



National Investor Relations Institute

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May 22, 2020

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

Re: Petition for Rulemaking on Short and Distort, Petition No. 4-758 (February 12, 2020)

Dear Ms. Countryman:

The National Investor Relations Institute (NIRI) submits this comment letter in support of the Petition for Rulemaking on Short and Distort filed by a group of securities law professors led by Professors John C. Coffee, Jr. and Joshua Mitts of Columbia Law School.

Founded in 1969, NIRI is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. Our more than 3,000 members represent over 1,600 publicly held companies and \$9 trillion in stock market capitalization. Through its collaborative community, NIRI advances engagement in the capital markets and drives best practices in corporate disclosures, governance, and informed investing.

Effective Issuer-Investor Engagement Requires Transparency

One of the most important duties of a corporate investor relations (IR) officer is to respond to requests from institutional investors and analysts for calls or meetings with C-suite executives and members of the company's Board of Directors. At most companies, the volume of requests far exceeds the scarce executive (or director) time available for such engagement, so IR officers have to decide which investors and analysts should have priority. A key consideration in allocating executive (or director) time among investors is knowing whether the investor has a net long or short position, the size of that position, and whether the investor is increasing or decreasing that position. Unfortunately, the archaic Schedule 13(f) disclosure rules, which only require the quarterly disclosure of long positions with a 45-day time lag, make it nearly impossible for IR officers to know with any reasonable certainty the size or nature of an

investor's position, as much of the 13(f) information provided by investors is out of date by the time it is filed and includes no details about short positions.¹

Contrary to some investors' perceptions, many companies are willing to engage with short sellers and answer their questions, but IR teams should be able to learn if whether an investor has a net short position (and the approximate size of that position) before deciding to accept a meeting request and preparing their CEO for such a meeting.

NIRI was pleased to read the law professors' rulemaking petition, as NIRI has long advocated for improving transparency around short positions. In October 2015, NIRI joined with the NYSE Group in filing a rulemaking petition that urged the Commission to implement Section 929X of the Dodd-Frank Wall Street Reform and Consumer Protection Act and develop a public disclosure regime for short positions on all Section 13(f) filers.² Nasdaq filed a similar petition in December 2015.³ In response, more than 15 issuers (including both large-cap and small-cap companies), several Congressional lawmakers, and the Biotechnology Innovation Organization (BIO) all wrote comment letters in support of improved disclosure.⁴

Since the 2015 rulemaking petitions were filed, there has been growing support within the U.S. capital markets for greater transparency around short positions. In both 2016 and 2017, the

¹ Regrettably, IR officers cannot simply accept investors' ownership representations at face value. In an August 2016 survey of NIRI members, 45 percent said they definitely had experiences with investors who misrepresented their positions to obtain meetings with C-suite executives, while another 31 percent said they suspected that had happened.

² See NYSE Group and NIRI, Petition for Rulemaking Pursuant to Sections 10 and 13(f) of the Securities Exchange Act of 1934, Petition No. 4-689, October 7, 2015, available at: <https://www.sec.gov/rules/petitions/2015/petn4-689.pdf>. NIRI, along the NYSE Group and the Society for Corporate Governance, filed a rulemaking petition in 2013 requesting the modernization of the 13(f) long-position disclosure rules. See Request for Rulemaking Concerning Amendment of Beneficial Ownership Reporting Rules Under Section 13(f) of the Securities Exchange Act of 1934 in Order to Shorten the Reporting Deadline under Paragraph (a)(1) of Rule 13f-1, Petition No. 4-659, February 4, 2013, available at: <https://www.sec.gov/rules/petitions/2013/petn4-659.pdf>.

³ See Nasdaq, Petition for Rulemaking to Require Disclosure of Short Positions in Parity with Required Disclosure of Long Positions, Petition No. 4-691, December 7, 2015, available at <https://www.sec.gov/rules/petitions/2015/petn4-691.pdf>.

⁴ In a 2019 commentary for *Pensions & Investments*, executives from Nasdaq and BIO explained why better disclosure is needed: "[W]hen unscrupulous short sellers make false claims about biotech firms in order to profit financially, they divert investment from potentially life-saving research and development and unfairly harm the investors who make that research possible. The fact that these trading strategies take place in the dark erodes investor confidence in the fairness and integrity of our capital markets. Market participants deserve to know if someone making negative claims about a company has a large short position against the company. That critical information gives other investors the ability to evaluate the validity of claims being made as is required when entities take a significant long position." See Jim Greenwood and Nelson Griggs, *Pensions & Investments*, "Commentary: Shining a light on shorts will improve market integrity, investor protection," May 30, 2019, available at: <https://www.pionline.com/article/20190530/ONLINE/190539989/commentary-shining-a-light-on-shorts-will-improve-market-integrity-investor-protection>.

SEC's Government Business Forum on Small Business Capital Formation recommended the agency adopt a short-position disclosure mandate. Nasdaq's 2017 "The Promise of Market Reform" report also strongly endorsed short-position reporting. In April 2018, a broad coalition of eight business organizations, including the U.S. Chamber of Commerce, Sifma, and TechNet, included short-position disclosure among its recommendations to improve the climate for IPOs and public companies.⁵

In addition, NIRI representatives have voiced concerns about how issuers have been victimized by short-selling abuses during NIRI's yearly meetings with Commission staff, including as recently as September 2019. Notwithstanding these concerns and the Section 929X mandate, the Commission staff advised NIRI that short-position disclosure was not a current rulemaking priority.

