

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64383; File No. 4-627]

### Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2)

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Request for comment.

**SUMMARY:** The Securities and Exchange Commission (“Commission”), on behalf of its Division of Risk, Strategy, and Financial Innovation (“Division”), is requesting public comment with regard to studies required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of the feasibility, benefits, and costs of requiring reporting in real time, either publicly or, in the alternative, only to the Commission and the Financial Industry Regulatory Authority (“FINRA”), of short sale positions of publicly listed securities, and of conducting a voluntary pilot program in which public companies would agree to have all trades of their shares marked “long,” “short,” “market maker short,” “buy,” or “buy-to-cover,” and reported as such in real time through the Consolidated Tape.

**DATES:** Comments should be received on or before June 23, 2011.

**ADDRESSES:** Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/other.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number 4-627 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. All submissions should refer to File Number 4-627. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov>). Comments will also be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Amy Edwards, Assistant Director, Bruce Kraus, Co-Chief Counsel, Lillian Hagen, Special Counsel, Sandra Mortal, Financial Economist, Division of Risk, Strategy, and Financial Innovation, at (202) 551-6655, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-4977.

**DISCUSSION:**

Under Section 417(a)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act),<sup>1</sup> the Commission's Division of Risk, Strategy, and Financial Innovation is required to conduct studies of the feasibility, benefits, and costs of (A) requiring reporting in real time, publicly or, in the alternative, only to the Commission and the Financial Industry Regulatory Authority, short sale positions in publicly listed securities, and (B) conducting a voluntary pilot program in which public companies could agree to have sales of their shares marked "long," "short," or "market maker short," and purchases of their shares

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<sup>1</sup> Pub. L. No. 111-203 (July 21, 2010).

marked “buy” or “buy-to-cover,” and reported as such in real time through the Consolidated Tape.<sup>2</sup>

In the Division’s estimation, data made public by certain self-regulatory organizations (“SROs”) indicate that orders marked “short” under current regulations account for nearly 50% of listed equity share volume.<sup>3</sup> Short selling involves a sale of a security that the seller does not own or a sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller.<sup>4</sup> Typically, the short seller later closes out the position by purchasing equivalent securities on the open market and returning the security to the lender.<sup>5</sup> In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of an economic long position in the same security or in a related security.<sup>6</sup>

To better inform the study required by Section 417(a)(2) of the Dodd-Frank Act, the Commission, on behalf of the Division, seeks comment on both the existing uses of short selling in securities markets and the adequacy or inadequacy of currently available information

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<sup>2</sup> The term “Consolidated Tape,” as used throughout this release, refers to the current reporting systems for transactions in all exchange-listed stocks and ETFs. These systems include Tapes A and B of the Consolidated Tape Plan and Tape C of the Unlisted Trading Privileges or “UTP” Plan. Trades in New York Stock Exchange (“NYSE”) -listed securities are reported to Tape A; trades in NYSE-Amex, NYSE-Arca, and regional exchange-listed securities are reported to Tape B; and trades in NASDAQ-listed securities are reported to Tape C. Transactions in unlisted equities, options, or non-equity securities are not currently reported to the Consolidated Tape. For more information see <http://www.nyxdata.com/cta> and <http://www.utplan.com/>.

<sup>3</sup> This estimate was made by the Division based on short selling volume data for June 2010 made available by SROs. This estimate is consistent with estimates for prior months, and the short percentage varied little from day to day. The underlying data can be found at hyperlinks available at <http://www.sec.gov/answers/shortsalevolume.htm>, and have been provided since August 2009 by the SROs listed therein. As indicated on these hyperlinks, “short selling volume” is the volume of executed orders marked “short” or “short exempt” pursuant to Rule 200(g) of Regulation SHO (which requires broker-dealers to mark all equity sell orders as either “long,” “short,” or “short-exempt”). See 17 CFR 242.200(g). Under current rules, these order marks are not submitted to or reported on the Consolidated Tape, but are maintained as part of broker-dealers’ books and records pursuant to Rules 17a-3 and 17a-4. See 17 CFR 240.17a-3(a)(5)-(7) and 240.17a-4(b)(8).

<sup>4</sup> See 17 CFR 242.200(a).

<sup>5</sup> See Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (“Regulation SHO Adopting Release”), available at <http://www.sec.gov/rules/final/34-50103.htm>.

