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VIA E-MAIL

October 7, 2015

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-1090

Re: *Petition for Rulemaking Pursuant to Sections 10 and 13(f) of the Securities Exchange Act of 1934*

Dear Mr. Fields:

NYSE Group. Inc.,[1] along with the National Investor Relations Institute ("NIRI"),[2] hereby respectfully submits this petition for rulemaking to the U.S. Securities and Exchange Commission (the "Commission") pursuant to Rule 192(a) of the Commission's Rules of Practice, requesting that the Commission promulgate rulemaking pursuant to Sections 10 and 13(f) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which were amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), in order to require the periodic public disclosure of short-sale activities by institutional investment managers.

Consistent with our petition submitted on February 1, 2013, advocating for more timely mandatory reporting and disclosure of long positions under Section 13(f),[3] this petition for

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[1] NYSE Group, Inc. is the parent company of New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc., national securities exchanges registered under Section 6 of the Exchange Act. The three markets list the securities of more than 2,400 public companies that may benefit from Commission action on the matters discussed in this petition.

[2] NIRI is a professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. NIRI's more than 3,300 members represent over 1,600 publicly held companies and $9 trillion in stock market capitalization.

[3] *See* Petition for Rulemaking Under Section 13(f) of the Securities Exchange Act of 1934 (February 1, 2013), available at http://www.sec.gov/rules/petitions/2013/petn4-659.pdf (the "2013 Petition"). In the 2013 Petition, along with another interested party, the NYSE Group and NIRI advocated for the reduction of the 45-day reporting period allowed for mandatory reporting and disclosure of long positions under Section 13(f), in consideration of the original intent of the regulations and the "massive technological advances in recordkeeping and reporting systems" over the more than thirty years since it was originally adopted by Congress. The NYSE Group and NIRI continue to believe that it would be appropriate for the Commission to shorten the 45-day reporting period allowed for long-position reporting, and also believe that short-position and long-position disclosure should be subject to consistent reporting deadlines. Short-position disclosure should not be viewed

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rulemaking seeks to improve public disclosure standards and broaden the accessibility of relevant data to the investors and listed companies. More specifically, this petition for rulemaking requests that the Commission bring light to a less transparent and increasingly consequential corner of the securities market through instituting a short-sale activity reporting and disclosure regime applicable to institutional investment managers. It does not call on the Commission to impose additional restrictions on the practice of short selling.

We believe that the Commission's pending rulemaking under Sections 929X(a) and 984(b) of the Dodd-Frank Act provides an opportunity to implement meaningful public disclosure standards for short-sale activity, consistent with that currently required for institutional investment managers under Section 13(f) of the Exchange Act for long-position reporting. Indeed, we believe it is past time for the Commission to require short-position reporting at least to the same extent of long-position reporting.

Background

Short selling, or the sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller,[4] has long been a controversial practice.[5] Advocates for short selling frequently make the point that short selling promotes efficiency, competition and accurate price discovery, and strongly resist any attempts to impede or materially restrict short selling,[6] while critics charge that some forms of short selling, particularly "naked" short selling, facilitate illegal market manipulation to the detriment of investors and issuers.[7]

(continued….)

as a substitute for more timely long-positions reporting. All market participants would benefit from greater transparency into both long positions and short-sale activity.

4 See Rule 200(a) of Regulation SHO under the Exchange Act.

5 *See, e.g.*, Robert T. Wearing, "Are Short Sellers Stakeholders?" (Nov. 2006), available at http://repository.essex.ac.uk/10053/2/Are%20short%20sellers%20stakeholders.pdf ("Short selling has been recognised for hundreds of years. Staley (1997) points out that at the beginning of the seventeenth century, directors of the Dutch East India Company blamed short sellers for sharp declines in the price of the company's shares on the Amsterdam Exchange. The company's directors complained that 'bear attacks, which generally assume the form of short selling, have caused and continue to cause immeasurable damage to innocent stockholders, among whom one will find many widows and orphans' (quoted in Staley, 1997, pp. 235-236).").

6 *See, e.g.*, Letter of Roy J. Katzovicz, Chief Legal Officer, Pershing Square Capital Management, L.P. (June 19, 2009), commenting upon *Amendments to Regulation SHO*, Release No. 34-59748; File No. S7-08-09 (Apr. 10, 2009), available at http://www.sec.gov/comments/s7-08-09/s70809-3801.pdf.

