

October 10, 2008

Brandon Becker

## VIA ELECTRONIC MAIL

+1 202 663 6979 (t)

+1 202 663 6363 (f)

brandon.becker@wilmerhale.com

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

Dear Ms. Harmon:

We write on behalf of an institutional investment manager client regarding the Securities and Exchange Commission's ("SEC" or the "Commission") emergency order dated September 21, 2008 concerning disclosure of short selling (the "Emergency Order"), as extended on October 2, 2008.<sup>1</sup> Based on our client's experience submitting Form SH on September 29, 2008 and October 6, 2008, as well as its understanding of the Emergency Order and accompanying guidance, our client has several comments that we hope the Commission will consider in connection with the release of an interim final rule.<sup>2</sup> We submit these comments pursuant to the Commission's invitation in Question 18 of the "Guidance Regarding the Commission's Emergency Order Concerning Disclosure of Short Selling."

**I. We urge the Commission to keep Forms SH non-public.**

The Commission has indicated that Forms SH submitted pursuant to the Emergency Order "will remain nonpublic to the extent permitted by law without the filer needing to submit a confidential treatment request."<sup>3</sup> We respectfully request that the SEC include a similar provision in any interim final rule. We strongly believe that public disclosure of information from Form SH could be harmful to the markets and reduce investor confidence, even if released weeks or months after initial submission to the Commission. Specifically, we are concerned that the Forms will give the public an inaccurate picture of institutional investors' views about the securities subject to reporting. As you know, short selling does not always indicate a negative view about an issuer; for example, short sales may be part of a firm's hedging strategy. In addition, the information required by Form SH is highly proprietary and could be used to try to reverse engineer an investment manager's trading strategy.

---

<sup>1</sup> SEC Release No. 34-58724 (Oct. 2, 2008); SEC Release No. 34-58591A (Sept. 21, 2008).

<sup>2</sup> The Commission indicated in a press release dated October 1, 2008 that it intends for the use of Form SH to continue beyond October 17, 2008 in the form of an interim final rule.

<sup>3</sup> See SEC Release No. 34-58724 (Oct. 2, 2008).

Ms. Florence Harmon  
October 10, 2008  
Page 2

**II. We urge the Commission to eliminate the requirement that Form SH be submitted via EDGAR.**

In order to both reduce the cost of compliance and mitigate the risk of inadvertent public disclosure, the SEC should eliminate the requirement that Form SH data be submitted via EDGAR. Given the short time-frames provided for collecting and submitting Form SH data, it would be more cost-effective and efficient for firms to submit the information in an alternative format. Moreover, as noted above, the Commission has determined that all Form SH filings will be non-public “to the extent permitted by law,” which would seem to minimize the need for the Forms to be EDGAR-filed. Also, there is an added element of public disclosure risk for the non-public Form SH filings if submitted via EDGAR. In light of the sensitive, confidential nature of the Form SH data, we recommend that the interim final rule permit direct submission of spreadsheet data (in Excel or delimited file format) to the Commission by a more secure transmission process (*e.g.*, e-mail or secure upload).

**III. We urge the Commission to delay submission of Form SH to mid- or late-week.**

The Commission currently requires that Form SH be filed before 5:30 pm on the Monday (or first business day) of each calendar week following a Form SH reporting period. It would be more cost-effective and would enhance the quality of the data if Form SH could be filed later in the week (*e.g.*, Friday). The cost savings would derive largely from not having to require so much weekend work. The potential data quality improvement would result from having more time to check the data and address any cancelled or corrected trades or other trades that may not be captured until Monday morning (*e.g.*, Friday option expiration information often is not received until the following business day).

**IV. We urge the Commission to eliminate the market value prong of the Form SH *de minimis* exclusion.**

If a short transaction or position in a 13(f) security constitutes less than one-quarter of one percent of the outstanding class of such security, it would seem unnecessary to subject the same transaction or position to a second *de minimis* test based on its market value (calculated using the security’s closing price for that day). The current \$1 million threshold is skewed to capture insignificant short positions or transactions in securities with a high price. This prong of the *de minimis* exclusion also requires a comparison of the \$1 million threshold to the value of the end-of-day position, which is data that is not otherwise required to be reported on Form SH.

Ms. Florence Harmon  
October 10, 2008  
Page 3

**V. We urge the Commission to eliminate columns 7 and 8 of Form SH (i.e., largest intraday short position and time of such position).**

The requirement to determine the size and time of the largest intraday short position is challenging to implement, especially for a manager that utilizes multiple strategies. While we appreciate the Commission's statement that institutional investment managers may rely on Rule 12b-21 under the Exchange Act, we would prefer to avoid any uncertainty regarding what constitutes "unreasonable effort or expense."<sup>4</sup> In addition, the data in columns 7 and 8 of Form SH is not obtainable from systems that many firms currently have in place. Firms often do not receive information regarding executions or option assignments on a real-time basis, which further complicates compliance with the requirement to determine the size and time of the largest intraday short position.

**VI. We urge the Commission to eliminate columns 3 and 6 of Form SH (i.e., start-of-day and end-of-day positions).**

Start- and end-of-day position information calculated according to Form SH's methodology often does not correspond to a firm's actual (i.e., net) short position, but rather represents an aggregate of short positions by account. To be able to report such information, firms must aggregate positions across prime brokers and make other adjustments, which can be a time-consuming, manual process. In addition to these practical difficulties, we are concerned that this information may overstate the extent of a firm's short interest.

\* \* \* \* \*

We appreciate the opportunity to provide comments regarding Form SH and respectfully request that the Commission consider these comments in connection with the release of an interim final rule concerning disclosure of short selling. If you have any questions, please do not hesitate to contact me at 202.663.6979, or my colleague Beth Stekler at 202.663.6588.

Respectfully submitted,

*Brandon Becker* /JK

Brandon Becker

---

<sup>4</sup> See "Guidance Regarding the Commission's Emergency Order Concerning Disclosure of Short Selling," Question 14.

Ms. Florence Harmon  
October 10, 2008  
Page 4

cc: Erik R. Sirri, Director, Division of Trading and Markets  
Robert L D Colby, Deputy Director, Division of Trading and Markets  
Marlon Paz, Senior Counsel, Division of Trading and Markets  
Andrew J. Donohue, Director, Division of Investment Management  
Douglas Scheidt, Associate Director and Chief Counsel, Division of Investment  
Management  
John W. White, Director, Division of Corporation Finance  
Brian Breheny, Deputy Director, Division of Corporation Finance