

April 26, 2022

Submitted Electronically

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

Re: Proposed Rulemaking on Short Position and Short Activity Reporting by
Institutional Investment Managers
File Number S7-08-22 (February 25, 2022)

Dear Secretary Countryman:

I am a member of the asset management and investment funds practice group at K&L Gates LLP¹ and welcome the opportunity to provide the Securities and Exchange Commission (the “**Commission**”) with comments on the Commission’s proposal to adopt new Rule 13f-2 under the Securities Exchange Act of 1934 (the “**Exchange Act**”) and the related new Form SHO, which would require certain institutional investment managers to report, on a monthly basis, specific short position and short activity data (the “**Proposal**”).² We support the Commission’s goal of promoting greater market transparency and seeking to deter market manipulation. We also appreciate the Commission’s careful review of comments prior to finalizing any rule, particularly where the rule may impose an onerous burden on market participants without furthering the stated policy of the proposed reforms.

I. Background and Summary

We represent a broad range of investors and managers (together, “managers”) that engage in short sales for a variety of reasons and are affected by the Proposal. Given our role in the representation of these diverse industry members, we understand the ways in — and

¹ My comments reflect the views of a group of attorneys in our asset management and investment funds practice, and only those attorneys. The views expressed in this letter do not necessarily reflect the views of our clients, other members of our asset management and investment funds practice, our other colleagues at K&L Gates LLP, or the firm itself.

² Short Position and Short Activity Reporting by Institutional Investment Managers, File Number S7-08-22 (Feb. 25, 2022) (the “Proposing Release”).

purposes for — which short sales may be used, have observed the market as a whole and are well positioned to provide comments.

As discussed in detail below, we urge the Commission to significantly reconsider the Proposal. First, substantial short sale data is already available from multiple sources, which provides the market transparency sought with the Proposal. Second, the scope of the Proposal is overly broad, as it applies to all managers that have relatively small gross short positions, regardless of the purpose or practice of using those positions and the absence of any potential abusive or manipulative scheme associated with such short sale use. As a result, the Proposal will undoubtedly cause managers to inundate the Commission with a voluminous amount of data that requires substantial resources to produce, but will likely not effectively assist the Commission in deterring manipulative campaigns or furthering its investor protection aims. Finally, the Proposal could pose a potential risk to confidentiality of market participants, particularly in the case of a single manager engaging in a short sale.

II. The Proposal is unnecessary and, on balance, overly burdensome given the sufficiency of existing data availability and the limited purpose for which certain managers engage in short sales.

As stated in the Proposing Release, the Commission believes that the Proposal would result in such a positive impact from having greater transparency regarding short sales that the overwhelming costs of complying with the Proposal to, and consequent risks imposed on, managers subject to the Proposal, would be outweighed. For example, the Commission indicated that, in its view, the immense amount of detailed data managers would be required to collect and report could alert regulators to suspicious activity so efficiently and help protect investors by deterring market manipulation so effectively that, on balance, the burden imposed on managers would be justified. The Proposal fails to achieve such a balance.

As the Commission observed in the Proposing Release, comprehensive short sale data is already publicly disseminated by the Financial Industry Regulatory Authority, Inc. and most of the securities exchanges. Although that data is not currently reported via EDGAR, it is available to the Commission and market participants through other means. While the Proposal calls for some information that supplements what is currently accessible, the value and impact of that supplementary data on preventing abusive schemes is unlikely to be so tremendous that it justifies requiring managers — particularly managers that engage in short sales only for tactical reasons or for hedging or defensive purposes (“tactical managers”) — to divert substantial time and resources away from enhancing shareholders’ returns or pursuing other business goals that would benefit clients, to instead completing a disclosure form with information that is largely available through other sources.

This is particularly true for tactical managers. For instance, a long-only manager may take a short position in a security as a hedge against the downside risk of a substantial long position in the same security that the manager was not able to sell down. This limited defensive use sharply contrasts the type of speculative use of short selling and other short selling strategies used by other managers that the Proposal was designed to address. As an example, a tactical

manager's use of a short position for hedging purposes in the manner described would not give rise to concerns that the manager is seeking to "spread false information about an issuer whose stock [it] sold short in order to profit from a resulting decline in the stock's price."³ It could also not be reasonably viewed as a "potentially abusive or manipulative" scheme.⁴ As such, the Commission's concerns would not be addressed by, and no sought-after policy goals described in the Proposing Release would be achieved from, imposing the Proposal's burdens on tactical managers.

