

April 26, 2022

Ms. Vanessa Countryman
Secretary
US Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

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

Dear Ms. Countryman:

The Investment Company Institute¹ (ICI) is writing to respond to the Securities and Exchange Commission's (SEC or "Commission") rule proposal to require institutional investment managers to report, on a monthly basis, information that discloses short positions in equity securities or exchange-traded funds that exceed certain threshold sizes and related short activity information.² Under the proposal, which implements Section 13(f)(2) of the Exchange Act as amended by Section 929X of the Dodd-Frank Act,³ the Commission would aggregate and publish the information that is reported via a new Form SHO on an approximately one-month delay. The Commission cites transparency as the primary focus of the proposed rule, but also believes that the reported information would enhance its oversight over short selling, including the ability to reconstruct significant market events.

We support the Commission's oversight over short selling activity, with the goals of ensuring fair and orderly markets and addressing sudden and excessive fluctuations of securities prices. At

¹ The [Investment Company Institute](#) (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia, and other jurisdictions. Its members manage total assets of \$31.0 trillion in the United States, serving more than 100 million investors, and an additional \$10.0 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through [ICI Global](#).

² *Short Position and Short Activity Reporting by Institutional Investment Managers*, Securities Exchange Act Release No. 34-94313 (Feb. 25, 2022), 87 Fed. Reg. 14950 (Mar. 16, 2022) ("Proposal").

³ Section 13(f)(2), as amended by section 929X of the Dodd-Frank Act, provides that "[t]he 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 failures to deliver the security following the end of the reporting period. At a minimum, such public disclosure shall occur every month." Dodd-Frank Wall Street Reform and Consumer Protection Act Pub. L. No. 111-203, § 929X, 124 Stat. 1376, 1870 (codified at 15 U.S.C. 78m(f)(2)).

the same time, we believe that any reporting and public dissemination requirements for information related to short selling activity must avoid negatively affecting overall market quality and investors. Such requirements must therefore balance increased transparency with additional burdens on market participants and harms of information leakage, which can inhibit the overall benefits of short selling activity to the market. We support changes that maintain this critical balance and appreciate the Commission's recognition of these tradeoffs. These considerations serve as the context for the comments we provide below on the proposal.⁴

As an initial matter, we emphasize that the length of the comment period that the Commission has provided for a rule proposal of this complexity is insufficient for market participants to provide adequate and meaningful feedback. Rule 13f-2, as proposed, would impose a new regulatory framework for granular short sale reporting that, as we discuss below, overlaps in key respects with other existing reporting requirements. We appreciate that the SEC is eager to complete the rulemaking, which was mandated by Section 929X. However, we strongly believe that, almost ten years after the rulemaking was due to be completed, the SEC has an obligation to take the time necessary to complete the rulemaking in a thoughtful manner that will optimize the benefits of any additional short sale reporting for market participants and regulators.

In the absence of a longer period to comment, we have had a limited opportunity to provide detailed recommendations to improve the proposal. Therefore, we provide our views on key aspects that we support, which include the use of reporting thresholds and aggregated anonymous reporting. We also provide several recommendations, including a request for the Commission to develop a longer-term and more cohesive approach to short sale reporting that limits the burdens that Rule 13f-2 would impose on advisers and other market participants.

I. Background

ICI members include US registered investment companies, such as open-end investment companies, exchange-traded funds (ETFs), and closed-end funds that are regulated under the Investment Company Act of 1940 ("registered funds"), and non-US regulated funds (together with registered funds, "regulated funds" or "funds"), along with the advisers to these regulated funds. Regulated fund advisers may meet the definition of "institutional investment manager" under Section 13(f) of the Exchange Act and, thus, may be subject to reporting on proposed Form SHO.

Funds and advisers have a strong interest as investors regarding how short position and related short activity information is reported and publicly disseminated because this information may affect overall market quality. Short selling enhances market quality for all market participants—including funds and their investors—regardless of whether they engage in short selling.

