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Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Submitted electronically via rule-comments@sec.gov

April 26, 2022

Dear Ms. Countryman:

Short Position and Short Activity Reporting by Institutional Investment Managers (File No. S7-08-22)

The Alternative Investment Management Association (AIMA)[1] appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's (SEC or Commission) proposed rule that would: (i) require institutional investment managers that meet or exceed a specific reporting threshold to report specified short position data and short activity data for equity securities and (ii) prescribe a new "buy to cover" order marking requirement (the "Proposal").[2] AIMA's members include institutional investment managers, most of whom will be impacted by the Proposal and therefore required to file Proposed Form SHO.

[1] AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with around 2,100 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2.5 trillion in hedge fund and private credit assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 250 members that manage $600 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialized educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

[2] SEC, Proposing Release, Short Position and Short Activity Reporting by Institutional Investment Managers, 87 Fed. Reg. 14950 (Mar. 16, 2022) (the "Proposing Release"). The Proposal would also make amendments to Consolidated Audit Trail (CAT) data; however, we have chosen to limit our response to Proposed Rule 13f-2 and Proposed Rule 205.

At the outset, we would like to thank, and note our agreement with, the Commission and the Staff of the Division of Trading and Markets that any short sale data should be aggregated and anonymized prior to its public disclosure, a determination consistent with section 929X(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[3] Although we agree with this reasoning, we would like to propose alternative means by which the Commission can achieve its stated objectives.

Proposed Rule 13f-2 would collect a significant amount of commercially sensitive and valuable short position data that, should it become compromised, would harm both Managers and market participants, disrupt markets and, ultimately, undermine the Commission's mission to protect investors, maintain fair, orderly and efficient markets and facilitate capital formation. Accordingly, we believe the Commission can achieve its goals and fulfill the statutory mandate via a less burdensome route and without imposing an additional, new reporting regime on market participants. In particular, we suggest:

- Preferably enhancing and relying upon existing short sale data collection and publication instead of mandating a new reporting regime, but failing that;
- Expanding the scope of Proposed Rule 13f-2's applicability because its limitation to only institutional investment managers (as defined in section 13(f)(6)(A) of the Exchange Act) will negatively impact the completeness of the aggregated and disclosed data;
- Reconsidering Proposed Rule 13f-2's Reporting Thresholds because they are based on stale and limited data;
- Eliminating Table 2 from Proposed Form SHO because it is too granular and would contain an extensive amount of commercially sensitive and valuable proprietary data;
- Revising the proposed amendment requirements for Proposed Form SHO; and
- Reassessing the feasibility of Proposed Rule 205 to address the likely inaccuracies, challenges and operational complications that would result from its current form.

These points are discussed in further detail below in the attached annex with relevant data points provided. We would be happy to elaborate further on any of the points raised in this letter. For further information, please contact Daniel Austin, AIMA's Director of U.S. Policy and Regulation, by email at daustin@aima.org or phone at (601) 842-4545.

Yours sincerely,

[3] Public Law 111-203, 929X, 124 Stat. 1376, 1970 (July 21, 2010).

Jiří Król
Deputy CEO, Global Head of Government Affairs
AIMA

Cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
Mr. Haoxiang Zhu, Director, Division of Trading and Markets

ANNEX

1. AIMA supports the Commission's preliminary determination that only the publication of aggregated and anonymized short sale data is consistent with section 929X of Dodd-Frank and is needed to avoid many of the negative market consequences that would likely result from Manager-level attribution.

Section 929X(a) of Dodd-Frank directs the Commission to "prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, *aggregate* [emphasis added] amount of the number of short sales of each security, and any additional information as determined by the Commission."[4] Proposed Rule 13f-2 would result in the publication of certain short sale data and would be aggregated across all reporting institutional investment managers ("Managers")[5] for each reported equity security prior to publication.[6] The Commission notes that it "currently plans" to publish only aggregated data derived from information in Proposed Form SHO[7] and solicits comment on a potential alternative approach that would publish short sale data at the Manager level, without aggregation with other reporting Managers, with the reporting Manager's identifying information being removed prior to publication.[8]

We strongly encourage the Commission to preserve in any final rule this preliminary determination that any short sale data only be published in an aggregated and anonymized manner. Choosing instead to disclose non-anonymized, Manager-level short sale data will: (i) lead to a number of negative consequences for both Managers and the markets and (ii) violate the plain meaning of section 929X of Dodd-Frank and its legislative history.