Moreover, as the Commission noted in the Proposing Release, even if Form SHO reports receive confidential treatment, it is possible to identify a reporting manager by reverse engineering the data, which poses a tremendous business risk. Accordingly, it is particularly unnecessary and overly burdensome for tactical managers that do not use short sales as part of a systematic investment strategy to report this largely already available information, as the Commission's objectives in introducing the Proposal will not be met by requiring such managers to do so.

For context, the accurate and timely reporting through EDGAR required by the Proposal would obligate managers to, among other things, develop and implement appropriate systems to track short positions in the particular manner that would permit the managers to comply with the Proposal, identify specific daily activities related to such positions and determine the hedge status of short positions. Once such information has been gathered, managers must then provide the information in the manner called for by Form SHO, which in itself could be a laborious process. Meanwhile, the Proposal provides for a short deadline to file the reports: within 14 calendar days after the end of the calendar month. In addition, any amendments to Form SHO must restate the Form SHO in its entirety. Accordingly, complying with the Proposal is no easy feat, and for many managers, may not be done without investing substantial resources necessary to enable the managers to abide by the reporting requirements. Tactical managers — whose activities do not present the risks that the Commission is seeking to mitigate — would be required to absorb these significant costs: economic (*e.g.*, cost of new technology or lost opportunities to invest in a service that could directly benefit clients), organizational (*e.g.*, diverting the attention of personnel to preparing Form SHO) in order to comply with the Proposal, and business risk (*e.g.*, ramifications of reverse engineering and having the manager's identity detected). For the reasons stated above, such costs would be a waste, as (i) these managers do not participate in the activities that the Commission seeks to deter, and (ii) information relating to these managers' limited use of short sales is already available through other sources.

III. The scope of the Proposal, which applies to all managers regardless of their use of short sales, is overly broad by and does not further the objectives of the Commission by applying the requirements to tactical managers.

As indicated above, we believe that the Proposal is unnecessary in light of the short sale information already available. However, we do support the Commission's overall goal of

³ Proposing Release at 11.

⁴ *Id.* at 11.

promoting risk management and deterring market manipulation, and we share the Commission's concern that some market manipulators may engage in abusive schemes through the use of short selling activity. If the Commission determines that additional disclosure regarding short sale positions is necessary despite the current availability of data, then any regulatory reform should be limited to apply solely to those market participants engaging — or that could be potentially be engaging — in the type of activity that the Commission seeks to address.

As noted above, tactical managers using short positions as an occasional measure largely for risk management purposes, do not engage in the market manipulation activities or abusive practices that Form SHO is intended to deter. On the contrary, such managers generally take short positions to protect their clients' interests, such as when seeking to hedge the risk associated with a particular long position. In contrast, the activities of other managers that routinely engage in short sales as part of their stated investment process and frequently take short positions intended to generate significant returns are more likely to raise the type of concerns that the Proposal is intended to address. We can appreciate that there may be some value in enhancing the disclosure requirements for managers that engage in such activities. However, the value of the Proposal ends there; subjecting tactical managers to the Proposal would, as described above, (i) impose a substantial burden and risk on such managers, and yet (ii) not help to further the Commission's objectives. Therefore, we urge the Commission to consider limiting the scope of the Proposal to exclude tactical managers. By limiting the Proposal in this manner, the Commission could continue to seek to deter market manipulation and other abuses from short selling activity without imposing extraordinary burdens on managers that do not present the risks sought to be mitigated or conduct the activities sought to be deterred.

IV. The scope of the Proposal is overly broad in terms of the relatively small short position that would trigger a reporting requirement, and requiring managers with such small positions to furnish voluminous and overwhelming amounts of detailed data to the Commission would not further the Commission's objectives.

To better serve the Commission's aims in introducing the Proposal, the Commission should modify the Reporting Thresholds (defined herein) in the manner we suggest below. For the reasons we already presented, tactical managers should not be subject to the Proposal. However, in the event that the Commission determines to not limit the Proposal as suggested, then the burden and risks imposed on tactical managers would at least be lessened if the modifications to the Reporting Thresholds we suggest are adopted. In addition, the modifications would result in more useful and digestible information being furnished to the Commission, and would likely result in more accurate and efficient reporting by managers.