Deterring "Short and Distort" Abuses

In their petition for rulemaking, the law professors raised many valid concerns about "short and distort" tactics and the impact of "negative" activists on companies and their investors. It's appalling that a market participant can open a large short position against a company's shares and then pay a confederate to go on Twitter (or a financial news program) and make misleading statements about the company's prospects and watch its stock price plunge – all without disclosing the opening (and subsequent closing) of that short position.⁶ As the law professors point out, this is not an isolated occurrence: between 2010 and 2017, there were 1,720 pseudonymous attacks on mid- and large-cap companies that resulted in over \$20.1 billion in mispricing.⁷

NIRI concurs with the professors' recommendations that the Commission should:

- Impose a duty to update promptly a voluntary short position disclosure which no longer reflects current holdings or trading intentions.

⁵ See U.S. Chamber of Commerce, "Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public," Spring 2018, pp. 22-23, available at: https://www.uschamber.com/sites/default/files/ipo_report_expanding_the_on-ramp.pdf

⁶ NIRI was pleased to hear Chairman Jay Clayton voice support for improving ownership transparency. During a CNBC interview on April 7, 2020, Clayton said: "On investors, and I'll just speak generally, we want market commentary out there. Information is good. But when somebody has a position and they're talking in particular about a particular company, we believe it's appropriate for them to disclose that position. If it's a short position and they're saying that that company is, you know, challenged, tell people you have a short position. If it's a long position and you think a particular company is going to do well, tell people you have a long position." CNBC Transcript, SEC Chairman Jay Clayton Speaks with CNBC's Andrew Ross Sorkin on "Squawk Box" Today, April 7, 2020, available at: <https://www.cnbc.com/2020/04/07/cnbc-transcript-sec-chairman-jay-clayton-speaks-with-cnbc-andrew-ross-sorkin-on-squawk-box-today.html>.

⁷ See Petition for Rulemaking on Short and Distort, Petition No. 4-758, p. 2.

- Clarify that rapidly closing a short position after publishing (or commissioning) a report, without having specifically disclosed an intent to do so, can constitute fraudulent scalping in violation of Rule 10b-5.

In addition, NIRI believes that the Commission should go further and mandate regular disclosure of all short positions held by 13(f) institutions, even in those cases where an investor does not make a public statement, given the difficulty in tracking whether an investor secretly arranged for a confederate to spread false information on Twitter or another online forum about a company. A market-wide short-position disclosure rule would make it easier for the SEC's Enforcement Division to ferret out wrongdoing, while providing useful disclosure to other investors and public companies.

Short Selling Amid the Global Pandemic

The need for greater transparency around short positions has only increased since the global COVID-19 pandemic rattled U.S. and overseas markets this spring.⁸ Many U.S. companies experienced significant volatility (often exceeding 5 percent price swings in a trading day) in their shares along with a spike in short selling in March and early April. These unusual market dynamics, along with the uncertainty posed by the pandemic, contributed to a surge of inquiries from investors and analysts to IR officers seeking information about their company's cash flow and ability to continue operations. In a survey of NIRI's corporate IR and counselor members conducted in April 2020, 53 percent of respondents reported an increase in investor/analyst requests for calls/meetings with C-suite executives, as compared with the same period in 2019. In addition, nearly 45 percent of respondents said they had noticed an increase in short-sale activity in their company's stock (or believed that was happening) since the start of the pandemic.

Given the more than 1.5 million coronavirus cases in the United States, NIRI believes that it is highly likely that some companies and retail investors will be victimized by short sellers who spread false rumors about the health of an issuer's executive team, a company's ability to continue operations, or an imminent bankruptcy filing. If short sellers were required to disclose their positions every month, as envisioned by Section 929X of Dodd Frank, (or had to promptly disclose large positions that exceed 0.1 percent of a company's issued share capital, as required in Europe) that would help deter such manipulative conduct.

⁸ At least six countries, including South Korea, France, Italy, Spain, Belgium, and Greece, were so concerned about the risks posed by short selling amid the pandemic that they imposed short-term bans on the practice. On March 16, 2020, the European Securities and Markets Authority (ESMA) tightened its disclosure rules. Under these temporary rules, investors that have a net short position of more than 0.1 percent of a company's issued share capital must promptly disclose their positions to their national securities regulator. See Theodore N. Mirvis, Adam O. Emmerich, and Sabastian V. Niles, Wachtell, Lipton, Rosen & Katz, *Harvard Law School Forum on Corporate Governance*, "Worldwide Regulatory Response to Short Selling Following COVID-19 Market Crisis," March 26, 2020, available at: <https://corpgov.law.harvard.edu/2020/03/26/worldwide-regulatory-response-to-short-selling-following-covid-19-market-crisis/>

Request for Commission Action

NIRI respectfully asks the Commission to move swiftly to draft a “short and distort” disclosure rule as outlined by the law professors. Given the increased risks to companies and retail investors during the global pandemic, we urge the Commission to make this matter a priority.

NIRI also asks the Commission to convene a roundtable later this year to hear investors and issuers’ views on additional measures to enhance market transparency, including the rulemaking petitions filed by NIRI and the exchanges on improving equity ownership disclosure and investor-issuer engagement. A roundtable should seek feedback on alternative regulatory approaches, such as confidential reporting from large investors directly to IR teams, that could promote better engagement while also addressing concerns about proprietary trading strategies. The roundtable also should seek input from market participants about updating the SEC’s definition of beneficial ownership to include derivatives and modernizing the 13(d) disclosure rules.

NIRI also encourages the Commission staff to confer with their ESMA counterparts to learn from their experiences with the temporary ESMA rule that requires short sellers to promptly disclose net short positions larger than 0.1 percent of a company’s issued share capital.

Sincerely,



Gary A. LaBranche, FASAE, CAE
President & CEO
National Investor Relations Institute

cc:

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