Similarly, we would strongly discourage the Commission from pursuing the potential alternative discussed in the Proposal, i.e., anonymized, non-aggregated disclosure.[9] We agree with the Commission's preliminary determination that even this form of disclosure "could result in a reduction in short selling, along with a reduction in the corresponding liquidity and price transparency benefits."[10] As the Commission correctly notes, even if the data is anonymized, market participants could still identify certain reporting Managers.[11] Such a result would yield many of the same negative effects that would materialize from non-anonymized, Manager-level disclosures.

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4 *Id.*

5 For the purposes of Proposed Rule 13f-2, "institutional investment managers" has the same meaning ascribed to it in section 13(f)(6)(A) of the Exchange Act, i.e., these could include investment advisers, banks, broker-dealers and others. *See* Proposing Release, *supra* note 2, at 14951, n. 15.

6 *Id.* at 14955.

7 *Id.* at 14957.

8 *Id.* at 14967.

9 *Id.* at 14967.

10 *Id.*

11 *Id.*

Benefits of Short Selling

The Commission has a long history of acknowledging the benefits of short selling.[12] Some of these benefits include providing the market with liquidity, price discovery and market efficiency, while also serving as an important tool for managing portfolio risk.[13] To preserve and protect these benefits, the Commission has built a robust regulatory framework and further charged the Financial Industry Regulatory Authority (FINRA) with supporting the Commission in its oversight responsibilities of the short selling market.[14]

Two key aspects of short selling should be kept in mind. First, a substantial amount of short selling occurs as part of overall portfolio management activity, including risk management. Short sales are often made in tandem with long purchases of securities with similar characteristics to hedge a Manager's exposure to downside risk and ultimately protect investor returns.

Second, where short positions are entered into on a standalone basis, they are the result of in-depth analysis that concludes that a given security is over-valued, e.g., if an investor concludes that a given company's prospects are not as good as the market expects. The short seller may also often act as an early warning mechanism, issuing signals that the market should heed, allowing investors to potentially avoid losses in situations where market consensus does not take account of important information. The events surrounding Wirecard[15] attest to the important role short sellers play in the dissemination of important company information through forensic research.

Short selling, therefore, in comparison to the simple buying and selling of securities, provides differentiated means by which market participants can express a variety of nuanced views regarding both absolute and relative levels of security prices. This allows the market price to reflect the full range of underlying economic analysis. Short selling is a significant factor in price discovery and in efficient markets – an activity that should be valued by policymakers. If short sellers exit the market because their positions would be made available to the public, price discovery, among other benefits, would be negatively impacted.

Public Policy Justifications for Aggregating and Anonymizing Manager Data

The Commission notes, and we agree, that aggregating short sale information across reporting Managers can "help safeguard against the concerns noted . . . related to retaliation against short selling, including short squeezes, and the potential chilling effect that such public disclosure may have on short selling."[16] The Proposing Release goes to great lengths to highlight the negative impacts that

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[12] *See, e.g.,* SEC, Final Rule, *Amendments to Regulation SHO*, 75 Fed. Reg. 11232, 11242 (Mar. 10, 2010); SEC, Concept Release; Request for Comments, *Short Sales*, 64 Fed. Reg. 57996, 57997 (Oct. 28, 1999).

[13] *Id.*

[14] *See, e.g.,* SEC, Final Rule; Interpretation, *Short Sales*, 69 Fed. Reg. 48008 (Aug. 6, 2004).

[15] *See infra* note 21 and accompanying text.

[16] *See* Proposing Release, *supra* note 2, at 14955.

would result from the public disclosure of the identities of Manager's with short positions and their investment and trading strategies.[17] The Commission explains that disclosing data reported on Proposed Form SHO would "likely spur copy-cat trading strategies," an outcome that it notes has been documented to occur in the EU where individual short sellers' names are made public.[18] It concludes that an increase in copycat trading would likely create indirect costs, like herding and increased market volatility.[19]

Indeed, several studies have quantified the negative impacts of disclosing non-anonymized, Manager-level short positions can have on equity markets.[20] When public disclosure of Managers' short positions is required, they are less willing to initiate or maintain short positions for fear of adverse consequences, e.g., copycat trading or short squeezes. That reluctance, in turn, leads to an inevitable decrease in liquidity and overall trading volumes, the widening of bid-ask spreads, less efficient price discovery and undue increases in volatility. Moreover, additional public disclosure of a Manager's portfolio, i.e., non-anonymized short position data, would further erode the importance of conducting fundamental research and developing critical proprietary investment theses and strategies and risks harming the Manager and its clients.