Under the Proposal, in relevant part, a manager must file a Form SHO with regard to any equity security of an issuer that is registered pursuant to Section 12 of the Exchange Act (or for which the issuer is required to file reports pursuant to Section 15(d) of the Exchange Act) over which the manager, and all accounts over which the manager — or any person under the manager's control — has investment discretion, collectively have either (i) a gross short position

in the equity security with a U.S. 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% or more (the “**Reporting Thresholds**”).⁵ In our experience, and based on our observations of the market, these Reporting Thresholds are not only arbitrary, but they also do not represent a significant portion of an issuer’s outstanding equity securities. Unless the Reporting Thresholds are modified, we anticipate that the Commission will be inundated with reports providing significant detail about positions that, in many cases, are not sufficiently sizable to impact the larger markets or raise the type of concerns that the Proposal was intended to address. We believe that a more appropriate reporting threshold would be a position representing more than 5% of an issuer’s voting equity securities, which is consistent with the existing reporting requirements of Rule 13d-1 under the Exchange Act (the “**New 5% Reporting Threshold**”).

The New 5% Reporting Threshold is more appropriate for (i) achieving the Commission’s goals of receiving information that will help it oversee short selling activity and provide greater investor protection, and (ii) facilitating managers’ ability to provide, on a timely basis, the detailed information otherwise required by the Proposal. The Commission has already determined the New 5% Reporting Threshold to be an appropriate trigger for the significant and expansive reporting obligations under Rule 13d-1. As the Commission has found the New 5% Reporting Threshold sufficient to satisfy the policy concerns behind Rule 13d-1, it follows that the same position should be adequate to satisfy the policy concerns behind the Proposal.

In addition, having a larger position trigger the reporting requirement would help to limit the reports furnished to the Commission to those that are more likely to have data that could be useful to the Commission and worth the dedication of the Commission’s resources to review. Moreover, because managers are generally already accustomed to monitoring their positions for compliance with Rule 13d-1, they should have the infrastructure, technology, compliance procedures and systems in place to make it easier to comply with the New 5% Reporting Threshold in connection with the Proposal. Changing the Reporting Thresholds to the New 5% Reporting Threshold would serve to both limit the information reported to the Commission to data that would be useful, and reduce the burden on managers — particularly tactical managers — from having to establish the infrastructure necessary to derive and report the information required and complete the reporting obligations regarding relatively small positions that do not raise investor protection concerns.

V. The Proposal must ensure indefinitely the confidentiality of managers subject to the reporting requirements.

We observed that the Proposing Release states that the Commission “currently plans” to publish only aggregated data derived from information provided in Form SHO reports, and that the form, by its terms, ensures that information that could reveal the identity of the reporting

⁵ *Id.* at 191.

manager will be deemed subject to a confidential treatment request.⁶ The use of the term “currently plans” is alarming. As the Commission acknowledges, even as proposed, the Proposal permits the data to be reverse engineered to identify the manager, particularly where there is only one person selling short. The Commission also acknowledges that such reverse engineering, which requires at least some effort to be achieved, could result in negative effects on the identified short seller.⁷ Imagine, then, the tremendous negative impact on managers if their identities were disclosed by the Commission.

Any final rule or final Form SHO should ensure confidentiality. To the extent that the Commission seeks to amend that rule or form in the future, such a change should be subject to additional comment solicitation and consideration. The potential harm to managers from having their identities disclosed would likely discourage such managers from engaging in short sales at all, and clients of tactical managers, which generally sell securities short only for the limited purposes described herein, would not enjoy the benefit of those short positions as a result.

VI. Conclusion

We support the Commission’s ultimate goal of seeking to detect and deter market manipulation and other abusive schemes involving short sales. At the same time, and with this sentiment in mind, we implore the Commission to appreciate the overwhelming costs and burdens presented by, and limited benefits to be derived from, the Proposal. We encourage the Commission to strongly consider the modifications suggested in this letter, which we believe will not only better serve the Commission’s objectives but also be more appropriate in light of the limited manner in which short sales may be used by tactical managers and the measures that would be required to be taken to comply with the Proposal in its current form.

We appreciate the opportunity to comment on the Proposal and would be pleased to meet with the Commission and Staff to discuss our comments. Please do not hesitate to contact me if you have any questions.

Best regards,



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⁶ *Id.* at 23.

⁷ *Id.* at 24.