April 26, 2022

By Email

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 205499–1090
rule-comments@sec.gov

Re: Release No. 34–94313; File No. S7–08–22
Short Position and Short Activity Reporting by Institutional Investment Managers

Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] and its Asset Management Group[2] appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's (the "SEC" or "Commission") release on proposed Rule 13f-2 ("Proposed Rule 13f-2") under the Securities Exchange Act of 1934 ("Exchange Act") and associated Form SHO ("Proposed Form SHO"), as well as Rule 205 of Regulation SHO ("Proposed Rule 205") and amendments to the national market system plan ("NMS Plan") governing the consolidated audit trail ("CAT") (collectively, the "Proposed Rules"), all of which

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] SIFMA's Asset Management Group (SIFMA AMG) brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg.

would significantly expand the reporting requirements applicable to short positions, short sales, and other related activity impacting short positions.[3]

SIFMA generally supports the SEC's stated objectives with respect to the Proposed Rules, namely, increasing the transparency of short sale-related data available to the Commission and facilitating the monitoring by regulators of activity that could indicate abusive or manipulative schemes, such as manipulative "short squeezes".[4] SIFMA also commends the SEC for its careful analysis leading to its decision to not publicly disclose information related to the short sales and short positions of individual "institutional investment managers", as defined under Section 13(f)(6)(A) of the Exchange Act[5] ("Institutional Investment Managers"), which could make the holders of such positions more susceptible to manipulative short squeezes, and could also negatively impact markets by reducing overall short interest. However, SIFMA strongly believes that the SEC currently has ready access to sufficient information, through the many reporting developments and data enhancements that have been implemented in the past 12 years, to meet its mandate under Section 929X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[6] SIFMA is concerned that the expansive reporting regime contemplated under the Proposed Rules would extend significantly beyond what Congress intended in passing Section 929X and would impose burdens and costs on reporting parties that would materially outweigh the benefit of the information they might yield, and that the Commission has not demonstrated that there is a sufficient regulatory policy benefit to justify such expansive reporting. SIFMA fears that, if adopted as proposed, the Proposed Rules could reduce legitimate short selling and market making activities and deprive the market of the many benefits that these activities afford. Accordingly, SIFMA urges the SEC to reconsider the Proposed Rules in light of the extensive data and information that is already available to it and, at a minimum, implement the amendments recommended herein. SIFMA welcomes the opportunity to engage in further discussions with the Commission Staff as it continues to gather information from the industry on potentially viable approaches for reporting short sale-related information.

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[3] Short Position and Short Activity Reporting by Institutional Investment Managers, Exchange Act Release No. 94313 (Feb. 25, 2022), 87 FR 14950 (Mar. 16, 2022) ("Proposing Release").

[4] Please note that, at certain points in the Proposing Release, the SEC seems to indicate that a "short squeeze" arises in connection with "potential manipulative behavior involving short selling." *See, e.g., id.*, 87 FR at 14959. A short squeeze actually arises when the price of a security is pushed upward to force short sellers out of their positions, and such "upside" manipulation can be actionable under anti-fraud and anti-manipulation rules. Short sellers are generally required by brokers to maintain margin above a certain level. As prices rise, short sellers must add cash to their margin accounts or close out their short positions. Investors with short positions that are publicly disclosed would be directly vulnerable to a short squeeze because other market participants would know the extent of their short positions and be able to trade against them. Equally harmed, however, are those investors who purchase the shares at an inflated price due to the short squeeze, only to suffer losses when the prices of the company's shares return to trading at prices more in line with their fundamentals.

[5] 15 U.S.C. 78m(f)(6)(A) (defining the term "institutional investment manager" to include "includes 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.")

[6] Pub. L. 111-203, § 929X, 124 Stat. 1376 (2010) ("Dodd-Frank Act").

SIFMA also urges the SEC to eliminate Proposed Rule 205 requiring a broker-dealer to mark a purchase order as "buy to cover" if, at the time of entry, the purchaser has a gross short position in such security. SIFMA believes that this new order marking requirement would lead to extensive costs and would not lead to meaningful data being reported.

In addition to our substantive comments on the Proposed Rules, we note that the comment period provided on this proposal, combined with the multiple overlapping proposals out for comment at the same time, creates significant risk that meaningful public input into the rulemaking process is being lost. Sufficient time for meaningful public input into individual proposals and more holistically on the Commission's rulemaking agenda and the possible interconnectedness of these proposals is important and ultimately could have a significant impact on savers, investors, capital formation, and economic growth and job creation.[7]

I. Introduction and Executive Summary

SIFMA acknowledges the SEC's mandate, pursuant to Section 929X of the Dodd-Frank Act, to "prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission" every month.[8] As set forth in detail below, since Section 929X was originally enacted in 2010, there have been significant enhancements in the reporting of short sales, short positions, and related activity, including the development of CAT and the collection and public dissemination of short sale information by the Financial Industry Regulatory Authority ("FINRA") and various exchanges. While SIFMA notes that the SEC in the Proposing Release stated its belief that this existing information would be "additive" to the proposed information that would be reported under Proposed Form SHO, SIFMA believes that the SEC can fully meet its mandate under Section 929X by leveraging the aforementioned information and/or by codifying through rules the current aggregate short sale reporting that is performed by FINRA and the exchanges.

If the SEC proceeds with the Proposed Rules as currently drafted, SIFMA believes that certain aspects of the proposed requirements—most notably, the extensive daily tracking and reporting of trade activity contributing to reported short positions—would be extremely onerous to firms and inconsistent with the intent of Congress in enacting Section 929X. SIFMA is concerned that such an expansive reporting regime would impose burdens and costs on reporting parties that would materially outweigh the benefit of the information they might yield, and that the SEC has not provided justification for why such information is necessary and/or cannot already be obtained through other means available to the SEC.[9] Notably, the daily tracking and reporting requirements pertaining to short sales and short positions under Proposed Rule 13f-2 and Proposed Form SHO would impose obligations well beyond any that apply to long holders of

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[7] *See* Letter of 25 Associations on Importance of Appropriate Length of Comment Periods (Apr. 5, 2022), available at https://www.sifma.org/resources/submissions/importance-of-appropriate-length-of-comment-periods/.

[8] Dodd-Frank Act, § 929X(a).

[9] *See, e.g., infra* Section II.

securities under existing Rule 13f-1 and Form 13F. While one of the key rationales provided by the SEC for such daily requirements is to identify "manipulative" and "fraudulent" short selling activity, the SEC also acknowledges in the Proposing Release that such concerns are based on "theoretical" studies, and that, "[t]he Commission notes that there is currently no empirical evidence that these types of manipulation occur or are widespread . . . ."[10] This conclusion is consistent with the SEC's own reported enforcement actions, *i.e.*, any reported instances of "short-side" manipulation (*e.g.*, "short and distort" campaigns) are dwarfed by the instances of "long-side" manipulation (*e.g.*, "pump and dumps").[11] There thus is simply no basis for such asymmetric regulation.

While the impact of the proposed reporting requirements would be significant for SIFMA members that are asset managers and hedge funds meeting the definition of an "institutional investment manager" under Section 13(f)(6)(A) of the Exchange Act, SIFMA firms that are broker-dealers would also be subject to the reporting requirements, as currently proposed; for example, with respect to short positions established in connection with facilitating asset manager transactions (*e.g.*, short positions established as hedges in connection with facilitating asset managers' swaps and other derivative transactions).

SIFMA addresses our concerns in greater detail below, and offers a number of recommendations that we strongly urge the SEC to adopt in any final rulemaking:

A. To better adhere to the legislative intent of Section 929X and more appropriately balance the reporting burden imposed by Proposed Rule 13f-2 and Proposed Form SHO, eliminate, in its entirety, Information Table 2 of Proposed Form SHO requiring the highly burdensome reporting of daily trade activity contributing to reported short positions. Alternatively, if the SEC proceeds with requiring some form of daily activity reporting, Information Table 2 of Proposed Form SHO should be limited to reporting only gross short positions at the end of each settlement day on or after which the applicable reporting threshold(s) are breached through the end of the month, without the proposed detailed purchase/sale activity information. However, SIFMA believes that reporting on Information Table 1 should be triggered only if the Institutional Investment Manager holds a gross short position in an equity security subject to Form SHO reporting (as

[10] Proposing Release, 87 FR at 14992.

