

CLIENT ALERT

SEC Adopts New Short Position and Short Activity Reporting Rule for Institutional Investment Managers

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AUTHORS

Benjamin B. Allensworth | **James E. Anderson** | **Brian Baltz** | **Justin L. Browder**
P. Georgia Bullitt | **Mark A. Vandelaar** | **Richard F. Jackson** | **Uri A. Jurist**

On October 13, 2023, the Securities and Exchange Commission (the “SEC”) adopted new Rule 13f-2 (the “Final Rule”)¹ under the Securities Exchange Act of 1934 (the “Exchange Act”). The Final Rule imposes short-selling disclosure requirements on certain institutional investment managers (“Managers”).² Commissioners Uyeda and Peirce dissented, with Commissioner Uyeda quoting the staff’s own economic analysis that “Rule 13f-2 may harm price efficiency by increasing the cost of short selling.”³

Under the Final Rule, Managers will be required to report confidentially to the SEC, on new Form SHO, on a monthly basis, short position data and short activity data for equity securities that satisfy prescribed thresholds. The SEC will then aggregate, anonymize and publish specified short sale information extracted from the filings.

¹ [Short Position and Short Activity Reporting by Institutional Investment Managers](#), Exchange Act Release No. 34-98738 (Oct. 13, 2023) (the “Adopting Release”).

² Section 13(f)(6)(A) of the Exchange Act defines “institutional investment manager” to include “any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person.”

³ See Commissioner Mark T. Uyeda, “Statement on Short Position and Short Activity Reporting by Institutional Investment Managers,” Oct. 13, 2023, available [here](#).

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The Final Rule also includes an amendment to the national market system plan that governs the consolidated audit trail (“CAT NMS Plan”) to mandate that CAT reporting firms disclose whether a short sale order is effected by a market maker that claims the bona fide market making exception from the “locate” requirement in Rule 203(b)(2)(iii) of Regulation SHO.

I. Background

Section 13(f)(2) of the Exchange Act, which Congress added under Section 929X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, requires the SEC to prescribe rules providing for the public disclosure of aggregate short sale activity of equity securities no less frequently than monthly.⁴ In furtherance of that Congressional mandate and to augment transparency around short sale activity, the SEC published a proposed rule and related proposed Form SHO in February 2022.⁵ The SEC explained that the information in Form SHO filings and the aggregated publications by the SEC of the Form SHO information is expected to benefit the market generally by “... inform[ing] market participants regarding the overall short sale activity by reporting Managers and...bolster[ing] the Commission’s and other regulators’ oversight of short selling.”⁶ As discussed in detail below, the Final Rule and Form SHO will impose new and substantial compliance obligations on Managers.

II. Discussion

A. Short Sale Reporting Obligations

The Final Rule applies to Managers that exercise investment discretion for their own accounts or the accounts of others with respect to equity securities.⁷ Importantly, the definition of “Manager” is broader than that used to identify persons required to file Form 13F because, unlike Form 13F, Form SHO will be required to be filed by Managers having less than \$100 million in equity securities under management.⁸ Rule 13f-2 requires all Managers that satisfy the specified thresholds

⁴ Adopting Release at 7-8.

⁵ [Short Position and Short Activity Reporting by Institutional Investment Managers](#), Exchange Act Release No. 34-94313 (Feb. 25, 2022), 87 FR 14950 (Mar. 16, 2022) (the “Proposing Release”). See also Adopting Release at 8.

⁶ Fact Sheet, Final Rules: Enhancing Short Sale Disclosure at 1, available [here](#).

⁷ Rule 13f-2(b)(3) of the Exchange Act provides that the term “investment discretion” has the same meaning set forth in Rule 13f-1(b) under the Exchange Act. Adopting Release at 20. Rule 13f-1(b) in turn provides that “investment discretion” has the meaning provided in Section 3(a)(35) of the Exchange Act. Section 3(a)(35) provides: “A person exercises ‘investment discretion’ with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the [SEC], by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this chapter and rules and regulations thereunder.”

