October 29, 2022

By Email

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
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rule-comments@sec.gov

Re: Release No. 34-94313; File No. S7-08-22 Short Position and Short Activity Reporting by Institutional Investment Managers

Ms. Countryman,

I write to you as a concerned retail investor. I work as a technician and researcher in higher education.

I fully support the Commission in this rulemaking, and urge the Commission to go further with these disclosures. Many aspects of the market are made unnecessarily complex. The structure of the market has inherent conflicted aspects, with a lack of transparency and visibility into the inner workings around short selling.

The lack of transparency around short positions, the inability to adequately quantify short interest, and the ability for firms to skirt regulation through derivative positions such as options and security-based swaps are making a mockery of our free and open markets. The inadequate ability to properly measure and understand economic short exposure leads to supply/demand imbalances in markets and affects trading prices.

As a retail investor I cannot shake the feeling that the major players have an unfair informational advantage.

The protests of the industry in terms of the effort required to comply with the Proposal ring hollow given the Commission's experience with interim temporary Rule 10a-3T - firms had no problem complying and the data provided was useful to the Commission. Indeed, the Proposal is easier to comply with, given the monthly rather than weekly reporting of interim temporary Rule 10a-3T.

In my opinion, the Proposal does not go far enough. WTI urges the Commission to provide the same level of disclosures and transparency for short positions as is currently done with long positions via 13F filings. None of the arguments for aggregation or lagged reporting are consistent with the reporting of long positions via 13Fs. Our markets already have a position disclosure standard, and that standard should simply be updated with short positions to allow retail and institutional investors to do the same kind of analysis regarding short positions as they currently do with long positions.

Having lived most my life in Europe, I lament the fact that regulators in European and Asian jurisdictions have done more, moved further, and advanced the cause of transparency far more significantly than has happened in the United States. As other commentators have noted, the EU adopted a short sale reporting regime that essentially requires "immediate public disclosure of large short positions," by individual issuers. Despite this onerous disclosure regime that goes much further than the Proposal, I agree that "**a study of the impact of the EU's regulation finds no evidence that the disclosure requirements have resulted in increased coordination or have resulted in short sellers being targeted for short squeezes**."[1] *The concerns from the industry and from the short selling community are simply not valid.*

Harmonizing the Proposal with European standards would provide significant benefits, both from a transparency perspective and from the short-selling investment manager's perspective — it is far easier to comply with the same rule across multiple jurisdictions than to manage varying standards and rules from country to country.

It is also important to note, from the perspective of how to set an appropriate threshold for disclosure that, as the Commission acknowledges, the European threshold of 0.5% is being gamed, and therefore setting a threshold substantially higher than that will lead to even further gaming of the threshold and disclosure avoidance. There is no doubt that firms will game any threshold that is set, as has happened with 13F long disclosures for many years. Given the European experience with a very low threshold, I argue that **it is important to set the threshold as low as possible** to mitigate any effects and impacts from firms attempting to game the threshold.

Despite the constant concerns expressed in comment letters about "reverse engineering trading strategies" and the concern voiced in the proposal that there would be a "risk of retaliation towards short individual sellers [...] as well as the ability for market participants to engage in copy-cat strategies,"[2] the same can be said of current 13F disclosures. Indeed there is an entire industry that follows 13F and other similar disclosures (e.g., politician trades) and allows for copy-cat strategies.

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1 *See* letter from Stephen W. Hall, Legal Director and Securities Specialist, Better Markets (Apr. 26, 2022)

2 Proposal at 158

The value of transparency and the need for investors, both retail and institutional, to understand the holdings of investment managers, as well as to form an accurate picture of short interest and short trading dynamics should far outweigh these concerns. The Commission has agreed with this view in crafting 13F policies, the EU has agreed with this view with their disclosure regime, and **the Proposal should be expanded to include robust public disclosure at the individual manager level of this information.**

Finally, I further urge the Commission to set a goal to harmonize reporting timelines for all relevant disclosures, from 13F long and short disclosures to reporting timelines for FINRA and the SROs to ensure that data is released consistently, to avoid misunderstandings and misconceptions.

Choice and Control are Fundamental Investor Rights

Much like the reasoning behind recent proposals from the Commission around ESG Disclosures[3], retail and institutional investors want to know the composition of the positions of the funds that they are investing in. While retail investors may not always have access to the type of funds that accumulate significant short positions, they may still be in the position of doing business with such firms, and they deserve to know when such firms are betting against core portfolio positions that they may be holding and may be very passionate about.

The feedback from the industry has several consistent themes, but primarily it is focused on disguising short selling activity and reducing transparency. This is antithetical to the Commission's objectives with the Proposal. Both retail and institutional **investors cannot properly exercise their right to choose investments, counterparties and other relationships without visibility into the firms that they are investing in** or doing business with. An appropriate level of transparency is absolutely required to *empower* investors to act in their own best interests in an informed manner.

All Short Exposure Must Be Included

The Proposal as currently crafted has a significant hole that must be remedied, one that the Commission is well aware of — "an investor wishing to profit from the decline of a security's value can also trade in various derivative contracts, including options and security-based swaps."[4] **The failure to include derivative exposure in this rule will inevitably result in firms exploiting the loophole and will drive more and more firms into the less regulated and less transparent space of derivatives.** As the Commission acknowledges in

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[3] *See* Proposed Rule No. 33-11068 (May 25, 2022) (Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies).

