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December 16, 2008

Ms. Florence Harmon
Acting Secretary
U.S. 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
(File No. S7-31-08)

Dear Ms. Harmon:

The Investment Company Institute¹ supports the Commission's continuing initiatives to address market manipulation and abuses related to short selling. To that end, we commend the Commission for its goal of ensuring fair and orderly markets and of addressing sudden and excessive fluctuations of securities prices. The Commission's interim final temporary rule - Rule 10a-3T² - is intended to further this goal by requiring institutional investment managers to report to the Commission certain information concerning their short sales and short positions.

While we strongly support the Commission's need to obtain information to analyze the effects of its rulemaking relating to short sales and to consider when questions about the propriety of certain short selling occur, it is critical that it balances this need with the burdens imposed on market participants by the new disclosure requirements and the potential unintended consequences of those requirements. Most significantly, we urge the Commission to (1) retain the portion of the rule that makes the information submitted under the disclosure requirements non-public and (2) make certain amendments to the rule to reduce the costs and burdens on investment managers subject to the

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$10.10 trillion and serve almost 90 million shareholders.

² See *Disclosure of Short Sales and Short Positions by Institutional Investment Managers*, SEC Release No. 58785 (October 15, 2008), 73 FR 61678 (October 17, 2008) ("Release").

required disclosures. Our specific recommendations, which we believe are fully consistent with the Commission's interest in obtaining information that it needs to fulfill its regulatory function, follow.

I. Disclosure of Institutional Investor Short Sale Activity – Rule 10a-3T

Interim final temporary Rule 10a-3T under the Securities Exchange Act of 1934 extends with some modifications the requirement, imposed by the Commission's emergency order issued on September 18, 2008,³ that certain institutional investment managers file Form SH to report short sales and short positions in Section 13(f) securities.⁴ Specifically, institutional investment managers that exercise investment discretion with respect to accounts holding securities described in Rule 13f-1(c) under the Exchange Act that have an aggregate fair market value of at least \$100,000,000, and effect short sales of those securities, generally are required to file Form SH with the Commission on a weekly basis.

A. Retain Confidentiality of Information Provided on Form SH

The September 18 emergency order provided that the information on Form SH would be made publicly available on the Commission's EDGAR system. On September 19, 2008, the Institute sent a letter to SEC Chairman Cox expressing serious concerns about several aspects of the order.⁵ The Institute's letter explained that the confidentiality of information about a fund's securities holdings is a critical issue to Institute members, who hold over 27 percent of the value of publicly traded U.S. equity securities,⁶ and that any leakage of this information can lead to frontrunning of a fund's trades, adversely impacting the price of the stock that the fund is buying or selling to the detriment of fund shareholders.⁷ The letter also noted the efforts by the Institute and its members to address issues relating to the confidentiality of this information and that public disclosure of a fund's short positions as prescribed by the order has the potential to seriously impair these efforts. The letter therefore urged the Commission to address this aspect of the order and, at the very least, to make Form SH filings and all accompanying information nonpublic.

³ SEC Release No. 58591 (September 18, 2008), 73 FR 55175 (September 24, 2008).

⁴ Relevant securities under Section 13(f) of the Securities Exchange Act include securities of a class described in Section 13(d)(1) of the Exchange Act that are admitted to trading on a national securities exchange or quoted on the automated quotation system of a registered securities association of a registered securities association.

⁵ See Letter from Paul Schott Stevens, President and CEO, Investment Company Institute, to Christopher Cox, Chairman, Securities and Exchange Commission, dated September 19, 2008.

⁶ See 2008 Investment Company Fact Book, 48th Edition, page 11.

⁷ The Institute has made this point to the Commission on several prior occasions. See Letters from Paul Schott Stevens, President, Investment Company Institute, to Christopher Cox, Chairman, Securities and Exchange Commission, dated September 14, 2005 and August 29, 2006.

On September 21, 2008, the Commission amended the emergency order to partially address these concerns, providing that it would only make the information filed on Form SH available to the public two weeks after the due date for the form.⁸ On October 2, 2008, the Commission amended the order once again, this time providing that the information on Form SH would remain nonpublic to the extent permitted by law.⁹ Following on the October 2 amendment, the interim final temporary rule retains the provision that Form SH will be classified as nonpublic to the extent permitted by law.¹⁰ The Release, however, requests comment on whether the information required by Form SH should be publicly reported.

