



October 9, 2008

Via E-Mail: rule-comments@sec.gov

Ms. Florence Harmon
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: *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)

Dear Ms. Harmon:

The Securities Industry and Financial Markets Association ("SIFMA")¹ appreciates the opportunity to comment on the *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* ("FAQs"), dated September 24, 2008, and the related Securities and Exchange Commission ("SEC" or "Commission") emergency orders ("Emergency Orders") requiring institutional money managers to report new short sales and short positions on Form SH.²

As discussed in further detail below, while SIFMA understands and supports the Commission's policy goals in requiring such disclosure, on an emergency basis, SIFMA firms believe that such goals may be achieved in a more efficient and less burdensome manner. More specifically, meeting certain of the weekly disclosure

¹ The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

² Exchange Act Release No. 58724 (October 2, 2008); Exchange Act Release No. 58591A (September 21, 2008).

requirements of the Form SH has imposed extreme costs upon member firms which outweigh the benefits from such disclosure. As the Commission has announced that it intends to maintain the disclosure requirements in the form of an interim final rule, SIFMA strongly urges the Commission to address the issues outlined below when instituting any permanent requirements. SIFMA would be pleased to discuss any or all of these issues further at the Staff's convenience.

I. Policy Goals Behind Short Sale Disclosure

In instituting the Form SH disclosure requirements, on an emergency basis, the Commission stated that it was "concerned about the potential for sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets" and further indicated that it "continues to believe that some persons may take advantage of issuers that have become temporarily weakened by current market conditions to engage in inappropriate short selling in the securities of such issuers." While SIFMA supports the Commission's rationale in taking such emergency action, SIFMA strongly urges the Commission to consider the policy goals it seeks to achieve after such emergency period has ended, and tailor future disclosure requirements accordingly.

In this regard, SIFMA requests that the Commission perform a full cost/benefit analysis prior to proceeding with any permanent, or even interim final, rulemaking. In order to comply with the Emergency Order, most SIFMA member firms were forced to put together somewhat rudimentary systems for collecting the reportable information and compiling the data into the format requested by the SEC. This process, which involved many different departments within firms working extremely long hours over several weekends, forced member firms to incur substantial costs. In fact, the Commission's Paperwork Reduction Act estimate that the preparation of the Form SH would take approximately 5 hours was grossly underestimated. It is simply not feasible to continue reporting using these systems, many of which require extensive manual intervention in order to get the correct data points. Any permanent rule will require the implementation of new systems to automate what is now an ad hoc, semi-manual process.

SIFMA feels strongly that the best form of rulemaking is one that allows for notice and comment (even a truncated notice and comment period) prior to proceeding with permanent rulemaking. SIFMA has outlined below a number of recommendations that it believes would allow the Commission to recognize the benefits associated with short sale disclosure, while also mitigating the extensive and unreasonable costs associated with the current requirements under the Emergency Orders. To the extent the Commission decides not to proceed with such alternatives, but rather largely maintains the current requirements under the Emergency Orders, SIFMA has identified a number of issues that it believes must be

resolved. Moreover, any interim final rule should also have an implementation date at least 6 months from the date the interim final rule is adopted to ensure that firms have sufficient time to develop systems to automate the reporting.

II. SIFMA Recommendations for Future Rulemaking

A. Use Existing Reporting Framework under Section 13

SIFMA believes that the Commission's policy goals concerning short sale disclosure could be met by leveraging the current reporting requirements for long positions. Specifically, similar to quarterly reporting of long positions under Section 13(f) of the Exchange Act, institutional investment managers could also be required to report short positions held as of the end of each quarter. Rather than requiring reporting of short positions in all 13F Securities, SIFMA believes that such reporting be narrowly tailored to a specific subset of securities that have been identified by the Commission and exchanges to have reported short interest in excess of a certain threshold, as further discussed below.

If the Commission wished to have information concerning any large short positions established during each quarter, it could require disclosure of short positions that exceed a certain percentage of the issuer's total shares outstanding. This could be similar, although not identical to, the disclosure requirements with respect to long positions under Section 13(d) (keeping in mind that the concept of "beneficial ownership" under Section 13(d) would not translate to a short seller). These requirements would enable the Commission to have both general disclosure of short position information, as well as more targeted information concerning managers who may be taking large short positions in certain issuers. While one must be careful to avoid any presumption that such large short positions are indicative of any manipulative or abusive activity, the Commission would be able to make further inquiries of the manager in question and derive comfort that no such abuse has occurred. As is the case with the current Forms SH, SIFMA would urge the Commission to maintain the confidentiality of the disclosed short sale and position information.

B. Focus Disclosure on Securities with High Short Interest

SIFMA recommends that the focus of short sale reporting be on securities that have reported short interest in excess of a certain threshold, as opposed to the current Form SH requirement to disclose short sales of all Section 13F securities. The 13F list is not ideally suited to this reporting function because it contains a substantial number of extraneous securities which are not applicable to Form SH, such as options. SIFMA proposes that the Commission work with the exchanges to create a Form SH Securities List targeting stocks that have high levels of short

interest, and require reporting of short sale activity in those securities, on a monthly, rather than weekly, basis. This would conform to the approach of the U.K. Financial Services Authority that has created a list of U.K. reporting entities which currently includes approximately 20 financial stocks.