[4] Proposal at 103

the proposal, "trading in derivatives frequently leads to related trading in the stock market as derivatives' counterparties seek to hedge their risk."[5] Derivatives have an impact on the market, and can have a detrimental effect on the price of stocks, as Archegos demonstrated so clearly. While the positions held by Archegos were not disclosed anywhere publicly because they had exploited a loophole in 13F disclosures, the impact on the market was material and overwhelming. Indeed, had these derivative positions been adequately disclosed, it is likely that institutional broker-dealers would have had enough information to mitigate the impact of Archegos' trading, would have been able to recognize the significant exposure that resulted from the leverage they extended via total return swaps, and would have prevented the crisis from developing in the first place.

In much the same way, it is critical for institutional broker-dealers and for retail and institutional investors to understand the extent to which individual firms have high levels of short exposure to individual stocks or ETFs, regardless of whether that exposure is via equity, through the use of derivatives or through other novel mechanisms that the Commission has not considered.

Markets are changing and evolving, and as regulators impose new disclosure requirements on firms, those firms will figure out ways to game or avoid those disclosures. That's what Archegos did with swaps, and that's what other firms might do with other novel ways of gaining short exposure. One example of this could be through security tokens on crypto exchanges. Another could be through the use of fungible or nearly fungible holdings in foreign affiliates — both equity and derivatives.

If one of the primary goals that the Commission is seeking to achieve with the Proposal is to give retail and institutional investors, along with regulators, better visibility into economic short exposure, **it is imperative that *all* short exposure is included.**

I would also encourage the Commission to include ETF creation and redemption activities. "ETFs constitute 10% of U.S. equity market capitalization but over 20% of short interest and 78% of failures-to-deliver."[6] Authorized participants are incentivized to "operationally short" ETFs, and often fail to deliver these shares. This is a potential source of stress on financial markets, and "the potential source of stress on the financial system appears to have shifted from common stocks during the pre-crisis period to ETFs during the post-crisis period."[7] As such, **transparency into the ETF creation and redemption**

[5] Proposal at 104

[6] Evans, Richard B. and Moussawi, Rabih and Pagano, Michael S. and Sedunov, John, Operational Shorting and ETF Liquidity Provision (January, 2018), Available at: https://jacobslevycenter.wharton.upenn.edu/wp-content/uploads/2018/08/ETF-Short-Interest-and-Failures-to-Deliver.pdf

[7] Ibid.

process is more important now than ever before. Whether that transparency starts strictly with regulatory transparency versus public disclosure is one that the Commission will have to decide — I would urge full public disclosure of ETF activities in order for the public to more accurately and adequately evaluate the risks involved in trading ETFs, and to better understand the short interest numbers in ETFs that can vary wildly.[8]

Hedging Indicator

If the Commission insists on continuing with the aggregated disclosures, I would offer one suggestion for an important change. The current proposal for categorizing a position as not hedged, partially hedged or fully hedged could lead to serious problems and misrepresentations of actual economic short exposure, which is the first shortcoming identified by the Commission. Aggregated information could actually end up being very misleading, by painting an inaccurate picture of the size of short positions despite the "hedging" distribution disclosure. "Partial" hedging could be manipulated or abused to mask true short positions (e.g., by hedging an immaterial portion of the position to flag it as "partially hedged"), and overall gross position disclosures could overstate short positions when net positions are not accounted for. A better solution would be to have the actual amount of position hedged, which could range from 0% to >100% if the manager's long position is larger than the manager's short position. This is similar to one of the alternatives proposed by the Commission, to report the delta value of hedged positions. This would be a critically important addition to the Proposal and make it far more informative if aggregation is the direction the Commission goes.

Bona Fide Market Making Reporting

I believe it is important that the Proposal's provision that would "require CAT reporting firms that are reporting short sales to indicate whether such reporting firm is asserting use of the bona fide market making exception under Regulation SHO"[9] is included in the final rule proposal. While I am encouraged by this, as it signals that surveillance teams and regulators are finally trying to better understand the use of this exception, I believe it to be an antiquated exception that is no longer applicable in modern markets, and which should be eliminated. The bona fide market making exemption is being abused, as illustrated by recent enforcement actions[10], and provides an unreasonable competitive advantage for firms who do not have affirmative obligations to make continuous markets on lit

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[8] The XRT ETF for example often shows short interest in the hundreds of percent of its shares outstanding, and many other ETFs can be close to 100% of shares outstanding.

[9] Proposal at 62

[10] *See* IMC Chicago, LLC, August 12, 2022 (File No. 3-20961), Wilson-Davis & Company, Inc., April 26, 2017 (File No. 3-17733) and others.

exchanges. As the Commission acknowledges in the proposal, "[f]irms that do not need to obtain a locate prior to effecting a short sale, on the basis of the bona fide market making exception, have a competitive advantage over firms that are required to obtain a locate because these firms can trade more quickly and more easily adjust to or take advantage of changing market conditions."[11]

It is also possible that market makers are using the bona fide market making exception to include transactions and arrangements where other broker-dealers or customers are using the market maker's exception to avoid compliance with Regulation SHO. It is important that the SEC and FINRA have the surveillance tools and data necessary to police markets, and including this data in CAT should be an easy decision.

While it is outside the scope of the Proposal, I believe that market structure reform should focus on levelling the playing field, and fostering more robust and verdant competition in markets. Repealing regulation that affirmatively advantages certain firms over other firms is an important step in that direction.

I also would also encourage the SEC to calculate fines at a cascading percentage of the estimated gains from breaking a rule. This percentage should start at 100% for the first offence and increase by a minimum of 20 percentage points for every subsequent offence. Disregard of SEC rules should be punished with hurtful fines, not a mere slap on the wrist.

Conclusion

I appreciate the opportunity to respond to the Proposal. Thank you for considering my comments and I would be happy to answer any questions or further explain any of the points.

Sincerely,

Weiss

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[11] Proposal at 64