

April 25, 2022

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: File No. S7-08-22; Release No. 34-94313, Short Position and Short Activity Reporting by Institutional Investment Managers

Dear Ms. Countryman,

We are law and finance professors who study and teach topics related to Release No. 34-94313 (the “Proposed Short Reporting Rules” or the “Release”), the proposed rules on short position and short activity reporting by institutional investment managers.¹ We thank the Commission for the opportunity to comment.

Proposed Rule 13f-2 would require monthly reporting of short position data and activity on new Proposed Form SHO. The Release recognizes that the Proposed Short Reporting Rules could impose increased costs and risks, including compliance costs, reduced incentives to gather information, increased risks of copycat trading and short squeezes, harms to price efficiency, and negative impacts on capital allocation and managerial decisions.² The Commission has stated that one potentially significant benefit of the Proposed Short Reporting Rules would be that the required disclosures would “fill an information gap for market participants and regulators by providing insights into the lifecycle of a short sale.”³

Specifically, proposed Rule 13f-2 would require certain institutional investment managers to file a new Form SHO to report privately to the Commission information related to monthly short positions and related daily activity. The Commission would then publish aggregated versions of this information during the following month, including the aggregate value of short positions. There are various potential alternatives to the Proposed Short Reporting Rules, including manager-level disclosure, which we believe would impose significant costs on short selling and deter short selling activity, with potentially harmful consequences.⁴

¹ We believe the Commission should consider the Proposed Short Reporting Rules in connection with both Release Nos. 33-11030; 34-94211 (the “Proposed Beneficial Ownership Rules”) and Release No. 34-93784 (the “Proposed Swaps Rules”). Some of us have submitted comments on these two proposals, and various comment letters have suggested that they intersect with each other and with the Proposed Short Reporting Rules. This comment letter was drafted by staff of the International Institute of Law and Finance (“IILF”), a non-profit, non-partisan corporation, with assistance from some of the professors who have signed this letter. Although the IILF staff are compensated for their work, no signatories to this letter received compensation for the letter.

² See Release, at 8-9.

³ Release, at 8.

⁴ See Release, at 53-54. Other alternatives include less frequent public reporting by the Commission, such as quarterly or annually, or thresholds based only on the percentage of shares outstanding (an approach that would result in fewer reports for stocks with larger market capitalizations). As the Release states,

We would like to make three comments on the Proposed Short Reporting Rules.

First, we urge the Commission to consider the widely-cited academic law and finance literature as part of its analysis of the Proposed Short Reporting Rules.⁵ Although the Commission addressed some of the academic literature on short selling in the Release,⁶ the Commission could consider additional studies and data not referenced in the Release.⁷

Second, we urge the Commission to delay any public reporting of summaries of the information it gathers for at least one year, to enable Commission staff and potentially the academic community, as appropriate, to study any new Form SHO data and determine the optimal approach to public reporting.⁸ We agree with the Commission that disclosing identities

“Less visibility into the actions of short sellers in larger market capitalization stocks would provide less information about bearish sentiment in the economy, generally because larger market capitalization stocks tend to be more well-established and harder to manipulate.” Release, at 167.

⁵ See, e.g., Engelberg, Joseph E., Adam V. Reed, and Matthew C. Ringgenberg, 2018, Short Selling Risk, *Journal of Finance* 73(2), 755-786; Boehmer, Ekkehart, Charles Jones, and Xiaoyan Zhang, 2013, Shackling the Short Sellers: The 2008 Shorting Ban, *Review of Financial Studies* 26, 1363-1400; Kolasinski, Adam C., Adam V. Reed, and Matthew C. Ringgenberg, 2013, A Multiple Lender Approach to Understanding Supply and Search in the Equity Lending Market, *Journal of Finance* 68, 559-595; Engelberg, Joseph E., Adam V. Reed, and Matthew C. Ringgenberg, 2012, How are Shorts Informed? Short Sellers, News, and Information Processing, *Journal of Financial Economics* 105, 260-278; Saffi, Pedro A. C., and Kari Sigurdsson, 2011, Price Efficiency and Short Selling, *Review of Financial Studies* 24, 821-852; Karpoff, Jonathan M., and Xiaoxia Lou, 2010, Short Sellers and Financial Misconduct, *Journal of Finance* 65, 1879-1913; Evans, Richard B., Christopher C. Geczy, David K. Musto, and Adam V. Reed, 2009, Failure Is an Option: Impediments to Short Selling and Options Prices, *Review of Financial Studies* 22, 1955-1980; Diether, Karl B., Kuan-Hui Lee, and Ingrid M. Werner, 2009, Short-Sale Strategies and Return Predictability, *Review of Financial Studies* 22, 575-607; Boehmer, Ekkehart, Charles Jones, and Xiaoyan Zhang, 2008, Which Shorts Are Informed? *Journal of Finance* 63, 491-527; Cohen, Lauren, Karl Diether, and Christopher Malloy, 2007, Supply and Demand Shifts in the Shorting Market, *Journal of Finance* 62, 2061-2096; D’Avolio, Gene, 2002, The Market for Borrowing Stock, *Journal of Financial Economics* 66, 271-306; Duffie, Darrell, Nicolae Gârleanu, and Lasse H. Pedersen, 2002, Securities Lending, Shorting, and Pricing, *Journal of Financial Economics* 66, 307-339; Geczy, Christopher C., David K. Musto, and Adam V. Reed, 2002, Stocks Are Special Too: An Analysis of the Equity Lending Market, *Journal of Financial Economics* 66, 241-269; Miller, Edward M., 1977, Risk, Uncertainty, and Divergence of Opinion, *Journal of Finance* 32, 1151-1168.