⁴ See, e.g., Letter from Paul Schott Stevens, President and CEO, ICI, to Christopher Cox, Chairman, US Securities and Exchange Commission (Sept. 19, 2008); Letter from Ari Burstein, Senior Counsel, ICI, to Florence Harmon, Acting Secretary, US Securities and Exchange Commission (Dec. 16, 2008); Letter from Heather Traeger, Assistant Counsel, ICI, to Florence Harmon, Acting Secretary, US Securities and Exchange Commission (Dec. 16, 2008).

Specifically, short selling helps to promote market liquidity and price discovery, both of which enable efficient markets that most effectively allocate capital and function in the interest of long-term investors. Short selling also contributes to capital formation.⁵ Funds themselves may establish short positions as a means of carrying out investment strategies and/or managing portfolio risk on behalf of their investors.

Funds are already subject to SEC requirements to disclose their short activity to regulators and the public. For example, SEC rules require that funds prepare monthly schedules of their portfolio investments on Form N-PORT that include the issuer name, the amount of investment by issuer, and the associated payoff profile (*i.e.*, whether the investment is long or short).⁶ SEC rules will also require funds to disclose short sale borrowings on Form N-PORT as part of their total derivatives exposure.⁷ Although funds must prepare this information on a monthly basis, they are required to file the information with the SEC on a quarterly basis, 60 days after quarter-end. Further, only portfolio information for the third month of each fund's fiscal quarter is made public, 60 days after quarter-end.⁸ This approach is intended to minimize the potential misuse of sensitive trading information, which could result in competitive harm and impose costs on funds and their investors.⁹

II. The Commission Should Develop a More Cohesive Approach to Short Position Reporting Based on Existing Reporting Regimes

We support the Commission's goal of obtaining additional data to enhance its oversight over short selling, including data that could accurately depict a short sale lifecycle and help detect fraud or manipulation on a timelier basis. The Commission acknowledges that short sale information currently is available, including data from the consolidated audit trail (CAT) and FINRA member reporting, but believes that that information has limited utility.¹⁰ Thus, the

⁵ The benefits of short selling for overall market quality are described in greater detail in the SEC Division of Economic and Risk Analysis's 2014 study on short sale reporting. See SEC Division of Economic and Risk Analysis, *Short Sale Position and Transaction Reporting* (June 5, 2014), available at <https://www.sec.gov/dera/reportspubs/special-studies/short-sale-position-and-transaction-reportingpdf.html>.

⁶ 17 C.F.R. 30b1-9; Part C of Form N-PORT.

⁷ 17 C.F.R. 18f-4. The relevant provisions of Rule 18f-4 will become effective in August 2022.

⁸ Funds are required to prepare monthly portfolio holdings reports within 30 days of month-end and make the information available to the SEC staff upon request. Funds also disclose their short interest positions in their financial statements attached to annual and semi-annual shareholder reports.

⁹ See Investment Company Reporting Modernization, Release Nos. 33-10231, 34-79095, IC-32314, 81 Fed. Reg. 81870 (Nov. 18, 2016).

¹⁰ Specifically, the Commission explains that the existing information does not distinguish (i) directional short exposure from hedged positions or intraday trading; (ii) trader type (*e.g.*, market maker, liquidity provider) or individual positions; or (iii) changes in the size of a short position over a daily settlement basis. Proposal at 14988.

Commission believes that the information reported on Form SHO would supplement this existing information and improve accessibility of certain short sale information.¹¹

As proposed, however, Rule 13f-2 would impose significant initial and ongoing compliance costs and burdens on funds and their advisers. In our view, these costs and burdens could deter short selling activity to such a degree that they would diminish price efficiency and overall market liquidity. These concerns have become especially heightened due to the other new reporting requirements and significant changes to existing reporting requirements that the Commission has recently proposed.¹² While the Commission acknowledges the likelihood of those costs, it does not fully consider the extent of the costs and burdens associated with the rule. These costs and burdens would be significant for funds and advisers that use short selling to carry out legitimate investment strategies or portfolio management on behalf of their investors. It is unclear that the value of the additional information that would be reported under the rule would sufficiently outweighs those costs and burdens.¹³ As the Commission itself acknowledges, a significant overlap would exist between the information obtained from FINRA's short interest reporting rule, which is reported on a bi-weekly basis, and the aggregated data that would be reported on a monthly basis from Form SHO filings.¹⁴

¹¹ The Commission notes that some daily short sale volume data is available from registered exchanges, albeit for a fee. *Id.* To the extent the Commission considers the cost of this data to limit its accessibility, we believe that the Commission can address its concerns through its oversight of the exchanges.

