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

RE: New Rule and Form For Short Position and Short Activity Reporting by Institutional Investment Managers (File No. S7-08-22)

Dear Ms. Countryman:

We are responding to the request of the Securities and Exchange Commission (the “Commission”) for comments to the proposed new rule and form related to short position and short activity reporting by institutional investment managers (the “Proposed Rule” and the “Proposed Form SHO”).¹ We recognize the time and effort invested by the Commission and the Staff of the Division of Investment Management (the “Staff”) in formulating the Proposed Rule and appreciate the opportunity to comment.

Schulte Roth & Zabel LLP is an international law firm with offices in New York, London and Washington, D.C. Our clients include many institutional investment managers that may be affected by the Proposed Rule. We regularly advise institutional investment manager clients with respect to regulatory obligations and responsibilities, including with respect to short trading positions and short sale activities. These comments, while informed by our experience in representing these clients, represent our own views and are not intended to reflect the views of the clients of the firm.

I. Introduction

On February 25, 2022, the Commission issued the Proposed Rule to, among other things, provide greater transparency through the publication of short sale related data to investors and other market participants. Under the Proposed Rule, institutional investment managers that meet or exceed reporting thresholds set by the Proposed Rule would be required to report, on a monthly basis using the Proposed Form SHO, specified short position data and short activity data for equity securities. Specifically, institutional investment managers would be required to file with the Commission confidential reports 14 calendar days after the end of each month that identify (among other things): (i) a gross short position in reporting equity securities with a U.S. dollar value of \$10 million or more at the close of any settlement date during the calendar month; or (ii) a monthly

¹ *Short Position and Short Activity Reporting by Institutional Investment Managers*, Release No. 34-94313 (Feb. 25, 2022) (the “Proposing Release”).

average gross short position (determined by looking to the gross short position as of the close of each settlement date during the calendar month) equal to 2.5% or more of the shares outstanding; and (iii) for non-reporting equity securities, a gross short position with a U.S. dollar value of \$500,000 or more at the close of any settlement date during the calendar month.

The Proposing Release recognizes that similar information gathering took place in 2008 and 2009 under interim temporary Rule 10a-3T, which required certain institutional investment managers to file weekly nonpublic reports with the Commission on Form SH regarding their short sales and positions in Section 13(f) securities, other than options. At the time, the information supplied in nonpublic institutional investment manager submissions on Form SH was held by the Commission and not supplied to the public. By keeping the information nonpublic, the Commission was able to collect short position data and also limit artificial volatility and further downward swings that are caused by short selling, while also collecting information that could be used to potentially identify and address market manipulation.

We appreciate the Commission's desire to provide information to investors and other market participants. We are concerned, however, that some of the reporting thresholds set by the Proposed Rule will have the opposite impact and will not provide clarity or transparency but instead will create confusion and lead market participants to draw misleading conclusions.

Therefore, we respectfully request that the Commission:

- (i) Consider adjusting upwards, or removing altogether, the reporting requirement for gross short positions in reporting equity securities with a U.S. dollar value of \$10 million or more at the close of any settlement date during the calendar month;
- (ii) Consider using net short positions rather than gross short positions to account for short positions that are hedged;
- (iii) Adhere to the proposal to aggregate all published data and not select an alternative proposal to publish data on an institutional investment manager basis; and
- (iv) Consider taking a flexible approach to publication that includes soliciting greater feedback from institutional investment managers about month-to-month confidentiality concerns.