<sup>6</sup> See, e.g., *id.*

regarding short sales, as well as comment on the likely effect of these possible future reporting regimes on the securities markets, including their feasibility, benefits, and costs.

The Commission is required to submit a report on the results of these studies to Congress no later than July 21, 2011. All interested parties are invited to submit their views, in writing. Empirical evidence relevant to any part of the Division's study is expressly requested.

## **I. Baseline**

Certain information regarding short sales is currently available to the public. This information includes the total "short interest" in each listed security (*i.e.*, total shares in short positions in that security in all customer and proprietary firm accounts of FINRA member firms), which has been reported twice each month since 2007,<sup>7</sup> as well as data made available more recently on the short selling volume for each listed equity security that is reported on a daily basis,<sup>8</sup> and trade-by-trade short sale transaction data that is released on a delayed (no more than 30 days after the end of the month) basis.<sup>9</sup> Additionally, certain data vendors offer stock lending data, including stock loan volume, lending costs, and the percentage of available stock out on loan, which some market commentators have used as measures of short selling.<sup>10</sup> Further, Section 929X(a) of the Dodd-Frank Act amended Section 13(f) of the Securities Exchange Act

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<sup>7</sup> See FINRA Rule 4560. FINRA member firms must report total shares in short positions in all of their customer and proprietary firm accounts in all equity securities twice per month through FINRA's web-based Regulation Filing Application ("RFA") system. The short interest data in listed stocks is released by exchanges that list those stocks. Further, FINRA releases the short interest data in unlisted stocks.

<sup>8</sup> See *supra* note 3 for more information on this data and how to obtain it.

<sup>9</sup> These data sets include one observation for each execution involving a short sale and typically date from August 2009. These data sets can be found at hyperlinks available at <http://www.sec.gov/answers/shortsalevolume.htm>.

<sup>10</sup> Data Explorers and SunGard, for example, provide data on securities lending to clients. As some commentators have noted, stock lending facilitates short selling (see, e.g., Speech by Chester Spatt, available at <http://www.sec.gov/news/speech/2007/spch042007css.htm>). As noted above, a number of data vendors sell information as to shares that have been loaned to other investors. Among other things, this information may include volume of loans, lending costs, and the percentage of available stock out on loan. This data offers indirect evidence of short selling, and some research has used stock lending data as a proxy for actual short sales. See, e.g., Oliver Wyman, "The effects of short selling public disclosure of individual positions on equity markets" (Feb. 2011), available at [http://www.oliverwyman.com/ow/pdf\\_files/OW\\_EN\\_FS\\_Publ\\_2011\\_Short\\_Selling\\_Public\\_Disclosure\\_Equity\\_Markets.pdf](http://www.oliverwyman.com/ow/pdf_files/OW_EN_FS_Publ_2011_Short_Selling_Public_Disclosure_Equity_Markets.pdf).

of 1934 (“Exchange Act”) to require the Commission to adopt rules requiring monthly (or potentially more frequent) public short sale disclosures by security, including the “aggregate amount of the number of short sales of each security, and any additional information determined by the Commission.”<sup>11</sup>

- Q1. How are currently available data used by issuers, market participants, and others (such as SROs, data vendors, media, analysts, and academics) today? How widely distributed are currently available data? Do costs or other factors limit access to currently available data? Are there other important sources of information as to short sales and short sale positions in addition to those mentioned above?
- Q2. The Division understands that equity market makers rely on short selling to facilitate customer buy orders and to ensure that they can maintain two-sided markets without carrying large risky positions. The Division also understands that option market makers frequently sell short to hedge positions taken in the course of market making activities.<sup>12</sup> Why else might market makers sell short? How much of all short selling is accounted for by bona fide market making? Do market makers sell short for purposes other than bona fide market making?<sup>13</sup> Are there ways in which short sales by market makers and other market participants performing similar roles or functions (but that are not subject to some or all of the requirements applicable to market makers) could be viewed as problematic?

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<sup>11</sup> See Exchange Act Section 13(f)(2), as amended.

<sup>12</sup> See, e.g., Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690 (Oct. 17, 2008).