7 *See, e.g.*, Letter of Jeffrey D. Morgan, President and CEO, National Investor Relations Institute, Vienna, Virginia (June 21, 2011), commenting upon *Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2)*, Release No. 34-64383; File No. 4-627 (May 3, 2011), available at https://www.sec.gov/comments/4-627/4627-134.pdf; and Letter of Edward D. Herlihy and Theodore A. Levin, Wachtell, Lipton, Rosen & Katz (Sept. 16, 2008), commenting upon *"Naked" Short Selling Anti-Fraud Rule*, Release No. 34-57511; File No. S7-08-08 (Mar. 17, 2008), available at http://www.sec.gov/comments/s7-20-08/s72008-605.pdf.

The Commission has on multiple occasions acknowledged the benefits of short selling,[8] even as the Commission has found it necessary to regulate short selling in order to address concerns raised by the practice, including the potential for short-sale activity to exacerbate market declines, driving down share prices and directly affecting individual issuers, as well as to curb abuses that have been associated with the practice, such as "naked" short selling and using shares purchased in a public offering to cover a short position.[9] In turn, Congress has signaled its concern over certain practices associated with short selling at various times, most recently in the Dodd-Frank Act.[10]

Specifically, Section 417(a)(2) of the Dodd-Frank Act directed the Commission's Division of Risk, Strategy, and Financial Innovation (now called the Division of Economic and Risk Analysis, the "Division") to conduct a study of the feasibility, benefits and costs of requiring the reporting of short-sale positions in publicly listed securities in real time, on a public basis or, in the alternative, only to the Commission and the Financial Industry Regulatory Authority. On June 5, 2014, the Division submitted its report (the "Dodd-Frank Study") to Congress,[11] explaining that it had studied the feasibility, benefits and costs of a real-time short position reporting regime, but that it had concluded that such a regime was unlikely "to be cost-effective when compared to the baseline."[12] However, the Division was careful to note that its study focused on real-time reporting only, and that it did

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[8] *E.g., Amendments to Regulation SHO and Rule 10a-1*, 71 FR 75068, 75069-75070 (Dec. 13, 2006) ("[s]hort selling provides the market with at least two important benefits: market liquidity and pricing efficiency. Market liquidity may be provided through short selling by market professionals, such as market makers (including specialists) and block positioners, to offset temporary imbalances in the buying and selling interest for securities. These short sales make stock available to purchasers and reduce the risk that the price paid by purchasers is artificially high because of a temporary contraction of selling interest. Short sellers covering their sales also may add to the buying interest of stock available to sellers.").

[9] *See* Staff of the Division of Economic and Risk Analysis, U.S. Securities and Exchange Commission, *Short Sale Position and Transaction Reporting* 7 (June 5, 2014), available at http://www.sec.gov/dera/reportspubs/special-studies/short-sale-position-and-transaction-reporting.pdf. For an archive of short sale-related Commission actions, s*ee also* https://www.sec.gov/spotlight/shortsales/shortsales_archive.shtml.

[10] For example, Section 929X(b) of the Dodd-Frank Act amended Section 9 of the Exchange Act to make it unlawful to effect a manipulative short sale of any security and provided the Commission with rulemaking authority to establish effective enforcement and remedies of such provision. 15 U.S.C. § 78i(d) (2012). Section 929X(c) of the Dodd-Frank Act amended Section 15 of the Exchange Act to provide customers of registered broker-dealers the right to refuse the use of their fully paid securities to be used in short sales, as well as the right to receive notice that they may be entitled to compensation in connection with such lending. 15 U.S.C. § 78o(d) (2012).

[11] Staff of the Division of Economic and Risk Analysis, U.S. Securities and Exchange Commission, *Short Sale Position and Transaction Reporting* (June 5, 2014), available at http://www.sec.gov/dera/reportspubs/special-studies/short-sale-position-and-transaction-reporting.pdf.

[12] *Id.* at ii.

> not address possible alternative reporting regimes outside the contemplation of Section 417(a)(2) of the [Dodd-Frank] Act. For example, the study [did] not analyze feasibility, benefits, and costs of the Commission adopting the daily (as opposed to real-time) position reporting required in a number of foreign jurisdictions, nor [did] the study address multiple definitions of 'real time.'[13]

Moreover, the Division specifically acknowledged the benefits of increased transparency and disclosure around short-selling activity, noting that "[m]ore precise and timely information about short selling could help the market adjust to new information faster, promoting price efficiency and hence capital formation."[14] Indeed, the Division noted that "many market participants indicate an interest in more public short selling data."[15]

1. *The Commission's Existing Authority Is Sufficient to Act on This Petition*

We believe that the Commission has ample authority to promulgate a short-position disclosure regime under the rulemaking authority provided by Section 929X(a) of the Dodd-Frank Act and the Commission's plenary rulemaking authority under Section 10 of the Exchange Act. Indeed, not only does the Commission possess adequate authority to require public short-position disclosure by institutional investment managers, but Congress, through Section 984(b) of the Dodd-Frank Act, has directed the Commission to use its authority to achieve this objective.