II. Dollar Value Reporting Thresholds

The Proposing Release acknowledges that the reporting thresholds associated with the Proposed Rule are designed to require the filing of the Proposed Form SHO by managers with "substantial gross short positions." The Commission believes that requiring reporting of short positions with a US dollar value of \$10 million or more would capture information from investment managers with substantial short positions, even if such positions are relatively small compared to the market capitalization of the issuer. The Commission also believes that requiring the reporting of short positions with 2.5% or higher of shares outstanding would capture information from investment managers with gross short positions that are large relative to the size of the issuer, and could

therefore have a significant impact on the issuer. Q5 of the Proposing Release asks, “are the proposed Reporting Thresholds appropriate?”²

The \$10 million threshold was first used in 2008 in connection with Rule 10a-3T, which also used 0.25% of shares outstanding (along with \$10 million) as an appropriate reporting threshold. Short positions of less than 0.25% of shares outstanding or \$10 million were deemed “*de minimis*.” In modernizing its reporting requirements, the Commission raised the percentage of shares outstanding threshold from 0.25% to 2.5% in part to capture data concerning managers with “substantial short positions.”³ For the data to be limited to substantial short positions, we believe a \$10 million threshold is too low and will capture routine insubstantial (and immaterial) short positions that are taken in connection with day-to-day volatility trading and do not reflect an institutional investment manager’s long-term views of an issuer. Short positions that are less than \$10 million that do reflect an institutional investment manager’s long terms views could, in some circumstances, be “substantial,” if the position is material to the issuer. In such cases, the short position would likely represent 2.5% or more of the shares outstanding.

We believe that the 2.5% threshold identifies those situations where a short position could lead to market manipulation. If the Commission believes that an absolute dollar threshold is useful, we suggest that the \$10 million threshold be adjusted consistent with the adjustment from 0.25% to 2.5% -- in other words an increase to \$100 million.

III. Hedging Information

The Commission recognizes that short selling is often used to “hedge the risk of a long position in the same security or a related security.”⁴ In Q3 of the Proposing Release, the Commission asks “When reporting on Proposed Form SHO, Managers would be required to identify whether the gross short position reported is fully hedged, partially hedged, or not hedged” and lists a number of questions about how hedges might be described and what other hedging information might assist in interpreting short position information.⁵ Q5 of the Proposing Release also asks “[are] there any pros and cons of the [gross short position reporting] approach, especially when compared to using a net short interest position calculation? If so, explain why, and describe any associated costs and benefits.”⁶

Under the Proposed Rule, gross short positions would mean the number of shares of the equity security that are held short, without inclusion of any offsetting economic positions, including shares of the equity security or derivatives of such equity security. Gross short positions shall be reported without offsetting such gross short position with long shares of the equity security or economically equivalent long positions. This is supposed to promote uniform reporting. The Proposed Form SHO, however, would require an investment manager to indicate whether each

² *Id.* at 46.

³ *Id.* at 38.

⁴ *Id.* at 5 (citing *Short Sales*, Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (“Regulation SHO Adopting Release”).)

⁵ See Proposing Release at 45.

⁶ *Id.* at 47.

identified gross short position is fully hedged, partially hedged, or not hedged at the close of the last settlement date of the calendar month of the reporting period.

Including hedging information can provide important context for the nature of a given short position, however, simply designating a short position as “fully hedged,” “partially hedged,” or “not hedged” alongside gross short position data pairs a qualitative description with quantitative information and has the likely effect of making both unclear, at best. For example, a “fully hedged” short position can be covered by a long position that is equal to 100% of the short position, or equal to 500% of the short position. Similarly, a “partially hedged” position could be partially hedged anywhere between 1% and 99%.

By using a net short interest position calculation instead, the Commission and the marketplace would have access to more accurate short position data and, in particular, would not be distracted with short sale data that might reflect day-to-day volatility trading by managers that are fully hedged many times over (i.e., have a long position that is 500% of the short position). Collecting net short interest positions would also clarify the size of any “partially hedged” position (i.e., the “partially hedged” designation draws no distinction between a 1% hedge and a 99% hedge). In both examples, net short position data would more accurately reflect actual positions taken by institutional investment managers and provide useful transparency to the Commission and to the marketplace.

The Proposed Rule and Proposed Form SHO also are proposed by the Commission to seek to improve the quality and scope of the information regularly available for the Commission’s own use in examining market behavior and recreating significant market events. In addition, the Proposed Rule and Proposed Form SHO would expand the scope of information available to market participants and could thereby assist in their understanding of the level of negative sentiment and the actions of short sellers collectively. We respectfully suggest that reporting gross positions would not give the market any understanding of the level of “negative sentiment” and would thereby not accomplish the SEC’s stated objective. If gross short positions are published with incomplete information about hedges, the market could easily get the impression that there is greater “negative sentiment” and could easily prompt market participants to take short positions.