<sup>13</sup> In adopting Regulation SHO, the Commission discussed several activities that are not bona fide market making. Specifically, the Commission stated bona fide market making: (1) “does not include activity that is related to speculative selling strategies or investment purposes of the broker-dealer and is disproportionate to the usual market making patterns or practices of the broker-dealer in that security”; (2) “where a market maker posts continually at or near the best offer, but does not also post at or near the best bid, the market maker’s activities would not generally qualify as bona fide market making for purposes of the exception”; and (3) “does not include transactions whereby a market maker enters into an arrangement with another broker-dealer or customer in an attempt to use the market maker’s exception for the purpose of avoiding compliance with Rule 203(b)(1) by the other broker-dealer or customer.” Exchange Act Release No. 50103, 69 FR 48008, 48015 (Aug. 6, 2004) (citations omitted).

Q3. The Commission requests comment on the ways and the extent to which, if any, commenters believe that short selling has been associated with abusive market practices, such as “bear raids” where an equity security is sold short in an effort to drive down the security’s price by creating an imbalance of sell-side interest?<sup>14</sup> In addition, the Commission requests comment on the ways and extent to which, if any, commenters believe trade-based manipulation (i.e., manipulating without a corporate action or spreading false information)<sup>15</sup> using short sales is possible? Would greater transparency of short positions or short sale transactions help to better deter or prevent such abuses, or assist in additional appropriate actions to prevent them? If so, what new disclosures should be required?

## II. Position Reporting

Section 417(a)(2)(A) of the Dodd-Frank Act requires the Division to conduct a study of short “position” reporting; the term “position” is not defined in the Exchange Act or in Section 417 of the Dodd-Frank Act. For purposes of this study, the Division plans to use “position” to refer to outstanding holdings at a point in time. Further, Section 417 of the Dodd-Frank Act does not specify a particular level of aggregation and netting, address whose positions would be reported, or indicate whether derivatives or other ways to obtain economic exposure to a stock are covered and existing U.S. regulatory definitions vary in this dimension.<sup>16</sup> “Economic exposure” as used by the Division in this request for comment refers to any financial interest in a

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<sup>14</sup> See, e.g., Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232, 11235 (Mar. 10, 2010).

<sup>15</sup> For a discussion of the theory regarding trade based manipulation, See Allen, F. and D. Gale, “Stock Price Manipulation,” (1992) *Review of Financial Studies*, 5(3), 503-529.

<sup>16</sup> FINRA defines a short position as resulting from “short sales” as that term is defined in Rule 200(a) of Regulation SHO, but captures the position as of a settlement date as opposed to a trading date. See FINRA Rule 4560. The Commission defined a short selling position in former Rule 10a3-T as “the aggregate gross short sales of an issuer’s Section 13(f) securities (excluding options), less purchases to close out a short sale in the same issuer,” and stated that “the Form SH short position is not net of long position.” See Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008). The reporting requirements of Form SH were in effect from September 22, 2008 to August 1, 2009.

company, however acquired. For example, an investor may have economic exposure to a company by owning the stock itself, or through ownership of an index or of derivatives. Likewise, the short sale position reporting requirements in foreign jurisdictions, implemented or proposed, differ from one another in a number of areas with respect to the definition of “position,” including inclusion or exclusion of derivatives in the short interest calculation, and reporting of net or gross position. For example, the short interest calculation in Australia<sup>17</sup> and Hong Kong<sup>18</sup> does not or would not include derivatives, whereas the U.K.<sup>19</sup> and a proposal by the European Union (the “E.U. Proposal”)<sup>20</sup> both include or would include them. In Australia,<sup>21</sup> the E.U. Proposal,<sup>22</sup> and the U.K.,<sup>23</sup> the reportable position is or would be the *net* short position, while in Hong Kong, long interest and short positions are calculated separately and are not netted.<sup>24</sup>

Q4. Would real time reporting of the short positions of all investors, intermediaries, and market participants be feasible, and if so, in what ways would it be beneficial? What problems would it address? What would be any reasons, in terms of benefits and costs, for treating short sale position reporting differently than long position reporting? Would “real time” reporting be necessary to achieve these benefits, or is “prompt” updating for

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<sup>17</sup> See Corporations Regulations 2001 (Commonwealth), regulation 7.9.99(2) (Australia), indicating that the short interest calculation includes securities, managed investment products, and sovereign debentures, stocks or bonds.

<sup>18</sup> See Hong Kong Securities and Futures Commission, Consultation Conclusions on Increasing Short Position Transparency (Mar. 2, 2010), available at <http://www.sfc.hk/sfc/doc/EN/speeches/consult/consultationconclusion2march2010english.pdf>.

