ROPES & GRAY LLP
PRUDENTIAL TOWER
800 BOYLSTON STREET
BOSTON, MA 02199-3600
WWW.ROPESGRAY.COM

April 26, 2022

Leigh R. Fraser
Ropes & Gray LLP
800 Boylston Street
Boston, MA 02199-3600
T +1 617 951 7485

Via Electronic Submission: rule-comments@sec.gov

Vanessa A. Countryman
Secretary of the Commission
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Short Position and Short Activity Reporting by Institutional Investment Managers - Proposed Rule (File Number S7-08-22) (the "Proposing Release")

Dear Ms. Countryman:

We appreciate this opportunity to comment on proposed rule 13f-2 (the "Proposed Rule") under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which was recently proposed by the Securities and Exchange Commission (the "Commission") and would require "institutional investment managers" to file monthly reports with the Commission regarding short-sale activity.[1] We write from the perspective of our clients who are large institutional investors and from time to time engage in short sales.

We support the Commission's efforts to protect investors and maintain fair, orderly and efficient markets. We also share the concerns expressed by a variety of market participants that given the complexity of these proposed rules and the number of rule proposals recently released by the Commission on related topics, the short comment period is not adequate.[2] We suggest that the comment period be extended to afford additional opportunity for market participants to provide relevant information and data requested by the Commission.

We acknowledge and support that the Proposed Rule only contemplates anonymized public disclosure of aggregate short positions in a security rather than the disclosure of positions held by particular institutional investment managers. Public disclosure on a manager-by-manager basis would give rise to significant concerns regarding confidentiality of trading strategies and competition among managers and would create a disincentive for institutional investment managers to research issuers and take short positions.

---

[1] SEC Release No. 34-94313 (Feb. 25, 2022).
[2] *See, e.g.*, Joint Comment Letter from SIFMA and other associations to the Commission on the "Importance of Appropriate Length of Comment Periods" (April 5, 2022), *available at* https://www.sifma.org/resources/submissions/importance-of-appropriate-length-of-comment-periods.

However, the reporting that would be required under the Proposed Rule is not necessary. Much of the information sought by the Commission to enhance its market surveillance capabilities is, or soon should be, available to it under existing regimes such as the consolidated audit trail and Exchange Act Rule 13h-1, and information already provided by broker-dealers to other regulators such as FINRA and the stock exchanges. These existing sources of short-interest data can be used to provide information to market participants. We encourage the Commission to use that information rather than imposing significant compliance burdens and associated costs on institutional investment managers under the Proposed Rule.

If, however, the Commission proceeds with the Proposed Rule, we believe that the Commission can achieve the goals of the Proposed Rule in a more efficient manner that imposes substantially fewer costs on institutional investment managers, as discussed below. The Proposed Rule is aimed at two goals: increasing information available to market participants and bolstering the Commission's ability to provide oversight of short-selling activities. The following elements of the Proposed Rule can be better tailored to achieve those goals:

- The public reporting of aggregate short positions by the Commission would include data that are of limited value to investors. The burdens imposed on institutional investment managers by the Proposed Rule can be eased by eliminating requirements to report such data.
  - Information as to whether a position is hedged, partially hedged or unhedged, is unlikely to be particularly useful to investors because of challenges in applying the definitions proposed by the Commission.
  - The Commission's proposal to publish the aggregate daily changes in net short positions will likely be of limited value to market participants because it would encompass transactions that might result in a change in net short position but do not reflect any change in sentiment.
  - All filing thresholds should be determined using average positions over a month rather than daily positions. Otherwise, institutional investment managers will be required to incur significant costs to report information that is likely of little interest to the Commission or the markets, and significant market disruptions could result in investors who do not intend to maintain significant short positions being required to report, which could result in reported spikes in short interest that do not reflect actual trading.
- The requirement to report short sales of equity securities that are 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 ("equity securities of non-reporting issuers") is overbroad and would include a wide swath of securities in which neither U.S. investors nor the Commission appear to have an interest consistent with the stated purpose of the Proposed Rule. We would also note that shares of many non-reporting companies are not readily available to borrow and, as such, as a practical matter cannot be sold short.

The remainder of this letter discusses the above points as they relate to specific requirements proposed by the Commission.

1. Data that will be used by the Commission as part of its market surveillance and made available to market participants.

The Commission currently has or will soon obtain access to data needed to conduct market surveillance through other mechanisms. As such, the Proposed Rule is unnecessary.