¹² *See, e.g.*, Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions, Securities Exchange Act Release No. 34-93784 (Dec. 15, 2021), 87 Fed. Reg. 6652 (Feb. 4, 2022) (“SEC SB Swap Large Position Proposal”); Modernization of Beneficial Ownership Reporting, Securities Act Release No. 33-11030 (Feb. 10, 2022), 87 Fed. Reg. 13846 (March 10, 2022) ; Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers, Securities Exchange Act Release No. 34-93169 (Sept. 29, 2021), 86 Fed. Reg. 57478 (Oct. 15, 2021); Reporting of Securities Loans, Securities Exchange Act Release No. 34-93613 (Nov. 18, 2021), 86 Fed. Reg. 69802 (Dec. 8, 2021); Reopening of Comment Period for Reporting of Securities Loans, Securities Exchange Act Release No. 34-94315 (March 2, 2022); Shortening the Securities Transaction Settlement Cycle, Securities Exchange Act Release No. 34-94196 (Feb. 9, 2022), 87 Fed. Reg. 10436 (Feb. 24, 2022).

¹³ Proposal at 14990-91. The Commission acknowledges that it will impose significant and ongoing costs on managers. *Id.* at 14981.

¹⁴ The Commission states that Form SHO would help to promote an enhanced view of short interest and provide investors with insight into changes in short interest between short interest reports. However, we note that FINRA is also considering increasing its short interest reporting and dissemination timeframe from bi-weekly to either daily or weekly submissions, among other changes. *Short Sales*, FINRA Regulatory Notice 21-19 (June 4, 2021), available at <https://www.finra.org/rules-guidance/notices/21-19>. FINRA states that increasing the frequency of dissemination would provide regulators and market participants with a timelier view of short interest that would enhance the regulatory value of the data and better inform investment decisions. *See* Letter from Sarah A. Bessin, Associate General Counsel, ICI to Jennifer Piorko Mitchell, FINRA (Aug. 31, 2021), available at <https://www.finra.org/rules-guidance/notices/21-19#comments> (“ICI Short Interest Letter”) (supporting weekly reporting and noting that it would offer greater transparency and market color).

We are especially concerned about the continuous monitoring that would be required (i) to determine if a reporting obligation exists; and (ii) if such obligation does exist, to report daily activity on Form SHO. Information Table 2 would require a reporting manager to include daily data on a broad range of activity that affects the size of a reportable gross short position during a given calendar month.¹⁵ Compliance with this requirement would not appear to be limited to reporting activity that increases and/or decreases a gross short position after it has reached a prescribed threshold. Instead, it appears that a manager would be required to track (and potentially report) daily activity that *may or may not ultimately result in a reportable gross position*. Given that market participants generally do not precisely determine ahead of time whether or when they will create or add to a gross short position, the proposed rule would appear to require a manager to continuously monitor and record *any* activity that could potentially be subject to future reporting on Form SHO.

