transactions through the Continuous Net Settlement (CNS)system. It guarantees completion of the transactions by assuming (i) the obligation of the buyers to pay for the shares upon delivery and (ii) the obligation of the sellers to deliver the shares. During the trading day, the CNS continually nets all trades by its members in each security. The member's previous trading day's closing net long or short position is continually updated with the day's purchases and sales. At the end of the trading day, the member's updated net long or short position in each stock is communicated to the DTC for overnight processing. Additionally, the SEC receives a failed delivery report on a daily basis.

Each short position is compared to the members's DTC account to determine if the member has enough shares on deposit to settle the short position. If so, then the DTC transfers the required number of shares from the member's DTC account to the NSCC's DTC account. Based on instructions from NSCC, the DTC transfers shares received from members with short positions to the accounts of members with long positions. If the member with a short position does not have enough shares in its account to cover the short position, then the NSCC has five choices. First, it can wait another day to see whether the seller cures the fail by delivering the shares. Second, if it determines that the open short position is a high-priority obligation, it can attempt to arrange to borrow enough shares through its stock borrowing program to satisfy the open position. If it is unable to borrow the shares, then the DTC has the three remaining choices: (1) it can demand a dealer buy-in (forcing the selling broker-dealer to buy the shares in the open market and deliver them to the DTC), (2) buy the shares itself in the open market and charge the cost of the buy-in to the account of the seller, or (3) as a last resort, demand that the seller break the trade and compensate the buyer for the associated cost.

The stock borrow program can facilitate naked shorting in two ways. First, sellers can continue to fail to deliver because the NSCC can borrow the shares it needs to meet its clearing obligations through the stock borrow program. It does not have to force the seller who fails to deliver to buy in shares, nor does it have to go into the market to buy in the shares. It simply borrows them from another member firm to effect the buy-in. Second, the stock borrow program allows the shares to be recycled. Each stock loan gives rise to another stock futures contract. Each futures contract credited to a broker-dealer’s sub-account at the DTC continues to be reported on the broker-dealer’s books as a share held either in its proprietary account or in a customer account. In either case, the account holder **believes** he/she owns a real share with all the rights attached to it. Consequently, the stock borrow program effectively creates additional unauthorized shares of the issuer’s stock. These phantom shares inflate the amount of stock that is available for trading and also increases the amount of stock that is available for lending to short sellers.

The Commission has stated that it believes that the SRO requirements’ have not fully addressed the problems of naked short selling and extended fails to deliver and that the Commission believes it would be beneficial to establish a uniform standard specifying the procedures for all short sellers to locate securities for borrowing. We concur with the Staff’s opinion that securities with lower market capitalization may be more susceptible to abuse, and therefore believe that the proposed additional delivery requirements should be extended to all equity securities, both reporting and non-reporting. We agree with this concept of a uniform standard, unfortunately a

$50,000 threshold for non-reporting issuers, along with the ability for exemptions, which will most likely be abused, provide no such uniformity. Keep in mind that these contracts all result from a standard basis of 3-day trade settlement requirements.

In general, we believe the proposed requirements, would assist the Commission in preventing abuses and promote the prompt and accurate clearance and settlement of securities transactions.

We appreciate the opportunity to submit the foregoing to the Commission. We remain ready to discuss our comments with the Commission staff.

Yours truly,

Stoecklein Law Group