Disclosure of non-anonymized, Manager-level short positions can have negative consequences that may extend beyond just the Manager. First, such disclosure could lead to issuer retaliation. Corporate management have been known to limit access to Managers with known short positions, thereby unduly limiting information flow to the public markets. Even worse, as evidenced by the events surrounding Wirecard,[21] they have been known to take retaliation to an entirely different, perhaps even criminal, level.

Second, non-anonymized, Manager-level disclosure of short positions could undermine the Commission's objective to foster sustainability.[22] A short position in an issuer that has neglected its ESG responsibilities can be just as valuable and important to the markets, and to the affected public, as a long position in a company that has adhered to its ESG mission. Finally, many, perhaps most,

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17 *See id*. at 14952.

18 *Id.* at 15005.

19 *Id.* at 15007.

20 *See* Oliver Wyman, *The effects of short-selling public disclosure regimes on equity markets* (Feb. 2010) (concluding that the public disclosure of manager-level short positions leads to: (i) short sellers' participation in the equity markets decreasing by approximately 20-25%; and (ii) as short selling liquidity decreases, trading volumes decrease, bid-ask spread widen, price discovery becomes less efficient and intraday volatility increases). *See also* Copenhagen Economics, *Market Impact of Short Sale Position Disclosures* (July 15, 2021) (concluding that public disclosure of short selling will likely impair price discovery because: (i) it deters informed investors from shorting assets, thereby withholding information from the price discovery process; and (ii) it leads to herding behavior, which is associated with a risk of exaggerated price adjustments and therefore higher volatility.

21 *See generally* Paul Murphy, *Wirecard critics targeted in London spy operation*, FIN. TIMES (Dec. 11, 2019) and Michelle Celarier, *Hacked Printers. Fake Emails. Questionable Friends. Fahmi Quadir Was Up 24% Last Year, But It Came at a Price*, INSTITUTIONAL INVESTOR (Jan. 9, 2019).

22 AIMA, *Short Selling and Responsible Investment* (June 7, 2021) (finding that short selling can be an excellent tool for mitigating undesired ESG risks and influencing the nature of capital flows).

short positions are a part of sound risk management, designed to reduce risk in a larger portfolio. If non-anonymized, Manager-level disclosure of short positions caused Managers to establish, or maintain, fewer such positions, the result would be less effective risk management – a result the Commission should find unwelcome.

Section 929X(a)'s Plain Meaning and Legislative History

As described above, section 929X(a) requires the Commission to promulgate rules that provide for the public disclosure of the "aggregate amount of the number of short sales of each security."[23] The plain meaning of section 929X(a) and its legislative history support the reporting, and subsequent disclosure, of aggregated, but anonymized, short sale information.

Section 929X(a)'s genesis began in 2009 in a bill proposed by Majority Leader Steny Hoyer (D-MD). The bill, as amended, would have required: (i) large money managers to report their individual short sales to the Commission on a daily basis and such reports would have been specifically exempt from Freedom of Information Act ("FOIA") requests; and (ii) the Commission to prescribe rules for the disclosure of the aggregate number of short sales of each security. The intent of Rep. Hoyer's legislation was clear: the Commission would collect individual short position data and then publish aggregate short sale information to the public. If one reads item (ii) as requiring the individual disclosure of short positions, there would have been no reason for Rep. Hoyer to also include a FOIA exemption for individual managers' short position data.

A modified version of Rep. Hoyer's bill was included in section 7422 of H.R. 4173, which, as amended, ultimately became Dodd-Frank.[24] H.R. 4173 maintained both requirements from Rep. Hoyer's bill, but it also provided for stronger confidentiality protections regarding the individual reports the Commission received.[25] During the Dodd-Frank House-Senate conference, the paragraph requiring private, daily reporting on a confidential basis was deleted, but the paragraph requiring the Commission to prescribe rules for reporting the aggregate number of short sales was retained.[26]

There is no indication that the deletion of the paragraph requiring private, daily reporting was intended to impact the clear meaning of the paragraph requiring public, aggregate disclosure by the SEC. Accordingly, a rule that takes a contrary approach – disclosing either anonymized or non-anonymized Manager-level data – would violate not only the clear statutory mandate but also legislative history and Congressional intent.

To summarize, we appreciate the Commission's preliminary determination that any publication of short sale data should be done on an aggregated and anonymized basis only and would strongly encourage it to maintain this determination indefinitely. Any final rule should preserve the many

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[23] *See supra* note 3 and accompanying text.