[11] SIFMA is aware of only two matters brought by the SEC in the past five years involving "short and distort" schemes, one of which is still in litigation. *See SEC v. Shuang Chen, et al.*, No. 19-cv-12127 (D. Mass. filed October 15, 2019); *SEC v. Gregory Lemelson, LLC et al.*, No. 18-civ-11926 (D. Mass. filed September 12, 2018). By contrast, SIFMA is aware of at least 20 enforcement matters brought by the SEC in the past five years involving long-side "pump and dump" schemes in which there was a final order, and several more that are still in litigation. *See*, *e.g.*, *SEC v. David N. Osegueda, et al.*, No. 2:19-cv-04348-PSG-AGR (C.D. Cal. filed May 20, 2019); *SEC v. Andrew I. Farmer et al.*, No. 4:19-cv-1774, (S.D.T.X. filed May 15, 2019); *SEC v. David M. Loflin*, No. CV-19-02548-PHX-JJT (D. Ariz. filed Apr. 19, 2019); *In the Matter of Mark E. Fisher*, Exchange Act Release No. 84525 (Nov. 2, 2018); *SEC v. Eddy U. Marin and Shane R. Spierdowis*, No. 18-cv-21744 (S.D. Fla. filed May 2, 2018); *In the Matter of Henry Lin-Han Jan*, Exchange Act Release No. 81965 (Oct. 26, 2017); *In the Matter of Norrell L. Walker*, Exchange Act Release No. 81003 (June 22, 2017).

recommended below), as of the last day of such month, in excess of the threshold(s) for reporting.

B. Amend the proposed reporting thresholds that trigger a Proposed Form SHO reporting obligation to eliminate the identification and application of the different thresholds to "Reporting Companies" and "Non-Reporting Companies," and instead only apply a uniform threshold to U.S. equity securities included on a new "Form SHO List," which could be prepared and published by the SEC in a manner similar to the SEC's existing "13F List".[12]

C. Due to the considerable calculation challenges—particularly for multi-service broker-dealers that use aggregation units and investment funds with multiple strategies—and the high risk of inconsistent, imprecise, and potentially misleading information, eliminate, in its entirety, Column 9 of Information Table 1 of Proposed Form SHO requiring identification of a short position as "fully hedged", "partially hedged", or "not hedged".

D. To avoid the risk of harm to Institutional Investment Managers and their clients, and to avoid losing the benefits that short selling provides to the market, retain the requirements that the SEC not disseminate publicly information reported to the SEC by Institutional Investment Managers on Proposed Form SHO. Given the SEC's acknowledgement that even anonymized and aggregated data can expose Institutional Investment Managers and their clients to significant risk of short squeezes,[13] the SEC should also take care to ensure that the publication of aggregated reported information is not the proximate cause of the exact type of activity that it is seeking to monitor and prevent.

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[12] As stated in FAQ 7 from the SEC's Frequently Asked Questions About 13F:

> These are securities that may be reported on Form 13F. A list of these securities - called the Official List of Section 13(f) Securities - is available shortly after the end of each calendar quarter on the SEC's website, at http://www.sec.gov/divisions/investment/13flists.htm. Section 13(f) securities are equity securities of a class described in Section 13(d)(1) of the Securities Exchange Act. See Section 13(d)(1) of the Securities Exchange Act.
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> The Official List of Section 13(f) Securities ("13F List") primarily includes U.S. exchange-traded stocks (*e.g.*, NYSE, AMEX, NASDAQ), shares of closed-end investment companies, and shares of ETFs. Certain convertible debt securities, equity options, and warrants are on the Official List and may be reported. But see Section 13(f)(4) (referring to equity securities of a class referred to in Exchange Act section 13(d)(1)) and exemptive rules 12a-4 and 12a-9 under the Exchange Act. Securities that are not on the Official List should not be reported on Form 13F. *See, e.g.*, Rule 13f-1(c) under the Securities Exchange Act. For example, shares of open-end investment companies, *i.e.*, mutual funds, are not included on the list and, therefore, should not be reported on Form 13F.

Frequently Asked Questions About 13F, https://www.sec.gov/divisions/investment/13ffaq.htm#:~:text=Q%3A%20Who%20must%20file%20Form,securities%20must%20file%20Form%2013F (last visited Apr. 25, 2022).

[13] The Proposing Release acknowledges that, even if information is anonymized and aggregated prior to publication, the identity of an Institutional Investment Manager and/or its client could still be uncovered and, as a result, it could be at an increased risk of targeting by predatory strategies such as short squeezes. *See* Proposing Release, 87 FR at 14995.

E. Due to the extensive costs that would be incurred, and the likelihood that it would not yield meaningful data, eliminate, in its entirety, Proposed Rule 205 of Regulation SHO requiring a broker-dealer to mark a purchase order as "buy to cover" if, at the time of order entry, the purchaser has a gross short position in such security in the specific account for which the purchase is being made. If the SEC proceeds with a "buy to cover" requirement, it should be made clear that broker-dealers may reasonably rely on customer representations, as in many situations broker-dealers may not have the information, or only incomplete information, that would be needed to complete such marking.

F. Because the cost and burden of updating systems to track it would materially outweigh the benefit of the resulting information, eliminate, in its entirety, the proposed addition of Sections 6.4(d)(ii)(D) and (E) of the CAT NMS Plan, which would require CAT reporting firms to report whether an order to sell an equity security is a short sale effected in reliance on the bona-fide market making activities exception to the "locate" requirement under Regulation SHO.[14]

SIFMA requests that the Commission incorporate all of these recommendations into the Proposed Rules[15] and solicit further public comment through another proposing release rather than proceeding straight to adoption.

II. Overview of Current Reporting of Short Sales and Short Positions

The Commission has long recognized that short selling provides the market with important benefits, including the following: (i) market liquidity is often provided through short selling by market professionals, such as market makers and block positioners, that offset temporary imbalances in the buying and selling interest for securities; (ii) short sales effected in the market add to the selling interest of stock available to purchasers and reduce the risk that the price paid by investors is artificially high because of a temporary imbalance between buying and selling interest; and (iii) short selling can contribute to the pricing efficiency of the equities markets, *i.e.*, market participants that believe a stock is overvalued may engage in short sales in an attempt to

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[14] *See* 17 C.F.R. § 242.203(b)(2)(iii).

[15] SIFMA raises for the SEC's consideration that for each SIFMA recommendation that the SEC determines not to accept, the burden and cost of implementing the Proposed Rules would increase exponentially. Further to that point, SIFMA is concerned that the SEC's economic analysis of the Proposed Rules does not adequately consider that the sum total of the proposed requirements may result in a burden that far exceeds the SEC's estimates with respect to each individual component—especially when considering that many of the required systems build-outs would be expected to affect many (or all) of the other required systems build-outs. Moreover, SIFMA is concerned that member firms may struggle to secure sufficient personnel to manage the envisioned build-outs, even if the SEC were to adopt all of SIFMA's recommendations.

SIFMA further notes that, as we have previously relayed to the SEC, SIFMA member firms are already undertaking numerous operational and compliance build-out efforts in connection with new SEC and FINRA regulatory requirements including, but not limited to, transition to T+1 settlement, commencement of the security-based swap reporting regime, and updates to electronic recordkeeping requirements for broker-dealers.

profit from a perceived divergence of prices from true economic values.[16] Short selling, whether via individual securities, basket constituents, or derivatives (*e.g.,* futures, swaps, options) is also a necessary component of prudent risk management.

The SEC has also long recognized that short sellers serve a critical market function in rooting out companies that may be engaging in illegal activity (*e.g.*, the issues with Enron Corporation were discovered by a short seller). Indeed, as the SEC stated in the Proposing Release:

> [S]hort sellers, and particularly large short sellers with the resources to perform fundamental research, serve as valuable monitors of management. If a corporate manager knows that short sellers are monitoring their actions and financial statements and are willing to expose wrong-doing, then they are less likely to engage in fraud or do other things that may hurt the value of the company. Historically, short sellers have, through doing research, uncovered fraudulent behavior.[17]

At the same time, recognizing the potential for abuses, the SEC has adopted comprehensive short sale regulations, including Regulation SHO, which applies a prophylactic rule set and is subject to robust examination and enforcement by both the SEC and FINRA. There are also restrictions on short selling as applied to certain activity, including Rule 105 of Regulation M,[18] which generally prohibits a person from effecting a short sale during a "restricted period" prior to the pricing of a SEC-registered offering conducted on a firm-commitment basis, and then purchasing in such offering. Moreover, there are already existing regimes providing for extensive disclosure of short sales and short positions, certain of which have been implemented and/or enhanced since the enactment by Congress of Section 929X of the Dodd-Frank Act.

A. Virtually Instantaneous Trade Reporting of Short Sales

Upon the execution of an order, a report of the transaction is submitted to an exchange (if executed on the exchange) or to FINRA (if executed over-the-counter ("OTC")), which identifies, among other things, whether the order was a "short" or "long" sale, or a "short exempt" sale. Such trade reports are generally required to be submitted shortly after execution of the order (*e.g.*, currently to FINRA within 10 seconds of execution).

