



Securities Industry and Financial Markets Association

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June 25, 2007

Mr. Gail Sheppick
Director
South Dakota Securities Division
445 East Capitol Avenue
Pierre, SD 57501-3185

Dear Gail:

On behalf of the Securities Industry and Financial Markets Association¹, I am writing to request a meeting with you to discuss the initiative petition to amend the South Dakota Uniform Securities Act of 2002 by adding restrictions to national markets activity and accompanying legal analysis supporting these onerous restrictions on financial firms provided by Danforth & Meierhenry, both documents are attached to this letter. Contrary to the legal analysis provided, the net result of the proposed initiative petition since it is in direct conflict with federal securities laws could be costly litigation for the state.

As written, the proposed amendment reaches beyond sales occurring within South Dakota, or even to sales of issuers that are incorporated or have a place of business in South Dakota, and would cover any broker-dealer who is registered in South Dakota (which would include most broker-dealers, who are generally registered in all states). What is more, the language of the proposed amendment would essentially prohibit every broker-dealer who is registered in South Dakota from engaging in short selling. Specifically, the language picks up as unlawful activity the selling of "securities which the seller does not own" - this is exactly the definition of a "short sale" under Rule 200 of the SEC Regulation SHO. The proposed amendment would also penalize any sales which did not result in delivery in three business days or less, the SEC has specifically indicated that selling and failing to deliver does not necessarily violate any federal securities laws.

As such, the South Dakota initiative would seek to adopt amendments which directly contradict the provisions of the federal securities laws. Not only does the SEC allow short selling, it has recently taken action to remove the price test restrictions on

¹ The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

short sales, noting in support of this action that short selling is necessary to, among other things, ensure efficient markets. As such, it would seem that the proposed South Dakota amendment would be directly at odds with Section 10(a) of the Exchange Act (providing the SEC with authority to regulate short sales).

Further, the initiative violates the National Securities Markets Improvement Act ("NSMIA"), which indicates that no state law, rule or regulation shall establish "margin" requirements for broker-dealers that differ from the requirements under the Exchange Act. A short sale is definitely a type of "margin" transaction (i.e., extending credit in connection with a sale of securities), and thus it would seem that South Dakota should be preempted by NSMIA from adopting an amendment to its statute which would prohibit short sales.

As a matter of background, prior to the November, 2006 merger of the Securities Industry Association (SIA) and the Bond Market Association to form SIFMA, SIA filed suit in federal court to overturn Utah short sale legislation. The Utah legislation was a more narrow proposal than the South Dakota initiative, in that it required broker-dealers to inform the state's Division of Securities when there was a "failure to deliver" securities issued by Utah companies that are traded on national markets. SIA argued the Utah legislation illegally usurps the jurisdiction of the Securities and Exchange Commission and is expressly preempted by federal securities law. As part of its complaint, SIA was seeking a temporary restraining order and has requested a permanent injunction prohibiting the application of the law.

The Utah law, SB 3004, would have affected transactions after October 1, 2006. Despite the fact that it is intended to regulate "naked" or uncovered short selling, the new regulatory requirements were not narrowly tailored to address only instances of "naked" or uncovered short selling. Rather, the law applied to all "fails to deliver," including covered short selling and purchases of a stock when the buyer expects the price to rise.

On August 11, 2006, SIA and the Utah Division of Securities stipulated to a preliminary injunction, which created an opportunity to reach a permanent resolution of the matter. After much reconsideration of the Utah short selling law on the part of most lawmakers, the legislature passed a bill to repeal their short sales statute (SB 277), which was signed into law by the Governor in March of this year.

I thank you for your consideration of our views on this matter, and I would very much like the opportunity to speak with you and your staff about this initiative. I can be reached at 212-618-0533.

Sincerely,



Nancy Donohoe Lancia
Vice President
State Government Affairs