[24] Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7422 (2009).

[25] *Id.*

[26] H.R. Rep. No. 111-517 (2010) (Conf. Rep.).

benefits short selling provides, avoid the litany of harms discussed above that could materialize from an alternative approach (i.e., non-anonymized, Manager-level disclosures) and be consistent with the statutory language and legislative history of section 929X. Despite our agreement with only published aggregated and anonymized short position data, we believe there are less burdensome means by which the Commission can fulfill the statutory mandate and still achieve the goals it sets out the in the Proposal.

2. Instead of mandating a new reporting regime for Managers, the Commission should enhance and rely upon existing short sale data and reporting thereof.

To reiterate, we support the Commission's determination that only aggregated and anonymized short position data should be published; however, we encourage the Commission to consider a more reasonable and less burdensome alternative that would not impose an additional reporting burden[27] on a significant number of market participants, many of whom are AIMA members. With tailored refinements to FINRA reporting and the combination of the proposed CAT amendments and a feasible "buy to cover" order marking requirement (if and when it is implemented),[28] we believe the Commission can still fulfill the statutory mandate and achieve the goals outlined in the Proposal but without creating additional reporting requirements, burdens and costs for many market participants.

Proposed Rule 13f-2 would require Managers that meet a Reporting Threshold, as defined in the Proposal, to file Proposed Form SHO with the Commission via EDGAR within 14 calendar days after the end of the calendar month.[29] Proposed Form SHO would consist of a cover page and two information tables (Manager's Gross Short Position Information ("Table 1") and Daily Activity Affecting Manager's Gross Short Position During the Reporting Period ("Table 2")), with the Commission receiving extensive, granular data on Managers' short positions from 25 separate data fields.[30]

The Proposing Release's Economic Analysis examines several sources of short selling data that are currently, or were, available both publicly and/or for regulatory purposes.[31] In its discussion, the Commission describes the perceived shortcomings of each of these data sources and concludes that

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[27] Proposed Form SHO would be one of several new reporting requirements, including proposed reporting requirements related to security-based swaps and securities lending. *See* SEC, Proposing Release, Reporting of Securities Loans, 86 Fed. Reg. 69802 (Dec. 8, 2021) and SEC, Proposing Release, Prohibition Against Fraud Manipulation, or Deception in Connection With Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions, 87 Fed. Reg. 6652 (Feb. 4, 2022).

[28] We discuss suggested revisions to Proposed Rule 205 in Section 7 below.

[29] Proposing Release, *supra* note 2, at 14956.

[30] *Id.* at 14958-59. Table 1 would include, among its 9 data fields, the Manager's gross short position, the dollar value of those shares and whether the position is fully hedged, partially hedged or not hedged. *Id.* Table 2 would include 16 separate data fields that would include information on a Manager's daily shorting activity, which the Commission believes will assist its assessment of systemic risk and reconstructing unusual market events. *Id.* at 14959. Managers would also be required to account for a gross short position in an ETF. *Id*. at 14958.

[31] The Commission examines bi-monthly short selling data collected by FINRA; short selling data sets published by many SROs; securities lending data; CAT data and Exchange Act Form SH that was used during the financial crisis. *Id.* at 14987-90.

they lack information about the levels and timing of changes in economic short exposure for specific Managers in specific securities.[32]

FINRA currently collects aggregate short interest information in individual securities on a bi-monthly basis as the total number of shares sold short in a given stock as of the middle and end of each month.[33] The exchange that lists the stock will then distribute the collected data, or, for OTC stocks, FINRA publishes the collected data.[34] FINRA requires member broker-dealers to report short positions, regardless of position size, in customer and proprietary firm accounts in all equity securities twice a month.[35] The data is typically available within two weeks of its submission.[36] The Commission, believes, however, that this data suffers from two major limitations: (i) it does not provide data on the timing with which short positions are established or covered and (ii) the aggregation prevents the Commission from understanding aspects of the underlying short selling activity.[37]

We believe the current FINRA reporting regime can be enhanced, and subsequently codified, to address the limitations the Commission believes exist. Reporting of short interest to FINRA could be accelerated from bi-monthly to weekly, with a one-week delay prior to its dissemination. This would provide the Commission and the market with more timely data than it would receive under Proposed Rule 13f-2 and from a broader group of market participants than just Managers. The Commission explains, however, that relying on enhanced and codified FINRA data would not provide it with positions of any identified Managers or any Manager-specific activity.[38] If the Commission is concerned about a lack of granular data on short positions, we would encourage it to simply rely upon its broad examination and supervisory authorities to gather such data from market participants, broker-dealers or the exchanges, a practice it currently utilizes with some frequency.