B. Daily Aggregate Reporting of Short Sales

There is also current public reporting of aggregate short sales by issuer. Specifically, based on the trade report information received from brokers in connection with short sales, the exchanges and FINRA publish on their websites information on aggregated short sale volume by security. FINRA, in particular, publishes on its website a Daily Short Sale Volume File, which provides

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[16] *See* Amendments to Regulation SHO, Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232, 11235 (Mar. 10, 2010).

[17] Proposing Release, 87 FR at 14996.

[18] *See* 17 C.F.R. § 242.105.

aggregate daily short sale volume data by security for most OTC-traded U.S. stocks.[19] FINRA also publishes a Monthly Short Sale Transaction File, which provides public access to more specific transaction data for generally every OTC short sale transaction in U.S. exchange-traded stocks.[20] Moreover, the various exchanges also publish for a cost short sale files based on the trading activity on each respective exchange. SIFMA believes that this information could be presented alongside the current reporting of short interest positions (*e.g.*, for the mid-month short interest report, include the average daily aggregate short sale volume from the first to the fifteenth day of the month) to provide market participants with a more complete picture of the overall short activity and short positions in any given security.

C. Consolidated Audit Trail Reporting

Any broker-dealer that is a member of a national securities exchange or FINRA and receives, originates and/or handles orders in NMS securities, which includes NMS stocks and listed options, and/or OTC equity securities, must report such information to CAT. CAT is designed to capture the end-to-end lifecycle of a trade, including, but not limited to, quotes, original receipts or originations of an order, modifications, cancellations, routing, receipts of a routed order execution (in whole or in part) and, ultimately, order allocations.

D. Short Interest Reporting

There is currently public reporting of short interest under FINRA Rules. Specifically, FINRA Rule 4560 currently requires FINRA member firms to maintain and report, on a twice-monthly basis, records of aggregate short positions that a firm holds in all customer and firm accounts.

Under Rule 4560, in general, each member is required to maintain a record of total "short" positions in all customer and proprietary firm accounts in all equity securities (other than "Restricted Equity Securities", as defined in FINRA Rule 6420)[21] and is required to report such information to FINRA twice per month.

SIFMA recognizes that FINRA is seeking to enhance its short interest reporting requirements through FINRA Regulatory Notice 21-19. In connection therewith, SIFMA has recommended that FINRA work to streamline existing short interest reporting requirements in connection with any enhancements of its short interest reporting regime. Moreover, SIFMA has noted to FINRA that such streamlining is absolutely necessary before any move to shorten the short interest reporting regime from the current bimonthly requirement can be contemplated.[22]

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[19] *See* Daily Short Sale Volume Files, FINRA, https://www.finra.org/finra-data/browse-catalog/short-sale-volume-data/daily-short-sale-volume-files.

[20] *See* Monthly Short Sale Volume Files, FINRA, https://www.finra.org/finra-data/browse-catalog/short-sale-volume-data/monthly-short-sale-volume-files.

[21] FINRA Rule 6420(k) defines the term "Restricted Equity Security" to mean "any equity security that meets the definition of 'restricted security' as contained in Securities Act Rule 144(a)(3)." *See* 17 C.F.R. § 230.144.

[22] *See* SIFMA Comment on Short Interest Position Reporting Enhancements and Other Changes Related to Short Sale Reporting (FINRA Regulatory Notice 21-19) (Sept. 30, 2021), https://www.sifma.org/wp-

E. Large Options Position Reporting ("LOPR")

FINRA Rules require disclosure of significant options positions of members and their customers. Specifically, FINRA Rule 2360(b)(5) requires, among other things, that each member prepare a report with respect to its own accounts, those of its employees, officers, and directors, as well as its broker-dealer and non-broker-dealer customers, which, acting alone or in concert, have an aggregate position of 200 or more options contracts (whether long or short) of the put class and the call class on the same side of the market covering the same underlying security or index. These LOPR requirements generally cover both standardized options and conventional options.[23]

F. Swap Reporting and Security-Based Swap Reporting

The Commodity Futures Trading Commission has a reporting regime concerning swaps, and the SEC is imposing security-based swap reporting requirements under both Regulation SBSR and new proposed Rule 10B-1. Regulation SBSR provides generally for the reporting of security-based swap information to registered security-based swap data repositories and for public dissemination of transaction, volume, and pricing information. Proposed Rule 10B-1 would create a multistep framework for determining when security-based swap positions and positions in related reference securities must be counted toward relevant reporting thresholds and who has an obligation to report when those applicable reporting thresholds are met or exceeded. Persons (and related entities) who are owners or sellers of security-based swap positions that exceed certain specified thresholds would be required to report these security-based swap positions and related information to the SEC on new Schedule 10B, and the information would be made publicly available immediately upon filing.

III. Prior Reporting Under Rule 10a-3T and Form SH

In the midst of the financial crisis in 2008, the SEC adopted interim temporary Rule 10a-3T on an emergency basis, which required certain Institutional Investment Managers to file weekly non-public reports (*i.e.*, not for public dissemination) with the SEC on Form SH regarding their short sales and short positions in securities included on the 13F List, other than options. Rule 10a-3T required reporting of short positions that were either greater than 0.25 percent of shares outstanding or $10 million in fair market value. Rule 10a-3T remained in effect through July 2009, at which time the SEC allowed it to lapse, stating that it was working with several self-regulatory organizations ("SROs") to make publicly available certain information related to short sale activity, such as short sale volume and transaction data. As noted above in Section II., such short sale reporting by FINRA and the exchanges was indeed implemented.

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content/uploads/2021/10/SIFMA-Comments-on-FINRA-RN-21-19-Final.pdf ("SIFMA Regulatory Notice 21-19 Comment Letter").

[23] With respect to standardized options, LOPR is only required to the extent the FINRA member is not a member of the options exchange on which the option is listed and traded. To the extent that this leads to a gap in FINRA's information with respect to large synthetic short positions in standardized options, FINRA could obtain this information from the relevant options exchange.

SIFMA submitted two comments letters on Rule 10a-3T and Form SH, in October and December 2008.[24] In our comment letters, SIFMA noted certain issues with the requirements and provided recommended alternatives. These included: (i) requiring reporting of short positions held as of the end of each quarter, rather than weekly; (ii) focusing on reporting of short sale transaction information, while eliminating intraday activity such as purchases and buys to cover; (iii) clarifying that any "short sales" that result from option exercises and assignments do not need to be reported, due to the fact that they are not covered under FINRA trade reporting rules and are not captured as short sales in firms' systems; (iv) requiring that disclosure should remain non-public; and (v) providing that shorts in convertibles, warrants, other debt securities, and exchange-traded funds ("ETFs") not be covered by Form SH, under the same reasoning for excluding options, including the difficulty in determining the TSO for these instruments.

IV. Overview of the Proposed Rules

A. Proposed Rule 13f-2 and Proposed Form SHO

Under the reporting requirements contained in Proposed Rule 13f-2 and Proposed Form SHO, an Institutional Investment Manager would be required to report to the SEC within 14 days after the end of each calendar month, on Proposed Form SHO, information on the short positions and short sale and other transactions in equity securities[25] by the Institutional Investment Manager and all accounts over which the Institutional Investment Manager (or any person under the Institutional Investment Manager's control) has investment discretion where certain thresholds[26]

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[24] *See* SIFMA Letter on Disclosure of Short Sales and Short Positions by Institutional Investment Managers (Interim Final Temporary Rule 10a-3T and Temporary Form SH) (Release No. 34-58785; File No. S7-31-08) (Dec. 18, 2008), https://www.sec.gov/comments/s7-31-08/s73108-52.pdf ("December 2008 SIFMA Comment Letter"); SIFMA Letter on Division of Corporate Finance, Division of Investment Management, and Division of Trading and Markets Guidance Regarding the Commission's Emergency Order Concerning Disclosure of Short-Selling (File No. S7-24-08) (Oct. 9, 2008), https://www.sec.gov/comments/s7-24-08/s72408-31.pdf ("October 2008 SIFMA Comment Letter").

[25] Proposed Rule 13f-2(b)(2) provides that "[t]he term 'equity security' has the same meaning as in Section 3(a)(11) of the Exchange Act and Rule 3a11–1 thereunder." The Proposing Release states that Proposed Rule 13f-2 would apply to equity securities that are subject to Regulation SHO in order to be consistent with those requirements. *See* Proposing Release, 87 FR 14951, 14956 n. 59.

[26] The threshold for an equity security of a "Reporting Company" (*i.e.*, an equity security of an issuer that is 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) would be either of (i) a gross short position in the equity security with a U.S. dollar value of $10 million or more at the close of any settlement date during the calendar month, or (ii) a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5 percent or more (referred to in the Proposing Release as "Threshold A").