Section 929X(a) of the Dodd-Frank Act amended Section 13(f) of the Exchange Act to direct the Commission to "prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, *and any additional information determined by the Commission* following the end of the reporting period," providing that "[a]t a minimum, such public disclosure shall occur every month" (emphasis supplied).[16] Some commenters have suggested that the language and intent of Section 929X(a) is insufficient to justify that the Commission require institutional investment managers to publicly report their short positions.[17] In light of the intentionally broad language of Section 929X(a), we think this argument lacks merit. The fact that Congress used Section 929X(a) of the Dodd-Frank Act to amend Section 13(f) of the Exchange Act is instructive in this regard, since Section 13(f) already requires institutional investment managers to publicly

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[13] *Id.* at 2 (internal citations omitted).

[14] *Id.* at iv.

[15] *Id.* at 30.

[16] Pub. L. No. 111-203, § 929X(a) (codified as amended at 15 U.S.C. § 78m(f)(2) (2012)).

[17] *E.g.*, Letter from the Managed Funds Association (Feb. 7, 2011), commenting upon Section 929X of the Dodd-Frank Act, available at http://www.sec.gov/comments/df-title-ix/short-sale-disclosure/shortsaledisclosure-26.pdf

disclose their long positions. Had Congress intended to shield institutional investment managers from short-position reporting under Section 13(f), Congress would have said so.

Even without the rulemaking authority provided by Section 929X(a) of the Dodd-Frank Act, the Commission's plenary rulemaking authority under Section 10 of the Exchange Act already provides a sufficient basis to act on this petition. Under Section 10(a)(1), the Commission has authority to prescribe rules that are necessary or appropriate in the public interest or for the protection of investors concerning short sales, which the Commission has previously used to prescribe short-position reporting by institutional investment managers.[18] In addition, Section 984(b) of the Dodd-Frank Act, which supplements existing rulemaking authority under Section 10 of the Exchange Act, directs the Commission to "promulgate rules that are designed to increase the transparency of information available to brokers, dealers, *and investors*, with respect to the loan or borrowing of securities" (emphasis supplied).[19] Accordingly, not only does the Commission possess adequate authority to require public short-position disclosure by institutional investment managers, but Congress, through the Dodd-Frank Act, has directed the Commission to use its authority to achieve this objective.

We believe that the Commission's pending rulemaking under Sections 929X(a) and 984(b) of the Dodd-Frank Act provides the Commission an excellent opportunity to implement meaningful public disclosure standards for short-sale activity, which standards should include disclosure of the identities of institutional investment managers who employ the practice, their trading activity and open positions as of the reporting dates, similar to that currently required for institutional investment managers under Section 13(f) of the Exchange Act for long-position reporting. Consistent with the Commission's rulemaking efforts under the Dodd-Frank Act so far, the rules called for by this petition will provide for "increased transparency, better investor protections, and new regulatory tools."[20]

2. *Benefits of Short-Position Reporting Mirror Those of Long-Position Reporting*

One point frequently noted in commentary relating to short-sale regulatory proposals is the asymmetry of reporting requirements between long and short activity.[21] Under Section 13(f) of the Exchange Act, institutional investment managers must report long positions on Form 13F on a quarterly basis, within 45 days of the end each calendar quarter. Broadly, Section 13(f) requires disclosure of the value of securities that institutional investment managers own or over which they have investment discretion. This information is disseminated to the public in order to "report information useful in tracking institutional investor holdings in their investments,"

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[18] *Disclosure of Short Sales and Short Positions by Institutional Investment Managers*, Release No. 34-58785 (Oct. 15, 2008), available at https://www.sec.gov/rules/final/2008/34-58785.pdf.

[19] Pub. L. No. 111-203, § 984(b) (2010) (codified as amended at 15 U.S.C. 78j (2012)).

[20] Chair Mary Jo White, "Statement on the Anniversary of the Dodd-Frank Act" (July 16, 2015, available at http://www.sec.gov/news/statement/statement-on-the-anniversary-of-the-dodd-frank-act.html.