⁸ Exchange Act Section 13(f)(1) requires institutional investment managers, exercising investment discretion over accounts holding at least \$100 million in aggregate fair market value of specified equity securities to file reports on Form 13F with the SEC in accordance with the schedule set forth in Rule 13f-1. The equity securities covered by the statute are those of a class described in Section 13(d)(1) (i.e., voting securities registered pursuant to

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for short positions to report on new Form SHO monthly “gross short positions” and daily “net” activity (i.e., changes in the short positions) in an equity security. The specified thresholds differ depending upon whether the issuer is a reporting company issuer or a non-reporting company issuer.⁹ The SEC indicated that it anticipated that registered investment advisers, particularly those managing hedge funds, would be the entities most likely to be required to report on Form SHO.¹⁰

1. Scope of Equity Securities Subject to Rule 13f-2

Consistent with the Proposed Rule, the Final Rule will apply to an “equity security” as such term is defined in Section 3(a)(11) of the Exchange Act and Rule 3a11-1 promulgated thereunder.¹¹ The term includes exchange-listed and OTC equity securities such as exchange-traded funds (ETFs), certain physically-settled derivatives, options, warrants and other convertible securities that fall within the scope of Rules 200, 203 and 204 of Regulation SHO.¹² As is the case for reporting of long positions on Form 13F, Rule 13f-2 will not require reporting of positions based on derivatives that are not themselves “equity securities” for purposes of Section 3(a)(11) of the Exchange Act and Rule 3a11-1, such as cash-settled derivatives. The Exchange Act definition of “equity security” under Rule 13f-2 is significantly broader than that applicable to reporting on Form 13F, which is limited primarily to securities of reporting company issuers. Moreover, in contrast to Section 13(f), which requires the SEC to publish a list identifying all securities that must be reported on Form 13F, Rule 13f-2 does not contain such a requirement and the SEC declined to generate and publish a list of securities to be reported on Form SHO.¹³ The SEC’s rationale in not publishing a list of applicable securities for reporting on Form SHO was: (i) the absence of a statutory

Section 12 of the Exchange Act, equity securities issued by a closed-end investment company registered under the Investment Company Act of 1940 and certain insurance company and Native Corporation-issued securities).

⁹ A “reporting company issuer” is one that either has a class of securities registered pursuant to Section 12 of the Exchange Act or for which the issuer is required to file reports pursuant to Section 15(d) of the Exchange Act. “Non-reporting company issuers” include all issuers of a class of equity securities that are not reporting company issuers.

¹⁰ Adopting Release at 178.

¹¹ *Id.* at 36. Section 3(a)(11) of the Exchange Act provides: “The term ‘equity security’ means any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the [SEC] shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.” Rule 3a11-1 provides: “The term *equity security* is hereby defined to include any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; any security future on any such security; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.”

¹² Adopting Release at 36.

¹³ *Id.* at 30-32.

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requirement to provide such a list; and (ii) current short sale reporting to registered national securities exchanges and registered national securities associations does not entail use of a published list of securities.¹⁴

2. Reporting Thresholds Triggering a Form SHO Filing

Under the Final Rule, Managers must report specified short position data and short activity data for equity securities of reporting company issuers and non-reporting company issuers that trigger prescribed thresholds. The Final Rule sets forth two thresholds for these two categories of issuers: (1) a two-pronged threshold with respect to equity securities of reporting company issuers and (2) a single-pronged threshold with respect to equity securities for non-reporting company issuers.¹⁵ Reporting must be carried out on the basis of the Manager's gross position (rather than the net position calculated for purposes of compliance with the "locate" and other requirements of Regulation SHO).

a. Reporting Thresholds for Reporting Company Issuers

The Final Rule will require Managers of each equity security of a reporting company issuer to report on Form SHO if either of the following thresholds is met: (1) a monthly average gross short position at the close of regular trading hours in that equity security with a U.S. dollar value of \$10 million or more¹⁶ or (2) a monthly average gross short position at the close of regular trading hours as a percentage of shares outstanding in that equity security of 2.5 percent or more (the "Reporting Company Issuer Threshold").¹⁷ The dollar-value prong of the Reporting Company Issuer Threshold reflects a change from the Proposed Rule, which would have required Managers to report a gross short position of \$10 million or more at the close of regular trading hours on any settlement date during the calendar month, as opposed to reporting a "monthly average" of daily gross short positions.¹⁸ The SEC reasoned that the use of a monthly average for the dollar-value prong of the Reporting Company Issuer Threshold would lead to Form SHO reporting by Managers that "consistently carry large gross

¹⁴ *Id.* at 31-32.

¹⁵ *See supra* n.9 for definitions of reporting company issuers and non-reporting company issuers.