We would also note that just last year, FINRA requested comments on enhancements and other changes related to its existing short sale reporting and dissemination regime.[39] Some of the changes contemplated include more frequent filings and reducing the processing time involved in disseminating short interest data.[40] In other words, FINRA is considering revising several of the same aspects of its framework that the Commission has proposed to address with Proposed Rule 13f-2. However, instead of waiting on FINRA's proposed changes to be implemented and allowing time for assessing the success thereof, the Commission has chosen to mark its own path with a separate, divergent short sale reporting and disclosure regime that will prove more onerous and costly than

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32 *Id.* at 14987.
33 *Id*.
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.* at 14988.
38 *Id.* at 15004.
39 FINRA Regulatory Notice 21-19 (June 2021), *available at* https://www.finra.org/rules-guidance/notices/21-19.
40 *Id.*

existing and enhanced FINRA reporting. Again, the Commission should rely on enhanced FINRA reporting and dissemination rather than the route it has chosen with Proposed Rule 13f-2.

Regulators can currently extract short sale information from CAT data, which contains an order mark that indicates whether an order is a short sale.[41] Regulators are then able to identify traders who are short selling and see the order entry and execution times of these short sales.[42] The Commission cites several perceived shortcomings of current CAT data to support its decision to issue Proposed Rule 13f-2. We believe that a workable "buy to cover" order marking requirement, if and when implemented, along with amendments to the CAT NMS plan would also help the Commission achieve its ends.

Proposed Rule 205 would establish a new "buy to cover" order marking requirement for broker-dealers if, at the time or order entry, the purchaser (either 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 that broker-dealer.[43] The proposed amendment to the CAT NMS plan would require the reporting of short sales effected by a market maker.[44] The combination of a viable "buy to cover" order marking requirement and amendments to CAT data would provide the Commission and market participants with greater visibility into the kind and type of short selling activity occurring in the market, e.g., whether a purchase is a "buy to cover," in connection with market making activities or otherwise.

An alternative approach that includes the above suggestions would yield many of the same results the Commission hopes the Proposal will achieve but without the additional costs, compliance burdens and reporting requirements that would result from Proposed Rule 13f-2. Furthermore, this alternative approach would provide the Commission with extensive insight into the short sale market, enough, we believe, to assist it in its oversight responsibilities and its reconstructing of market events. And, to the extent this alternative approach goes beyond just Managers' activity and does not include prescribed reporting thresholds, we do not see this as a drawback, but instead a benefit to the Commission and market participants as they will receive a near-complete picture of short sale interest in equity securities because it will include almost all short positions.

3. Proposed Rule 13f-2's applicability to only Managers will omit many market participants from its scope and would impact the completeness of the aggregated and disclosed short selling data.

Instead of Proposed Rule 13f-2, we believe the Commission can still achieve the goals outlined in the Proposal and satisfy the statutory mandate, via the alternative discussed above, but without creating additional reporting requirements and costs for many market participants. If, however, the Commission does intend to finalize a version of Proposed Rule 13f-2, we would encourage it to expand

41 Proposing Release, *supra* note 2, at 14989.
42 *Id.*
43 *Id.* at 14968.
44 *Id*. at 14969.

the scope of market participants subject to reporting on Proposed Form SHO beyond just Managers. We believe the Commission's determination to omit a large group of market participants from Proposed Rule 13f-2's scope will negatively affect the completeness and analytical sufficiency of the aggregated and disclosed short sale data, impeding the Commission's ability to accurately reconstruct significant or unusual market events.

The Commission explains that Proposed Rule 13f-2 is "designed to provide greater transparency through the publication of certain short sale data"[45] and would "fill an information gap for market participants and regulators by providing insights into the lifecycle of a short sale."[46] The omission of a large group of market participants that trigger one of the proposed Reporting Thresholds, however, will ultimately undermine the Commission's stated goals.

Limiting the scope of market participants subject to Proposed Form SHO reporting would not provide the Commission with full visibility into the short sale market that it could otherwise achieve pursuant to Proposed Rule 13f-2. An artificially narrow scope will not further the Commission's stated goals of providing greater transparency and filling the information gaps for market participants and regulators.