III. Adjustments to the Form SH

While SIFMA strongly urges the Commission to consider the alternatives proposed above, should the Commission decide to continue with the disclosure requirements in their present form, there are certain adjustments that need to be made.

A. Timing for Disclosure

To the extent the Commission determines that weekly disclosure of short sales is necessary, SIFMA urges the Commission to change the filing date from the Monday following the reportable week, to the Friday following the reportable week (*i.e.*, reporting for Week 1 would take place on Friday of Week 2). Providing such additional time would not only allow the resolution of certain transactions which could erroneously appear on the Form SH (*e.g.*, due to cancels and corrects), but would also provide sufficient time for member firms to compile and cross-check the information to be included on the Form SH, thus improving the quality of the information and avoiding more Form SH amendments. Moreover, providing such additional time will help alleviate the present situation that firms find themselves in, whereby staff are working around the clock between the close of business on Friday and the filing deadline on Monday.

B. Reporting Short Sales But Not Short Positions

SIFMA urges the Commission to consider significantly altering the information required to be disclosed currently because some of the information sought is not readily available, impossible for SIFMA members to obtain, and/or potentially confusing or misleading.

Specifically, the information required for “Short Position (Start of Day)” (Column 3) and “Short Position (End of Day)” (Column 6) has required extensive system “work-arounds” and manual intervention, which has been labor intensive (particularly in the short turnaround period). It is also notable that the information does not relate to the firms’ actual short positions in the particular security, but rather requires firms to reduce the aggregate short sale activity in Column 4 (but not including any pre-existing short position in the security) and reduce from the Column 4 information any buys-to-cover short sales, excluding straight buys and long sales. (See Report for Firm Accounts, below.)

This is, for some firms, a complex process. Moreover, even with respect to the firms that can track buys to cover, the general methodology that many firms are using is to apply such covers on a last-in-first-out (“LIFO”) basis, even though the firms’ actual method of covering may be much different (e.g., applying covers on a “cost basis” or other methodology, which means that the covers may actually cover pre-existing short positions). Due to these and other practical difficulties in compiling information on end-of-day and start-of-day positions, and the fact that this information can be misleading, SIFMA strongly urges the Commission to remove the requirement to report this position information, and instead focus only on reporting of short sale transaction information in Columns 4 and 5, which SIFMA believes provides the SEC with relevant and intelligible data.

SIFMA also requests that the “Largest Intraday Short Position” (Column 7) and “Time of Largest Intraday Short Position” (Column 8) be eliminated from the reporting requirements in the interim final rule because this information is not obtainable under the systems that firms currently have in place. Developing a system which could capture the intra-day positions across thousands of accounts in thousands of securities of a major broker-dealer that has multiple reporting managers could take several “man-years” of development time and huge expense. We question whether the value of this information (other than an ad hoc request for a particular security) is critical when balanced against the burden and cost to automate the generation of this information. SIFMA believes that reporting the total short sales for the day will give the SEC the information that they need.

As a result, SIFMA proposes that the report required under any interim final rule include only columns 1, 2, 4, and 5.³

C. Recommended Changes to Existing Short Position Reporting Requirements

If the SEC does not adopt SIFMA’s proposed change to the reporting requirements away from short positions, SIFMA believes that the following issues still need to be resolved with respect to reporting short positions in any interim final rulemaking.

1. Pre- September 22nd Positions

SIFMA members believe that the SEC should give firms the option of excluding or including short positions prior to September 22, 2008 for reporting

³ In the absence of significant changes to the reporting requirements, SIFMA requests that the SEC continue to allow firms to continue to rely on Rule 12b-21 where the information cannot be obtained without undue expense and difficulty.

purposes. SIFMA understands the reasons why the Commission required this information to be excluded, but any interim final rulemaking should not perpetuate this imprecision. Without such an option, some SIFMA members will have to keep two sets of books until all of the pre-September 22nd positions are closed-out. As with the optional exclusions for riskless principal and market making activity, Form SH could include a check-box for whether the firm has included pre-September 22nd activity in its current report.

2. Reporting for Firm Accounts

Currently there is a difference with how firms report proprietary and customer account positions. Customer account positions are currently determined in accordance with the FAQs. Broker-dealers determine the “position” of a proprietary account by aggregating short sales, long sales, and purchases, including buys-to-cover. There is no equivalent of a customer long sub-account and a customer short sub-account. The methodology that firms apply when determining proprietary positions is consistent with how broker-dealers maintain their books and records pursuant to Rules 17a-3 and 17a-4 under the Exchange Act. In determining the aggregate broker-dealer short position in its proprietary accounts, broker-dealers aggregate all proprietary accounts that are short, ignoring accounts that are long.

