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April 26, 2022

***Via email to rule-comments@sec.gov***

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

**Re: Short Position and Short Activity Reporting by Institutional Investment Managers, Release No. 34-94313; File No. S7-08-22 (the "Proposal")**

Dear Ms. Countryman:

Perkins Coie LLP ("Perkins Coie" or "we") appreciates the opportunity on behalf of one of our institutional investor clients to offer views on the above-referenced proposal to promulgate a new Rule 13f-2 under the Securities Exchange Act of 1934 (the "Exchange Act") pertaining to short position and short activity reporting.[1] We are a leading national law firm that services clients with potential short position reporting obligations under the proposed Rule 13f-2. This letter is submitted on behalf of a client; however, the positions set forth in this letter represent views held by many institutional investors. Understanding that the United States Securities and Exchange Commission ("SEC" or "Commission") is instructed under Section 13(f)(2) of the Exchange Act to prescribe rules to make certain short sale data publicly available no less frequently than monthly,[2] we address certain elements of the Proposal that raise material concerns. We discuss the Proposal in more detail below.

## I. Executive Summary of Comments

This comment letter sets forth the following comments in Section III:

- The Proposal would impose significant reporting and monitoring burdens for certain institutional investment managers. The SEC should consider an exemption for certain types of managers that do not regularly utilize short positions or that only utilize short positions for passive investing purposes, or at a minimum impose a longer filing period for initial filing requirements.

[1] Short Position and Short Activity Reporting by Institutional Investment Managers, 87 Fed. Reg. 14,950 (March 16, 2022).
[2] 15 U.S.C. § 78m(f)(2); *see also* Dodd–Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 929X, 124 Stat. 1376, 1870 (July 21, 2010).

- The Proposal's emphasis on gross short positions may overstate the effect to the market of the number of short positions outstanding. Rule 13f-2 should instead focus on net short positions.
- The publication of data under the Proposal could allow for the reverse engineering of proprietary trading strategies. Instead of publishing gross aggregate short positions, the SEC should consider publishing net short positions.
- The Proposal may have a negative impact on the securities lending market.
- The SEC should focus the Form SHO disclosures on information that the Commission as well as Financial Industry Regulatory Authority ("FINRA") and the exchanges are not already collecting and publishing.
- The SEC should consider changing the dollar amount threshold under Threshold A of proposed Rule 13f-2 to $10 million net short position from gross, or include an exemption for hedged short positions.
- The SEC should consider raising the percentage threshold under Threshold A of proposed Rule 13f-2 from 2.5% to 5%.

In addition to the comments herein, due to the complexity of the Proposal, we also ask that the Commission extend the comment period for an additional 30 days after the current April 26, 2022 deadline.

## II. The Key Proposal Components

Proposed Rule 13f-2 under the Exchange Act would require institutional investment managers to file confidential proposed Form SHO, within 14 calendar days after the end of each calendar month, with regard to each equity security and all accounts over which the manager meets or exceeds one of two thresholds (i.e., "Threshold A" and "Threshold B").[3] The information an institutional investment manager would report on Form SHO includes the name of the eligible security; end-of-month gross short position information; and daily trading activity that affects a manager's reported gross short position for each settlement date during the calendar month reporting period.[4] The SEC would use Form SHO to publish aggregated short position data.[5]

## III. Comments to Proposed Rule 13f-2 and Proposed Form SHO

### A. Significant compliance obligations for passive shorting.

The reporting requirements are overly broad in scope. As such, we anticipate significant reporting and monitoring burdens for certain institutional investment managers. For instance, if

[3] 87 Fed. Reg. at 14,955-56.
[4] *Id.* at 14,958-61.
[5] *Id.* at 14,961.

an institutional investment manager triggers either of the two reporting thresholds,[6] it would be obligated to bear the expense of ongoing monitoring and compliance, when this information is already reported by SEC-regulated trading intermediaries. Further, for institutional investment managers that only selectively utilize short positions, or who only do so passively, these additional compliance costs in relation to the institutional investment manager's usage of short positions could in turn impose untended risks to the manager's underlying investors if the institutional investment manager must divert additional time and resources for compliance and oversight. This appears to be yet another affirmative reporting requirement that will increase compliance and overhead cost, without a commiserate benefit.

