

Building Success. Together.

Via Electronic Submission

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

April 26, 2022

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

Dear Ms. Countryman:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the proposal² by the U.S. Securities and Exchange Commission (Commission or SEC) to implement Section 929X9(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA).³ This statutory provision, which added Section 13(f)(2)⁴ to the Securities Exchange Act (Exchange Act), and requires the SEC to prescribe rules setting forth information, that must be provided by institutional investment managers (Managers), regarding equity security related short sale data if specified reporting thresholds are met or exceeded.

The statutory text that Congress voted into law in Section 13(f)(2) of the Exchange Act reads as follows - “The Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, **CUSIP number**, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of the reporting period. At a minimum, such public disclosure shall occur every month.”⁵

¹ The American Bankers Association is the voice of the nation’s \$23.3 trillion banking industry, which is comprised of small, regional, and large banks that together employ more than 2 million people, safeguard \$19.2 trillion in deposits, and extend nearly \$11 trillion in loans. Learn more at www.aba.com.

² U.S. Securities and Exchange Commission, Proposed Rule, “Short Position and Short Activity Reporting by Institutional Investment Managers”, 87 Fed. Reg. 14950, March 16, 2022.

³ Pub. L. No. 111-203.

⁴ 15 U.S.C. § 78(m)(f)(2).

⁵ In this letter, all emphasis is added by us.

The ABA is commenting as owner of the Committee on Uniform Security Identification Procedures securities identifier and identification system (CUSIP). This letter specifically addresses Congress's statutory mandate to the SEC to use, and the proposal's reference to, the CUSIP, and does not address other aspects of the proposal nor whether the SEC should adopt the proposed amendments as final.

To implement the Congressional directive in Section 13(f)(2), the SEC is proposing new rule 13f-2 (Proposed Rule 13f-2) and related form (Proposed Form SHO) under the Exchange Act. Among other items Proposed Form SHO requires Managers to report to the SEC information regarding their gross short positions (Information Table 1)⁶ and daily activity affecting gross short positions (Information Table 2)⁷, in each instance for an individual equity security (including an exchange traded fund, or ETF). Among the information specifically required to be provided in Proposed Form SHO, in Column 5 of each table, is “**the nine (9) digit CUSIP⁸ number** of the security for which the information is being reported.”

However, in addition to the statutorily mandated CUSIP number, Proposed Form SHO also would require, in Column 6 of both Information Tables 1 and 2, the provision of “the twelve (12) character, alphanumeric *Financial Instrument Global Identifier* (*FIGI*) of the security for which information is being reported, if a FIGI has been assigned.”⁹

By including reference to FIGI in Proposed Form SHO, the Commission has ignored the clear requirement by Congress to provide only the CUSIP identifier for each security. Including FIGI as a reportable field in connection with a final rule would not adhere to the Congressional mandate of Section 13(2)(f) of the Exchange Act. Furthermore, as a matter of sound policy, and as described in greater detail below, the CUSIP identifier for each security is superior to FIGI, and better meets the SEC's policy goals for the rule. This is because CUSIP is fungible and FIGI is not. Simply put, FIGIs do not transmit to the marketplace the same level of useful information as that provided by a CUSIP identifier. Accordingly, and for the reasons we explain in more detail below, we urge the Commission to remove any and all requirements to report FIGI in any final rule.

We begin our comment letter by providing background information about CUSIP, followed by a discussion of the practical, legal and policy reasons for why CUSIP should be the only security identifier that is required to be provided in Proposed Form SHO.

Background Information about CUSIP

Congress and the SEC are well aware that the NY Clearing House Association approached ABA in 1964 to develop a more efficient system for the trading, clearing, and settlement of securities,

⁶ 87 Fed. Reg. 14950, at 15019.

⁷ 87 Fed. Reg. 14950, at 15019.

⁸ *Id.* A CUSIP identifier may either be solely numeric or alpha numeric.

⁹ *Id.*

as a means to emerge from the securities settlement “paper crisis.” CUSIP is the system that ABA created, and the first CUSIP directory was published in 1968.¹⁰ In the ensuing decades, in parallel with widespread adoption and implementation by market participants, an increasing number of clearing corporations, regulators, and market authorities came to recognize the value and reliability of the CUSIP system. Under the direction and guidance of the CUSIP Board of Trustees, comprised of a cross-industry senior group of experts, CUSIP has continuously met new market needs by supporting identifiers for an ever-expanding universe of asset classes: municipal bonds, commercial paper, US treasury bonds, mortgage-backed securities, banker’s acceptances, and SPACs to name just a few. Over 50 years later, that spirit of innovation, sustained investment, and commitment to powering efficient capital markets lives on.

The Final Rule Should Only Require the Reporting of CUSIP, as the Exchange Act and DFA Mandates

Both sections 929X9(a) of DFA and 13(f)(2) of the Exchange Act specifically refer to and prescribe the use of the CUSIP identifier for each equity security. The proposal recognizes this.¹¹ While we note that the statutory text also allows the SEC to require the provision of “any additional information”, we do not believe that extends to the requirement to provide a different security identifier because the identifier is specifically mentioned in the text. The proposed requirement to provide the FIGI identifier ignores the statutory provisions and does not adhere to the Congressional mandate and the final rule should only require the provision of the CUSIP identifier, in Column 5 of Information Tables 1 and 2 and should remove Column 6 in both tables.