<sup>19</sup> Short Selling Rules, 2010, FINMAR 2010 (U.K.), ¶ 2.3.6.

<sup>20</sup> The Committee for European Securities Regulators (“CESR”) proposed to require that positions be netted at the legal entity level and include all financial instruments that create economic exposure to an issue. See CESR, Model for a Pan-European Short Selling Disclosure Regime, CESR/10-088 (Mar. 2010) (“E.U. Model”), at 9.

<sup>21</sup> See Corporations Regulations 2001 regulation 7.9.99 (Australia), which states that “a short position is short sales net of long positions.”

<sup>22</sup> E.U. Model, at 9.

<sup>23</sup> FINMAR (U.K.), at ¶ 2.3.2.

<sup>24</sup> See Hong Kong Securities and Futures Commission, Consultation Conclusions on Increasing Short Position Transparency (Mar. 2, 2010), available at <http://www.sfc.hk/sfc/doc/EN/speeches/consult/consultationconclusion2march2010english.pdf>.

material changes in the short position (such as Schedule 13D updating requirements) sufficient?<sup>25</sup> If real time reporting would be beneficial, should “real time” be defined as “continuously updated as soon as practicable,” or as frequent “snapshots” of short positions throughout the trading day? Should “as soon as practicable” be defined and, if so, how? If frequent short sale position reporting of some kind would be beneficial, how frequently should such reports be made in order to realize those benefits? Would real time data be more or less accurate than data reported on a delay? Please explain why or why not.

Q5. Who would be likely to use real time short position data, and how? Would the short sale position data be too voluminous to be used directly by investors? Could such data help to detect more easily, better deter, or better prevent short selling abuses? Would market commentators and others use real time short position data to help the public better understand the U.S. securities markets? Would users of real time short position data be able to derive reasonably clear interpretations of the data in real time, and, to the extent they could not, how would the costs and benefits of any reporting regime be affected? Would real time data on short positions help or hinder long-term investors in making “efficient investments?”<sup>26</sup>

Q6. How would real time data on short positions affect the behavior of short sellers and other investors? Would it affect abusive short selling, in particular? To what extent, if any,

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<sup>25</sup> Exchange Act Rule 13d-2 requires that if there is any material change in the facts set forth in a Schedule 13D, including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned, the person required to file the statement must promptly file an amendment disclosing the change. See 17 CFR 240.13d-2.

<sup>26</sup> See, e.g., Biagio Bossone, Sandeep Mahajan, and Farah Zahir, *Financial Infrastructure, Group Interests, and Capital Formation* (International Monetary Fund, Working Paper 03/24, 2003), available at <http://www.imf.org/external/pubs/ft/wp/2003/wp0324.pdf>. Efficient investments optimize an investor’s utility when trading off expected return and risk. If investors can more accurately estimate expected returns and risk, then they are better able to make efficient investments. For a summary of the underlying theory, see Bodie, Kane, and Marcus *Investments*, 7<sup>th</sup> ed. Chapters 8, 11, and 12.



would such data deter non-abusive short selling? For example, would such data reveal the trading strategies of non-abusive short sellers? Could the availability of such data create new opportunities for unfair or otherwise abusive market practices, such as bear raids or short squeezes? Could real time data on short positions lead to copycat trading?<sup>27</sup> How would real time data on short positions affect investor confidence?

- Q7. How would real time data on short positions affect liquidity, volatility, price efficiency, competition, and capital formation? Would real time short position reporting affect equity-related securities markets, such as option or other derivative markets, convertible bond or other debt markets? If so, in what ways?
- Q8. How should “position” be defined to help ensure any short sale position reports would be useful in detecting and deterring abusive short sale practices? Should “position” be defined differently to accomplish another purpose? If so, how, and what purpose would such a definition help accomplish? Would there be a trade-off between minimizing incremental implementation costs, above the cost of existing short reporting systems and procedures, in the context of a short position reporting regime and its utility? For maximum utility, should short positions be reported gross, or net of long positions, or in both ways? Should short positions include derivatives and index components? Should short positions be the net economic exposure to a stock across all instruments? Should short positions be defined as in former Rule 10a3-T, in which “the Form SH short position is not net of long position?”<sup>28</sup> In the case of broker-dealers, should position

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<sup>27</sup> Copycat trading is a form of “herd behavior,” which has been described as “[t]he tendency of investors, like herd animals, to follow the group. Such conformity can give rise to bubbles in individual securities and market sectors.” Library of Congress, Federal Research Division, Annotated Bibliography on the Behavioral Characteristics of U.S. Investors (Aug. 2010), available at [http://www.loc.gov/rr/frd/pdf-files/SEC\\_Annotated-Bibliography.pdf](http://www.loc.gov/rr/frd/pdf-files/SEC_Annotated-Bibliography.pdf).

