

## COMMENT LETTER

September 21, 2009

# ICI Comment Letter on SEC Regulation SHO

September 21, 2009

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

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

Dear Ms. Murphy:

The Investment Company Institute [1](#) is writing to comment on the Securities and Exchange Commission's latest proposed amendments to Regulation SHO under the Securities Exchange Act of 1934, specifically the Commission's proposed "alternative uptick rule" for short sales. [2](#) As we stated in our previous comment letter on the Commission's proposed short sale price restrictions, [3](#) an efficient and effective trading environment is critical to Institute members and the over 93 million shareholders they serve. We therefore have supported the Commission's continuing efforts to address issues relating to short selling that may impact the fair and orderly operation of the securities markets and investor confidence in those markets. At the same time, we believe that any examination of the issues surrounding short sales should be careful and deliberate, balancing the Commission's obligation to protect the markets from abusive short selling with the burdens imposed on market participants by, and the potential unintended consequences of, any short sale restrictions.

For the reasons discussed in the June 2009 letter, we do not support any new restrictions on short selling and believe that the Commission 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. Most significantly, Commission actions have already added necessary protections to address abusive short selling. Empirical evidence is lacking that any of the proposed approaches would have alleviated any of the markets' recent volatility, and as the Commission itself has acknowledged, there is uncertainty whether any of the proposed approaches would increase investor confidence in the markets. Further, the potential unintended consequences of any new restrictions warrant proceeding carefully. [4](#)

The proposed alternative uptick rule does not alter any of our views on whether short sale price restrictions should be implemented and we do not believe the alternative uptick rule would be an improvement over the prior proposed approaches. In fact, for the reasons discussed below, we believe the alternative uptick rule would exacerbate our concerns relating to imposing price restrictions on short sales. [5](#)

## **The Alternative Uptick Rule**

The alternative uptick rule would be similar in many respects to the other proposed approaches. For example, like the proposed modified uptick rule, the alternative uptick rule would use the current national best bid as a reference point for short sale orders. Unlike the other proposed approaches, however, the alternative uptick rule would not allow short selling at the current national best bid. Short selling, therefore, could only occur at a higher price than the current national best bid.

As the Release notes, 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. Without further evidence on the benefits of the alternative uptick rule to the overall market, we do not support its implementation.

We recognize that there may be potential benefits of the alternative uptick rule to some market participants as compared to the other proposed approaches. For example, because the alternative uptick rule would reference only the current national best bid in determining permissible short sales, it would not require monitoring of the sequence of bids. As a result, it could be easier to monitor and could be implemented more quickly than the other proposed approaches. Similarly, the alternative uptick rule could be less costly to implement and easier to program into trading and surveillance systems because it would not require bid sequencing.

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 Commission's decision on which, if any, short sale price restrictions to implement. To the contrary, the Commission's decision should be based on what is best for investors and the markets as a whole.

For this reason, we do not support any new restrictions on short selling. If the Commission 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.

We look forward to working with the Commission as it continues to examine these issues. In the meantime, if you have any questions, please feel free to contact me directly at (202) 326-5815, or Ari Burstein at (202) 371-5408 or Heather Traeger at (202) 326-5920.

Sincerely,

/s/ Karrie McMillan

Karrie McMillan  
General Counsel

cc: The Honorable Mary L. Schapiro  
The Honorable Kathleen L. Casey  
The Honorable Elisse B. Walter  
The Honorable Luis A. Aguilar  
The Honorable Troy A. Paredes

James Brigagliano, Acting Co-Director  
Dan Gallagher, Acting Co-Director  
Division of Trading and Markets

Andrew “Buddy” Donohue, Director  
Division of Investment Management

U.S. Securities and Exchange Commission

#### **endnotes**

[1](#) The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$11.02 trillion and serve over 93 million shareholders.

[2](#) SEC Release No. 34-60509 (August 17, 2009), 74 FR 42033 (August 20, 2009) (“Release”).

[3](#) Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated June 19, 2009 (“June 2009 letter”).

[4](#) These potential unintended consequences include increased costs to short selling, a decrease in market efficiency and price discovery, less efficient allocation of capital, and a decrease in liquidity.

[5](#) Our views represent a consensus, but we also acknowledge that some fund groups believe that the Commission should adopt some form of short sale price restriction, namely the proposed modified uptick rule, on a permanent basis to address the Commission’s concerns. All of our members agree, however, that regardless of what action the Commission takes, it must be careful to ensure that it does not negatively impact investors by, for example, reducing market liquidity or harming price discovery.