3. Aggregation Units under Reg SHO

The short position reporting under Form SH is based on the aggregation of individual account positions and appears to prohibit netting within the aggregation unit, consisting of more than one account. There is, however, a fundamental inconsistency between using the Reg SHO definition of short sale for purposes of identifying short transactions where there is netting within the aggregation unit and are reportable on Form SH in Columns 4 and 5, and requiring account-by-account aggregation of the positions, that does not permit netting within an aggregation unit.

SIFMA requests that the SEC clarify that firms relying on Reg SHO aggregation units may rely on the aggregation unit determination of short sales and short positions for the purposes of Form SH. This would allow for netting across accounts within the same aggregation unit, ensuring more consistency between Columns 3, 4, and 6, to the extent Columns 3 and 6 are retained.

4. Put Option Exercise and Call Option Assignments Resulting in Short Sales

Although the SEC indicated in FAQ 7 that any "short sales" that occur as a result of an options exercise or assignment must be reflected in the Form SH, we understand that capturing these as "short sales" for the purposes of Column 4 and 5 is either not feasible, or extremely onerous. Specifically, we understand that such

“sales” resulting from exercises and assignment are not marked as “long” or “short,” and thus are generally not captured as short sale transactions in firms’ systems. Moreover, as the Commission is aware, the FINRA trade reporting rules provide a specific exception for exercises and assignments of options. SIFMA would therefore urge that the Commission clarify that any “short” sales” that result from option exercise and assignment or similar event need not be reported on the Form SH.

5. Clarifying the De Minimis Exclusions

SIFMA requests certain clarifications in connection with the optional de minimis exclusions from the SH reporting requirements. The de minimis exemption for “positions” that are less than .25% of the outstanding issued shares and have a market value of less than \$1 million is difficult to implement and is unclear as to whether it relates to “sales” or “positions.” The guidance says “positions” but a logical reading would be “sales,” not “positions.” Furthermore, the FAQs speak to “de minimis transactions” instead of “positions” which further confuses the issue. SIFMA also recommends that the Commission consider increasing the thresholds for the de minimis test.

D. Disclosure Should Remain Non-Public

SIFMA strongly believes that this report should remain non-public. The potential to exacerbate recent market turmoil by disclosing short sale positions is great because the reporting in its current form can distort what is really occurring in the market. In addition for some SIFMA members that do not have multiple reporting managers and accounts, the information provided in the Forms SH can reveal proprietary strategies in which firms may have an intellectual property interest. For all firms, the report can overstate activity which, without the proper context, can be misinterpreted and relied upon erroneously by the public and other market participants. Given the nature of these reports, SIFMA also believes that making such reports public at any time may subject firms to private litigation risk.

SIFMA requests that the Commission provide clarity on how Freedom of Information Action (“FOIA”) requests for confidentiality can be made on filings made through EDGAR, without sending a separate letter to the FOIA office for each filing.

E. Optional Exclusions of Market Making

Similar to the approach that the Commission has taken to not require disclosure of short sales that occur in connection with riskless principal activity, SIFMA believes that firms should have the option to also exclude short sales effected in connection with market making activity. SIFMA believes that Form SH could

include check-boxes where firms disclose whether the report includes market making and/or riskless principal activity.

F. Exclusion of Shorts in Convertible Bonds, Warrants, Debt Securities, and Exchange Traded Funds (“ETFs”)

SIFMA requests that any shorts in convertible, warrants, other debt securities, and ETFs should not be covered by the Form SH, because such products seem to follow the same line of reasoning as that used by the SEC to determine that short sales of options are not required to be reported on the Form SH.

To the extent that these securities are retained in the 13F List, we request the Commission to permit the de minimis test to be determined on the value of a transaction only. Given the difficulty in determining the total shares outstanding for convertible bonds, warrants, other debt securities, and ETFs, without further guidance, firms are frustrated in their reliance on this exception for these securities.

SIFMA also requests the exclusion of the creation of ETFs. Form SH potentially over-reports short sales because many firms have not been able to exclude deliveries of shares to ETF sponsors for the creation of ETFs from Columns 3 and 6. These deliveries are not short sales; indeed, they are deliveries of the positions to the ETF sponsors and this activity should be expressly excluded.

G. Weekend and Holiday Activity

The SEC should allow weekend activity, which is typically processed on a batch basis, to be included in Monday's filing as "Monday" trading so long as the reporting firm indicates that it is doing so. Any trading on holidays would be included with the activity on the next business day. The firm could be required to provide more specific information if requested, should the SEC have reason to be concerned about activity on any particular weekend.

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SIFMA greatly appreciates the Commission's consideration of the issues raised above, which are intended to ensure that any future reporting of short sale information be accomplished in a logical and efficient manner, and without requiring firms to incur extensive costs which are not commensurate with the benefits to be derived from such disclosure. We would be pleased to discuss these comments in greater detail with the Commission and the Staff. I can be reached in this regard at 202-962-7385 or at mmacgregor@sifma.org.

Sincerely,



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