¹⁶ To determine whether the dollar-value prong of the Reporting Company Issuer Threshold has been met, a Manager must determine its gross short position at the close of regular trading hours in the equity security on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the settlement date ("end of day dollar value"). The Manager must then add all end of day dollar values during the calendar month and divide that sum by the number of settlement dates in the month to arrive at a "monthly average" for each equity security the Manager traded during that calendar month reporting period. Adopting Release at 55, n.164.

¹⁷ To determine whether the percentage-based prong of the Reporting Company Issuer Threshold has been met, a Manager must (1) determine its gross short position at the close of regular trading hours in the equity security on each settlement date during the calendar month, and divide that figure by the number of shares outstanding in such security at the close of regular trading hours on the settlement date and (2) add up the daily percentages during the calendar month as determined in (1) and divide that sum by the number of settlement dates in the month to arrive at a "monthly average" for each equity security the Manager traded during that calendar month reporting period. The number of shares outstanding of the security for which information is being reported must be determined by reference to an issuer's most recent annual or quarterly report, and any subsequent update thereto, filed with the SEC. *Id.* at 55-56, n.165.

¹⁸ *Id.* at 54-55.

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short positions” throughout a reporting month and reduce the reporting of non-directional, “transient” short sales activity, among other things.¹⁹ This change is likely to reduce the number of Managers subject to reporting obligations with respect to reporting company issuers.

b. Reporting Threshold for Non-Reporting Company Issuers

The Final Rule will require Managers for each equity security of a non-reporting company issuer to report on Form SHO a gross short position in such security with a U.S. dollar value of \$500,000 or more at the close of regular trading hours on any settlement date during the calendar month (the “Non-Reporting Company Issuer Threshold”).²⁰ The SEC cited the “opaque” markets for equity securities of non-reporting company issuers and the need for enhanced transparency, in addition to “lower liquidity” of such equity securities and greater sensitivity to “strategic trading” as compared to reporting company issuers as part of its rationale for adopting the lower-dollar threshold and daily calculation for the Non-Reporting Company Issuer Threshold.²¹ The Adopting Release indicates that Managers must report on Form SHO short sales of equity securities issued by non-U.S. issuers, as well as short sales occurring outside of the United States.²²

3. Form SHO Reporting

The Final Rule will require a Manager to file Form SHO with the SEC within 14 calendar days after the end of each calendar month with respect to each equity security for which the Manager meets or exceeds a reporting threshold.²³ A Manager must file Form SHO through EDGAR in an eXtensible Markup Language (“XML”) that is specific to Form SHO (custom XML).²⁴

¹⁹ *Id.* at 55-56.

²⁰ *Id.* at 57. *See also* Proposing Release at 14962.

²¹ Adopting Release at 57.

²² *See id.* at 34-36 (“...commenters raised questions as to whether the Commission’s jurisdiction extended to equity securities not traded in the U.S. One such commenter...stated that the ‘proposed scope of the rule would provide U.S. investors with information that is of limited value, particularly with respect to non-U.S. securities.’ Exchange Act Section 13(f)(2)’s cross-border reach is based on the territorial approach that the Commission has applied when crafting rules to implement other provisions of the Exchange Act....The Commission disagrees that the reported information would be of ‘limited value’ as was suggested by a commenter. Transparency regarding short selling by Managers of securities of U.S. and non-U.S. issuers is important regardless of where those sales occur.”).

²³ *Id.* at 70-71. *See also* Proposing Release at 14956.

²⁴ Adopting Release at 66.

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Form SHO consists of the following:

- A Cover Page that contains basic information such as a Manager's name, contact information and other items such as calendar month of the reporting period.
- Information Table 1, which captures the Manager's monthly gross short position in the reported equity security, in addition to information that identifies the reported equity security (e.g., CUSIP number) and its issuer.
- Information Table 2, which captures daily activity affecting a Manager's gross short position during a reporting period, in addition to information that identifies the reported equity security (e.g., CUSIP number) and its issuer.²⁵

