

preborrow securities for future trades only if too many fails have already occurred. This is somewhat akin to a "one free bite at the apple" approach, something regulators attempt to avoid. The reason is because, in practice, it turns out to be a "free bite at the apple" each time a manipulative trader switches brokers—something a manipulative trader can easily do with no penalty.

But this rule has proved effectively unenforceable according to former SEC Commissioner Roel Campos and others. Current SEC regulations allow traders to short a stock if the trader "reasonably believes that it can locate and borrow the security by the settlement day."

Reasonableness includes merely glancing at a list of easy to borrow stocks, with no need to continue to locate even if the list is faulty. Let me repeat. Reasonableness includes merely glancing at a list of easy to borrow stocks, with no need to continue to locate even if this list is faulty. That rule, the mother of all loopholes, is much too vague to have any real effect. Any trader who passed Finance 101 could provide proof that he or she "reasonably believed" the shorted stocks could be located. In fact, the provision of a false locate is beneficial for generating commissions on the trade.

Ultimately, many commentators and I believe the SEC cannot bring cases against the gravest violators of this rule, because it does not have the means to prove intent. The rule is, in effect, unenforceable. The SEC has, in fact, not brought a single enforcement case for naked short selling. We must change the rules so the SEC Enforcement Division can do its job.

Even former SEC Chairman Christopher Cox said the SEC is:

... concerned that the persistent failures to deliver in the market for some securities may be due to loopholes in Regulation SHO.

It is too difficult to prove a trader's motives necessary for proving a fraud violation. I strongly believe the SEC needs to strengthen its rules, surveillance, and the enforcement regarding naked short selling to prevent market manipulation and loss of investor confidence.

Again, according to Robert Shapiro:

... there is considerable evidence that market manipulation through the use of naked short sales has been much more common than almost anyone has suspected, and certainly more widespread than most investors believe.

Furthermore, indicators the SEC typically uses to determine the effects of abusive short selling do not accurately reflect the extent of the problem. The so-called Threshold List provided by the SEC tracks sustained fails to deliver of over 10,000 shares, accounting for at least 5 percent of a company's outstanding shares.

According to Shapiro, this list does not capture the naked short sales that occur frequently that are under this threshold, and it does not capture the

large volume of short interests that can spike during the 3-day settlement period. Nor does it capture any trades that occur outside of the Depository Trust and Clearing Corporation, so-called ex-clearing trades.

Let us look to other countries. Other countries have taken proper steps to make sure rules that prevent naked short selling are clear and easy to enforce. According to EuroMoney, naked short selling is:

... a situation specific to the U.S. markets.

Alan Cameron, head of clearing, settlement and custody client solutions at BNP Paribas Securities Services in London, says he has seen little to indicate similar instances of fails to deliver in Europe. Some European countries such as Spain impose strict fines on failures to deliver. It's not an issue here in Europe.

Therefore, I strongly believe that the SEC must adopt new policies in order to protect the damage to investor confidence and, yes, the damage to our economic recovery that is being caused by naked short selling.

Today, along with Senators ISAKSON and TESTER, and Representative CAROLYN MALONEY, who cochairs the Joint Economic Committee, I wrote to SEC Chairman Mary Schapiro on this subject. Our letter urged that the Commission establish a pilot program to study whether a strict preborrow agreement would work effectively to end the problem of naked short selling. Such a pilot program would lead to the collection of data about stock lending and borrowing and the costs and benefits of imposing a preborrow requirement on all short sales.

Recently, Senators LEVIN, GRASSLEY, and SPECTER, in connection with the release of a General Accountability Office study analyzing recent SEC actions to curb abusive short selling, called for the SEC to consider imposing a strict preborrow requirement on short sales as the best way to end abusive short selling.

I strongly agree. As I have said, a preborrow requirement would address the problem at its most fundamental level and it should be urgently considered by the SEC as it rethinks its regulations and enforcement approach in this area.

Moreover, the system by which stocks currently are loaned and borrowed can and should be greatly improved, improving efficiency and producing cost savings. For example, centralized systems for loaning and borrowing stocks might better enable the SEC to impose fair rules on stock loans and borrowers in connection with short sales as well as enhance the SEC's ability to provide regulatory oversight to prevent naked short selling.

As one commentator has written in EuroMoney in December 2008, the:

... SEC knows it has to introduce the preborrow rule if it wants to eliminate fails to deliver for good. As long as there are companies on the Regulation SHO list, then the problem is not being solved. The only sus-

tainable solution to making naked short-selling is a rule requiring both pre-borrow and a hard delivery. ... for Bear Stearns: only a pre-borrow could put a brake on the naked short-selling.

I urge the SEC to invite a balanced group of commentators, including members of the investing public, to air these issues publicly as it continues efforts to draft and promulgate additional rules to end abusive short selling.

I know there are critics of a preborrow requirement who claim it would limit liquidity. This is not so, and there is no meaningful evidence to support this argument. Indeed, the recent study by Robert Shapiro disproves the claim. Other knowledgeable sources, such as Harvey Pitt, former SEC Chairman and founder of LendEQS, an electronic stock loan transaction firm, believe the opposite would occur, because lending would increase.

In Hong Kong, the imposition of a preborrow requirement has been quite successful. Hong Kong implemented the preborrow rule after the Asian financial crisis of 1997 to 1998, when its markets collapsed. In late 2008, while the United States saw an exponential increase in fails to deliver, Hong Kong avoided large spikes in short sales almost completely. Other countries, such as Australia and many other EU members, have also successfully maintained preborrow requirements for years. The United States must urgently address the issue of abusive short selling. If we want to protect our markets, investors, and companies from caustic manipulation, we need better rules.

In closing, I urge the SEC to act decisively, both by following through and reimposing the substance of the prior uptick rule and through a pilot program to study the effects of a strict preborrow requirement. It is way past time to put an end to naked short selling, once and for all.

Mr. President, I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. REID. I ask unanimous consent we proceed to a period of morning business with Senators permitted to speak therein for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

15TH ANNIVERSARY OF THE PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA

Mr. REID. Mr. President, I rise to call to the attention of the Senate the 15th anniversary celebration of the Progressive Leadership Alliance of Nevada, also known as PLAN. PLAN is a