[21] *See* Dodd-Frank Study at 31, n. 198.

although the Commission has noted that "issuers, too, will find detail as to institutional investor holdings useful because much of their shareholder list may reflect holdings in 'street name' rather than beneficial ownership."[22]

Requiring institutional investment managers to provide similar information about short positions they hold would be just as informative for investors and issuers. If they applied to short-sale activity, the requirements of Section 13(f) would provide benefits akin to those that spurred the initial implementation of Section 13(f) long-position reporting. According to the Commission's 1979 release adopting Rule 13f-1 and related Form 13F pursuant to Section 13(f):

> The reporting system required by Section 13(f) is intended to create in the Commission a central repository of historical and current data about the investment activities of institutional investment managers, in order to improve the body of factual data available and to facilitate consideration of the influence and impact of institutional investment managers on the securities markets and the public policy implications of that influence.[23]

Given that short selling by institutional investment managers can have a similar "influence and impact . . . on the securities markets" as their long positions,[24] and given the self-evident "public policy implications of that influence,"[25] we believe that it is illogical to require comprehensive disclosure from institutional investment managers about one investment technique – their long portfolio positions – while requiring virtually no disclosure for the mirror investment technique – their short portfolio positions.

a. *Short-Position Reporting Would Benefit Investors.*

We believe that, overall, investors would benefit through augmentation, increased accuracy and increased visibility of the currently available data regarding short sales and positions in individual securities. Importantly, short-sale reporting would allow investors to more accurately evaluate market movements.

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[22] Form 13F, Securities and Exchange Commission, available at https://www.sec.gov/about/forms/form13f.pdf.

[23] Exchange Act Release No. 15461, 44 FR 3033, 3033-3034 (Jan. 5, 1979).

[24] *See, e.g.*, "SEC Approves Short Selling Restrictions" (Feb. 24, 2010), Securities and Exchange Commission ("'The rule is designed to preserve investor confidence and promote market efficiency, recognizing short selling can potentially have both a beneficial and a harmful impact on the market,' said SEC Chairman Mary L. Schapiro.").

[25] *See, e.g.*, Dodd-Frank Study at 9, n. 55 ("*See* Exchange Act Rel. No. 61595 (Feb. 26, 2010), 75 FR 11232 (Mar. 10, 2010) ('The Commission received more than 4,000 comments in response to the release, many of which expressed general concerns about the impact of short selling on markets. The comments are available at http://www.sec.gov/comments/s7-08-09/s70809.shtml').")

Currently, differences between long and short activity are sometimes cited to justify a disparate regulatory reporting approach. Long positions, it is argued, implicate issues of ownership and control. Yet any investor in a company that has been targeted by a determined short seller can testify to the impact of this activity on their ownership and control rights.[26]

Furthermore, disclosure of long and short activity is identical in a number of fundamental respects:

- the beneficial owners and issuers of the securities benefit from increased information,
- the motives and rationale behind the reporting investor's actions are relevant and of great interest to the beneficial owners and the issuers (albeit for different reasons), and
- disclosure provides additional information and context to all market participants and informs market movements.

In fact, in many contexts, information about short-sale activity may be more relevant to investors than information about long activity, given the light it can shed on questions of daily price movements and trading volumes. A closer alignment between the Commission's regulation of long- and short-position reporting would likely also have an effect on public perception, in that it could no longer be claimed that short sales receive some measure of special treatment.

Increasing disclosure regarding short-sale activity would help investors who today must struggle to draw inferences from the little data available which, beyond the information released strategically by the short sellers themselves, consists primarily of the short-sale data published by self-regulatory organizations. For example, an inference that a large short interest relative to a company's size signals the market's lack of confidence in the company might be misguided because the short position was undertaken in order to hedge an even larger long position (which might have been publicly disclosed under existing regulation) or, more likely, as part of a far more complex investment strategy by one or more sophisticated investors.

In addition, identification and disclosure of institutional investment managers who hold short positions in a given security would increase the contextual and supporting information available to investors.

b. *Short-Position Reporting Would Benefit Issuers.*

From the perspective of issuers, periodic reporting requirements and public disclosure of short-sale activity would improve their ability to analyze and understand market movements in

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[26] *See* Steven Davidoff Solomon, "Disclosure by Short-Sellers Would Improve Market Clarity," N.Y. TIMES (May 22, 2012), available at http://dealbook.nytimes.com/2012/05/22/disclosure-by-short-sellers-would-improve-market-clarity/; and "Ackman, Herbalife and Celebrity Short-Sellers," N.Y. TIMES (Jan. 1, 2013), available at http://dealbook.nytimes.com/2013/01/01/ackman-herbalife-and-celebrity-short-sellers/.

