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December 16, 2008

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

*Re: Request for Comment on Interim Final Temporary Rule for Disclosure of Short Sales
and Short Positions By Institutional Investment Managers; File No. S7-31-08*

Dear Ms. Harmon:

We submit this letter in response to the specific requests of the Securities and Exchange Commission (the "Commission") in Release No. 34-58785 (the "Release")¹ for comment on Rule 10a-3T, the interim final temporary rule (the "Interim Rule") under the Securities Exchange Act of 1934, as amended (the "Exchange Act"),² which requires certain institutional investment managers that filed, or were required to file, a Form 13F as of the most recent calendar quarter end to report their short sales and short positions of section 13(f) securities (excluding options) on Temporary Form SH ("Form SH").

We appreciate the opportunity to comment on the Interim Rule and the Release. Seward & Kissel LLP has a substantial number of clients who are required to file Form SH and we urge the Commission to consider our comments. The views we express in this letter, however, are our own and do not necessarily reflect those of our clients.

I. Purpose of the Interim Rule

The Commission has indicated concerns over the "sudden and excessive fluctuation of securities prices," "disruptions in the fair and orderly functioning of the securities markets," and the "possible unnecessary or artificial price movements that may be based on unfounded rumors and may be exacerbated by short selling."³ The Commission has explained that the Interim Rule will provide useful information to analyze the effects of the Commission's rulemaking related to short sales and to evaluate whether the Commission's current rules are

¹ Disclosure of Short Sales and Short Positions by Institutional Investment Managers, Exchange Act Release No. 34-58785, 73 Fed. Reg. 61,678 (Oct. 17, 2008) (to be codified at 17 C.F.R. pts. 240 and 249) [hereinafter *Release*].

² 15 U.S.C. §78a *et seq.*

³ *Release*, at 61,679.

working as intended.⁴ Furthermore, the Commission has noted that the Interim Rule may provide information regarding the propriety of certain short selling.⁵

While we recognize the Commission's need to monitor short sales, we believe alternatives to the Interim Rule would allow the Commission to achieve its goals without placing unnecessary burdens on institutional investment managers.

II. The Commission Has Other Ways to Collect Information About Short Sales

The Commission requests comments on whether there are other, better ways to collect information about short sales than by requiring certain institutional investment managers to file Form SH.⁶ We believe the Commission can obtain information about short sales through other channels that may provide more meaningful information than that received through the Interim Rule. For example, the Commission can obtain short sale information from the Financial Industry Regulatory Authority ("FINRA"), which requires securities firms to report short interest positions in all securities on a bi-monthly basis.⁷ While FINRA's information does not identify the particular investment manager that is linked to each short interest position, we believe the information reported to FINRA can provide the Commission with useful raw data, which the Commission may analyze to achieve its stated goals. Upon review of FINRA's information, the Commission would be in a position to further investigate those activities perceived as problematic. Additionally, the Commission can obtain short sale information directly from broker-dealers that execute the transactions, similar to the method by which the Commission obtains information regarding trading activity that may indicate insider trading violations. We believe these alternatives are more useful to the Commission than Form SH information, as they cover a broader universe of short sale activity than that which is required to be reported on Form SH (i.e., information pertaining to a larger volume of short sale activity, and not limited to information only with respect to managers who hold large long positions). By receiving and analyzing this larger universe of information, we believe the Commission will have a better ability to achieve its goals without imposing the significant administrative burden on institutional investment managers that file Form SH.

III. Does the Interim Rule Achieve Its Purpose?

While we believe the Commission's concerns regarding price volatility and market manipulation are justified, we do not believe that the application of the Interim Rule will more effectively prevent their occurrence. In an Emergency Order issued on September 18,

⁴ *Id.*

⁵ *Id.*

⁶ *Release*, at 61,680.