Given the existing sources of short sale information and the likely burdens of Rule 13f-2, we recommend that the Commission achieve its goal of increasing short selling transparency by developing a more cohesive approach to obtaining short sale data by leveraging existing reporting obligations, rather than building a completely new and additional short sale reporting regime. Specifically, the Commission should analyze the effort, costs, and timing of making potential regulatory and technical changes to the CAT and FINRA reporting to collect the information that Form SHO would otherwise require to be reported. The Commission could use its Section 929X authority to propose a focused rulemaking to address those data gaps by obtaining data from the CAT and FINRA reporting, as well as from monthly Form N-PORT filings.¹⁶

We appreciate that the Commission, to a limited extent in its cost-benefit analysis, has considered the benefits and drawbacks of these alternatives.¹⁷ Based on this initial analysis, we

¹⁵ Specifically, a reporting manager would be required to provide the number of shares of the security sold short and the number of shares purchased to cover an existing short position (in whole or in part). Further, the manager would be required to report information on whether, how, and when reported gross short positions are being reduced, closed out, created, or increased due to the acquisition or sale of shares resulting from call option exercises or assignments; put option exercises or assignment; tendered conversations; secondary offering transactions; and other activity.

¹⁶ Section 929X specifies that the Commission shall prescribe rules for “the public disclosure” of certain short sale information and not necessarily *additional* short sale reporting requirements for managers. We note that leading up to the adoption of Section 929X, the House version of the bill that became the Dodd-Frank Act included both (i) a specific provision that would have required managers to file a daily short sale report with the Commission, and (ii) aggregate and anonymous public dissemination by the Commission. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 7422(2)(A)-(B) (2009). Section 929X of the Act, as passed by both the House and the Senate, however, incorporated only the latter requirement and not the former. Therefore, to the extent that this information is already available or can be obtained through other sources in a less burdensome manner, we believe that the Commission’s rulemaking could specify the form, manner, and frequency under which public disclosure of this existing information would occur.

¹⁷ Proposal at 15003.

strongly believe that these alternatives warrant the Commission's additional consideration, and in particular, the expansion of the CAT to capture the same information as Form SHO would capture. Our support for this approach is based in part on the benefits identified by the Commission itself, which include mitigating information leakage risks and lowering compliance costs for investment managers.¹⁸ While the Commission states that expanding the CAT would be time-consuming and more expensive for CAT plan participants and members to implement than the proposal, we would welcome the further opportunity to provide additional feedback and input to inform the Commission's further analysis.

III. The Commission's Proposed Approach

If the Commission nevertheless proceeds with the proposed framework under Rule 13f-2, then we offer the following comments and recommendations below. Based on the statutory framework set forth by Section 13(f)(2) of the Exchange Act, proposed Rule 13f-2 would require a manager to file a Form SHO report if it has a short position in an equity security at the close of regular trading hours on any settlement date during the calendar month based on certain calculated thresholds.¹⁹ A Form SHO report must also include two categories of information: gross short position and daily activity that affects the gross short position during the reporting period. Managers would be required to file the report with the Commission within 14 calendar days after the end of the calendar month. The Commission would publish aggregated information derived from the filings for each reported equity security (including the issuer's name and related identifiers) across all reporting managers and estimates that it would do so within one month after the end of the reporting calendar month.

A. Use of Reporting Thresholds

We support fundamental aspects of the Commission's proposed approach. First, we support limiting the scope of the reporting requirement to only positions that meet or exceed specified size thresholds. Absent any thresholds, proposed Rule 13f-2 would otherwise impose substantial costs and burdens on advisers, funds, and other market participants without providing meaningful insight.²⁰ Targeted reporting that applies only to gross short positions deemed

¹⁸ *Id.* at 15003-04.

¹⁹ The proposed thresholds are: (1) for any equity security of an issuer registered under Section 12 or subject to Section 15(d) of the Exchange Act (a "reporting company issuer"), a position that meets or exceeds either (i) a gross short position in the equity security with a US dollar value of \$10 million or more at the close of regular trading hours on any settlement date during the calendar month; or (ii) a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5 percent or more; or, (2) for any equity security of an issuer that is not a reporting company issuer, a position that meets or exceeds a gross short position in the equity security with a value of \$500,000 or more at the close of trading hours on any settlement date during the calendar month. Proposed Rule 13f-2(a); *see also infra* Section IV.A.