The Fungibility of the CUSIP Identifier For All Equity Securities Is Critically Important to Promoting Greater Market Transparency

A critical aspect of the CUSIP numbering system is that it solves the industry-driven need for fungibility. Fungibility means that a security of an issuer is the same instrument for the purpose of unique identification regardless of the venue of execution and is one of the hallmarks of the CUSIP system. Fungibility of securities identifiers is industry-driven. For example, each share in Microsoft Corporation Common Stock (Microsoft) is the same instrument for the purpose of unique identification regardless of the venue of execution. All market participants with holdings of Microsoft, and which are required to be reported, do so with just one CUSIP: **594918 10 4**

With FIGI and certain other identification schemas, the industry-driven concept of fungibility is abandoned in favor of a different method in which there are multiple identifiers for the same financial instrument *depending on the Exchange where the instruments are purchased or shorted*.

¹⁰ “...The CUSIP system represents the foundation of the program to improve the speed and accuracy in the processing of securities and transactions involving them. We urge you to build upon that foundation as quickly as possible and again congratulate all of the organizations and individuals who participated in the development of the CUSIP system for their noteworthy achievement.” – SEC Chairman Hamer Budge, June 20, 1969.

¹¹ See, for examples, 87 Fed. Reg. 14950, at 14958 and 14959.

FIGIs are not fungible. Continuing to use Microsoft for example, there are more than 100 FIGIs for Microsoft, such as the following sample set:

BBG000BPH9J3
BBG000BPH459
BBG000BPH6D5
BBG000BPH654
BBG000BPH958
BBG000BPHG07
BBG000BPHD40
BBG000BPH583
BBG000BPH8J5
BBG000BPH4R5
BBG000HPKT18

Short Position Holders are a) unlikely to know which FIGI to use because they do not know on which Exchange the borrowed securities were originally purchased; and b) if they did, more likely than not report short holdings for the same security with different FIGIs, reducing transparency

As an example, if two Managers were to report gross short positions in Microsoft and were to include FIGIs in their Form SHO:

- One Manager with gross short positions in Microsoft based on borrowed shares that were originally purchased on the New York Stock Exchange would report the CUSIP of 594918 10 4 and, if also reporting the FIGI, should report the FIGI of BBG000BPH654.
- However, a different Manager with gross short positions of Microsoft based on borrowed shares that were originally purchased on the Hong Kong Stock Exchanges & Clearing would report the exact same CUSIP of 594918 10 4 but an entirely different FIGI of BBG000HPKT18.
- Both Managers necessarily would report their short positions using two different FIGI identifiers in their respective Form SHO *even while reporting the same issuer*. This degrades the transparency of the Form SHO reports as the same CUSIP is paired with different FIGI identifiers in different reports.

To make matters worse, a single Manager with short positions based on borrowed shares that were originally purchased on different exchanges would have to submit multiple reports, with the corresponding FIGIs, for the same equity security. This will further reduce transparency on a Manager's total short exposure.

Equally important, based on the current process to place a short trade, the Manager placing the short does not know on which exchange the "borrowed" securities were originally purchased and

thus would not know which FIGI to use in Form SHO. Moreover, using the US exchange-neutral/US composite venue FIGI is not a solution because it would be incorrect for securities purchased on international exchanges, as in the Hong Kong Exchanges & Clearing example above.

We understand that this multiplicity of identifiers is a deliberate feature of the FIGI system, but believe it will likely lead to inefficiency and errors in the reporting and monitoring of gross short positions of Managers, thus undermining the very purpose of Form SHO.

FIGI's lack of the critical feature of the fungibility makes it impossible to use these identifiers interchangeably. The SEC's proposing release itself elaborates on this point. In Section F (Request for Comments) of Part III (Proposed Rule 13f-2 and Proposed Form SHO), the proposal asks whether CUSIPs and FIGIs could be used interchangeably, in Q8: (Short Position Information) in the fifth bullet "Proposed Form SHO requires Managers to report CUSIP and if assigned, FIGI for a security for which information is being reported in both Instruction Tables 1 and 2."¹² If a FIGI has been assigned, should a Manager be required to report a CUSIP as well?"¹³ Quite apart from the fact that CUSIP is statutorily mandated, any substitution of FIGI for CUSIP will also not provide greater transparency through the publication of short sale related data to investors and other market participants.

Summary

The universal acceptance of the CUSIP system, including by Congress, due to its fungibility and efficacy is well established. This is not the case for FIGI. We respectfully submit that allowing the Form SHO report to include non-fungible security identifiers like the FIGI will be counter to the Congressional mandate and the SEC's stated policy goals of "greater transparency" in proposing the rule and the Form.

Respectfully

/s/ Tab Timothy Stewart

Tab Timothy Stewart,
Senior Vice President & Senior Counsel
Financial Services Standards & Corporate Trust
American Bankers Association

¹² We believe the SEC meant to say "Information" instead of "Instruction" Tables 1 and 2.

¹³ 87 Fed. Reg. 14950, at 14966.