The threshold for an equity security of a "Non-Reporting Company" (*i.e.*, an equity security of an issuer that is not registered pursuant to Section 12 of the Exchange Act or for which the issuer is not required to file reports pursuant to Section 15(d) of the Exchange Act) would be a gross short position in the equity security with a U.S. dollar value of $500,000 or more at the close of any settlement date during the calendar month (referred to in the Proposing Release as "Threshold B"). *See id.*, 78 FR at 15017 (Instructions for Calculating Reporting Threshold).

based on an Institutional Investment Manager's gross short position[27] are met. The SEC would then aggregate and make publicly available certain information reported by Institutional Investment Managers.

Institutional Investment Managers, with respect to short positions meeting the above-mentioned thresholds, would be required to provide, on Information Table 1 of Proposed Form SHO, information concerning the end-of-month gross short position (both the number of shares and U.S. dollar value) and whether the identified short position is fully hedged, partially hedged, or not hedged. Institutional Investment Managers would also be required to report, on Information Table 2 of Proposed Form SHO, extensive information concerning daily activity affecting the Institutional Investment Manager's gross short position for each settlement date during the calendar month reporting period including, among other things: (i) the number of shares sold short (including the number of shares sold in a put exercise or call option assignment); (ii) the number of shares purchased to cover an existing short position (including the number of shares purchased in a call exercise or put option assignment); (iii) number of shares obtained through secondary offering transactions; (iv) other activity that creates or increases a short position (including but not limited to shares resulting from ETF creation and redemption); and (v) other activity that reduces or closes a short position (including but not limited to shares resulting from ETF creation and redemption).

SIFMA notes that the current version of Proposed Rule 13f-2 and Proposed Form SHO raise a number of interpretive questions, including:

- ***The definition of "gross short position" for purposes of calculating whether the thresholds have been exceeded.*** Specifically, such term is defined to mean "the number of shares of the equity security that are held short . . ." Although the definition states that it excludes offsetting economic positions, including long positions in the equity security or derivatives thereof, it is presumed that "gross short position" should include purchases to cover. Therefore, for example, to the extent that short sales were effected intraday in excess of the thresholds, but purchases to cover were also effected, such that the amount of securities "held short" by the end of the day does not exceed the thresholds, there would be no Proposed Form SHO obligation with respect to such security. Institutional Investment Managers would thus be able to look to their trade date stock records to determine whether the Institutional Investment Manager had "gross short positions" in excess of the thresholds on any given day. However, as the Proposing Release notes, requiring Institutional Investment Managers to consider intraday short sale activity, which would not be captured in the "gross short position" as reflected on their trade date stock records, in determining whether the threshold has been exceeded, would be

[27] Proposed Rule 13f-2(b)(4) would define "gross short position" to mean "the number of shares of the equity security that are held short, without inclusion of any offsetting economic positions, including shares of the equity security or derivatives of such equity security." *See id.*, 78 FR at 15016.

incredibly onerous—particularly, for example, for market makers that generally may not carry large overnight short positions.[28]

- ***The definition of "gross short position" as of the end of the month for purposes of reporting on Proposed Form SHO, including whether a trade-date short position or settlement-date short position.*** While SIFMA presumes that the reporting should be based on the trade date gross short position at the end of the month, it is noted that the Proposing Release introduced confusion by stating: "The information being reported will include gross short position information regarding transactions *that have settled* during the calendar month being reported."[29]
- ***Whether the daily activity required to be reported is to be measured as of trade date or settlement date.*** In this regard, it is noted that the instructions for Column 7 of Information Table 2 of Proposed Form SHO state to "enter the number of shares of the equity security for which information is being reported that resulted from short sales *and settled on that date*," and Column 8 states to "enter the number of shares of the security for which information is being reported that were purchased to cover, in whole or in part, an existing short position in that security *and settled on that date.*"[30] Similar statements are made for purposes of Columns 9-11.[31]

B. Proposed Rule 205

Proposed Rule 205 of Regulation SHO would require a broker-dealer to mark a purchase order as "buy to cover" if, at the time of order entry, the purchaser (which could be the broker-dealer or another person) has a gross short position in such security in the specific account for which the purchase is being made at the broker-dealer. The broker-dealer would be required to mark the purchase order as "buy to cover" regardless of its size in relation to the size of the purchaser's gross short position in the account, and regardless of whether the gross short position is offset by a long position held in the purchaser's account at the time of order entry.

C. Proposed CAT Amendments

The proposed addition of Sections 6.4(d)(ii)(D) and (E) of the CAT NMS Plan would require a firm to report whether an order to sell an equity security is a short sale effected by a market maker in connection with bona-fide market making activities in the security for which the market

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[28] *See, e.g., id.*, 87 FR at 14962. We note that the language of the Proposing Release indicates that the SEC does *not* in fact intend that such intraday activity should be captured by the definition of "gross short position". *See, e.g., id.*, 87 FR 15009 (describing that an alternative approach the SEC *could* have taken is requiring the thresholds to be based on activity and not just positions, which would pull in "entities with high volumes of short selling are likely to be market makers who use short selling to maintain two sided quotes in the absence of inventory and other high frequency traders [and] trade in large volumes, but tend to end trading sessions fairly flat on inventory in larger stocks.")

[29] *Id.*, 87 FR at 14958 (emphasis added).

[30] *Id.*, 87 FR at 14959 (emphasis added).

[31] *Id*.

maker is claiming an exception to the Regulation SHO "locate" requirement pursuant to Rule 203(b)(2)(iii) of Regulation SHO.

V. Potential Negative Consequences of the Proposed Rules; Recommended Amendments

A. Tracking and Reporting of Daily Activity Contributing to Short Positions is Contrary to the Legislative Intent of Section 929X and Would be Unduly Burdensome and Costly

While SIFMA has previously advocated for, and continues to believe that, the SEC's policy goals could be met by reporting of short positions on a quarterly basis,[32] SIFMA acknowledges that Section 929X of the Dodd-Frank Act directs the SEC to publish aggregated reported short sale information every month, and accordingly, SIFMA does not object to monthly reporting of short positions.

SIFMA firmly believes that by leveraging the extensive information on short sales and short positions that is already available to it, the SEC can meet its mandate under Section 929X of the Dodd-Frank Act. As noted above, the development of short selling information collection and aggregation regimes by FINRA and the exchanges was one of the cited reasons for the SEC ending in 2009 the requirement for Institutional Investment Managers to report to the SEC information on short sales and short positions through Form SH. Since the enactment of Section 929X in 2010, there have been other extensive enhancements with respect to the reporting of short positions and short sales and other related activity, to include the comprehensive data that the SEC will have at its fingertips through CAT.[33] It is therefore unclear to SIFMA why the SEC could not leverage this information, including making any necessary enhancements or consolidations to these existing regimes, to meet the SEC's Section 929X mandate, as opposed to requiring Institutional Investment Managers to incur the extensive operations and compliance costs that will be necessary to comply with Proposed Rule 13f-2 and Proposed Form SHO. Indeed, leveraging the existing FINRA and exchange information would not only meet the SEC's mandate under Section 929X, it would also provide for more comprehensive aggregate short sale reporting, in that it would not only capture short sale information from Institutional Investment Managers, but also other market participants.

SIFMA respectfully disagrees with the Commission's assertions that the data available to it though the existing reporting regimes is not sufficient to allow the SEC to meet its obligation under Section 929X to disseminate aggregated short sale-related data on a monthly basis. In discussing the fact that FINRA and the exchanges "collect and publish daily aggregate short sale volume data, and on a one month delayed basis publish information regarding short sale transactions," which, again, was the express predicate for the SEC deciding to *cease* Form SH reporting in 2009, the Commission appears to discount leveraging such information to meet its Section 929X mandate because, "the Commission understands that some exchanges only make

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[32] *See* December 2008 SIFMA Comment Letter at 3.