The SEC should consider an exemption for certain types of managers that do not regularly utilize short positions or that use short positions as a hedge or for other passive purposes. If not an exemption by type of manager, then the SEC should consider a longer filing period. For example, the SEC could require an initial filing be made within 28 calendar days upon crossing the threshold and then require a shorter period of 14 calendar days for any subsequent filing to reduce the monitoring and compliance burdens for infrequent short position users. In addition, and as discussed further below, the disclosures required on Form SHO should only address information that the SEC does not already collect and publish. Without calibrating the reporting requirements of Rule 13f-2 and Form SHO to the appropriate managers, any investor protection benefit from the additional disclosure would be outweighed by the additional compliance costs levied on managers that do not regularly utilize short positions.

**B. Gross short positions may overstate the overall shorting effect to the market.**

Understanding that the SEC desires to know the number of gross short positions,[7] in practice, institutional investment managers are more likely to track their net short positions. In turn, institutional investment managers' decisions for usage of short positions are gauged in such net terms, rather than gross. In addition, institutional investment managers' analysis of particular issuers or the securities markets at large is guided by an understanding of net rather than gross positions. The utilization of gross position reporting by intermediaries such as broker-dealers may be helpful for assessing volume of short positions in the market, and in turn, evaluating the overall risk to the market from short positions.[8] The volume of gross short positions may also assist in understanding the risks being created by certain types of investors that utilize a high volume of short positions. However, when evaluating the usage of short positions by institutional investment managers and institutional investors, the SEC may overstate the effect to the market of short positions outstanding by requiring the reporting of gross short positions rather than net short positions. To the extent that there are corresponding long positions, such

[6] *Id.* at 14,955-56.
[7] *Id.* at 14,956 ("A Manager's gross short position in a security is distinct from its net short position in such security, and the Commission believes that gross short position information provides a more complete view of a Manager's short exposure . . . .").
[8] FINRA Rule 4560(b), *available at* https://www.finra.org/rules-guidance/rulebooks/finra-rules/4560; FINRA Regulatory Notice 12-38, *available at* https://www.finra.org/rules-guidance/notices/12-38.

institutional investment managers and institutional investors would pose a substantially smaller risk to overall market integrity. Net short positions would more accurately reflect risk in the markets.

Therefore, the SEC should consider amending its proposal to require net position reporting by certain types of managers that do not regularly utilize short positions. For instance, the SEC could require net short position reporting by filers that are solely reporting on Form SHO with regards to one issuer. For any filer reporting more than one issuer, the SEC could require gross short position reporting.

### C. Reverse engineering concerns.

Under the Proposal, the SEC would publish data based on information reported on proposed Form SHO. The SEC would publish the aggregated gross short position across all reporting managers in the reported security at the close of the last settlement date of the calendar month of the reporting period, as well as the corresponding dollar value of this reported gross short position.[9] The SEC would also publish the percentage of the reported aggregate gross short position that is reported as being fully hedged, partially hedged, or not hedged.[10] Institutional investment managers are concerned that publication of this data by the SEC could facilitate reverse engineering of trading strategies. Even if it is not possible to reverse engineer the trading strategy of a specific institutional investment manager, much of the contemplated data would be the result of proprietary trading strategies developed by institutional investment managers. Using this data, traders could still reconstruct these proprietary trading strategies and in turn create disincentives for institutional investment managers when considering trading strategies that involve short positions. This would ultimately be a detriment to market efficiency, because, as noted by the Commission, short selling can be beneficial for the provision of information to markets.[11]

Therefore, the SEC should take steps to ensure that the data it publishes does not discourage or impair institutional investment managers' use of trading strategies that include short positioning, in order to protect proprietary trading strategies. For instance, similar to the suggestion in Section III.B above, if the SEC were to publish the aggregate *net* short positions above certain thresholds, traders would have difficulty reverse engineering proprietary trading strategies of institutional investment managers while gaining transparency into short position market information for a given issuer.

[9] 87 Fed. Reg. at 14,961.
[10] *Id.*
[11] *Id.* at 14,951 ("Short selling has also been shown to improve pricing efficiency by providing information to the market."). "Efficient markets require that prices fully reflect all buy and sell interest. Market participants who believe a stock is overvalued may engage in short sales in an attempt to profit from a perceived divergence of prices from true economic values. Such short sellers add to stock pricing efficiency because their transactions inform the market of their evaluation of future stock price performance. This evaluation is reflected in the resulting market price of the security." *Id.* at 14,951 n.5 (citing the Adopting Release for Rule 201, 75 Fed. Reg. 11,232, 11,235 n.29 & n.30 (Mar. 10, 2010)).