²⁰ We agree with the Commission that these costs to managers would include compliance costs, costs associated with retaliation against short sellers, and negative impacts on price discovery and market efficiency attributable to short selling activity. Proposal at 14961 n.76.

substantial in size would instead avoid unnecessary reporting of information on normal-course short selling activity. This would better enable the Commission to achieve its goal of performing enhanced oversight over short selling activity that may contribute to significant market events.²¹

B. Aggregated Reporting on an Anonymous Basis

We also support the publication of position information for each equity security on an aggregated basis in a manner that would not disclose the identities of individual reporting managers. Public disclosure of short positions on an aggregate basis, rather than at the individual manager level, is consistent with the plain statutory language of Section 929X of the Dodd-Frank Act and its legislative history.²² We also agree with the Commission that publishing aggregated position information and daily activity data on an aggregate net basis would mitigate the potential harm caused by prematurely revealing investment strategies or portfolio management methods.²³ Disclosure that prematurely reveals strategies or methods could encourage increased shorting of certain issuers by others seeking to imitate those disclosed positions and/or short squeeze activity intended to retaliate against the short seller, both of which could increase market distortion and misrepresent the fundamental value of that security. These risks may disincentivize market participants from engaging in short selling, thus diminishing its market benefits, including price discovery, market efficiency, and liquidity. Accordingly, we agree with the Commission that publishing only aggregated position data is critical to reduce the possibility of such retaliation or other abusive trading strategies.

In response to the Commission's request for comment on alternative approaches to disclosing positions on an aggregate basis, we strongly oppose any approach that would disclose an individual reporting manager's identity, unaggregated gross short position, and/or individual transactions affecting that short position. As the Commission acknowledges, disclosure of this information would allow sophisticated market participants to identify a manager with a short

²¹ See Proposal at 14990 (noting that the Commission would be more likely able to identify individuals with large short positions and could quickly focus its inquiries on entities in an economic position to potentially profit from manipulation). To the extent that the Commission is interested in obtaining data on short selling activity below these thresholds, in particular activity that is attributable to funds, we note that this information is available from other sources, such as Form N-PORT filings.

²² In the legislative history, Congress clearly distinguished between the individual reporting of positions and public dissemination of aggregate positions. See H.R. 4173, § 7422(2)(A) (requiring individual reporting to the Commission), (2)(B) (requiring aggregate and anonymous public dissemination).

²³ With respect to gross short positions, the SEC would publish (i) the aggregated number of total shares at the close of the last settlement date of the calendar month and the corresponding US dollar value; and (ii) a summary of the managers' reported hedging information, (*i.e.*, the percentages of the aggregate gross short position that is reported as being fully hedged, partially hedged, or not hedged). With respect to daily activity, the SEC would publish the "net" activity in the equity security aggregated across all reporting managers for each individual settlement date within a reporting period calendar month, which would be determined by offsetting the purchase and sale activity reported in Form SHO. Market participants engage in short selling, for example, to execute long/short portfolio strategies or to hedge against portfolio risk.

position that is reported on Form SHO.²⁴ The risk of identification may be especially high for funds, given that they currently disclose both their identities and their individual short positions on Form N-PORT filings. We would be greatly concerned about the ability of other market participants to use the information that is made available in those filings to extrapolate an individual manager's overall short position, and potentially the manager's strategies or portfolio management methods, across different fund clients. Even removing a reporting manager's identifying information, *i.e.*, its name and active LEI, from a Form SHO filing prior to publicly disclosing that filing would not sufficiently mitigate these risks of identification. Further, disclosing unaggregated information would not provide any meaningful additional insight to market participants.