The Institute strongly urges the Commission to retain the nonpublic status of the information provided on Form SH. As discussed above, making public the information filed by investment managers on Form SH may lead to frontrunning of fund trades, a longstanding concern for funds. In addition, allowing for public disclosure of the information on Form SH can lead to several other unintended consequences and may confuse investors and other market participants about an investment manager's intentions. For example, public disclosure of the information on Form SH may provide an inaccurate picture of institutional investors' views about the security subject to the reporting. Short selling does not always indicate a negative view about a particular issuer; it may be part of a firm's investment strategy or used as a vehicle to hedge against a long position. In addition, some issuers have indicated that they would cease communications with analysts of those investment managers that have shorted their securities and exclude the analysts from information sessions. Finally, as the Commission noted in the Release, public disclosure of the information on Form SH could result in increased shorting of certain stocks as other market participants imitate firms' publicized short positions.

The nonpublic disclosure element of the interim temporary final rule also will remain critical given that the Commission is eliminating the "grandfather" provision that was included in the Form SH filing conditions set forth in the emergency orders. Specifically, the emergency orders did not require disclosure of existing or outstanding short positions in Section 13(f) securities held before the September 22, 2008 effective date of the initial order. As the Release states, this grandfather provision was established primarily to address concerns about the public disclosure of institutional investment

⁸ SEC Release No. 58591A (September 21, 2008), 73 FR 58987 (September 25, 2008).

⁹ See SEC Release No. 58724 (October 2, 2008), 73 FR 58987-01 (October 8, 2008). The Commission stated its belief that, "the nonpublic submission of Form SH may help prevent artificial volatility in securities as well as further downward swings that are caused by short selling, while at the same time, providing the Commission with useful information to combat market manipulation that threatens investors and capital markets. Also, the Commission...is concerned that publicly available Form SH data could give rise to additional, imitative short selling that was not intended by the Commission's order."

¹⁰ Specifically, filers are directed to mark Form SH "nonpublic" but directed not to submit requests for "confidential treatment."

managers' pre-existing short positions before the Commission indicated that Form SH filings would be made on a nonpublic basis.

Even the Release's section on "Consideration of Burden of Competition and Promotion of Efficiency, Competition and Capital Formation" recognizes the importance of the nonpublic nature of this information. It states that Rule 10a-3T will not have an adverse impact on competition among the institutional investment managers required to file Form SH and other parties effecting short sales because the Commission will keep Form SH information nonpublic to the extent permitted by law.

Finally, we do not believe that keeping the information on Form SH nonpublic would impede the purposes of the interim final temporary rule - providing useful information to Commission staff to analyze the effects of rulemakings relating to short sales; evaluating whether current Commission rules are working as intended, particularly in times of financial stress in the securities markets; and supplying the Commission with important information about the size and changes in short sales of particular issuers by particular investors to allow the Commission to consider when questions about the propriety of certain short selling occur. Similarly, we do not see how public disclosure of the information filed on Form SH will better serve these goals. For all of these reasons, we believe it is critical that Form SH should remain nonpublic.¹¹

Even with the nonpublic classification of Form SH, we remain concerned with the Commission's ability to maintain the confidentiality of the reported information. As noted above, the Commission states in the Release that the Form SH information will be nonpublic "to the extent permitted by law," *i.e.*, subject to The Freedom of Information Act ("FOIA"). The Commission explains that there are two exemptions under which it has authority to withhold the information.¹² We request that the Commission clarify what it means to keep the Form SH information nonpublic "to the extent permitted by law" and specifically state its intention to exercise this authority as a matter of course to preserve the nonpublic status of all Form SH information.¹³

¹¹ The Release requests comment whether concerns about public reporting would be alleviated if there was a delay in filing the information, such as a delay of 45 days after the end of a quarter in which the transaction occurred, similar to the 45-day deadline for Form 13F filings. As discussed below in connection with our comments on the timing of the filing of Form SH, we would not object to public disclosure of this information if the rules were made consistent with the current Form 13F requirements.

¹² FOIA Exemption 4 provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." FOIA Exemption 8 provides an exemption for matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."

¹³ The Release requests comment whether the Commission should require all short sellers to publicly provide a notice filing when their short sale activity or positions cross a specific threshold that would be deemed significant. For the reasons discussed above, we would strongly oppose such a requirement.

B. Extend Timing for Filing Form SH

The interim temporary final rule requires that Form SH be filed on the last business day of the calendar week following a Form SH reporting period. This is a change from the Form SH filing deadline set forth in the emergency orders which required the form to be filed on the first business day of each calendar week immediately following a week in which the institutional investment manager affected certain short sales. The Release states that the change was made to provide filers with additional time to gather, verify and file the data, decreasing the burden on filers without affecting the efficacy of the information to Commission staff. As we noted to the Commission following the issuance of the original emergency order, providing institutional investors with only the weekend to determine and fulfill their reporting obligations raised significant operational, cost, and quality concerns, particularly for managers with complex situations such as those that must aggregate short sale activity across several affiliates. While we believe that the extended period provided by the interim temporary final rule alleviates some of these concerns, providing the required information on a weekly basis still creates unnecessary costs and burdens for filers.