[33] *See supra* Section II.

certain data available for a fee."[34] Furthermore, the Commission laments the fact "[a]ggregate short selling statistics and short selling transactions have different lags with which they are available," noting that while aggregate short selling volume statistics are usually released by SROs "by the end of the following business day," for the transactions data the lag can be longer "and in some cases the data is released with a one month lag—implying that some short selling transactions data are not available for two months."[35] However, the Commission provides no basis for why this needs to be a self-fulfilling prophecy, *i.e.*, the Commission has the authority to codify through rulemaking the obligations of FINRA and the exchanges to collect, anonymize and aggregate, and publicly disseminate short sale data under a timeframe determined by the Commission, and for no cost. The Commission states its view of additional limitations in the short sale data collected and disseminated by FINRA and the exchanges, as follows:

> First, the data does not provide insight into the activities of either individual traders, or different trader types. Consequently, it is not possible with existing short selling data provided by the SROs and FINRA to separate trading volume associated with market makers, algorithmic traders, investment managers, or other trader types.
>
> Additionally, the data does not provide insight into activities that may reduce short exposure, thus using these data to estimate investor sentiment is fraught. For example, these data provide information only on short sales, whereas short positions could also change because investors can increase or decrease their positions in ways other than short selling the stock. For example, investors can increase their short positions by exercising put options and delivering borrowed shares or by delivering borrowed shares when they are assigned call options. Investors can reduce their short positions in an equity when they, for example, buy to cover their positions, purchase shares in a secondary offering, convert bonds to stock, or redeem ETF shares containing the equity. As a result of this, the short selling volume and transactions data cannot easily explain changes in short interest, exposing a gap between those two types of existing data.[36]

However, these alleged "limitations" in the existing data are targeted specifically at identifying information which, while called for under the Proposed Rules, is expressly *not* required under Section 929X, which only directs the SEC to adopt rules providing for the "public disclosure of the name of the issuer and the title, class, CUSIP number, [and] aggregate amount of the number of short sales of each security". While SIFMA acknowledges that Section 929X does provide the authority for the Commission to promulgate rules to capture "any additional information determined by the Commission," as described in detail further below in this section, SIFMA strongly believes that the SEC has not proven that the Proposed Rules, and most notably the proposed daily activity information in Information Table 2, are necessary, especially in light of the enormously disproportionate burden they would impose.

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[34] Proposing Release, 87 FR at 14953.

[35] *Id*., 87 FR at 14988.

[36] *Id*.

Finally, one of the most curious observations provided by the Commission on the "concerns" of the short sale data from FINRA and the exchanges is that it "may over-represent the total volume of short sales occurring in the market," in that, "[i]f a market participant is unclear whether their trade would meet all the requirements at settlement to be marked a long sale, then they may choose to mark the trade as short to not run afoul of Regulation SHO requirements, even if the trade is likely an economic long sale."[37] While, as SIFMA has previously noted to the SEC Staff, there may indeed be instances where sales need to be marked as "short" even where the seller has a long position (*e.g.*, due to the guidance imposed by the SEC's Division of Trading and Markets FAQ 2.5 and other FAQs requiring decrementation of long positions for orders that have been submitted but not yet executed[38]), it is strange that the SEC would then assert that this somehow means that the short sale data collected and disseminated by FINRA and the exchanges is not "reliable." Furthermore, if this is indeed the case, then it could seem to equally call into question the accuracy of any data that would be provided under Form SHO.

If, however, the SEC proceeds with implementing the proposed expansive reporting regime and collecting additional detailed information beyond its mandate under Section 929X, SIFMA advocates that the proposed monthly reporting under Information Table 1 of Proposed Form SHO should be triggered only if the Institutional Investment Manager holds a gross short position in an equity security, as of the last day of such month, in excess of the threshold(s) for reporting—not, as the SEC has proposed, if the Institutional Investment Manager breaches the threshold on *any* settlement date during such month. This alternative reporting structure would be much easier to comply with, and would be more consistent with reporting of long positions on Form 13F (*i.e.*, which requires reporting of long positions held as of the last day of each quarter), as well as the proposed requirements under the Commission's amendments to Section 13(d) for "Qualified Institutional Investors" ("QIIs", which category includes registered broker-dealers and registered investment advisers) to report on Schedule 13G long positions exceeding five percent beneficial ownership *as of the end of each month*.[39] Stated another way, since SIFMA member firms will already be collecting and analyzing their gross long positions at the end of each month, for purposes of Form 13F (if such month is also the end of the quarter) and for purposes of Schedule 13G reporting, it would be efficient for SIFMA member firms to also be able to consider their gross short positions at the end of each month, for purposes of Proposed Form SHO reporting. In that regard, SIFMA notes that, while the SEC argues that requiring only an end-of-month calculation might incentivize Institutional Investment Managers to close out their short positions before the end of the month, the same could be said for long positions held at the end of the quarter for Form 13F reporting purposes and/or long positions held as of the end of the month by QIIs for purposes of Schedule 13G reporting (*i.e.*, if a QII exceeded a five percent beneficial ownership threshold during the month, but then sold the position so that it did

[37] *Id*.

[38] *See* Responses to Frequently Asked Questions Concerning Regulation SHO, SEC, https://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm (last visited Apr. 25, 2022).

[39] QIIs are currently required to analyze their gross long positions at the end of each month to determine if they exceed ten percent beneficial ownership, for purposes of reporting on Schedule 13G, and their gross long positions at the end of the calendar year to determine if they exceed five percent beneficial ownership (again, for reporting on Schedule 13G).

not exceed the five percent threshold as of the end of the calendar year, under current Rule 13d-1(b), or by the end of the month under the SEC's proposal, there would be no Schedule 13G required). As previously noted, SIFMA does not believe that the SEC has demonstrated why there should be asymmetric requirements for reporting of long positions and short positions. SIFMA agrees, however, with the SEC's proposal that an Institutional Investment Manager's gross short position should not include derivative instruments like options, convertibles, warrants, other debt securities, and ETFs.[40]

Notwithstanding the foregoing, if the Commission continues to assert that the standard for Proposed Form SHO reporting should be based on whether an Institutional Investment Manager exceeds the threshold(s) for reporting of short positions, calculated on each settlement date, and to report the gross short positions held as of the end of the month within 14 calendar days of each month, SIFMA strongly believes that there should *not* also be a requirement to report detailed information on the daily trade activity contributing to such short positions as contemplated in Information Table 2 of Proposed Form SHO.

Notably, not only is such a daily reporting requirement of such activity *not* mandated under Section 929X, but the legislative history of Section 929X reflects that Congress made an explicit decision *not* to impose a daily reporting requirement on Institutional Investment Managers. The language that eventually became codified as Section 929X originated in a bill proposed by Majority Leader Steny Hoyer in October 2009, which contained a provision that would have required the publication of daily information concerning short sales and related activity.[41] House

[40] *See* Proposing Release, 87 FR at 15016 (Rule 13f–2(b)(4)). This proposal is consistent with SIFMA's previous recommendation with respect to Form SH that short sales in convertibles, warrants, and other debt securities, and ETFs should not be captured in the reporting requirements. *See* December 2008 SIFMA Comment Letter at 4.

[41] The bill contained the following provision:

> The Securities and Exchange Commission shall require brokers to publish daily information regarding the identity of short sellers, the companies whose shares are being sold short, the number of shares that are sold short, and new fails to deliver. Brokers must disclose in customer account agreements that lending shares for short selling may result in the loss of voting rights if the shares are on loan on the record date for a corporate election and the substitute dividend payments might be taxed at higher rates than normal dividends.

Majority Leader Hoyer later amended his proposed legislation to replace "broker" with "institutional investment manager" and to require such entities to report information to the SEC on a daily basis for publication instead of requiring them to publish the information themselves. The relevant portion of Majority Leader Hoyer's revised legislation provided:

> Section 13(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(f)) is amended by redesignating paragraphs (2), (3), (4) and (5) as (3), (4), (5) and (6) respectively and inserting after paragraph (1) the following:
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>> "(2) A. Every institutional investment manager that effects a short sale of an equity security shall also file a report on a daily basis with the Commission in such form as the Commission, by rule, may prescribe. Such report shall include, as applicable, the name of the institutional investment manager, the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, aggregate fair market value of each security, and any failures to deliver the security. For

Financial Services Committee Chairman Barney Frank included a modified version of Majority Leader Hoyer's language in his manager's amendment to H.R. 4173 (which was the House version of the bill that, as amended, became the Dodd-Frank Act). Section 7422 of H.R. 4173, as passed by the House, included this version of the provision, which provided for two different reporting regimes: one daily and one quarterly. During the House-Senate conference, House leaders proposed amending the Senate bill by including the text in Section 7422 in the final conference report. The Senate accepted the House amendment, with a very important change—the deletion of the daily reporting requirement in paragraph (2)A. Thus, as a result of the agreement in conference, the paragraph requiring *daily* reporting on a confidential basis by Institutional Investment Managers was deleted from Section 929X, while the paragraph on public, aggregate reporting by the SEC was retained. SIFMA believes that these legislative changes to the mandate for disclosure of short sale-related information reflect Congress's intent that the new short reporting regime under Section 929X should not be significantly greater than the disclosure of long positions under existing Rule 13f-1 and Form 13F, which explicitly do not require any reporting of daily trade activity that contributed to the Institutional Investment Manager's reported long positions held as of the end of each quarter. Therefore, SIFMA feels strongly that the current proposed Information Table 2 of Proposed Form SHO is inconsistent with both the legislative intent of Section 929X and with other generally comparable reporting regimes.