It is also worth noting that, if the Commission limits Proposed Rule 13f-2's applicability to only Managers, this determination could have negative, unintended consequences. For example, although positions reported on Proposed Form SHO would be anonymized and aggregated, some market participants may nonetheless be sensitive to submitting very granular data to the Commission. Such an outcome could change these market participants' incentives to actively engage in short selling in order to avoid triggering one of the Reporting Thresholds. This result would remove valuable liquidity from the market, heighten volatility and limit these market participants' hedging opportunities.

4. Proposed Rule 13f-2's Reporting Thresholds should be reconsidered because they are based on stale and limited data.

Pursuant to Proposed Rule 13f-2, a Manager would be required to file Proposed Form SHO via EDGAR with the Commission within 14 calendar days after the end of each calendar month with regard to each equity security over which the Manager and all accounts over which the Manager has investment discretion collectively meet or exceed one of the proposed Reporting Thresholds.[47] The Reporting Thresholds are based on the Manager's gross short position and do not include the calculation of derivative positions or long positions in the equity security.[48]

Reporting Threshold A applies to reporting company issuers and would require a Manager to file Proposed Form SHO if it has either: (i) a gross short position in the equity security with a U.S. dollar

[45] *Id.* at 14951.
[46] *Id.* at 14952.
[47] *Id.* at 14961-62.
[48] *Id.* at 14962.

value of $10 million or more at the close of regular trading hours on any settlement date during the calendar month or (ii) a monthly average gross short position as a percent of shares outstanding in the equity security of 2.5% or more.[49] Reporting Threshold B would require a Manager to file Proposed Form SHO if it meets or exceeds a gross position in the equity security of a non-reporting company issuer with a U.S. dollar value of $500,000 or more at the close of regular trading hours on any settlement date during the calendar month.[50] The Proposal explains that Reporting Threshold A is based on comment letters and analysis of data collected from Form SH under Rule 10a-3T, which required reporting of short positions that were either greater than 0.25% of shares outstanding or $10 million in fair market value.[51] Reporting Threshold B is based on analysis of OTC data.[52]

The Commission acknowledges the shortcomings of this stale data,[53] particularly with regard to prong (i) of Reporting Threshold A. Managers filed Form SH from November 2008 through February 2009,[54] meaning that the data relied upon to establish prong (i) of Reporting Threshold A is now 13 years old and taken from a brief, four-month period, during one of the most volatile times in U.S. market history. Given the staleness of this data and its limited scope, we do not believe the Commission can reasonably rely upon this data to establish Reporting Threshold A.

Accordingly, we believe that a more complete assessment of the current state of the short selling market is necessary before any final thresholds are established for reporting issuers. Furthermore, we do not believe Managers should be required to account for and report a gross short position in an ETF, regardless of the fact that the Commission has proposed not to require the Manager to consider short positions that the ETF holds. We therefore encourage the Commission to review and analyze current short interest market data for reporting issuers to ensure that any final threshold based on a gross position's dollar value accounts for the latest and most complete data.

5. The granular data to be reported on Proposed Form SHO is unnecessary.

Proposed Rule 13f-2 would require Managers that meet a Reporting Threshold to file Proposed Form SHO with the Commission via EDGAR within 14 calendar days after the end of the calendar month.[55] Proposed Form SHO would consist of a cover page, Table 1 and Table 2, with the Commission receiving extensive, granular data on Managers' short positions from *25 separate data fields*.[56] We respectfully question whether the scope of information the Commission proposes to collect is necessary for it to

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49 *Id.*
50 *Id.*
51 *Id.* at 14963.
52 *Id.* at 14964.
53 *Id.* at 14963, n. 80.
54 *Id.*
55 *Id.* at 14956.
56 *Id.* at 14958-59. Table 1 would include, among its 9 data fields, the Manager's gross short position, the dollar value of those shares and whether the position is fully hedged, partially hedged or not hedged. *Id.* Table 2 would include 16 separate data fields that would include information on a Manager's daily shorting activity, which the Commission believes will assist its assessment of systemic risk and reconstructing unusual market events. *Id.* at 14959.

fulfill the statutory mandate and achieve the goals it seeks to meet with the Proposal. Specifically, we have concerns about the granular nature of the data reported on Table 2 – the *16 separate data fields* a Manager would be required to populate – and how the Commission intends to maintain the confidentiality and security of this valuable and proprietary data.

Table 1 includes nine columns and would require Managers to report gross short position information regarding transactions that have settled during the calendar month being reported.[57] Table 1 would also require the Manager to report whether its gross short position is fully hedged, partially hedged or not hedged.[58] With the exception of the hedging requirement, we do not object to the data reported on Table 1 and would therefore encourage the Commission to eliminate the reporting of whether a Manager is hedged, partially hedged or not hedged from Table 1.