### D. Potential negative impact on securities lending.

Adoption of Rule 13f-2 as drafted could have a negative impact on the securities lending market, as short selling relies on the ability to borrow securities that are available for loan.[12] As further noted by the SEC, the Proposal would increase the cost of short selling, particularly large short positions, which could potentially lead to less overall short selling.[13] When investors borrow shares, they pay a borrowing fee to the owner of the share. These fees can represent a significant source of revenue for pension funds, mutual funds, and other market participants on the buy-side. Therefore, to the extent that the Proposal discourages short selling, it may also lower overall portfolio returns, not just for the clients of institutional investment managers, but also for institutional investors that rely on securities lending as a source of passive return.[14]

### E. Duplicative reporting.

The disclosures under the Proposal would require many institutional investment managers, including those that do not regularly employ hedging strategies, to disclose information the SEC already publicly publishes. As the SEC explains in the Proposal, "[t]here are currently multiple sources of public and nonpublic data related to short sales."[15] For instance, the SEC publishes fail-to-deliver data.[16] In addition, FINRA and most exchanges collect and publish daily aggregate short sale volume data, and on a one month delayed basis publish information regarding short sale transactions.[17]

Additional short position disclosure on a Form SHO by managers that extensively utilize short positions in their investment strategies (e.g., hedge funds) may add to this existing data and help increase market transparency for investors. The additional data from the disclosures on Form SHO could reduce the limitations of certain current practices such as some exchanges only making certain data available for a fee.[18] In addition, with the short position data that is already disclosed, there is no need for a new reporting infrastructure for buy-side participants. For such managers, any increased costs and burdens from monitoring and reporting would be proportional with the volume of their use of short positions. However, other institutional investment managers such as family offices that do not generally utilize short sales as part of their investment strategies should be exempted from the potentially onerous compliance obligations that are counter to principal preservation.

### F. Net versus gross calculation as reporting threshold.

One of the triggering thresholds under the Proposal for institutional investment managers to file the proposed Form SHO is a gross short position in the equity security with a U.S. dollar value of

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[12] *Id.* at 14,984.
[13] *Id.* at 14,997.
[14] *See id*.
[15] *Id.* at 14,953.
[16] *Id.* at 14,953 n.30.
[17] *Id.* at 14,953.
[18] *Id.*

$10 million or more at the close of regular trading hours on any settlement date during the calendar month.[19] The SEC stated that its basis for this threshold is that it believes that requiring short position reporting with a U.S. dollar value of $10 million or more would capture managers with substantial short positions, even if such positions are relatively small compared to the market capitalization of the issuer.[20] However, the $10 million gross short position threshold is too low. By focusing on gross short positions and excluding hedged short positions, the metric of gross short positions of $10 million or more fails to consider the systemic market risk caused by the short positions. In turn, the short position overreporting risk may result in large quantities of trading data being reported to the SEC that do not necessarily create systemic risk. Rather than set a low threshold and over capture short position information, the SEC should revise the requirement to $10 million net short positions as opposed to gross. Or, alternatively, the SEC should consider exempting hedged short positions from reporting on Form SHO.

### G. Align Rule 13f-2 with Rule 13d-1.

Another triggering threshold under the Proposal for institutional investment managers to file the proposed Form SHO is a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5% or more.[21] This 2.5% threshold should be aligned with the requirements of Rule 13d-1(a), which require the filing of a Schedule 13D or 13G upon the crossing a 5% threshold of ownership of any class of an equity security.[22]

## IV. Conclusion

Thank you for the opportunity to offer these comments to this Proposal on behalf of our client.

Sincerely,

Valerie Dahiya

Valerie Dahiya
Partner

cc: Andrew Cross, Esq.
Thomas Ahmadifar, Esq.

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[19] *Id.* at 14,955.
[20] *Id.* at 14,962.
[21] *See id.* at 14,955 (describing the two alternatives under which an institutional investment manager could trigger "Threshold A" of proposed Rule 13f-2).
[22] 17 C.F.R. § 240.13d-1(a).