SIFMA further believes that while the SEC states that "such daily activity information would provide market participants and regulators with additional context and transparency into whether, how, and when reported gross short positions in the reported equity security are being closed out (or alternatively, increased)," and would "assist the Commission in assessing systemic risk and in reconstructing unusual market events, including instances of extreme volatility,"[42] such daily reporting is not necessary to achieve these stated objectives. More specifically, from the information on Information Table 1 of Proposed Form SHO reported each month to the SEC, it would already be readily determinable where an Institutional Investment Manager had a short position in a security exceeding the specified threshold, and such short position had increased or decreased over the prior month. Moreover, to the extent that the SEC has further questions concerning such increases or decreases in an Institutional Investment Manager's reported short position, it will be able to access the extensive information that it already has readily available to it, including purchase and sale transaction data reported to CAT, aggregate short sale data collected and compiled by FINRA, as well as LOPR and other short interest information collected and compiled by FINRA. For example, the information that the SEC proposes to capture through Information Table 2 is largely already available through CAT execution report

purposes of section 552 of title 5, United States Code, this subparagraph shall be considered a statute described in subsection (b)(3)(B) of such section.

B. The Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any failures to deliver the security following the end of the reporting period. At a minimum, such public disclosure shall occur every three months."

[42] Proposing Release, 78 FR at 14959.

files (2a/2b) and/or CAT allocation report files (2c/2d). Moreover, the CAT Customer and Account Information System ("CAIS") file (2e) implementation effort is scheduled to go live in July 2022 and will provide the SEC with detailed client information which in turn will be used to map clients to their transaction activity street-wide, as well as their allocation activity street-wide. The mapping of a client to its transaction and allocation activities will bring together for the regulators a more complete picture of who is engaging in the market.[43] Moreover, the SEC is able to efficiently and expeditiously request further data from broker-dealers, as deemed necessary, through requests for electronic bluesheet and Large Trader records, for example.

Requiring Institutional Investment Managers to collect and report the extensive daily activity information required on Information Table 2 would be highly burdensome.[44] SIFMA has in the past raised for the SEC's consideration the many difficulties of implementing reporting requirements that would seek to capture derivatives-related activity in connection with short reporting. For example, in our 2008 comment letters addressing Form SH, SIFMA noted the challenges involved in compiling purchase and sale activity as a result of option exercises and assignments—including, among other reasons, that such deliveries upon assignment or exercise are required to be excluded from trade reporting under FINRA Rules and that they generally are not captured as short sale transactions in a broker-dealer's system because they are not marked as "long" or "short".[45]

Finally, while the SEC states that Proposed Rule 13f-2 and Proposed Form SHO (inclusive of Information Table 2) are designed to provide transparency of "manipulative short selling campaigns," SIFMA believes that the SEC has not properly demonstrated how the significant costs that Institutional Investment Managers would incur in collecting information to populate Information Table 2 would be outweighed by the benefits that the Commission would accrue in obtaining such information. Indeed, there are very limited instances of SEC enforcement actions relating to abusive "short and distort" schemes engaged in by short sellers, which is very likely a product of the already-extensive short sale restrictions imposed by Regulation SHO and the extremely aggressive examination and enforcement of its requirements. The number of enforcement actions related to manipulative short selling activities is far outweighed by the number of enforcement actions involving "long-side" manipulation, including "pump and

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[43] SIFMA further notes that CAIS specifications could be enhanced to require, for example, that firms identify clients that meet the definition of an "institutional investment manager" under Section 13(f)(6)(A) of the Exchange Act, to provide the clarity needed for the SEC to identify specifically Institutional Investment Manager activity on the existing daily transaction and allocation CAT reporting files. Such an additional CAIS attribute could be used in place of the daily activity reporting requirements proposed in Information Table 2.

[44] In this regard, SIFMA believes the SEC's estimate that the annual total cost for reporting Institutional Investment Managers would be between \$18,065,352 and \$52,212,000 is materially undervalued and, critically, does not appear to consider the cost of the proposed daily calculation and reporting activity under Proposed Rule 13f-2 and Proposed Form SHO. *See* Proposing Release, 87 FR at 14998–99. SIFMA notes, for example, the SEC's statements that the Form SH requirements were very "costly" because they were "weekly reporting requirement[s]." *See id.* at 14990. Thus, it stands to reason that the proposed daily calculations and reporting requirements would be exponentially more costly than the Form SH requirements.

[45] *See* December 2008 SIFMA Comment Letter at 6; October 2008 SIFMA Comment Letter at 6–7.

dumps."[46] Indeed, in the 2003 release proposing Regulation SHO, the SEC cited to an economic study which demonstrated that, in the vast majority of instances where companies complained about potential short selling abuses, the stocks of these companies themselves had performances that lagged the market, thereby indicating that short sellers were correct in their belief that the companies were over-valued.[47] In light of this fact, there is simply no justification to require reporting of daily activity contributing to reported short positions under Proposed Rule 13f-2, when there is no similar requirement to report daily activity contributing to report long positions under existing Rule 13f-1. Moreover, while the SEC cites the "market volatility" events in the recent past, the SEC's own statements in connection with its 2021 report on the volatility in GameStop Corp. and other "meme" stocks reflect that short selling did not play an active role in such events.[48]

For the aforementioned reasons, SIFMA strongly believes that the proposed reporting of daily short activity information on Information Table 2 of Proposed Form SHO should be eliminated in its entirety. However, if the SEC proceeds with requiring some form of daily activity reporting, Information Table 2 of Proposed Form SHO should be amended to be limited to reporting only gross short positions at the end of each settlement day on or after which the appliable reporting threshold(s) are breached through the end of the month, without the proposed detailed purchase/sale activity information.

B. Determining the Applicable Reporting Threshold Would be Unnecessarily Burdensome

SIFMA agrees with the SEC's proposal that the obligation to submit Proposed Form SHO to the SEC for a given month should be contingent on an Institutional Investment Manager triggering one or more prescribed reporting thresholds.[49] However, as currently proposed, the threshold structure would be unnecessarily difficult to calculate and impose an undue burden on Institutional Investment Managers compared to alternative means which are already available.

The SEC's proposed threshold for an equity security of a Reporting Company under Threshold A would be either of (i) a gross short position in the equity security with a U.S. dollar value of $10 million or more at the close of any settlement date during the calendar month, or (ii) a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5 percent or more. The threshold for an equity security of a Non-Reporting Company under Threshold B would be a gross short position in the equity security with a U.S. dollar value of $500,000 or more at the close of any settlement date during the calendar month.[50] SIFMA believes that the proposed distinction between the thresholds that would apply to Reporting

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[46] *See supra*, footnote 10.

[47] *See* Short Sales, Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, 62975 n. 32 (Nov. 6, 2003).

[48] *See* Staff Report on Equity and Options Market Structure Conditions in Early 2021, SEC, 30–31 (Oct. 14, 2021 (concluding that "a short squeeze did not appear to be the main driver of events").

[49] In our October 2008 comment letter regarding Form SH, we similarly recommended that the Form SH reporting should be subject to certain thresholds. *See* October 2008 SIFMA Comment Letter at 3.

[50] *See supra*, footnote 25.

Company securities and Non-Reporting Company securities would be unnecessarily complicated and burdensome. Discerning first whether an equity security is issued by a Reporting Company or Non-Reporting Company in order to determine which threshold criteria to apply would be a difficult process for Institutional Investment Managers and could potentially result in erroneous and/or inconsistent reporting. By contrast, the statutorily mandated 13F List that the SEC routinely updates and makes available for use in the preparation of reports filed with the SEC pursuant to Rule 13f-1 significantly facilitates the Form 13F filing process by providing a single, easily accessible resource for Institutional Investment Managers. Accordingly, instead of the proposed Threshold A applicable to Reporting Company securities and Threshold B applicable to Non-Reporting Company securities, SIFMA recommends that the SEC consider leveraging the current 13F List to create a new "Form SHO List" that would provide firms with an official list of equity securities that would be subject to Proposed Rule 13f-2 and Proposed Form SHO.[51] More specifically, the Form SHO List would include securities that are included on the 13F List, while also excluding certain extraneous securities, such as options, warrants, convertibles, and ETFs that should not be covered by Proposed Form SHO reporting. SIFMA recommends that the Form SHO List also include, for each security, the TSO. Including the TSO as part of the Form SHO List would greatly facilitate Institutional Investment Managers' calculation of the reporting threshold percentage. Therefore, SIFMA recommends that there be a uniform threshold applied for all securities included on the Form SHO List—in this regard, while certain SIFMA members believe that the threshold should be higher,[52] other SIFMA members did not object to the proposed threshold of 2.5 percent of the issuer's TSO or $10 million fair market value.[53]

C. Calculating Whether a Short Position is "Fully Hedged", "Partially Hedged", or "Not Hedged" Would Yield Inherently Inconsistent and Imprecise Information

The proposed requirement that Institutional Investment Managers report in Column 9 of Information Table 1 of Proposed Form SHO, whether a short position is "fully hedged", "partially hedged", or "not hedged" fails to appreciate the difficulty—particularly for multi-service broker-dealers that use aggregation units and investment funds with multiple strategies—of calculating and determining such information for reporting purposes. Importantly, the SEC concluded that an Institutional Investment Manager should report its gross short position rather than its net short position out of "concern[] that using net short positions could result in

[51] Indeed, SIFMA previously recommended that the SEC publish such a list in connection with Form SH. *See* October 2008 SIFMA Comment Letter at 3–4.

