

December 11, 2008

Via Electronic Filing

Florence E. Harmon
Acting Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Disclosure of Short Sales and Short Positions by Institutional Investment Managers, Rel. No. 34-58785; File No. S7-31-08

Dear Ms. Harmon:

The Investment Adviser Association (“IAA”)¹ appreciates the opportunity to comment on the Commission’s interim final temporary rule – 10a-3T – and temporary Form SH under the Securities Exchange Act of 1934.² Rule 10a-3T and Form SH require certain institutional investment managers to file information concerning their short sales and positions of section 13(f) securities, other than options. The IAA fully supports the Commission’s goal of ensuring fair and orderly markets and of addressing sudden and excessive fluctuation of securities prices. To this end, we recognize that the Commission may need information about short positions to monitor for manipulative short selling practices during these unprecedented times. We, however, continue to believe the rule should be carefully tailored to balance the need for this information with the burden imposed on institutional investment managers.

In this regard, we applaud the Commission for amending the requirements of Form SH from the Emergency Orders³ to address many of the recommendations made by market participants, including those of the IAA on behalf of SEC-registered investment advisers. Many of our members are filers of Schedule 13F and as such are subject to the requirements of Form SH. In complying with the new requirements of Form SH, however, our members

¹ The IAA is a not-for-profit association that exclusively represents the interests of investment adviser firms registered with the SEC. Founded in 1937, the Association’s membership consists of more than 500 firms that collectively manage in excess of \$9 trillion in assets for a wide variety of institutional and individual clients, including pension plans, trusts, investment companies, endowments, foundations, and corporations. For more information, please visit our web site: www.investmentadviser.org.

² *Disclosure of Short Sales and Short Positions by Institutional Investment Managers*, Exchange Act Rel. No. 58785 (Oct.15, 2008), available at <http://www.sec.gov/rules/final/2008/34-58785.pdf> (Interim Release).

³ Release Nos. 34-58591 (Sept. 18, 2008) [73 FR 55175], 34-58591A (Sept. 21, 2008) [73 FR 58987], 34-58724 (Oct. 2, 2008) [73 FR 58987-01].

continue to find certain aspects of the form to be problematic. Therefore, we respectfully request additional modifications to Form SH and its requirements, should the Commission decide to adopt the interim final temporary rule in final form.

The Commission Should Evaluate Whether Information is Critical or Necessary

As an initial matter, we request that the Commission carefully evaluate whether the information provided on Form SH is necessary to the SEC in the long term and should continue to be required. The interim final temporary rule and temporary form will be in place until August 1, 2009. Long before the Commission determines whether to adopt a final rule and form, the Commission will have received a significant amount of weekly data on short sales and short positions by institutional investment managers. Given the significant burden that this weekly filing requirement imposes on institutional investment managers, the Commission should carefully review the data collected and determine whether the data will continue to be useful and necessary to achieve the purposes articulated by the Commission in its release.

Specifically, among the benefits cited by the Commission in its Cost-Benefit Analysis is that the Form SH disclosure will enable the Office of Economic Analysis and Office of Compliance, Inspections and Examinations to analyze short selling patterns and use the data to study the impact of short selling on the market in times of financial crisis. In addition, the Commission is of the view the Form SH disclosure will help the staff evaluate the effectiveness of some of the other emergency initiatives relating to short selling, such as Rule 204T. We believe that the Commission should have sufficient data to complete a study of the impact of short selling and an analysis of whether the emergency initiatives have been effective. Based on the study and the analysis, the Commission can determine whether it continues to need this information.

If the usefulness of the information is severely limited or the SEC has completed its study or analysis of short selling patterns and rules that were adopted or no longer needs the information, it should consider letting the rule and form expire on August 1, 2009. As noted by the Commission, the cost of complying with Rule 10a-3T and Form SH is not insubstantial and adoption of a final requirement would continue to impose a burden on investment managers.

The Commission Should Retain Key Modifications to Form SH

If the Commission, after evaluating the data, determines that the information on Form SH is critical, the Commission should retain certain key changes made to Form SH at the request of filers. First, Form SH should remain non-public and should not be disclosed publicly even with a delay. These filings if made public could be used to appropriate legitimate intellectual property of investment managers by those interested in mimicking their investment strategies.

Second, we request that the Commission continue to require only the information currently requested in temporary Form SH and not reintroduce the items requiring intra-day positions and time of the largest intra-day position. Institutional investment managers have

difficulty obtaining the intra-day data, which must be tracked through a labor-intensive and transaction-by-transaction process. Moreover, we believe that this data would not provide truly useful information to the Commission.