In addition to providing additional information to market participants, the Proposed Rule is intended to facilitate the Commission's ability to perform market surveillance and enforce existing rules prohibiting fraudulent and manipulative conduct. While we agree that market surveillance is an important goal, requiring extensive reporting by institutional investment managers of information regarding daily trading activity to which the Commission already has access is unnecessary to achieve that objective.

The Commission has access to data from "large trader" reporting under Exchange Act Rule 13h-1 (which is not addressed in the Proposing Release and which identifies significant market participants) and from the consolidated audit trail, including information that will become available to it after the Customer Account Information System goes live (which the Proposing Release indicates is expected to occur shortly, in July 2022), that allows it to see trading activity in securities subject to suspicious trading patterns or a market disruption.[3] We expect that the Commission would be able to use the totality of the information available to it to conduct targeted searches in connection with suspicious trading patterns or a market disruption in particular securities, mitigating the inefficiencies of using the consolidated audit trail noted in the Proposing Release.[4] The Commission can also require broker-dealers to provide it with information regarding trading by "large traders" under Exchange Act Rule 13h-1 in connection with market disruptions, as well as look to data collected by FINRA and securities exchanges.

We believe that costs to institutional investment managers in developing and maintaining systems and controls necessary to provide highly sensitive granular daily trading data to the Commission would outweigh difficulties (relative to if the Proposed Rule was adopted) faced by the Commission in reconstructing trading data related to suspicious trading patterns or market disruptions based on information from the consolidated audit trail and other sources available to it. Such costs would be borne by all managers required to report rather than just those for which the Commission needs trading data to evaluate a particular event.

Because reporting under the Proposed Rule would impose significant costs on institutional investment managers, would not result in the disclosure of actionable information to market participants (as discussed below) and is not necessary to allow the Commission to perform effective market surveillance, we suggest eliminating the requirement to provide such reporting.

---

[3] *See* Proposing Release at 113.
[4] *See* id.

Existing sources of short-interest data can be used to provide information to market participants.

We also do not believe that the operational burdens of the Proposed Rule are necessary to provide short interest reporting to market participants. As noted in the Proposing Release, this information is already available (following a one-month delay) from FINRA and securities exchanges.[5] In the Proposing Release, the Commission notes four advantages of the reporting under the Proposed Rule as compared to the current reporting by FINRA and the securities exchanges: (1) FINRA or the securities exchanges could discontinue their reporting at any time; (2) some securities exchanges charge a fee for the data; (3) the Commission reporting under the Proposed Rule will be "consolidated in a readily accessible location;"[6] and (4) the reported information does not include daily trading activity. If the information is already available, it does not seem appropriate to impose significant regulatory burdens on market participants just in case the information becomes unavailable in the future; if that were to happen, the Commission could address the issue at that time. As the Proposing Releases notes, the Commission could codify the existing reporting process used by FINRA and securities exchanges and require that it continues.[7]

It would be much more efficient for the Commission to receive reporting of this information from FINRA and the securities exchanges that are already compiling and reporting much of the information contemplated by the Proposed Rule and to then provide that information in a consolidated location rather than impose an entirely new disclosure obligation (with the associated compliance burdens and costs) on institutional investment managers. The Commission could require the reporting provided by FINRA and securities exchanges to include daily trading activity if it has determined that such information would be useful, as well as address any other concerns regarding the sufficiency or availability of that data with FINRA and securities exchanges.

Further, we believe that use of the information obtained from broker-dealers, FINRA and the securities exchanges may be more reliable and efficient than reports obtained from institutional investment managers. Due to the extensive reporting requirements already imposed on broker-dealers, FINRA and securities exchanges, these market participants already have long-established and significant reporting protocols and systems in place that are designed to provide effective reporting.[8] Institutional investment managers would be required to develop and implement new systems to comply with the requirements of the Proposed Rule, and especially if the scope of the securities covered by the Proposed Rule remains broader than the scope of the

[5] *See* Proposing Release at 12.
[6] Proposing Release at 43.
[7] Proposing Release at 155.
[8] The Commission has acknowledged the differences between the operational procedures of dealers and buy-side entities before, when it adopted the "reporting hierarchy" for security-based swaps reporting in Regulation SBSR. Pursuant to the reporting hierarchy, the Commission assigned reporting responsibility to the registered SBS dealer in the case of a transaction involving a registered SBS dealer and a counterparty that is not a registered SBS dealer, noting that SBS dealers "will have greater technological capability than non-registered persons to report security-based swaps as required by Regulation SBSR" and will have "devoted substantial infrastructure and administrative resources to its security-based swap business, and thus would be more likely to have the capability to carry out the reporting function than a non-registered counterparty." Release No. 34-74244 at 140 – 141 (Feb. 11, 2015).