We therefore recommend that the Commission require that Form SH be filed on a less frequent basis, such as 45 days after the end of a quarter, similar to the current Form 13F reporting requirements. Such a filing requirement would better balance the Commission's need to monitor short sale activity with the costs and burdens of producing Form SH data and, in the Institute's view, will not lessen the Commission's ability to monitor for manipulative short selling.¹⁴ Quarterly reporting also would provide managers with adequate time to accommodate operational and cost concerns raised by creating, maintaining, and regularly operating the necessary systems to fulfill their obligations under the rule. Our members report that the creation of the Form SH reporting mechanism requires managers to extract data from multiple sources, including trading systems and accounting systems, and also to assimilate, sort and categorize the data, which is typically maintained in a format to address reporting requirements other than Form SH. This information then must be reconciled and certified before filing with the Commission. The time burden has been even harder to meet for investment managers that do not operate on one global system or that must aggregate across affiliates (discussed below). Finally, creating consistent timing with the current requirements under Section 13(f) would allow for coordination of reporting of long and short positions in Section 13(f) securities for purposes of Schedule 13F and Form SH.¹⁵

¹⁴ The Institute appreciates the purposes behind the rule including supplying the Commission with information about short sales to allow it to consider when questions about the propriety of certain short selling occur. To that end, if the Commission believes that in the short term it needs the information filed on Form SH more frequently than quarterly, the Commission could require reporting on a monthly basis for a period of time (e.g., six months) and, once market conditions improve, revert to a quarterly reporting requirement.

¹⁵ As the Commission notes in the Paperwork Reduction Act and Cost Benefit Analysis sections of the Release, many institutional investment managers incurred a reporting burden due to the compressed timeframe in which managers had to comply with the Form SH and the need for new programs to satisfy the Form SH disclosure requirements. Moving to a quarterly disclosure requirement would significantly alleviate those burdens.

C. Clarify Aggregation Requirements Under the Rule

As discussed above, the interim final temporary rule defines a short position as the aggregate gross short sales of an issuer's Section 13(f) securities, less purchases to close out a short sale in the same issuer. Our members report that it is unclear under the rule whether investment managers are required to aggregate the holdings of control affiliates to determine whether the affiliates or the parent company would be required to file reports under Form SH. The Institute believes that requiring such aggregation in all cases would result in several difficulties for investment managers.

For example, if aggregation is required in all cases between a parent company and its affiliates, several affiliates that would otherwise be under the filing threshold may in the aggregate end up with filing requirements under Form SH. Similarly, requiring control affiliates to report positions that individually would not be reportable or requiring the parent company to report the aggregated position could present an inaccurate and misleading picture of short sale activity to the Commission.¹⁶ Operational and cost burdens also would be presented for a parent company. Specifically, a parent company must gather and reconcile the data, often from numerous differently formatted systems to analyze whether a filing or filings are due.¹⁷ Finally, 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 contrary to 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.

The Institute therefore recommends that the Commission clarify 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 (*i.e.*, proper information barriers are in place), short positions of affiliates should not be required to be aggregated to determine whether there is a reportable short position for the affiliate group. This is consistent with the Commission's position on aggregation under Schedules 13D and 13G, where it 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."¹⁸

¹⁶ If the Commission continues to require aggregated reporting of short sales, we recommend that the Commission permit an investment manager, when reporting on behalf of affiliated entities, to identify on Form SH the specific affiliate that conducted a particular transaction adjacent to the appropriate short sale(s), as is allowed currently in Form 13F reporting.

¹⁷ Some members have informed us that this is accomplished by affiliates sending raw data to the top-level reporting entity, which then must calculate whether de minimis thresholds have been crossed.

¹⁸ *Amendments to Beneficial Ownership Reporting Requirements*, Securities Exchange Act Release No. 39538 (January 12, 1998), 63 FR 2854 (January 16, 1998).

D. Expand Exceptions to the Rule's Reporting Requirements

Rule 10a-3T provides that filing of Form SH is not required with respect to a 13(f) security if, on each calendar day during the relevant week, 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 0.25 percent of the class of securities issued by the issuer and the fair market value of these short positions is less than \$10 million. According to the Commission, these thresholds represent, "significant short sales and positions that have the potential to materially affect the price of the underlying securities."