IV. Published Data Should be Aggregated

The Proposing Release includes an alternative proposal that would publish data on an individual institutional investment manager basis and not aggregate data for publication (the “Alternative Proposal”). In Q14 of the Proposing Release, the Commission asks “Under the potential alternative approach presented, the reported information by a Manager would be published at the Manager level, without aggregation with other reporting Managers, with the reporting Manager’s identifying information, including any active LEI, being removed prior to publication.”⁷ The Alternative Proposal would likely eviscerate potential confidentiality protections and it would deprive reporting independent investment managers of many protections regarding specific positions, strategies, or proprietary business information. The risks attendant to the Alternative Proposal could easily prompt wary institutional investment managers to alter strategies or to make other business decisions that would contradict the Commission’s desire to maintain efficient

⁷ *Id.* at 54.

markets (the Proposing Release’s introduction acknowledges that “[s]hort selling has long been used in financial markets as a means to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of a long position in the same security or a related security” – all hallmarks of an efficient market).⁸

V. Exercising Caution To Preserve Confidentiality

The Proposing Release recognizes that Proposed Form SHO “expressly provide[s] that all information that would reveal the identity of a Manager filing a Proposed Form SHO report with the Commission is deemed subject to a confidential treatment request under Rule 24b-2” and that the Commission “currently plans to publish only aggregated data derived from information provided in Proposed Form SHO reports.”⁹ The Proposing Release attempts to reassure that “Proposed Form SHO, by its terms, ensures that information reported on the form that could reveal the identity of the reporting Manager will be deemed subject to a confidential treatment request”¹⁰ and that institutional investment managers can also make separate requests for confidential treatment pursuant to Rule 24b-2 and “should provide enough factual support in the request to enable the Commission to make an informed judgment as to the merits of the request.”¹¹ The Commission, however, warns that “it would be unlikely to grant requests for confidential treatment of the information from which the aggregated data is derived.”¹²

We respectfully urge the Commission to recognize that there can be a variety of valid reasons to seek confidential treatment including reasons beyond the example of a single institutional investment manager selling short where the short seller has publicly disclosed that it has a short position in a specific security. In certain cases, including when an investment manager is the only short position holder or one of a small group of short positions holders, an investment manager could also have a good faith reason to believe that including its information in the published data, even though anonymized and aggregated, could be reverse engineered to reveal the manager’s short positions. The Proposed Rule should allow for confidential treatment requests on a case-by-case basis. A more flexible process for seeking confidentiality will enable investment managers and the Staff to more efficiently determine whether confidential treatment is appropriate. Moreover, if the Commission were to adopt the alternative proposal to publish data on a manager-by-manager basis, confidential treatment would be necessary in a greater number of circumstances to having manager-level positions disclosed (even if anonymized), including by revealing trade secrets (such as the frequency of taking certain short positions), confidential commercial data (such as taking short positions in a subset of issuers within an industry sector) or confidential financial information (such as changing sizes of short positions from month to month). In such cases, confidential treatment would be appropriate.

For these reasons, and in spite of the Commission’s interest in making gross short positions available, the Commission and the marketplace would be better informed and protected by adopting these suggestions.

⁸ *Id.* at 5.

⁹ *Id.* at 23.

¹⁰ *Id.*

¹¹ *Id.* at n. 65.

¹² *Id.* at 24.

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We would be pleased to respond to any inquiries you may have regarding our letter or our views on the Proposed Rule more generally. Please feel free to direct any inquiries to Craig Warkol or Phil Bezanson at (212) 756-2000.

Respectfully submitted,

SCHULTE ROTH & ZABEL LLP

cc: The Honorable Gary Gensler
The Honorable Caroline Crenshaw
The Honorable Allison Herren Lee
The Honorable Hester Peirce
William Birdthistle, Director, Division of Investment Management