⁷ NASD Rule 3360 and Incorporated NYSE Rule 4211 require firms to report short interest positions in all customer and proprietary accounts in NASDAQ, New York Stock Exchange (NYSE), NYSE Arca (ARCA) and Over-the-Counter (OTC) equity securities (as well as other listed securities not reported to another self-regulatory organization (SRO)) to FINRA twice a month. *See* FINRA REGULATORY NOTICE NO. 08-13, SHORT INTEREST REPORTING REQUIREMENTS (2008).

2008,⁸ the Commission placed a temporary ban on short selling the stocks of 799 financial companies. Industry experts report that the Commission's Order did little to prevent the decline of the affected companies' stock prices, and it has been stated that "stocks with greater short-sales constraints exhibit greater 'momentum' return, i.e., they will eventually experience greater volatility."⁹ Along these lines, an analysis by Credit Suisse Advanced Execution Services reported that the ban caused "across the board" falls in liquidity levels, which increased volatility.¹⁰ Similar to the result of this previous Order, we do not believe that the Interim Rule is likely to help control price volatility in the securities markets.

IV. We Believe the Interim Rule Imposes Excessive and Unnecessary Burdens on Reporting Managers

We are mindful that in adopting the Interim Rule, the Commission has taken steps to reduce the burdens imposed on reporting managers by modifying the data elements that were included in the previous version of Form SH under the Commission's Emergency Orders published in Release Nos. 34-58591 (Sept. 18, 2008) and 34-58591A (Sept. 21, 2008) (collectively, the "Emergency Orders").¹¹ Nevertheless, we believe excessive burdens still remain, which we have outlined below, together with changes that we recommend the Commission implement.

A. The Commission's Cost Estimates of Preparing a Form SH is Not Realistic

The Release sets forth the Commission's estimates for the time and expense incurred by each Form SH filer as follows: (1) each filer will spend 20 hours for each filing, at an hourly rate of \$175 (for a total of \$3,500); (2) outside law firm legal costs will be \$1,000 per filing; and (3) the filing agent costs will be \$1,500 per week.¹² Based on these estimates, each filer will incur a weekly expense of \$6,000 (\$3,500 for internal cost plus \$2,500 for outside legal firm and filing agent fees). Pursuant to these estimates, we believe an undue burden is placed on managers, especially those with smaller portfolios. For example, a manager having investment discretion over an account holding section 13(f) securities with a fair market value of just over \$100 million is required to file Form SH. If this manager received a management fee of 1%, its fees would amount to approximately \$1 million. At \$6,000 per filing, during the nine month period covered by the Interim Rule, this reporting manager will spend \$216,000, or

⁸ Emergency Order Pursuant to Section 12(K)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 34-58592 (Sept. 18, 2008).

⁹ Menachem Brenner and Marti G. Subrahmanyam, *End the Ban on Short-Selling*, Commentary, Forbes.com (Oct. 1, 2008) http://www.forbes.com/2008/09/30/short-selling-ban-oped-cx_mb_1001brenner.html.

¹⁰ *See Short-sale bans widen spreads and increase volatility—Credit Suisse*, The Trade News (Oct. 17, 2008) <http://www.thetradenews.com/regulation-compliance/regulation/2386>.

¹¹ Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 34-58591 (Sept. 18, 2008); Amendment to Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 34-58591A (Sept. 21, 2008).

¹² *Release*, at 61,686-87.

approximately 22% of its management fee on filing Form SH. In light of the current economic crisis, in which managers are experiencing significant declines in asset values, we believe this is an excessive cost to impose on managers. Moreover, we have found that many filers do not have the systems in place to readily extract the specific data required by Form SH. Consequently, many filers compile the information manually, which takes a considerable amount of time, resulting in greater internal costs.