The interim final temporary rule increases the "fair market value" part of the two-part test from \$1 million to \$10 million. The Institute strongly supports this increase, as it will facilitate capturing only material short sale positions. We question, however, how effective such a change will be without a similar change to the second part of the two-part test. For this reason, we recommend that a similar increase be made to the "percentage of shares outstanding" part of the exception to more accurately reflect the capturing of positions with the potential to materially affect the price of the underlying securities. The current 0.25 percent threshold will require managers with substantial assets under management to report nearly every short position they hold, producing a considerable amount of data, at a significant cost. We believe that a higher percentage threshold (*e.g.*, 2 percent) is appropriate to ensure that Form SH captures only significant short positions.

We also recommend that the Commission bifurcate the two-part test into separate standards. The two-part test is unnecessary; crossing either of the thresholds would result in the Commission obtaining sufficient information to analyze short selling activity. Accordingly, we recommend that institutional managers be permitted to exclude positions for reporting purposes if the positions satisfy either one of the specified standards.¹⁹

E. Limit the Reportable Information to Short Positions

Rule 10a-3T requires managers to report short sales and short positions, as defined in Rule 200 of Regulation SHO.²⁰ We recommend that the Commission require only the disclosure of short positions, similar to the long position reporting requirement in Section 13(f). In adopting the requirements under Section 13(f), the Commission determined that the reporting of long position data

¹⁹ We would also request that the Commission clarify when a manager must use "N/A" in the appropriate data category of Form SH and when the manager may forego reporting the name of an issuer in which short sale activity falls below the reporting threshold. Rule 10a-3T states that a manager may use "N/A" in filling out Form SH when it has determined that it has a filing requirement but the particular data element falls below the reporting threshold. This has created some confusion as to what reporting must take place if the short position or short sale activity fluctuates during the day but ends the day below the reporting threshold.

²⁰ Rule 200 of Regulation SHO defines a short sale to mean any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.

(*i.e.*, holdings data) would permit it to analyze the influence and impact of institutional investment managers on the securities markets. Similarly, we believe the Commission would obtain the information it needs to evaluate any significant market impact of a manager's short activity, and the effectiveness of the Commission's short sale rules, through collection of short position information only.

Limiting the scope of the reporting requirement to short positions would balance the needs of the Commission to protect the marketplace with the high costs of developing and operating new systems to collect, compile and provide the Commission with data that is not otherwise captured by investment managers.²¹ As previously discussed, collecting short position and short sale information requires managers to extract data from multiple sources – trading systems and accounting systems – after which the managers must sort through both data streams before aggregating it across affiliates for the separate categories of information. Collection of only short position information would ease the collection and assimilation burden and significantly reduce the consumption of limited compliance resources. Limiting the reporting to short positions also would create operational efficiencies because the new system could be designed to work in conjunction with existing systems for long positions, gathering data on Section 13(f) securities.²²

F. Create Consistency with Regulations in Other Jurisdictions

As the Commission examines its current, and considers further, initiatives relating to short sales in the U.S., we urge it to work closely with foreign regulators to create consistent and sensible cross-border regulations in this area. As the Release recognizes, regulators in several foreign jurisdictions also have adopted rules requiring disclosure of short sales and short positions. At the moment, however, these rules are not consistent and in many jurisdictions, the rules' provisions, particularly those relating to public disclosure of investment managers' short sales and positions, generate significant concerns relating to frontrunning. Other provisions of these rules create operational and cost burdens similar to those discussed above.

We commend the Commission for its participation in several global efforts in this area, such as the International Organization of Securities Commission's ("IOSCO") efforts to address disparate short sale regulation across the globe. We urge the Commission to work with IOSCO and to coordinate actions where possible. Our increasingly global markets demand such cooperation among national regulators to avoid negative consequences of incongruent regulatory requirements and to

²¹ In adopting the interim temporary final rule, the Commission revised the data to be disclosed on Form SH. Filings no longer need to include the value of the securities sold short, the largest intraday short position, or the time of day of the largest intraday short position. The Institute strongly supports the elimination of these categories from the reporting requirements. As noted by the Commission, this information is extremely difficult to gather and burdensome to track.

²² The Release requests comment whether the rule should require the disclosure of information relating to short positions in financial instruments other than equity securities, such as options or single stock futures. The Institute strongly opposes such an expansion of the scope of the rule.

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encourage regulatory synergies as fund managers pursue an increasing cross-border presence in the interest of shareholders.

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We appreciate the opportunity to comment on the interim final temporary rule. If you have any questions regarding our comments or need additional information, please contact Heather Traeger at (202) 326-5920 or the undersigned at (202) 371-5408.

Sincerely,

/s/ Ari Burstein

Ari Burstein
Senior Counsel

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