

SEC Reporting & Compliance Alert

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SEC Proposes Short Sale Disclosure Rules

On February 25, 2022, the U.S. Securities and Exchange Commission (SEC) announced that it unanimously voted to approve proposed changes requiring certain institutional investment managers¹ (managers) to report short sale-related information to the SEC.

Proposed Rule 13f-2 under the Securities Exchange Act of 1934 (Exchange Act) would require managers exercising investment discretion over short positions exceeding certain thresholds to file with the SEC, on a nonpublic basis, new Form SHO to report certain information relating to month-end short positions and certain related daily activity. The SEC would then take the details provided in Form SHO and publish aggregate information on large short positions related to individual equity securities and net activity during the applicable month. This information is intended to supplement the current short sale transaction information provided by major U.S. stock exchanges and the Financial Industry Regulatory Agency (FINRA).

Ultimately, Proposed Rule 13f-2 seeks to address Congress' directive under Section 929X of the Dodd-Frank Act to provide more transparency of short selling. SEC Chairman Gary Gensler stated that Proposed Rule 13f-2 "would strengthen transparency of an important area of our markets that would benefit from greater visibility and oversight." If adopted, this new rule will make significant changes to short selling disclosure obligations for managers in the SEC's effort to provide more insight on large short sellers' behavior and mitigate stock price manipulation during times of irregular market volatility. Key aspects of the proposed changes are described in further detail below.

Disclosure Requirements

Proposed Rule 13f-2 requires a manager to file Form SHO if it exceeds one of the thresholds described below during a calendar month. The threshold depends on whether the short position relates to an equity security of a reporting or nonreporting entity. With respect to equity securities of a reporting issuer, the proposed rule would require

¹ Under Section 13(f)(6)(A) of the Securities Exchange Act of 1934 and for purposes of Proposed Rule 13f-2, "institutional investment managers" include "any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person" (e.g., investment advisers, banks, insurance companies, broker-dealers, pension funds, corporations, etc.).

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a manager to file Form SHO to report each “gross short position”² over which it and any person under the manager’s control has investment discretion collectively that (i) has a value of at least \$10 million³ at the close on any settlement date during the calendar month; or (ii) represents a monthly average gross short position as a percentage of shares outstanding in the equity security of at least 2.5%.⁴ However, for short positions in equity securities of a nonreporting issuer, disclosure is required of each short position with a value that meets or exceeds \$500,000⁵ at the close of any settlement date during the month.

A manager will need to determine whether it has a Form SHO filing requirement on a month-by-month basis.

Proposed Form SHO

Managers that meet the disclosure threshold in a calendar month would be required to file proposed Form SHO with the SEC via EDGAR within 14 calendar days following the end of such month. The proposed Form SHO consists of a cover page and two information tables. The Form would report applicable short position information over which the manager, and any person under the manager’s control, has investment discretion.

Table 1 requires, among other information for the applicable short position, certain information identifying the issuer and type of security shorted, the gross short position, gross short position value and whether the gross short position is fully hedged, partially hedged or not hedged at the close of the applicable calendar month’s last settlement date.

Table 2 requires certain information relating to the daily activity affecting the manager’s applicable gross short positions during the reporting period, including but not limited to certain information identifying the issuer and type of security shorted, and

² Under Proposed Rule 13f-2, “gross short position” refers to the number of shares of the equity security that are held short without inclusion of any offsetting economic positions, including shares of the equity security or derivatives of such equity security.

³ Such value shall be determined by multiplying the end-of-day gross short position in the equity security on each settlement date during the calendar month by the closing price on the settlement date.

⁴ This percentage is calculated by (a) dividing the gross short position in the equity security at the close of business on a settlement date by the number of shares in such security outstanding as of the end of the settlement date; then (b) adding the daily percentages during the calendar month as determined in (a) and dividing the sum by the number of settlement dates during the calendar month.

⁵ Such value is determined by multiplying its end of day gross short position in the equity security by the closing price of the security. If the closing price is not available, the manager is required to use the last price at which it purchased or sold such security.

certain information about each transaction that settled during the month that created, increased, reduced or closed such short position (including through the exercise or trading of options or other derivatives, shares purchased to cover such short position, shares obtained through secondary offerings or tendered conversions, or other activity).

Public Disclosure/Confidentiality

The instructions to Form SHO explicitly provide that the identity of the manager filing Form SHO is confidential. The SEC believes that public disclosure of individual reporting managers may result in retaliation against short sellers and have a chilling effect on short selling. Accordingly, the resulting data collected by the SEC for each security will be aggregated to maintain the reporting managers’ confidentiality.

One month after the end of each calendar month, the SEC will publish the following aggregate short position information regarding each individual equity security reported by managers on Form SHO:

- the aggregate gross position as of the calendar month’s last settlement date;
- the aggregate gross short position’s dollar value;
- a summary of the managers’ reported hedging information with respect to the reported equity security;
- the aggregate gross short position’s percentage of the reported equity security that is being reported as being fully hedged, partially hedged or not hedged; and
- the “net” activity in the reported equity security for each individual settlement date during the calendar month.

The delay between the data’s publication and Form SHO’s submission deadline is intended to reduce the risk of imitative trading activity by market participants and protect any managers’ proprietary trading strategies.

Next Steps

The public comment period will remain open for 30 days following publication in the *Federal Register* or April 11, 2022, whichever period is longer.

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More information on the proposed changes is available in the SEC’s [proposing release](#) and [accompanying press release](#).

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