B. The Commission Should Adjust the Reporting Thresholds to Reduce Burdens

The Emergency Orders exempted the reporting of short sales and short positions otherwise reportable on Form SH if: (1) the short sale or short position constituted less than .25% of that class of the issuer's section 13(f) securities issued and outstanding, as reported on the issuer's most recent annual or quarterly report, and (2) the fair market value of the short sale or position in the section 13(f) security was less than \$1 million. The Commission has indicated that the de minimis thresholds were established to limit the potential costs associated with Form SH filing.¹³ The Interim Rule raised the de minimis threshold with respect to the value of the securities sold or held short such that a manager is not required to report a short sale or a short position if the fair market value of the start of day short position, the gross number of securities sold short during the day and the end of day short position is less than \$10 million. While we strongly support the increase in the de minimis threshold, we have not observed any material decrease in the number of filings among our clients. In order to achieve a more meaningful cost reduction, we recommend the changes described below.

1. Raise the de minimis threshold to 1%

The Commission asks for comments on whether the de minimis thresholds are set at appropriate levels.¹⁴ Despite the increase in the fair market value prong of the de minimis threshold from \$1 million to \$10 million, there are disproportionately substantial burdens that remain for those managers with relatively small short portfolios who are not likely in a position affect securities prices. We recommend that the Commission raise the .25% threshold with respect to an issuer's outstanding shares so that a manager is not required to report a short sale or a short position if the start of day short position, the gross number of securities sold short during the day and the end of day short position constitute less than 1% of that issuer's section 13(f) securities issued and outstanding. We believe that a 1% threshold will reduce the burden on filers and effectively achieve the Commission's goal of monitoring market manipulation. We believe a strong analogy exists in the case of Rule 144 under the Securities Act of 1933, as amended (the "Securities Act"),¹⁵ which is the Commission's "safe harbor" rule for sales of restricted securities and securities owned by affiliates of the issuer. Under that rule, affiliates may sell restricted and other securities without being deemed an "underwriter" if the quarterly volume of such sales is less than 1% of the outstanding shares of the class being sold. If Rule 144's threshold level of 1% is indicative of the Commission's belief that trading with respect to

¹³ Release, at 61,687.

¹⁴ Release, at 61,682.

¹⁵ 15 U.S.C. §77a *et seq.*

an amount less than 1% of the outstanding shares is not likely to have a material impact on the securities markets, then a strong analogy exists for setting the threshold level for Form SH at 1%. We believe short sales and short positions that constitute less than 1% of the outstanding shares are unlikely to have a material impact on securities prices.

2. Fair market value of \$100 million in *short* positions

The Commission solicits comments on whether it should continue to require Form SH reporting by institutional investment managers that are required to file Form 13F.¹⁶ We believe Form SH reporting should be limited to those institutional investment managers who have an aggregate fair market value of \$100 million in short positions as of the previous calendar quarter end. The Commission has stated that the Interim Rule applies “only to Form 13F filers because they exercise discretion over large accounts that have significant potential to affect the markets.”¹⁷ However, because the Commission is interested in monitoring short sales and short positions, we believe it is more appropriate to limit Form SH filing to those managers that hold a substantial portfolio of short positions, rather than those managers who hold a substantial portfolio of long positions.¹⁸

3. Decrease reporting frequency

The Commission requests comments on whether it is appropriate to require the filing of Form SH on a weekly basis.¹⁹ We do not believe the weekly requirement is necessary for the Commission to achieve its goals, and recommend that the Commission require filings on a less frequent basis and/or place a larger delay between the reporting period and the filing deadline. Currently, no other filing with the Commission is made on a weekly basis for ordinary transactions by institutional investors.²⁰ Similar to the quarterly requirements of Form 13F, we believe Form SH should be filed with the Commission on a quarterly basis. In addition to the burdens discussed above regarding the time and expense incurred weekly by managers to file Form SH, we believe the weekly requirement creates additional burdens with respect to staffing and vacation and holiday scheduling, all of which are especially difficult for smaller organizations, as qualified persons must be available to make timely filings of the Form SH.