<sup>28</sup> See *supra* note 16.

reporting be based on existing Regulation SHO aggregation units within broker-dealers,<sup>29</sup> for the broker-dealer taken as a whole, or for its holding company? Please describe the feasibility of any incremental changes to the existing short sale reporting systems that would be necessary to report short sale “positions.” Would any potential definitions of short positions be infeasible in real time?

- Q9. What would be the benefits and costs of short position reporting if “position” was defined to mean short interest,<sup>30</sup> which would be the aggregate number of shares short in each stock? Would real time public reporting of aggregate short interest be feasible? If so, what problems would it address, and how (and by whom) would this data be used? Should the position reporting to be examined in the Division’s study be more comprehensive than the current bi-monthly short interest reporting? For example, “arranged financing” (which would include borrowing from a foreign bank or affiliate to cover short positions) is not currently included in short interest. What would be the impact of including arranged financing in a definition of short position?
- Q10. What would be the feasibility, benefits, and costs of real time short position reporting to regulators only, and not to the public? What would the benefits and costs be if this real time reporting information were to be made public on a delayed basis? What length of delay might best balance any benefits and costs?
- Q11. Who would be in a position to report short positions in real time? Would broker-dealers be able to accurately report customer short positions in real time? Would anyone else be better suited? Would short sellers themselves be equipped to report their own short positions in real time? Would anyone but the short seller be in a position to report the

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<sup>29</sup> Rule 200(f) of Regulation SHO permits a broker-dealer, under certain conditions, to calculate its long or short position by independent trading-unit, rather than on a firm-wide basis. 17 CFR 242.200(f).

<sup>30</sup> See *supra* note 7.

short seller's short position, whether or not the short position was defined as the short seller's economic position including derivatives? What would be the feasibility of adapting the technology infrastructure that supports existing reporting requirements to support real time short position reporting?

- Q12. Who would be in a position to collect and disseminate short positions in real time? Would it be feasible for listing exchanges to collect and disseminate this information? Would a consolidator be better suited to collect this information? What would be the feasibility of adapting the technology infrastructure supporting existing reporting requirements to support real time short position collection and dissemination? Would short position data developed from existing systems be less meaningful than data from a new system designed for this purpose? Why or why not?
- Q13. What would be the direct, quantifiable costs of short position reporting for those compiling, reporting, collecting, or disseminating the data? Please differentiate implementation costs from ongoing costs and include opportunity costs. How feasible would it be for brokers, exchanges, and others to create or modify a reporting and dissemination system? What would be the particular technological challenges faced in creating or modifying a reporting and dissemination system? Responses based on the costs of implementing the 2007 modifications to short interest reporting<sup>31</sup> or the 2008 implementation of Form SH<sup>32</sup> are particularly requested.
- Q14. How would the establishment of a significant reporting threshold, which would limit short position reporting requirements to holders of significant net short positions, affect

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<sup>31</sup> See *supra* note 7.

<sup>32</sup> This requirement was instituted via three emergency orders (dated Sep. 18, 2008, Sep. 21, 2008, and Oct. 2, 2008), which implemented Exchange Act Rule 10a-3T (See Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008)). Comments are available at <http://www.sec.gov/comments/s7-31-08/s73108.shtml>.

costs and the utility of the short position information? If reporting thresholds would be useful, would thresholds at the 5% level used under Section 13(g) of the Exchange Act or the 0.25% level used in former Form SH<sup>33</sup> be appropriate, or would a lower threshold, such as that used in the U.K. model, be preferable?<sup>34</sup> Or would a higher threshold be appropriate? Please explain why or why not. Would thresholds (computed on a net basis) at U.K. levels (or the lower levels being contemplated by the E.U.)<sup>35</sup> capture ordinary course, bona fide market maker positions, or would they tend generally to capture only the positions of investors taking a view as to the stock's future price direction? Would a general exemption from position reporting (or public position reporting) for market makers be appropriate? Why or why not?