securities covered by other Commission reporting requirements (as discussed below), such systems would not be part of a broader reporting infrastructure of the institutional investment managers and are therefore more prone to have errors, including by being incomplete or over-inclusive. In the Proposing Release, the Commission estimated that 3.5% of managers who file a Proposed Form SHO in a given month would file an amended Proposed Form SHO,[9] presumably because the initial Proposed Form SHO was incorrect. The Commission and market participants would be better served by relying on information provided by market intermediaries who are well positioned to report and are already reporting.

If, however, the Commission elects to proceed with the Proposed Rule, we believe it should make the changes described below to better tailor the Proposed Rule to achieve its goals and mitigate burdens on managers.

2. Data that will be publicly reported by the Commission.

Aggregated data as to whether a position is hedged and net daily changes in short positions will likely include considerable noise that would limit its utility to investors. The obligation to report that data will be costly and burdensome to institutional investment managers and should be eliminated.

The Commission's proposal would require institutional investment managers to produce and report information that will likely be of limited use to investors when aggregated and published by the Commission. As part of its reporting of aggregate short positions at month-end, the Commission proposes to "identify the percentage of the aggregate gross short position for a reported equity security that is reported as being fully hedged, partially hedged or not hedged."[10] Difficulties in defining those terms, however, are likely to lead to inconsistent reporting among institutional investment managers that will limit the meaningfulness of that information to investors and to the Commission.

The Commission proposed to require reporting of a position as "'fully hedged' if the Manager also holds an offsetting position that reduces the risk of price fluctuations for its entire position in that equity security, for example, through 'delta' hedging (in which the Manager's reported gross short position is offset 1-for-1)."[11] Delta hedging, however, requires regular adjustments to a position to account for changes in the delta between the instrument being hedged and the instrument used to provide the hedge. As a result, positions that a manager intends to fully hedge may be only "partially hedged" at a particular moment in time while the hedge is being adjusted. As an example of how the Proposed Rule could result in inconsistent reporting, managers may take different views as to whether such a position should be reported as "fully hedged" or "partially hedged." They may also take inconsistent positions as to how hedging transactions using derivatives or instruments with different correlations to the security being hedged should be treated.

---

[9] *See* Proposing Release at 74.
[10] Proposing Release at 35.
[11] Proposing Release at 197.

Additionally, the Commission's proposal would require a position to be reported as "partially hedged" if 1% of the potential exposure was hedged or if 99% of the potential exposure was hedged. A manager with investment discretion over multiple accounts that have different objectives and strategies may also be required to report a position as "partially hedged" even if some accounts are fully hedged and others are not hedged. As such, the ability of investors to use the proposed reporting to understand market sentiment and the ability of the Commission to use the information to enhance market surveillance efforts will likely be quite limited. We suggest that the Commission remove Column 9 from Proposed Form SHO because the proposed requirement is unlikely to elicit comparable reporting across managers in order to provide information on which market participants or the Commission can act.

The Commission would also require institutional investment managers to report daily trading activities in securities for which it exceeds the proposed threshold in Rule 13f-2. The Commission would then publish a single daily net number for each security "determined by offsetting the purchase and sale activity" reported on Table II of Proposed Form SHO.[12] That reporting would encompass transactions due to, for example, delta hedging, transactions to satisfy margin requirements, rebalancing, option exercises due to expiry dates and transactions in accounts that have differing investment strategies and objectives. As a result, it will be difficult to discern market sentiment or levels of activity from the net number published by the Commission, and the utility of publishing daily net transactions data to market participants will also likely be limited. However, organizing and reporting that data will impose significant costs on institutional investment managers. Because the Commission has access to sources of data that can be used to obtain a granular view of trading by managers to facilitate its market surveillance efforts, reporting of transactions by managers regarding daily trading is unnecessary. As such, we suggest the Commission delete Table II from Proposed Form SHO.