C. "Buy to Cover" Requirement

To the extent that the Commission requires information on closeouts of open short positions, we support the proposed approach of amending Rule 205 under Regulation SHO to require a broker-dealer to mark transactions as "buy to cover." Specifically, we strongly support the Commission's determination to not require customers to provide their broker-dealers with this information, including positions held across multiple accounts. As the Commission correctly recognizes, requiring customers to provide this information would impose unnecessary and significant operational costs on both broker-dealers and their customers, which include fund advisers.²⁵ Advisers would be required to significantly alter existing internal systems or create new systems to notate whether an order is a buy order or a "buy to cover" order and to develop mechanisms with each of their trading counterparties, including multiple brokers with different systems, to communicate that information. Advisers would also be required to make significant changes to existing trade aggregation and trade allocation processes, given that they do not know at execution whether a transaction is intended to cover a short position and thus may only be able to relay this information after allocation occurs. We emphasize that these burdens would increase exponentially if an adviser were required to mark in the aggregate transactions across other accounts. Thus, we believe that the Commission has appropriately determined that the costs of this alternative approach would not outweigh its benefits.

IV. Recommended Changes

While we support certain aspects of the Commission's proposed approach, we offer suggestions that we believe would greatly reduce the likely operational burdens of reporting under Form SHO without reducing the utility of the data that would be reported.

A. Reporting Threshold for Short Positions

We recommend that the Commission amend the proposed reporting thresholds in several respects. First, we recommend that the Commission adopt a single reporting threshold level that

²⁴ Proposal at 14967.

²⁵ *Id.* at 15010.

is an average short position in an equity security based on a percentage of shares outstanding rather than on a dollar value. As proposed, a manager would be required to report a gross short position that: (1) for reporting issuers, meets or exceeds (i) a US dollar value of \$10 million or more, or (ii) a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5 percent or more; or (2) for non-reporting company issuers, meets or exceeds \$500,000. The Commission believes that the specified dollar value thresholds would capture managers with “substantial” short positions, even if such positions are relatively small compared the issuer’s market capitalization.²⁶

We believe that a single percentage-based threshold level, which should apply to *both* reporting and non-reporting company issuers, would establish a more targeted and simplified approach to identifying short positions that could have potential market impact. Importantly, our recommended approach would mitigate unnecessary operational and cost burdens on managers, including complexities from monitoring and reporting with up to three separate thresholds. Based on our members’ experience, compliance with a dollar value threshold typically requires significant manual processes and more difficult system buildouts. We also believe that whether a short position on an equity security is “substantial” is based in large measure on its size relative to the issuer’s market capitalization, and thus, its liquidity.²⁷ A single threshold would create greater consistency with how the reporting requirement is triggered, *i.e.*, it would apply in a more focused manner to short positions with potentially significant market impact.²⁸ Therefore, we believe a single percentage-based threshold would allow the Commission to achieve its objectives without imposing unnecessary complexity on advisers and other reporting managers.

For similar reasons, we also recommend that the Commission set the reporting threshold to be an average short position that meets or exceeds 5 percent of an issuer’s outstanding shares. The

²⁶ *Id.* at 14962.

²⁷ Specifically, we believe that a \$10 million short position threshold for a large cap issuer whose equity shares are liquid would be less likely to have a significant market impact, given that it would likely be easier to acquire shares in the market to cover that short position.

²⁸ We acknowledge the Commission’s rationale behind a dollar value threshold for non-reporting company issuers, which it believes would help managers avoid the cost and complexity of locating the total number of shares if calculating a monthly average short position based on a percentage threshold. Proposal at 14962. To avoid such a problem, however, we suggest that the Commission instead maintain and provide on its website an updated list of securities that would be subject to Form SHO reporting, as well as the number of shares outstanding for each listed security. The Commission currently maintains this type of list for Section 13(f) reporting. *See, e.g.*, SEC, Official List of Section 13(f) Securities, *available at* <https://www.sec.gov/divisions/investment/13flists.htm>. As we have recommended in the past for the list of Section 13(f) Securities, the SEC should provide the list of Form SHO securities in the form of a table or spreadsheet so that filers can sort and search the data efficiently and compare it to data in their internal systems. *See* Letter from Susan Olson, General Counsel, and Sarah A. Bessin, Associate General Counsel, Investment Company Institute to Ms. Vanessa A. Countryman, Secretary, Securities and Exchange Commission (Sept. 29, 2020), *available at* <https://www.sec.gov/comments/s7-08-20/s70820-7860142-223928.pdf>. Among other benefits, this would promote greater efficiency in validating reported short positions and consistency in reporting of those positions among managers.