Q15. How should experiences with short sale position reporting regimes in foreign jurisdictions<sup>36</sup> inform the analysis of feasibility, benefits, and costs? How relevant are any analyses of other reporting regimes to the Division's study?<sup>37</sup> The Commission requests information on any relevant studies not cited in this request for comment.

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<sup>33</sup> Certain institutional investment managers were required to report short sales of certain securities on former Form SH unless the short position constituted less than 0.25% of the class of shares and had a fair market value of less than \$10,000,000. See Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008).

<sup>34</sup> Two types of short positions must be publicly disclosed in the U.K. A net short position of 0.25% and above of issued capital in a U.K. company involved in a rights issue must be disclosed. In addition, a net short position in a U.K. financial sector company must be disclosed initially when such interest exceeds 0.25% of total share capital, and on an ongoing basis when the position exceeds or falls below 0.25%, 0.35%, 0.45% and 0.55% and each 0.1% threshold thereafter. See FINMAR §§ 2.2.1, 2.1.2. See also U.K. Financial Services Authority, "Implementing Aspects of the Financial Services Act 2010" (2010), at 2.13.

<sup>35</sup> The E.U. Model would require reporting to regulators when short interest exceeds 0.2% of issued share capital, and reporting to the public when it exceeds 0.5% of issued share capital. See E.U. Model, at 8-9.

<sup>36</sup> See supra notes 17-24, 34, and 35 for examples.

<sup>37</sup> See Oliver Wyman Report, supra note 10, and also U.K. Financial Services Authority, Short selling: Feedback on DP09/1, 09/4 (Oct. 2009), available at [http://www.fsa.gov.uk/pubs/discussion/fs09\\_04.pdf](http://www.fsa.gov.uk/pubs/discussion/fs09_04.pdf); European Commission, Impact Assessment on the Proposal for a Regulation of the European Parliament and of the Council on Short Selling and Certain Aspects of Credit Default Swaps, SEC(2010) 1055 (Sep. 15, 2010), available at [http://ec.europa.eu/internal\\_market/securities/docs/short\\_selling/20100915\\_impact\\_assessment\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/short_selling/20100915_impact_assessment_en.pdf).

### III. Transaction Reporting

The Commission requests comment, on behalf of the Division, on the feasibility, benefits, and costs of the Consolidated Tape collecting and disseminating certain transaction marks. Specifically, Section 417(a)(2)(B) of the Dodd-Frank Act requires the Division to study the feasibility, benefits, and costs of conducting a voluntary pilot program in which public companies would agree to have all trades of their shares marked “long,” “short,” and/or “market maker short” (for the sell portion(s) of the trade), and “buy” and/or “buy to cover” (for the buy portion(s) of the trade) and reported in real time through the Consolidated Tape.

Q16. What benefits, costs, or unintended consequences would flow from adding these transaction marks to the Consolidated Tape? Who would use these marks, and how? Would data from the Consolidated Tape be accessible to the market participants who are most interested in short selling information? Would the Consolidated Tape data be too voluminous to be used directly by interested market participants? How would the Consolidated Tape marks affect the behavior of short sellers and other investors? Would Consolidated Tape marks help or hinder long-term investors in making “efficient investments?”<sup>38</sup> Would market commentators and others use Consolidated Tape marks to help the public better understand markets? Could such marks help to better detect, deter, or prevent identified short selling abuses? Alternatively, could such marks themselves present opportunities for alleged unfair or otherwise abusive market practices, such as bear raids or short squeezes? Would real time Consolidated Tape marks lead to copycat trading? How would Consolidated Tape marks affect investor confidence?

Q17. Please discuss the feasibility, benefits, and costs related to the “short sale,” “market maker short,” and “buy-to-cover” marks specifically, and the effects of any choices that

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<sup>38</sup> See *supra* note 26.

would be made when defining such terms. Would there be a trade-off between defining the trades that would be subject to these marks for maximum utility and accuracy to investors, and minimizing implementation costs by building on existing definitions and order marking infrastructure?<sup>39</sup> If so, how should the tension between these goals be best resolved? Would there be any other potential issues associated with the accuracy or clarity of Consolidated Tape marks? Would the Consolidated Tape marks present possibilities for misinterpretation of the data that could impact any benefits and costs?