The Commission Should Raise the Threshold for Reporting

We appreciate the Commission's increasing one aspect of the threshold for reporting short positions. Institutional investment managers may exclude short positions that have a fair market value of less than \$10,000,000 (up from \$1,000,000) and constitute less than .25% of that class of the issuer's outstanding securities. We agree with the Commission that raising the first of the two-part threshold, as the Commission has done, would more likely provide information to the Commission regarding significant positions and further the Commission's goal of monitoring for manipulative trading. Requiring the filing of small positions only detracts from more useful information provided to the Commission.

For similar reasons, we believe that the Commission should raise the second of the two-part threshold – whether the short positions constitute less than .25% of that class of the issuer's securities issued and outstanding. For small and even mid-cap securities, the .25% threshold can be reached easily and would capture relatively insignificant short positions. Therefore, the increase to \$10 million in fair market value of the short positions is not as helpful in eliminating smaller positions as it could have been because both prongs of the threshold would have to be satisfied for the positions to be excluded. We suggest that either the percentage threshold be increased (*e.g.*, 2.5%) or that institutional managers be permitted to exclude positions for reporting purposes if the positions satisfy either one of the two conditions.

The Commission Should Reduce the Frequency of Filing

We recognize that when the Commission first adopted the Emergency Orders instituting Form SH, the times were quite unusual and frequent reporting may have been necessary for the Commission to monitor possible manipulations of the markets. As an ongoing requirement, however, we are of the view that weekly filings may be too frequent; such a frequent filing requirement may not be as critical to the Commission and is onerous for institutional investment managers. We believe it would be more reasonable to require a quarterly filing, as is the case with Schedule 13F. We request that the filing deadline and the filing frequency be coordinated with those required under Schedule 13F.

The Commission Should Not Require Aggregation among Affiliates That Do Not Share Information about Investment Decisions

We understand there is some confusion among the industry whether institutional investment managers are required to aggregate the holdings of control affiliates to determine whether the affiliates or the holding company would be required to report under Form SH. We believe that when investment managers are deemed to share investment discretion only because of control relationships and affiliates do not share information about investment

decisions for business purposes, short positions of affiliates should not be required to be aggregated to determine whether there is a reportable short position for the affiliate group.

First, such a position would require affiliates to share information for purposes of filing Form SH that they otherwise would not share. Requiring sharing of information for these purposes is at odds with the information barriers and other policies and procedures that are typically in place to ensure that affiliates do not have access to any nonpublic information regarding other affiliates.

Second, requiring affiliates to report positions that individually would not be reportable or requiring the holding company to report the aggregated position would present at best an inaccurate, and at worst a misleading, picture to the Commission. This type of reporting also may lead the Commission to view the shorts positions as being coordinated among affiliates in a group when that is clearly not the case. We believe aggregating in these situations – where investment decisions or information about investment decisions are not shared among affiliates – would send confusing and unhelpful information to the Commission regarding short sales.

Moreover, although modeled after Form 13F, the requirement of Form SH is more akin to requirements under Schedule 13D and Schedule 13G to report accumulations and changes in stock holdings. Rule 10a-3T requires institutional investment managers to file Form SH when short sales have been effected during the reporting period or when there are changes to a manager’s position beyond a de minimis threshold.⁴ In the context of Schedules 13D/13G, the Commission has recognized that where the “organizational structure of the parent and related entities are such that the voting and investment powers over the subject securities are exercised independently, attribution may not be required for the purposes of determining whether a filing threshold has been exceeded and the aggregate amount owned by the controlling persons.”⁵ We urge the Commission to take a similar approach for Form SH.

Therefore, we request that the Commission not require aggregation where affiliates do not share information about their investment decisions. Moreover, parent companies of affiliates that do not aggregate holdings among affiliates should not be required to file Notice Filings with the Commission because such filings would not provide any relevant information.

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The IAA strongly supports the Commission’s efforts to stabilize the securities markets and monitor for abusive practices. We encourage the Commission to consider carefully, however, whether data provided on Form SH provides useful information to prevent manipulative practices. We urge the Commission to assess whether a rule that may have been helpful on an emergency and temporary basis would continue to provide useful information

⁴ See Interim Release, *supra* note 2 (Commission states that Form SH reports will supply “information about the size and changes in short sales of particular issuers by particular investors”).

⁵ *Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34-39638 (Jan. 12, 1998).

given the burden imposed on institutional investment managers. We appreciate the opportunity to provide our views on these issues and would be pleased to provide any additional information. Please contact the undersigned or Karen L. Barr, General Counsel, at (202) 293-4222 with any questions regarding these matters.

Respectfully submitted,

/s/ Jennifer S. Choi

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Assistant General Counsel

cc: The Honorable Christopher Cox, Chairman
The Honorable Kathleen L. Casey
The Honorable Elisse B. Walter
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