Commission believes that its proposed 2.5 percent threshold would capture managers with positions that are large relative to the issuer's size and could therefore have a significant impact on the issuer.²⁹ However, we believe that a higher threshold would still provide the Commission with information on such large positions, while reducing the burdens on managers of reporting smaller positions that likely would have a lesser market impact. We note that in other recent instances, the Commission has identified 5 percent as a threshold over which a position could have a meaningful market impact.³⁰

We further recommend that the Commission streamline and simplify how managers account reflect hedging positions by adopting a net short position threshold and eliminating the required indication of whether a position is hedged or not in Form SHO. As proposed, Rule 13f-2 would (i) set the reporting threshold level based on a gross basis rather than a net basis within a reporting period; and (ii) require a manager to designate a reported gross position in Form SHO as "fully hedged," "partially hedged," or "not hedged." The Commission states that this two-part approach would provide a "more complete view" and more consistent reporting of short exposures.³¹ Further, it is concerned that a net threshold approach would otherwise enable managers to apply varying types of "long" positions to offset a gross short position, leading to inconsistent reporting.³²

We are concerned that the proposed hedging indicators could result in inconsistent reporting on Form SHO because managers may reasonably come to different conclusions regarding the extent to which similar positions are hedged, thereby limiting the usefulness of the information provided. Managers, however, would be required to expend significant resources to build out their reporting systems and protocols to facilitate this reporting requirement. Further, such designations would not provide detailed information as to the precise level that a reported gross short position is hedged, which could lead to a misleading impression about the price risk associated with that position. Therefore, we recommend a net short position threshold approach which, as the Commission notes, would allow a manager to account for any hedging positions.³³ To address concerns about reporting inconsistency, we recommend that the Commission clarify

²⁹ Proposal at 14962.

³⁰ For example, the Commission recently proposed the reporting and public dissemination of a large position in security-based swaps based on equity securities for "security-based swap equivalent position" that exceeds 5 percent of the outstanding shares of a class of equity securities. The Commission stated that this threshold, among others, help to achieve the goal of informing the market and public of positions that could have a significant adverse impact on market participants, including issuers and other shareholders. *See* SEC SB Swap Large Position Proposal at 6668.

³¹ Proposal at 14956. The Commission also states that indicating whether a position is hedged would otherwise provide meaningful insight into whether a reported gross short position is directional or non-directional, as well as the type of trading (*e.g.*, position trading or an arbitrage strategy). *Id.* at 14959.

³² *Id.* at 14956.

³³ *Id.* at 15007.

that a manager can only net its gross short position against physical securities within an account and not net against other “long” positions held in swaps or other derivatives.³⁴ While a net approach could limit the amount of data reported, we believe that the data that is reported would still have significant value because it would more precisely convey to the Commission the existence of directional short positions that may pose significant risks.

B. Short Position and Daily Activity Monitoring

We strongly recommend that the Commission amend the proposal to alleviate the significant operational and cost burdens that daily monitoring and reporting requirements under Rule 13f-2 would impose on managers. Managers’ reporting systems generally are not equipped to monitor short positions and related transactions that affect those positions on a daily basis. While we appreciate the desire to obtain this information for oversight purposes, the proposed approach would require any manager that engages in short selling to expend significant and unnecessary time and resources to enhance or revamp its systems to monitor this activity continuously, without certainty as to if or when its short selling activity meets or exceeds the reporting thresholds.