Even if the Commission decides to maintain the weekly filing requirement, we recommend that the Commission modify the reporting cycle to implement a greater delay between the end of a reporting period and the date on which the filing is due with respect to that

¹⁶ *Release*, at 61,680.

¹⁷ *Id.*

¹⁸ Under the Interim Rule, a manager with discretion over an aggregate of \$50 million of short positions and \$100 million of long positions is required to file Form SH, whereas a manager with discretion over an aggregate of \$1 billion of short positions would not have to file if its aggregate long position was only \$50 million.

¹⁹ *Release*, at 61,684.

²⁰ While certain filings (i.e., Form 3, Form 4 and Schedule 13D) may be required more frequently than weekly, we note that such filings are made in extraordinary circumstances rather than by ordinary market participants that have not reached “control” or “insider” status, as is the case with Form SH.

reporting period. We acknowledge that the Commission has increased the time that managers have to prepare the filings until the Friday, rather than the Monday, following each reporting period to prepare their Form SH. However, similar to the reporting delay for Form 13F between the end of the reporting period and the filing due date (i.e., 45 days after the end of a reporting period), we believe that a greater delay is necessary to mitigate the burdens of a weekly filing requirement for Form SH.

C. The Commission Should Eliminate Certain Unnecessary Burdens

The Commission solicits comments on whether the detailed reports required on Form SH are appropriate, and whether the Commission should only require reporting of new positions.²¹ We believe the detailed reports required on Form SH are unnecessarily burdensome and reporting should be limited only to those changes in short positions that are above the de minimis threshold.²² We believe that reporting in circumstances where there are no changes or only de minimis changes from the previous entries creates or imposes additional burdens without a meaningful enhancement of the value of the information provided to the Commission. Accordingly, we recommend that the Commission require reporting only in situations in which there is a change in the size of a position since the previous disclosure.²³

The Commission also solicits comments on whether the XML tagged data file format is more easily generated than an ASCII document in columned or delimited format and whether delimited ASCII text data should be considered for transaction data.²⁴ Some of our clients have indicated that the XML format creates certain technical and monetary burdens for managers who do not have the resources or the systems in place to file in this format. These costs are especially taxing on smaller organizations, and we recommend that the Commission accept filings in a format that is more ubiquitous, such as Word or Excel.

D. We Strongly Urge the Commission to Formally Reevaluate the Interim Rule Prior to August 1, 2009

In light of what we believe to be excessive burdens for managers that file Form SH, we strongly urge the Commission to formally reevaluate the requirements of the Interim Rule prior to August 1, 2009. As discussed above, we believe the Commission can better collect information about short sale activities through FINRA, or through the broker-dealers that execute the short sales. Given the current economic and market conditions, we also feel that these methods are better alternatives, as they do not place the excessive burdens imposed by the

²¹ *Release*, 61,683.

²² The UK Financial Services Authority (“FSA”), which has banned the short selling of financial stocks, only requires disclosure when there is a change in the size of the short position since the previous disclosure. Moreover, the FSA’s ban covers only 34 securities, and has a termination date of January 16, 2009.

²³ The FSA requires reporting only when there is a change in short positions since the previous disclosure. *See supra* note 22. We believe the Commission should adopt this approach, as this would help mitigate the burdens on managers and still provide the Commission with information related to short sales.

²⁴ *Release*, at 61,685.

Interim Rule on managers who have already been taxed by declining asset values and reduced staffing.

V. It is Imperative that Disclosures Remain Nonpublic Indefinitely

The Commission solicits comments as to whether the disclosures on Form SH should remain nonpublic to the extent permitted by law.²⁵ We believe it is imperative that the disclosures remain nonpublic and we strongly urge the Commission to treat Form SH as nonpublic, indefinitely, without the submission of a confidential treatment request.