Requiring a Manager to report this hedging information, which the Commission subsequently intends to aggregate and disclose, could create a false impression of Managers' sentiments regarding an issuer. Some market participants may then attempt to adjust their trading strategies accordingly and perhaps to their detriment. The hedging classification will also involve a level of subjectivity that is unlikely to be applied uniformly across Managers. In some instances, it might be clear that one position is intended to hedge another specific position; however, this will not always be the case. The analysis for determining whether a position is hedged, partially hedged or not hedged will prove even more complicated for a large quantitative portfolio.

For example, in a long/short equity portfolio where the goal is to be net beta neutral plus or minus a target percentage, there will be both long and short exposures that consciously offset each other, but it may not be clear that one position necessarily offsets the price risk of another position. The portfolio is clearly hedged, but, under Proposed Rule 13f-2, a Manager would have to report all of the short positions in the portfolio as not hedged.

Another example of the complications that can arise from the hedging classification is where a long portfolio of private investments in a particular sector is hedged by a custom basket of public stocks in that sector. The clear intention of the short positions is to hedge long exposure, but there would not be a clear, nor obvious, one-to-one offset of the price risk between any particular stock in the basket and any particular long position. It appears that Proposed Rule 13f-2 would require the Manager to mark all of the short positions as not hedged, incorrectly signaling to the market that the Manager has a short view on these securities.

Table 2 would include 16 columns in which a Manager would be required to report granular, daily activity for the calendar month being reported.[59] The Commission believes that such extensive, granular data will provide market participants and regulators with additional context and

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[57] *Id.* at 14958.
[58] *Id.* at 14959.
[59] *Id.*

transparency into short positions and assist the Commission's assessment of systemic risk and reconstruction of unusual market events.[60] We respectfully question whether the means that Commission has proposed justify the ends it seeks to address.

At the outset, we are concerned whether the regulatory value of the data reported on Table 2 outweighs its extremely high commercial sensitivity and value. Although the Commission has proposed to aggregate and anonymize data reported on Proposed Form SHO, it will nonetheless maintain vast quantities of proprietary, valuable and sensitive data on its internal systems, yet it fails to explain how it intends to protect this data nor does it acknowledge that Commission systems are susceptible to breaches.[61] If this data were to be compromised, whether inadvertently or intentionally, it would have significant, negative ramifications for Managers, the markets and the Commission. Even absent a data breach or other misappropriation, aggregated and anonymized data may indirectly reveal investment and trading strategies, especially for a subset of some issuers with a limited number of reported short positions. Accordingly, we strongly encourage the Commission to limit the data reported on Proposed Form SHO to only that data that is absolutely essential.

In fact, we believe that Table 1, without the requirement to report hedging information, would be sufficient for the Commission to fulfill its statutory mandate and achieve its goals and without collecting so much highly sensitive and commercially valuable data. The Commission would be publishing aggregated and anonymized short position data thereby providing additional transparency and context into short positions. Also, with the proposed amendments to Form PF, the Commission will have even more timely information from investment advisers, many of whom may be required to file Proposed Form SHO, to assess any potential systemic risk concerns.[62]

If the Commission is concerned that it would not have enough granular data on short positions without Table 2, we believe it could utilize existing sources of short sale data. If this route does not yield the data it seeks, we would encourage the Commission to use its existing examination and supervisory authorities to request more granular data from Managers. Either of these alternatives would relieve Managers from the time and costs to calculate, maintain and populate the 16 data fields in Table 2 and, in turn, relieve the Commission from collecting additional data on its internal systems that will make it even more of a target for bad actors.

6. The Commission should revise its proposed amendment requirements for Proposed Form SHO.

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60 *Id.*

61 *See* Press Release, SEC, SEC Brings Charges in EDGAR Hacking Case (Jan. 15, 2019), https://www.sec.gov/news/press-release/2019-1; Chris Isidore, *Why the SEC hack is a really big deal*, CNN Money (Sept. 21, 2017), https://money.cnn.com/2017/09/21/news/sec-edgar-hack/index.html; Alain Sherter, *SEC EDGAR hack took months to discover*, Moneywatch (Sept. 21, 2017), https://www.cbsnews.com/news/sec-edgar-hack-corporate-filing/.

62 SEC, Proposing Release, Amendments to Form PF To Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers, 87 Fed. Reg. 9106 (Feb. 17, 2022).