[52] The December 2008 SIFMA Comment Letter on Form SH had recommended a threshold of five percent of the issuer's TSO or $25 million fair market value. However, importantly, the Form SH was only required to be reported to the SEC and there was no public dissemination by the SEC of reported short data.

[53] Please note that our recommendations with respect to the proposed thresholds are linked to the assumption that any information disseminated publicly will only be on an aggregate basis across all Institutional Investment Managers reporting on Proposed Form SHO. Should the Commission be inclined at all to move forward with publicly disseminating the Proposed Form SHO information reported by individual Institutional Investment Managers (*i.e.*, without aggregating, even if there is no identifying information of the Institutional Investment Managers) we urge the Commission to solicit further feedback as to the risk that public reporting presents with respect to predatory practices and whether such risk can be mitigated through the use of a higher or lower threshold.

[Institutional Investment] Managers using varying approaches" to determine what positions are appropriate to offset and, consequently, could result in different reporting results.[54] SIFMA believes that the same issues would arise when calculating and determining whether a short position is "fully hedged", "partially hedged", or "not hedged". Indeed, we note that on a number of occasions, the SEC has not provided exceptions for hedging activity from rule requirements under other regulations, including certain provisions of Regulation SHO, due to the inherent difficulties in determining whether a position is hedged.[55] For example, the Proposing Release does not make clear how a broker-dealer would identify a short position where one aggregation unit/business within the broker-dealer established a short position that was reportable on Proposed Form SHO, and another aggregation unit/business within the broker-dealer held a long position in the same security—would that need to be identified as a "hedged" position? While the short position could be said to be "hedged" at the overall parent level of the Institutional Investment Manager (*i.e.*, the top level control entity), it would not be accurate that the short position is "hedged" at the aggregation unit level, and indeed information barriers are required under Rule 200(f) of Regulation SHO that would prevent such information from being shared between the aggregation units. Additionally, similar issues would arise for managers to private investment funds, especially for situations involving multi-strategy funds utilizing different portfolio managers and strategies. SIFMA believes that, as a consequence, information reported in Column 9 of Information Table 1 would be inherently inconsistent and imprecise and, therefore, of very little value to regulators in that it could be highly misleading.

Because of the aforementioned challenges and inherent risks, SIFMA recommends that Column 9 of Information Table 1 of Proposed Form SHO be eliminated in its entirety.

D. Publishing Unaggregated Data Would Expose Institutional Investment Managers and Their Clients to Significant Risk

While SIFMA supports the SEC's stated regulatory transparency and monitoring objectives, SIFMA agrees with the Proposing Release's numerous statements regarding the potential harmful consequences that could result from public disclosure of identifying information, or overly detailed or specific information regarding short positions or short activity.[56] SIFMA therefore believes that the SEC's proposed alternative approach of publishing data as it is

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[54] Proposing Release, 87 FR at 14956.

[55] We note, for example, the SEC's decision to not grant an exception from the Regulation SHO "locate" requirement: "We have decided not to incorporate an exception from the locate and delivery requirements of Rule 203 for short sales that result in bona-fide fully hedged or arbitraged positions. *Because 'bona-fide' hedging and arbitrage can be difficult to ascertain*, we are concerned about including a blanket exception for some activity that may have the potential to harm issuers and shareholders." Short Sales, Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48016 (Aug. 6, 2004) (emphasis added) ("Regulation SHO Adopting Release").

[56] *See, e.g.,* Proposing Release, 87 FR at 14952 ("[R]equiring disclosure of large short positions, even in an aggregated format, could make holders of such short positions more susceptible to short squeezes."); *id.*, 87 FR at 14992 ("Despite not releasing Managers' identities to the public, the nature and the position size thresholds that underlie publicly released information may lead to the risk of Managers being identified by the public."); *see also id.*, 87 FR 14957.

reported on Proposed Form SHO without first aggregating such information[57] would not only be inconsistent with the directive set in Section 929X of the Dodd-Frank Act but would also—even if such information were anonymized—expose the investment strategies of Institutional Investment Managers and their clients, subjecting them (and the entire market) to increased risk.

SIFMA shares the Commission's concern that this proposed alternative approach "could result in a reduction in short selling, along with a reduction in the corresponding liquidity and price transparency benefits" that short selling provides.[58] Therefore, to protect the proprietary investment strategies of Institutional Investment Managers and their clients, and to limit the risk that reported information could be used to engage in abusive or manipulative schemes such as short squeezes, SIFMA recommends that the Commission retain the proposed requirements that information reported to the SEC on Proposed Form SHO be deemed subject to confidential treatment and that all information made publicly available by the SEC be anonymized and aggregated prior to publication.

Moreover, because, as the Proposing Release concedes, the proposed publication of anonymized and aggregated information could still risk exposing Institutional Investment Managers and their clients "to retaliation by other market participants" and "to increased risk of being the target of predatory strategies such as short squeezes",[59] SIFMA urges the SEC to take care that its dissemination of such information occurs in a way that is designed to ensure such disclosure is not the proximate cause of the exact type of activity that it is seeking to monitor and prevent.[60]

E. *Marking Trades as "Buy to Cover" Would be Costly and Would Not Yield Meaningful Data*

Proposed Rule 205 would require a broker-dealer to mark a purchase order as "buy to cover" if, at the time of order entry, the purchaser (which could be the broker-dealer or another person) has a gross short position in such security in the specific account for which the purchase is being made at such broker-dealer—regardless of its size in relation to the size of the purchaser's gross short position in the account and regardless of whether the gross short position is offset by a long

[57] *Id.,* 87 FR at 14967.

[58] *Id.; see also id.*, 87 FR at 15006 (noting that "[r]eleasing all the information from Proposed Form SHO could reveal trading strategies that would be costly even if the identities of the short sellers remained anonymous" and could "increase the risk of copycat trading" and "lead[] to less price efficiency and potentially more volatility".)

[59] *Id.,* 87 FR at 14995.

[60] In addition to these risks, SIFMA also notes that the reporting requirements under the Proposed Rules would expose reporting firms to increased cyber security risks. As we noted in our comment letter on FINRA's proposed short interest reporting enhancements, the reporting (even if only to the regulator) "of short positions in individual accounts raises the significant cyber security risks and inadvertent data breach risks associated with disseminating voluminous customer-specific sensitive confidential information that may reveal proprietary trading strategies". *See* SIFMA Regulatory Notice 21-19 Comment Letter at 3. In particular, we noted that "[s]hort positions are considered by many clients to be among the most sensitive and confidential information that firms maintain on their behalf" and that "[c]hief among the risks of providing such information are the cyber security, theft and inadvertent data breach concerns associated with the dissemination of a substantial amount of highly sensitive client account information that may reveal commercially sensitive proprietary strategies to FINRA on a regular basis." *Id.* at 10.

position held in the purchaser's account at the time of order entry. However, while the SEC states that its rationale in proposing this requirement is to, among other things, facilitate the identification of potential short squeeze activity, SIFMA does not believe that the proposed requirement would yield meaningful data, and would impose costs on Institutional Investment Managers, including both broker-dealers and asset managers, that are grossly disproportionate to any possible benefits. In particular, SIFMA believes there is only a remote chance that Proposed Rule 205 reporting might identify signals of a short squeeze that would not otherwise be identifiable to the SEC through other currently available information.

As a preliminary matter, we note that, while the existing requirement to identify sales as "long" or "short" is necessary to determine applicability of short sale restrictions (*i.e.*, to determine: (i) whether a locate is needed; (ii) whether the price test should apply; and (iii) the timeframe for close-outs to occur), there is no similar rationale for a requirement to identify orders as "buy" versus "buy to cover."

Additionally, the Proposing Release fails to consider that the reporting broker-dealer generally would have to rely on representations from its clients of whether orders are for "buys" or "buys to cover." In this regard, such reliance on clients would be essential for executing brokers that do not custody the clients' positions (*i.e.*, where the positions are custodied away, such as at a prime broker or bank).[61] Such reliance on client representations on "buy to cover" purchases would likely even be necessary for situations where the executing broker is also custodying and clearing the client purchase—at the time of trade, the broker-dealer will likely not be aware of its client's intentions on purchasing to close out an existing short position (*i.e.*, which should be identified as "buy to cover") or whether the client intends to "box" the position (*i.e.*, not identify the purchase as "buy to cover" and rather maintain simultaneous long and short positions in the security).[62] Notwithstanding such reliance on customers, firms would also be required to re-design their order creation systems to perform a position mark on a buy order creation (currently, this is only done for sell orders). Communications protocols (FIX, Ouch, etc.) would all need to be modified to allow the new value transport, and validation services would need to be changed.