A. Negative Impacts of Public Disclosure

We believe public disclosure of Form SH information would result in a number of negative repercussions. To begin with, public disclosure will allow issuers to identify which managers enter into short sales with respect to the issuers' securities. As a result, these issuers can withhold information from the managers. The inability of managers to access material information about issuers may have negative consequences on the manager's portfolios, and in turn, harm the underlying investors. Furthermore, public disclosure will allow market participants to know which managers are shorting a particular security and, thus, certain market participants will be in a position to effect a "short squeeze" on a particular manager. Additionally, as the Commission has stated, "publicly available Form SH data could give rise to additional, imitative short selling."²⁶ We agree with the Commission that disclosing short sale information will allow for copycat investors, and we believe this will not only discourage intellectual output but will also discourage strict compliance with the Interim Rule. Accordingly, we believe public disclosure will inhibit, rather than further, the Commission's goal of preventing price volatility and market manipulation.

Moreover, the Commission has noted that for managers who use short sales as part of their routine hedging strategy, public disclosure could inaccurately suggest that they have a negative view of some issuers' prospects.²⁷ Given that the Commission is concerned about unnecessary or artificial downward price movements that may be based on unfounded rumors, we believe it is necessary to keep Form SH information confidential in order to prevent exacerbating a "crisis of confidence that is not warranted by the issuer's true financial condition."²⁸

Along with harming the managers and the underlying investors, we believe public disclosure will also have a negative impact on competition generally and discourage intellectual output. The Commission has stated that the Interim Rule will not have an adverse impact on competition "because the Commission will keep Form SH information nonpublic to the extent

²⁵ *Release*, at 61,684.

²⁶ *Release*, at 61,683.

²⁷ *Release*, at 61,688.

²⁸ *Release*, at 61,686.

permitted by law.”²⁹ We agree with the Commission that keeping Form SH information nonpublic is crucial to preserving competition among institutional investment managers. As the Commission has acknowledged, information required by Form SH is highly proprietary and could be used to reverse engineer a manager’s investment strategy and expose the manager’s trade secrets.³⁰ For all of the reasons set forth above, we believe it is imperative for the Commission to keep Form SH information nonpublic indefinitely.

B. Exemptions Under the Freedom of Information Act

As noted by the Commission, the Freedom of Information Act (“FOIA”) provides at least two exemptions under which the Commission has authority to withhold Form SH information.³¹ Under Exemption 8, the Commission can withhold information “contained in, or related to, any examination, operating or condition report prepared by, on behalf of, or for the use of the Commission.”³² Under Exemption 4, the Commission can withhold from public disclosure (1) trade secrets, and (2) privileged or confidential commercial or financial information submitted to it.³³ As stated above, we believe public disclosure will result in the exposure of trade secrets. Therefore, we believe the Commission can withhold Form SH information under the first prong of Exemption 4. Furthermore, when a person is obliged to furnish certain information to an agency, courts will determine that such information is confidential for purposes of Exemption 4 if disclosure of the information would either (1) impair the Government’s ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.³⁴ We believe public disclosure can impair the Government’s ability to obtain necessary information in the future and result in substantial competitive injury to a manager. Therefore, we believe the Commission can also withhold Form SH information under the second prong of Exemption 4.

C. The Commission Should Petition Congress to Adopt a FOIA Exemption for Form SH

For the reasons stated above, we believe that the information contained in Form SH should remain nonpublic. We also believe it is crucial for the information to remain nonpublic *indefinitely*. Therefore, we urge the Commission to petition Congress to adopt a FOIA Exemption for Form SH in order to provide a clear protection for filers from third parties. In doing so, we believe it is important for the Commission to take a strong public position in favor of the managers whose interests outweigh the interests of the general public. While the Commission has already expressed its rationales for making Form SH nonpublic, we believe more is necessary to ensure that managers and their clients are protected, that adverse impact on competition is mitigated, and that imitative short selling is prevented.

²⁹ *Release*, at 61,688.

³⁰ *Id.*

³¹ *Release*, at 61,683.