To avoid these burdens, we first recommend that the Commission allow a manager to determine whether it has met or exceeded the quantitative thresholds based on its position at the end of the trading day on the last settlement date of the month, instead of its end-of-day position on any settlement date during a given calendar month. The Commission states that its proposed approach is intended to prevent a manager from avoiding the reporting requirements by engaging in short selling activity on the last day of the month, rather than over the course of a calendar month.³⁵ Allowing a manager to determine whether it has met the reporting threshold based on calculations performed on a single date in a calendar month for its equity security holdings, rather than on every single possible settlement date across every reporting period, would greatly alleviate the operational burdens and compliance resources required to identify whether a reporting obligation has been triggered. We believe that it would be unlikely that a manager would avoid establishing a short position over the course of a calendar month—especially when doing so could be economically beneficial—simply to avoid Form SHO reporting. Doing so would likely lead to short selling activity that is economically inefficient and may be inconsistent with a fund’s established investment strategy and objectives.³⁶

³⁴ *See id.* at 14956 (expressing concern that managers would apply equivalent “long” positions through derivatives to offset their gross short positions when determining whether they meet the reporting thresholds).

³⁵ Proposal at 14963.

³⁶ We also note that decreasing positions solely to avoid a filing obligation may be inconsistent with an investment adviser’s fiduciary duty and may be inconsistent with a fund’s investment strategy. An index fund, for example, seeks to closely track the performance of a specified index. Decreasing a position in a particular issuer likely would be inconsistent with that strategy.

Second, we recommend that the Commission consider an alternative to daily monitoring and reporting of activities that increase or decrease a short position. Rather than obtain information about relevant transactions that occur on any settlement date within a reporting period, the Commission could instead require managers to report this information on a weekly or bi-weekly basis. Although the Commission would receive less granular information, we believe that it would still obtain meaningful insight on changes to a short position throughout a lifecycle without imposing unnecessary and onerous burdens on managers.³⁷ As we also recently noted with respect to proposed changes to the frequency of reporting FINRA short interest data, short selling levels are unlikely to fluctuate day-to-day to such an extent that daily data would provide meaningful additional insight.³⁸

C. Timing for Form SHO Preparation

We further recommend that the Commission align the proposed timelines for preparing and submitting Form SHO filings with other existing filing requirements, such as those for Form N-PORT filings. As proposed, a reporting manager would be required to file a Form SHO with the Commission within 14 calendar days after the end of each calendar month. Given that short positions held by funds are already prepared for Form N-PORT, creating consistent timing between these requirements would allow a manager to coordinate the process of including short positions under both reporting frameworks. Providing the same amount of time to prepare these filings—30 days after the end of the month—would enable managers to leverage existing systems that already capture and process funds' short positions for reporting. Given the breadth of information required in a Form SHO filing, managers would likely need the additional time to extract and process data from multiple sources, including trading systems and accounting systems, and use that data to complete different calculations. This additional time would better balance the costs and burdens of completing Form SHO with the Commission's need to monitor short sale activity and would not lessen the Commission's ability to monitor for manipulative trading activity nor the utility of the data to investors.

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We hope that this information and these recommendations are helpful to the Commission in considering its short position reporting requirements. If you have any questions, please contact Sarah Bessin at [REDACTED] or Nhan Nguyen at [REDACTED].

³⁷ In lieu of daily monitoring and reporting of transactions that change a short position, the Commission could also consider the appropriateness of increasing the frequency with which a manager reports a short position. We note, for example, our support for FINRA adopting a weekly submission timeframe for short interest reporting, but not daily reporting. Specifically, we noted that moving from bi-weekly to weekly reporting would provide benefits to regulators and market participants that could outweigh the additional costs of reporting more frequently than on the current bi-weekly basis. *See* ICI Short Interest Letter at 5.

³⁸ *Id.* (noting that ICI members likely would not utilize the significant additional volume of daily short interest data if it becomes available).

Ms. Vanessa Countryman

April 26, 2022

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Regards,

/s/ Sarah A. Bessin

Sarah A. Bessin
Associate General Counsel

/s/ Nhan Nguyen

Nhan Nguyen
Assistant General Counsel

cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
The Honorable Alison H. Lee
The Honorable Caroline A. Crenshaw

Haoxiang Zhu, Director, Division of Trading and Markets
Timothy Riley, Branch Chief, Division of Trading and Markets
Josephine Tao, Assistant Director, Division of Trading and Markets
Securities and Exchange Commission