Similarly, we believe that requiring institutional investment managers to test if their short position has exceeded, for securities of reporting issuers, the $10,000,000 threshold or, for securities of non-reporting issuers, the $500,000 threshold as of the end of any trading day in the relevant month creates a significant risk that short-term market disruptions may require reporting by institutional investment managers that do not maintain significant short positions in the relevant class of securities. That risk is exacerbated by the use of the same dollar thresholds for each issuer regardless of size – for many public companies, $10,000,000 would represent an extremely small percentage of their market capitalization. This requirement will would result in increased costs to institutional investment managers. It may also result in increased noise in the public data published by the Commission, as a significantly larger group of investors may be required to report in a particular period, which could result in a spike in reported gross short positions that is due to the increased number of reporting persons rather than any change in market sentiment. To mitigate those concerns, we believe that proposed Rule 13f-2(a)(1)(ii) should be the sole trigger for Form SHO filings. Further, to mitigate costs to investors and provide consistency with other reporting regimes adopted by the Commission, we believe the threshold in Rule 13f-2(a)(1)(ii) should be increased from 2.5% to 5%.

If the Commission elects to maintain a filing threshold based on the dollar value of a position, we would suggest amending the Proposed Rule to provide that all reporting thresholds

[12] Proposing Release at 36.

are calculated using a monthly average gross short position (as in proposed Rule 13f-2(a)(1)(ii)) rather than the position at the end of each trading day. Testing the threshold at the end of each trading day would increase the frequency and effect of the distortions noted in the prior paragraph. Further, it seems arbitrary that the reporting threshold based on the percentage of a certain security held is determined based on an average holding over a month, while the reporting threshold based on the dollar value of a security held is measured as of the end of any trading day.

3. Application to equity securities of non-reporting issuers.

The Proposed Rule would require reporting of positions and transactions in which U.S. investors and regulators likely have minimal, if any, interest.

We suggest that the Commission remove clause (a)(2) of Proposed Rule 13f-2(a)(2) because it would expand reporting obligations related to equities of non-reporting issuers beyond those applicable to equities of reporting issuers and because it would require reporting of short positions that have no nexus to the United States.

The Proposed Rule would require “institutional investment managers” (which includes non-U.S. persons[13]), to report transactions in an “equity security” (which includes securities of foreign issuers[14]) issued by non-reporting issuers (which as proposed would include *any* issuer that does not have securities registered under Section 12 of the Exchange Act and is not required to report under Section 15(d) of the Exchange Act[15]) if all accounts over which the institutional investment manager has investment discretion have, as of the end of any settlement date during a calendar month, an aggregate gross short position in that equity security with a U.S. dollar value of at least $500,000. In other words, it would require reporting of short sales by non-U.S. institutional investment managers of equity securities issued by non-U.S. issuers that are not traded in the United States. In addition to the question of whether such reporting is in furtherance of the stated objectives of the Proposed Rule, there are meaningful questions as to whether the Commission’s jurisdiction extends to such transactions.

Aside from jurisdictional questions, it is unclear why the Commission or U.S. markets would have an interest in short sales of securities that are traded offshore.[16] Such a reporting requirement may also impose substantial burdens on non-U.S. institutional investment managers, who may not currently be required to make any filings with the Commission and who would need to develop new systems and potentially employ new personnel and/or external advisers to advise on the Commission’s filing processes (e.g., the use of XBRL and EDGAR) and

[13] See SEC Release No. 34-14852 (Jun. 14, 1978). Unlike reporting under Exchange Act Rule 13f-1, reporting under proposed Exchange Act Rule 13f-2 would not be limited to institutional investment managers that utilize U.S. jurisdictional means. *Compare* Section 13(f)(1) of the Exchange Act (“Every institutional investment manager *which uses the mails, or any means or instrumentality of interstate commerce in the course of its business as an institutional investment manager* …”) (emphasis added) *with* proposed Exchange Act Rule 13f-2 (“An institutional investment manager shall file a report …”).

[14] *See* Exchange Act Rule 3a-11.

[15] *See* proposed Exchange Act Rule 13f-2(a)(2).

