

MEMO# 23801

September 17, 2009

Draft ICI Comment Letter on SEC Short Sale Regulation Proposal

[23801]

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TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 19-09
ETF ADVISORY COMMITTEE No. 28-09
EQUITY MARKETS ADVISORY COMMITTEE No. 39-09
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 7-09
SEC RULES COMMITTEE No. 54-09 RE: DRAFT ICI COMMENT LETTER ON SEC SHORT SALE
REGULATION PROPOSAL

As we previously informed you, the SEC has re-opened the comment period on its proposal to impose pricing restrictions on short selling to solicit feedback on an alternative price test ("alternative uptick rule") that would allow short selling only at a price above the current national best bid. [\[1\]](#) The Institute has prepared the attached draft comment letter on the proposal. The most significant aspects of the letter are summarized below.

Comments on the proposal are due to the SEC by September 21, 2009. If you have comments on the ICI's draft letter, please contact Ari Burstein (aburstein@ici.org or 202-371-5408) by COB Monday, September 21.

The draft letter reiterates the views expressed in the Institute's previous comment letter on the SEC's proposed short sale price restrictions, most significantly, that the Institute does not support any new restrictions on short selling and believes that the SEC should continue to rely on current short sale regulations and the anti-fraud and anti-manipulation provisions of the securities laws to address potentially abusive short selling. The draft letter states that SEC actions have already added necessary protections to address abusive short

selling. Empirical evidence also is lacking that any of the proposed approaches would have alleviated any of the markets' recent volatility, and as the SEC itself has acknowledged, there is uncertainty whether any of the proposed approaches would increase investor confidence in the markets. Finally, the potential unintended consequences of any new restrictions warrant proceeding carefully.

The draft letter states that the proposed alternative uptick rule does not alter any of the Institute's views on whether short sale price restrictions should be implemented and that we do not believe the alternative uptick rule would be an improvement over the prior proposed approaches. The letter adds that the alternative uptick rule may exacerbate concerns relating to imposing price restrictions on short sales. Most significantly, because the alternative uptick rule would not allow short selling at the current national best bid, short selling could only occur at a higher price than the current national best bid. As a result, the alternative uptick rule would not allow short sales to get immediate execution, even in an advancing market, and therefore would restrict short selling to a greater extent than the prior proposed approaches. In turn, this could potentially lessen some of the benefits of legitimate short selling, including market liquidity and pricing efficiency.

The draft letter states that the Institute recognizes that there may be potential benefits of the alternative uptick rule to some market participants as compared to the other proposed approaches. The letter adds that, while we do not dismiss these potential benefits, we do not believe that the ease or timeframe in which the alternative uptick rule may be able to be implemented, or the cost savings to certain market participants, should be the determining factors in the SEC's decision on which, if any, short sale price restrictions to implement. To the contrary, the SEC's decision should be based on what is best for investors and the markets as a whole. Finally, the draft letter reiterates the Institute's views that if the SEC nevertheless determines that it must impose one of the proposed restrictions, we continue to believe that a circuit breaker triggering the proposed modified uptick rule, with appropriate exceptions, would have the least impact on legitimate short selling and normal market activity, and would best ensure that the restrictions allow for the orderly functioning of the securities markets and flexibility in trading. [2]

Ari Burstein
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[Attachment](#)

endnotes

[1] See [Memorandum](#) to SEC Rules Members No. 91-09, Equity Markets Advisory Committee No. 35-09, ETF Advisory Committee No. 27-09, ETF Committee No. 6-09, and Closed-End Investment Company Committee No. 34-09, dated August 24, 2009 [23735].

[2] The letter notes that the views expressed in the letter represent a consensus but that some fund groups believe that the SEC should adopt some form of short sale price restriction, namely the proposed modified uptick rule, on a permanent basis to address the SEC's concerns.

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