their securities. Many public companies currently utilize available short-sale data to evaluate the market outlook and anticipate developments with respect to their securities (including potentially malicious rumors and false news).[27] With the data currently published by self-regulatory organizations,[28] issuers are able to discern the aggregate quantity of short positions in their securities, but receive none of the information that might provide valuable additional insight. Public companies are unable to engage in a dialogue with short sellers unless the short sellers choose to surface publicly – and even then, the short seller may act in a manner that, at best, does little to address fundamental questions of overvaluation or, at worst, reinforces negative perceptions by appearing to reward the short seller at the expense of other investors.[29]

c. *Short-Position Reporting Would Not Unduly Prejudice Institutional Investment Managers.*

Public disclosure of short-sale positions has frequently been described as a threat to proprietary investment strategies, which might allow for copycat traders and otherwise harm the interests of institutional investment managers.[30] With appropriately designed rules, however, these concerns could be addressed. Confidential investment strategies could be protected through the use of reporting thresholds, either as a percentage of existing market capitalization, a percentage of the investor's portfolio or as a flat value threshold. Likewise, incorporating a delay period between reporting and public disclosure would protect the timeliness of investment decisions and reduce the threat and efficacy of any copycat investment strategies.[31] Lastly, under appropriate circumstances, an institutional investment manager could take advantage of the Commission's available Freedom of Information Act ("FOIA") exemptions.[32]

A necessary consideration with respect to any proposed regulation is the increased compliance burden on those affected. However, aside from a general aversion to increased regulatory requirements, a closer alignment of the short-sale reporting regime with the existing long-position reporting requirements under Section 13(f) of the Exchange Act could minimize any additional burden on reporting investors. We believe that the benefits for investors and public companies of public disclosure of short-sale positions would outweigh the additional compliance burden.

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27 Dodd-Frank Study at 18.

28 *See* Securities and Exchange Commission, "Short Sale Volume and Transaction Data," (Apr. 20, 2015), available at http://www.sec.gov/answers/shortsalevolume.htm.

29 The ongoing dispute between investor William A. Ackman and Herbalife is a useful example. *See, e.g.*, DealBook, *Dueling Claims From Herbalife and Hedge Fund*, N.Y. TIMES (June 2, 2015), available at http://www.nytimes.com/interactive/2015/06/02/business/dealbook/claims-from-herbalife-and-hedge-fund.html.

30 *See* Dodd-Frank Study at 80.

31 *Id.* at 30, note 192.

32 *See* Securities and Exchange Commission, "The Office of FOIA Services: What It Is, What It Does" (May 21, 2013), available at http://www.sec.gov/foia.shtml.

Petition for Rulemaking

For the above reasons, we petition the Commission to promulgate rulemaking pursuant to its authority under Sections 10 and 13(f) of the Exchange Act that provides for a short-sale activity reporting and disclosure regime applicable to institutional investment managers and consistent with existing Commission regulations under Section 13(f) regarding the reporting of long positions in listed securities.

Effective rulemaking should:

- address the disparity in long-position and short-position reporting requirements,
- define "short position" broadly to include not only short sales, but also derivative and similar transactions having the same economic impact,
- provide for public disclosure of individual institutional investment managers and their positions,
- broaden the accessibility of relevant data to investors and listed companies, and
- maintain the benefits of short-sale activity to market efficiency.

In our view, the appropriate reporting requirements for short-sale activity would involve:

- a periodic reporting requirement for institutional investment managers currently required to report under Section 13(f), with reporting periods to be no longer than one quarter,
- short-sale transaction and position information for the securities specified under Section 13(f),
- reporting thresholds, determined either by reference to a flat transaction value, a percentage of the issuer's market capitalization or a percentage of the reporting investor's portfolio,
- such exemptions as the Commission finds appropriate, and
- public disclosure of the reported information, including the institutional investment manager's identity, on no more than a two-week delayed basis,[33] subject to available exemptions under FOIA, all as determined by the judgment of the Commission.

[33] The NYSE Group and NIRI believe that short-position and long-position disclosure should be subject to consistent reporting deadlines. *See* note 3, *supra.*

We believe that the concerns of Congress embodied in the passage of the Dodd-Frank Act provisions discussed above, as well as the Commission's current and ongoing regulation of short-sale activity, together establish a reasonable basis that the reporting and public disclosure as proposed herein is consistent with, and would further, the aims of existing regulation and advance the public interest. We agree that a final decision on the appropriate reporting requirements under Sections 10 and 13(f) of the Exchange Act should be made by the Commission after considering the comments of investors, public companies, other market participants and the general public.

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Please do not hesitate to contact the undersigned should you have any questions regarding this petition.

Thank you for your consideration.

Respectfully yours,

Elizabeth King
Corporate Secretary
NYSE Group, Inc.

James M. Cudahy, CAE
President and CEO
National Investor Relations Institute