[61] *See* Proposing Release, 87 FR at 15010 ("[The current proposed reporting requirement] may miss some buy to cover trades that may occur if a[n Institutional Investment] Manager uses a broker to execute short sales and a prime broker (or prime brokers) for other long positions. In this case, the broker-dealer managing the purchase of shares would not know that the buy is actually a buy to cover and would thus not mark the trade as such. The current proposal may also miss some transactions that may occur if a[n Institutional Investment] Manager uses multiple accounts at the same broker-dealer to trade.")

[62] Indeed, even when a prime broker Institutional Investment Manager has custody of its client's positions, the prime broker still may have no real-time knowledge of the client's full position because institutions very often "trade away" from the prime broker. Accordingly, the prime broker may only receive allocation information and know the final positions at the end of the day. In addition, even where the prime broker does hold the client's positions, they are typically not available to trading system position keeping/marking systems. Rather, such systems generally will only look at firm aggregation unit positions. Therefore, customers are responsible for supplying all order marks to the broker. Additionally, the institutional customer account is not always known at time of order placement. Often, institutions place orders for many accounts, and then provide allocations to different beneficial owner accounts. The broker does not have this information at the time of the order receipt. Importantly, SIFMA is concerned that netting together all subaccounts for a customer, even if the positions were known, would provide a distorted view of the position.

Similar modifications would need to be made by asset managers with respect to the systems utilized to transmit orders to broker-dealers for execution.

Moreover, with respect to broker-dealers marking orders effected for their own account, it would still be unclear when a purchase must be identified as "buy to cover"; and, in any event, would result in significant unwarranted complexity, asymmetry, and expense. Proposed Rule 205 would require a "buy to cover" designation if the account for which the buy is effected also "holds" a gross short position in the security being purchased. As the SEC Staff is aware, pursuant to guidance from the Division of Trading and Markets in FAQ 2.5, broker-dealers must decrement from their long position orders that have been submitted but not yet executed, for purposes of marking orders as "long" or "short". Notwithstanding, the proposed definition of gross short position refers to securities "held" by the broker-dealer, which appears to refer to the broker-dealer's actual position, as opposed to its theoretical position under FAQ 2.5. Thus, broker-dealers would need to track, on a real time basis, different net positions for purposes of marking sell orders (based on the FAQ 2.5 theoretical position) versus marking buy orders as "buy" or "buy to cover" (based on the actual, non-theoretical position). Further, the sell-side marking requirements regard aggregation unit positions, whereas the proposed buy-side marking requirement regards specific account positions. These dual-level position tracking systems, with different metrics of theoretical versus actual short positions, are asymmetrical, complex to implement and maintain, and materially expensive. As broker-dealers generally needed to incur respective costs between $5-10 million for programming systems to abide by the FAQ 2.5 aggregation unit order marking interpretations, it can be expected that costs would be at least equal (and likely much greater) to also maintain a simultaneous account-level actual position for compliance with Proposed Rule 205.

For the aforementioned reasons, SIFMA recommends that Proposed Rule 205 of Regulation SHO be eliminated in its entirety. SIFMA also believes, as discussed above in Section V.A., that the information collected on Information Table 1 of Proposed Form SHO and through the existing reporting regimes described in Section II. would provide information that would just as effectively (if not better) meet the SEC's transparency and monitoring objectives.

F. The Challenges of Implementing the "Bona-Fide Market Maker Exception" Marking Requirement Would be Materially Disproportionate to the Information's Utility

The proposed addition of Sections 6.4(d)(ii)(D) and (E) of the CAT NMS Plan requiring that an order to sell an equity security be marked as a short sale effected in reliance on the bona-fide market making activities exception to the "locate" requirement under Rule 203(b)(2)(iii) of Regulation SHO would be very difficult to implement from an operational perspective. For example, SIFMA understands that the bona-fide market maker logic exists on the front end of entry into the trade, whereas CAT occurs at the end.[63] As a result, all downstream systems

[63] Again, as noted above, there may be many instances where a market maker may need to mark orders to sell as "short," based on the SEC's guidance in FAQ 2.5 on decrementing sell orders submitted but not yet executed, even where the market maker actually holds a long position in the security being sold. This adds further complications with respect to the CAT processes that must occur at the back end.

would need to be updated to build in that logic so that it could ultimately be reported to CAT.[64] Given that the information that would result from this proposed reporting requirement is already available to the SEC and other regulators on demand, SIFMA believes that the cost and burden of implementing the requirement would materially outweigh the benefit of such information. Accordingly, SIFMA recommends that the SEC eliminate the proposed amendments to the CAT NMS Plan in their entirety.

Moreover, and especially to the extent that there is a requirement to identify reliance on the exception through CAT, the SEC should re-confirm that, while bona-fide market making is based on certain "facts and circumstances" as set forth in prior interpretive guidance, there are different ways in which broker-dealers engage in bona-fide market making, including not only through making markets on exchanges, but equally through wholesale market making and other activities in connection with facilitating customer orders in the OTC market. SIFMA is concerned that the coinciding of this proposal with the occurrence of several recent regulatory inquiries into firms' use of the bona-fide market making exception in connection with their market making activities—market making activities that have been examined (without objection) numerous times by regulators since the implementation of Rule 203(b)(2)(iii) of Regulation SHO over 17 years ago—signals an intention by the SEC to further limit the availability of the bona-fide market making exception in a manner that would be inconsistent with the SEC's original guidance in the 2004 Regulation SHO Adopting Release and in its 2008 guidance.[65] The Proposing Release's comment that this proposed reporting requirement would be an additional tool to determine whether such activity qualifies for the exception or conversely "could be indicative of, for example, proprietary trading instead of bona-fide market making"[66] suggests that our concern may not be ill-founded.[67] In this regard, SIFMA would welcome the

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[64] For example, a broker may be a registered market maker on certain exchanges but not on others. On the exchanges where the broker is a market maker, there may be a requirement to mark orders (quotes) with certain values. The broker's order entry/routing system may have a parameter set to reflect that it is a market maker in the context of one local exchange; meanwhile, the system may have a parameter set to reflect that it is a Designated Primary Market Maker (DPM) in the context of another exchange, and that it is not a registered market maker in the context of a third exchange. However, the broker may still be acting in the global capacity of a bona-fide market maker when it trades on that third exchange (and of course, a market maker may obtain liquidity and/or lay off risk on any venue). As a result, it may be systematically and/or operationally difficult for the broker to define when it is globally acting in a bona-fide market maker capacity given the granular details of a market maker's many activities, and the existing systems design. Brokers would therefore likely need to update many systems with a new parameter to indicate "Don't worry about my status on Exchange A or Exchange B or C, just know that this order originated from a global bona-fide market maker strategy for regulatory reporting purposes". Then, that new parameter must be passed down through *all* data capture and reporting systems.

[65] *See* Amendments to Regulation SHO, Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690 (Oct. 17, 2008); Regulation SHO Adopting Release, 69 FR 48008.

[66] Proposing Release, 87 FR at 14971.

[67] SIFMA further notes the SEC's recent statements in its recent proposing release on registration of significant market participants that "bona-fide market-making exceptions under Regulation SHO are only available to registered broker-dealers that publish continuous quotations for a specific security in a manner that puts the broker-dealer at economic risk", that "[b]roker-dealers that do not publish continuous quotations, or publish quotations that do not subject the broker-dealer to such risk (e.g., quotations that are not publicly accessible, are not near or at the market, or are skewed directionally towards one side of the market), would not be eligible for the bona-fide market-maker exceptions" and that "broker-dealers that publish quotations but fill orders at different prices than those

opportunity to speak with the SEC regarding the recent regulatory inquiries into firms' reliance on the bona-fide market making exception.

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SIFMA appreciates the opportunity to respond to the Proposing Release and also your consideration of our recommendations as set forth herein. SIFMA would welcome the opportunity to meet with the Commission Staff to discuss our recommendations and any other aspects of the Proposed Rule. If you have any questions or require additional information, please do not hesitate to contact us by calling Rob Toomey at (212) 313-1124, Lindsey Keljo at (202) 962-7312, Joe Corcoran at (202) 962-7383 or Bill Thum at (202)-962-7381.

Sincerely,

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quoted would not be engaged in bona-fide market making for purposes of Regulation SHO." *See* Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer, Exchange Act Release No. 94524 (Mar. 28, 2022), 87 FR 23054, 23068 at n. 157 (Apr. 18, 2022)).

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Cc: The Hon. Gary Gensler, Chair
The Hon. Hester M. Peirce, Commissioner
The Hon. Allison Herren Lee, Commissioner
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