³² 17 C.F.R. § 200.80(b)(8).

³³ 17 C.F.R. § 200.80(b)(4).

³⁴ *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

VI. Filing Under Special Circumstances

In the process of preparing Form SH for a substantial number of our clients, we have encountered several situations that we feel are ambiguous or problematic. We outline them below and respectfully ask the Commission to address these issues.

A. *Stock Splits*

Form SH requires managers to report short positions that exceed the de minimis threshold. Where an issuer causes a stock split to occur, a manager's de minimis short position can effectively become non-de minimis by virtue of the split, even if the manager does not engage in any further short sales. We believe the Commission should establish a relief for such circumstances and allow managers to exclude them from Form SH.

B. *Triggering the Filing Obligation*

1. 13F filer who filed but was not required to file

The Interim Rule requires Form SH filing by institutional investment managers that filed, or were required to file, a Form 13F as of the end of the most recent calendar quarter. To comply with the Interim Rule, a manager who accidentally filed a Form 13F, but was *not* required to file, is still required to file Form SH. Given the enormous costs and burdens of filing Form SH, we recommend that the Commission except such managers from the Interim Rule's filing requirement.

2. 13F filer who has triggered the filing requirement but is not required to file until the first quarter of 2009

The filing obligation for Form 13F is triggered when an institutional investment manager has investment discretion over \$100 million on the last trading day in any of the preceding twelve months. We believe there are ambiguities in applying this criteria to the Interim Rule. For example, a manager who triggers the 13F filing requirement in the third quarter of 2008 is not required to file a 13F until February 16, 2009. However, we believe it is unclear whether this manager has a Form SH filing obligation as of the fourth quarter of 2008, or the first quarter of 2009. We recommend that the Commission consider and provide guidance on this issue.

3. 13F filer whose portfolio falls below \$100 million

Given the current economic and market conditions, we believe the Commission should consider the Interim Rule's costs and burdens on a manager who is required to file Form SH, but whose portfolio is currently below the 13F threshold (e.g., a manager who has triggered 13F filing requirement for the quarter ending December 31, 2008 and the first three calendar quarters of 2009, but who currently holds 13(f) securities having an aggregate fair market value of \$50 million). While such a manager may be required to file Form 13F, the expense and burden of making weekly Form SH filings far exceeds the expense and burden of making

quarterly 13F filings. We urge the Commission to consider excepting such managers from incurring the extraordinary costs of complying with the Interim Rule.

4. Insolvency and administration of custodian broker or counterparty

While the Commission did not specifically raise this issue in the Release, we request that the Commission clarify the uncertainties surrounding the reporting of securities held by a custodian broker or counterparty in circumstances such as insolvency or administration (e.g., Lehman Brothers International (Europe)). More generally, with respect to circumstances in which a custodian broker or a counterparty defaults, becomes insolvent, or is otherwise subject to estate administration, the possibility of a manager gaining access to its securities is extremely remote. It would be helpful for the Commission to confirm that in these circumstances, managers need not continue to report their positions.

5. Detailed books and records

As a final thought, we would like to respond to the Commission's request for comment on the requirement of detailed books and records. The Commission solicits comments on whether short sellers should be required to keep current detailed books and records of their short sale activities and short positions, of the sort required under Rule 17a-3(a)(6) under the Exchange Act.³⁵ To the extent not otherwise required, we believe this would be a tremendous operational burden on managers and the information would not be useful in helping the Commission achieve its objectives. Accordingly, we strongly recommend against the adoption of such a requirement.

We appreciate the opportunity to comment on the Interim Rule. If you have any questions regarding this letter, please contact the undersigned at the telephone numbers indicated below.

Very truly yours,

/s/ Patricia A. Poglinco
Patricia A. Poglinco
212.574.1247

and

/s/ Robert B. Van Grover
Robert B. Van Grover
212.574.1205

³⁵ Release, at 61,680.