A Manager must file an amendment to a Proposed Form SHO filed with the Commission if it contains errors that affect its accuracy.[63] Amendments must restate the entirety of the Proposed Form SHO, and a Manager must provide a written description of the revision being made, explain the reason for revision, and indicate whether any data from one or more prior filings has been affected by the amendment.[64] If the data being reported in an amendment and restatement impacts the data reported on a Proposed Form SHO filed for multiple reporting periods, the Manager must notify the Commission within two business days after filing the amendment and restatement and provide an explanation of the reason for the revision.[65]

We do not think it is necessary that if a non-material error has been made, a Manager should be required to restate Proposed Form SHO in its entirety. This, to us, seems excessive. For example, if the Manager makes a non-material error or omission on the cover page or in Table 1, we believe a simple note or addendum on the subsequent form that informs the Commission of the error or omission would suffice.

We would also encourage the Commission to adopt a materiality threshold for other errors or omissions. If the Commission ultimately chooses to finalize Proposed Form SHO, and it includes 25 separate data fields, we believe that the Commission will likely (and frequently) receive amendments to forms it has received. Given the granular details and data Managers would be required to track on a daily basis across dozens of portfolios – each containing dozens, maybe hundreds – of short positions, it follows that errors would arise.

We would posit an alternative that would require a Manager to file Proposed Form SHO in its entirety if it made an error that materially impacts only the data the Commission intends to publish. If the error is made in one of the granular reporting fields on Table 2 – for example, reporting the number of shares obtained through a secondary offering that reduces or closes a short position on the reported short position and settled on a particular date[66] – but the reported figure does not materially impact the data the Commission intends to publish, then the Manager should not be required to restate Proposed Form SHO in its entirety. We believe this materiality threshold would eliminate the need for the Commission to collect even more commercially sensitive and valuable data and, in turn, relieve Managers of the time and costs that would be required to calculate, populate and re-file an entirely new Proposed Form SHO.

7. The Commission should reassess the feasibility of Proposed Rule 205 to address the likely inaccuracies and operational complications that would result from its current form.

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63 Proposing Release, *supra* note 2, at 14960.

64 *Id.*

65 *Id.* at 14960-61.

66 *See id.*

Proposed Rule 205 would establish a new "buy to cover" order marking requirement for certain purchase orders effected by a broker-dealer for its own account or the account of another person at the broker-dealer.[67] A broker-dealer would be required to mark a purchase order as "buy to cover" if the purchaser has a gross short position in such security in the specific account for which the purchase is being made.[68]

Although we previously state our belief that the combination of a "buy to cover" order marking requirement, the proposed CAT amendments and enhancements to FINRA reporting would eliminate the need for Proposed Rule 13f-2, the use of a "buy to cover" order marking requirement cannot be a part of this remedy without reassessment. We are aware of a number of complications and operational challenges that would arise from Proposed Rule 205 in its current form, many of which other commenters will highlight in their responses; therefore, we discuss below only one complication of Proposed Rule 205.

For confidentiality protections and other commercial purposes, many Managers will spread the execution of their trading strategies among several broker-dealers, and they may also have multiple accounts with these broker-dealers. If Proposed Rule 205 is finalized as is, we believe that, given the complexity of trading strategies and the number of accounts, a single trade at a broker-dealer where the Manager has a gross short position may not actually be a "buy to cover" purchase.

For example, broker-dealer A may mark a purchase order as "buy to cover" for the Manager; however, if the Manager has a gross long position at broker-dealer B or in a separate account with broker-dealer A, the "buy to cover" marking would be inaccurate. Without the ability for a broker-dealer to see all of the Manager's other accounts, it would be unable to verify the accuracy of the order marking. This is not to suggest that the Manager should be required to report holdings at broker-dealer B to broker-dealer A, because that would undermine the very rationale for keeping the holdings separate in the first place.

It is clear that, even from the simplified example above, that Proposed Rule 205 could have unintended consequences. Market participants and the Commission would be unable to benefit from this inaccurate "buy to cover" data. Moreover, the Commission could not reasonably rely on this data to reconstruct market events or identify and investigate potentially abusive trading practices.[69] Proposed Rule 205 could also lead to mismatched records between broker-dealers and their Manager clients, which would result in a number of complications and issues.

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[67] *Id.* at 14968.

[68] *Id.* The "buy to cover" marking would be required regardless of the size of the purchaser's gross short position and regardless of whether the gross short position is offset by a long position. *Id.*

[69] *See id.*