Q18. How would any additions to Consolidated Tape marks affect liquidity, volatility, price efficiency, competition, and capital formation? To what extent, if any, would such data deter short selling activity not associated with abusive market practices, but that enhances market quality, for example, by revealing trading strategies? What are the consequences of such deterrence? Would any additions to Consolidated Tape marks have consequences (including benefits or costs) for equity-related securities markets, such as options or other derivative markets, convertible bond or other debt markets? If so, please explain. What would the feasibility, benefits, and costs be if this real time reporting information were to be made public on a delayed basis? What length of delay might best balance any benefits and costs?

Q19. What would be the direct, quantifiable costs of adding the additional fields to the Consolidated Tape to support new marks? Please differentiate implementation costs from ongoing costs and include opportunity costs. How feasible would it be for brokers, exchanges, and others to modify order management systems, or other systems, for these marks? What would be the potential technological challenges faced in implementing these marks? Would the Consolidated Tape bear significant implementation or ongoing

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<sup>39</sup> See *supra* note 3.

costs? For example, would capacity requirements be significantly higher? Would vendors and others who receive feeds from the Consolidated Tape bear significant implementation or ongoing costs? Responses based on the costs of implementing Regulation SHO Rule 201,<sup>40</sup> Regulation NMS,<sup>41</sup> and Form SH<sup>42</sup> are particularly requested.

- Q20. What would be the benefits and costs (including the direct, quantifiable costs) of conducting a pilot for the Consolidated Tape marking? Would a pilot for Consolidated Tape marking be feasible? Would the direct, quantifiable costs of implementing and maintaining a pilot be any less, or more, than those of implementing and maintaining Consolidated Tape marking on all listed issuers? Would market participants be likely to behave differently during a pilot, for example by hesitating to develop new trading strategies?<sup>43</sup>
- Q21. What would be the benefits and costs of the *voluntary* component of the pilot? What types of issuers would likely volunteer to participate in a pilot? How would this self-selection affect the usefulness of any data derived from a pilot? Are there other consequences from a *voluntary* pilot? To maximize the utility of any pilot, should the pilot be designed to limit participation in a way that facilitates comparisons of trading in pilot companies and trading in non-pilot companies? If participation should be limited,

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<sup>40</sup> 17 CFR 242.201.

<sup>41</sup> 17 CFR 242.600 *et seq.*

<sup>42</sup> See *supra* note 33.

<sup>43</sup> For example, in 2004, the Commission adopted Rule 202T, which provided for the temporary suspension of the short sale uptick rule in certain securities so that the Commission could study trading behavior in the absence of a price test. See Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004). In the view of Division Staff, Boehmer, Jones, and Zhang provide evidence suggesting that trading behavior may not have completely adjusted to the Regulation SHO Pilot. See Boehmer, Jones, and Zhang, “Unshackling Short Sellers: The Repeal of the Uptick Rule” (2008), available at <http://www.gsb.columbia.edu/mygsb/faculty/research/pubfiles/3231/UptickRepealDec11.pdf>.

how should the Commission determine which volunteers to include or exclude from the pilot?

- Q22. How should experiences with transaction marking regimes in foreign jurisdictions<sup>44</sup> inform analysis of the feasibility, benefits, and costs? Are there any analyses of transaction marking regimes that are relevant to the Division's study?
- Q23. To what extent would Consolidated Tape marks be a substitute or compliment to real time short position reporting? How would the benefits and costs of any Consolidated Tape marks be impacted if real time position reporting existed and vice versa?

By the Commission.

Elizabeth M. Murphy  
Secretary

Dated: May 3, 2011

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<sup>44</sup> Several foreign jurisdictions have short sale marking requirements in place including Australia (Australian Securities and Investment Commission , Regulatory Guide, RG 196.12 (April 2010)), Canada (Universal Market Integrity Rules, Rule 3.2), Hong Kong (Hong Kong Exchange Rules, Eleventh Schedule, Rule 5), and Japan (Japan Financial Services Agency, "FSA Extends Temporary Measures Regarding Restrictions on Short Selling and Purchases of Own Stocks by Listed Companies" (Jan. 21, 2011) (effective until Apr. 30, 2011)).