⁶ The Release cites some of the literature on both the benefits of short selling, and the problems associated with regulation that imposes costs on short selling. See, e.g., Release, at 127-32 (citing studies).

⁷ Some recent legal literature also has addressed issues relevant to the Release, including data and studies relevant to the Proposed Short Reporting Rules, as well as references to other relevant academic literature. Some of this literature also was referenced in the Release. See Molk, Peter, and Frank Partnoy, 2022, The Long-Term Effects of Negative Activism, *University of Illinois Law Review* 2022:1-70; Bliss, B., Peter Molk, and Frank Partnoy, Negative Activism, 2020, *Washington University Law Review* 97:1333-1395; Molk, Peter, and Frank Partnoy, 2019, Institutional Investors as Short Sellers, *Boston University Law Review* 99:837-871.

⁸ The Release states that “because the Commission does not have, and in certain cases does not believe it can reasonably obtain, data that may inform the Commission on certain economic effects, the Commission is unable to quantify certain economic effects.” Release, at 94.

of short sellers publicly is not necessary and could chill short selling.⁹ The Commission should not include such public disclosures as a part of any final rules. But we also are concerned that aggregate public disclosure of short selling positions could lead to confusion and cost, and relatedly to regulatory arbitrage transactions.¹⁰ At least some of us, and potentially other academics, would be willing to assist the Commission in addressing these concerns by studying any submitted data, subject to appropriate non-disclosure arrangements.

Third, we understand that the International Institute of Law and Finance is willing to hold one or more roundtable discussions to assist the Commission with respect to determining the appropriate disclosure thresholds under proposed Rule 13f-2. We urge the Commission to consider more carefully whether the stated disclosure thresholds are appropriate, based on more recent data and analysis, and whether there should be a mechanism that would permit these thresholds to change over time.¹¹ The Release bases its threshold levels on short position data from late 2008 and early 2009,¹² a period of abnormal market conditions that does not reflect recent changes in the markets, particularly as many prominent short sellers have exited the industry. The release recognizes the limitations of this data,¹³ and we believe the Commission could and should more robustly support its rationale for these thresholds before adopting any final rule.

We thank the Commission for its consideration of our concerns regarding the Proposed Beneficial Ownership Rules.

Respectfully,

Barbara Bliss, *Associate Professor of Finance, Knauss School of Business, University of San Diego*

Joey Engelberg, *Professor of Finance and Accounting, Rady School of Management, UC San Diego*

Jonathan M. Karpoff, *Professor of Finance and Washington Mutual Endowed Chair in*

⁹ Release, at 16.

¹⁰ For example, the Release discusses the use of derivatives, see Release, at 102-04, but does not include the calculation of derivative or long positions in the proposed disclosure thresholds. See Release, at 39. That approach is an invitation to regulatory arbitrage transactions, including structured notes and swaps or derivatives with low notional amounts, which could be used to avoid the disclosure requirements.

¹¹ Specifically, there are two thresholds, meaning the amount that would trigger a reporting obligation. Both thresholds are monthly, meaning that the manager would look back each month at its daily position, and then be required to report various details about the gross value of position on Form SHO within 14 calendar days if the position exceeded the threshold on any settlement date during the month. First, with respect to equity securities of a reporting issuer, the threshold would be (1) \$10 million, or (2) at least 2.5% of outstanding securities. Second, with respect to equity securities of a non-reporting issuer, the threshold would be \$500,000. It is unclear to us whether these disclosure thresholds might be too high for some potential issues in the market, yet too low for others, and the Commission does not cite data or academic literature to support conclusions that the thresholds are appropriate for different purposes.

¹² See Release, at 41.

¹³ See Release, at 41 n.80.

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