In a departure from the Proposed Rule, the Final Rule does not require the reporting of hedging classifications.²⁶ Furthermore, the Final Rule eliminated several columns of short activity data in Information Table 2 that the SEC had proposed to help measure net activity in a reported security.²⁷ Instead, as adopted, new column 7 of Information Table 2 requires Managers to report the "net" change in short position showing how the gross short position in shares of the reported security are being closed out or increased as a result of the acquisition or sale of share activity measured by offsetting certain types of purchase and sale activity.²⁸ Accordingly, Managers must determine and report net activity in Information Table 2 for each settlement date in each calendar month capturing whether the reported gross short positions in the equity security that is covered in the Form SHO filing is being closed out or increased as a result of the acquisition or sale of shares of the equity security stemming from call options exercises or assignments, put options exercises or assignments, and secondary offering transactions, among other activities.²⁹

Finally, as proposed, and as adopted, if two or more Managers would be required to file a Form SHO for a reporting period covering the same security over which they both exercise investment discretion, only one Manager would need to make the applicable Form SHO filing for such security.³⁰ A Manager that relies on another Manager's Form SHO filing is required to

²⁵ *Id.* at 71.

²⁶ *Id.* at 79, 85. Under the Proposed Rule, a Manager would have been required to report on Information Table 1 of Form SHO: (1) whether it was "fully hedged" or "partially hedged," which turned on whether the Manager "held an offsetting position that completely or partially reduced the risk of price fluctuations for its position in that equity security, respectively" and (2) if the Manager's short position was "not hedged," meaning the Manager did not hold any offsetting positions. *Id.* at 79-80.

²⁷ *Id.* at 97.

²⁸ *Id.*

²⁹ *Id.* at 97-98.

³⁰ *Id.* at 105. Proposing Release at 14957.

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disclose on the cover page of the Form SHO the identity of any other Manager filing a Form SHO with respect to the reported security on behalf of the relying Manager.³¹

4. Confidential Treatment

The SEC will treat all information reported on Form SHO confidentially and as being subject to a confidentiality request under 17 CFR §200.83.³² No additional confidentiality request filing by a Manager will be required. The SEC will publish only aggregated and anonymized data derived from information provided in the Form SHO reports, which will not include the names of the reporting Managers. Publication of the aggregated data will be subject to an estimated one-month delay.³³

B. Amendment to the CAT NMS Plan

To augment the short sale-related data that Managers are required to report pursuant to the Final Rule and on Form SHO, the SEC adopted, substantially as proposed, an amendment to the CAT NMS Plan, which will require CAT reporting firms (i.e., primarily broker-dealers) to disclose whether a short sale order is effected by a market maker that claims the bona fide market making exception from the “locate” requirement in Rule 203(b)(2)(iii) of Regulation SHO.³⁴ In adopting the amendment to the CAT NMS Plan, the SEC noted that the reporting requirement would not alter how brokers or dealers that are market makers utilize the bona fide market making exception nor will the reported data be published.³⁵

C. Compliance Dates

The Final Rule will become effective 60 days after publication in the Federal Register (the “Effective Date”). The compliance date for the Final Rule and Form SHO is 12 months following the Effective Date. The SEC will begin publishing aggregated short sale-related data three months after the compliance date for the Final Rule and Form SHO.³⁶ The compliance date for the CAT NMS Plan amendment is 18 months following the Effective Date.³⁷

³¹ Proposing Release at 14957.

³² As a result, the SEC would follow procedures set forth in 17 CFR §200.83 in addressing requests for information reported on Form SHO under the Freedom of Information Act or other statutes or regulations.

³³ Adopting Release at 70.

³⁴ *Id.* at 139.

³⁵ *Id.* at 139-140.

³⁶ *Id.* at 141.

³⁷ *Id.*

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III. Conclusion

Compliance with the Final Rule is expected to require substantial build-out of operational systems to define the universe of covered equity securities and short sales. In addition, Managers will need to take into account Form SHO disclosure requirements and the possibility that a market participant may be able to deduce the identity of a Form SHO filer, when evaluating how best to execute short sale strategies.³⁸

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Benjamin B. Allensworth 202 303 1273 ballensworth@willkie.com	James E. Anderson 202 303 1114 janderson@willkie.com	Brian Baltz 202 303 1094 bbaltz@willkie.com	Justin L. Browder 202 303 1264 jbrowder@willkie.com
P. Georgia Bullitt 212 728 8250 gbullitt@willkie.com	Mark A. Vandelaar 212 728 8720 mvandelaar@willkie.com	Richard F. Jackson 202 303 1121 rfjackson@willkie.com	Uri A. Jurist 212 728 8879 ujurist@willkie.com

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³⁸ *Id.* at 221-222.