[16] Additionally, such transactions may be subject to reporting regimes in other jurisdictions that have a more substantial interest. See, e.g., Proposing Release at 157 – 158 (discussing European Union reporting requirements with respect to short sales).

requirements (to the extent the Commission can exercise jurisdiction over such non-U.S. managers). It would also create a significant burden on U.S. institutional investment managers, who would need to develop new systems to capture and report trading in securities that are not currently subject to reporting requirements imposed by the Commission.[17]

The Commission states in the Proposing Release that the universe of securities subject to the Proposed Rule would be consistent with those subject to Regulation SHO.[18] However, that appears to overstate the reach of Regulation SHO. Regulation SHO generally only applies to broker-dealers "using the United States jurisdictional means to effect short sales in securities traded in the United States."[19] Rule 201 (the "circuit breaker" provision) of Regulation SHO is further limited, applying only to "covered securities,"[20] which are defined as NMS Stock[21] (in turn defined as NMS Securities that are not options[22]).

The requirement to develop new systems to capture trading in securities issued by non-reporting companies would also apply to equity securities of U.S. private companies (i.e., equity securities of non-reporting issuers organized in the United States). Short sales of such securities are likely to be rare due to limitations on the number of securities available to borrow. However, if the Proposed Rule is adopted in its current form, institutional investment managers would still be required to update compliance systems and procedures to account for the possibility of such short sales, which will impose significant costs on managers for little benefit.

A requirement to report short sales of equity securities of non-reporting issuers in the Proposed Rule would represent a significant expansion of the reporting requirements imposed on investors by the Commission.

Existing Exchange Act reporting requirements for investors do not capture trading or positions in equity securities of non-reporting issuers, and the justification to apply the Proposed Rule to such issuers does not appear to be compelling. For example:

- Sections 13(d) and 13(g) only require reporting of beneficial ownership of voting equity securities registered under Section 12 of the Exchange Act;[23]
- Section 16 of the Exchange Act only applies to securities of issuers that have equity securities registered under Section 12 of the Exchange Act;[24]

---

[17] While we acknowledge that U.S. public companies (and in particular registered investment companies) may have disclosure controls that capture positions in those securities, such companies are only a subset of "institutional investment managers." Further, systems used for financial and portfolio reporting by those companies may need to be adapted in order to comply with the Proposed Rule.
[18] Proposing Release at 48.
[19] SEC Division of Market Regulation, Responses to Frequently Asked Questions Concerning Regulation SHO, at Q. 1.3, avail. at: https://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm.
[20] Rule 201(b), (c) and (d) of Regulation SHO.
[21] Rule 201(a) of Regulation SHO.
[22] Rule 600(b)(48) of Regulation NMS.
[23] Exchange Act Rule 13(d)(1)(i).
[24] Exchange Act Section 16(a)(1).

- Section 13(f) of the Exchange Act only requires reporting of Section 13(f) securities;[25] and
- Section 13(h) of the Exchange Act only includes trading in NMS Securities in the thresholds used to calculate if an entity is a "large trader" required to file Form 13H.

Prior Commission requirements for reporting of short positions under Rule 10a-3T applied only to 13(f) securities,[26] which the Commission's staff has stated "primarily includes U.S. exchange-traded stocks (*e.g.*, NYSE, AMEX, NASDAQ), shares of closed-end investment companies and shares of exchange-traded funds (ETFs)."[27]

It is unclear why the Commission's and public's interest in short sales of equity securities of non-reporting issuers would be significantly greater than its interest in long positions and transactions under the above regimes.[28] Such securities can only be held by a small number of U.S. investors[29] and cannot be traded on U.S. securities exchanges.[30] In many cases, such securities will also be subject to contractual restrictions on transfer. As such, trading in such securities will be limited, as is the ability, if any, to short such securities. It is not evident from the Proposing Release or otherwise why the Commission requires, or believes the public requires, reporting of short sales of such securities.

We suggest that the Commission remove paragraph 13f-2(a)(2) from the Proposed Rule.

***

Thank you for your consideration of our comments. If you have any questions, comments, or need any further information, please do not hesitate to contact us at +1 212 596 9000.

Very Truly Yours,

Leigh Fraser

Leigh R. Fraser

Marc B. Rotter

---

[25] Exchange Act Rule 13f-1(c).
[26] Proposing Release at 13.
[27] Staff of the Commission, Frequently Asked Questions About Form 13F at Q.7, available at: https://www.sec.gov/divisions/investment/13ffaq.htm.
[28] Rule 144(h) under the Securities Act of 1933 does require reporting of sales by affiliates of non-reporting issuers in reliance on Rule 144. However, the Commission has recently proposed eliminating that requirement. Release No. 33-10911 (Dec. 22, 2020).
[29] *See* Exchange Act Section 12(g).
[30] *See* Exchange Act Section 12(b).