

SEC Reporting & Compliance Alert

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SEC Adopts Short Sale Disclosure Rules

The Securities and Exchange Commission (SEC) has voted to adopt new Rule 13f-2 and related Form SHO requiring certain institutional investment managers¹ (managers) to report short sale-related information to the SEC.

Rule 13f-2 under the Securities Exchange Act of 1934 (Exchange Act) was approved on October 13, 2023, by a 3-2 vote. It will require managers exercising investment discretion over short positions that meet or exceed 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 will 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 Authority (FINRA).

Ultimately, Rule 13f-2 seeks to address Congress' directive under Section 929X of the Dodd-Frank Act to provide more transparency of short selling. The new rule and related form will cause significant changes to short selling disclosure obligations for managers as the SEC endeavors to provide more insight on large short sellers' behavior and mitigate stock price manipulation during times of irregular market volatility.

Key aspects of the new rules are described in further detail below.

Disclosure Requirements

Rule 13f-2 will require a manager to file a 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 rule will require a manager to file Form

¹ The SEC adopted Rule 13f-2(b)(1) to define "institutional investment managers" as having the same meaning as in Section 13(f)(6)(A) of the Securities Exchange Act of 1934 (Exchange Act), which is also used for Form 13F purposes. Under Section 13(f)(6)(A) of the Exchange Act and for purposes of 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., brokers and dealers, investment advisers, banks, insurance companies, pension funds, corporations, etc.). The term "institutional investment manager" is broad and can pick up persons not typically thought of as falling under the reach of the rule.

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SHO to report each “gross short position”² over which it and any person under the manager’s control has investment discretion collectively that, at the end of a calendar month, has:

- a monthly average gross short position at the close of regular trading hours in the equity security of at least \$10 million;³ or
- a monthly average gross short position at the close of regular trading hours 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 gross short position with a value that meets or exceeds \$500,000⁵ at the close of regular trading hours on any settlement date during the calendar month.

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

Form SHO

Managers that meet the disclosure threshold in a calendar month will be required to file a Form SHO with the SEC via EDGAR within 14 calendar days following the end of such month. The Form SHO report consists of a cover page and two information tables. The form will 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.

² Under Rule 13f-2, “gross short position” means the number of shares of the equity security for which information is being reported that are held short, without inclusion of any offsetting economic positions (including shares of the equity security for which information is being reported or derivatives of such security).

³ Such value shall be determined by (a) multiplying the gross short position at the close of regular trading hours in the equity security on each settlement date during the calendar month by the closing price at the close of regular trading hours on the settlement date (“end-of-day dollar value”); then (b) adding all end-of-day dollar values during the calendar month as determined in (a) and dividing that sum by the number of settlement dates in the month.

⁴ This percentage is calculated by (a) dividing the gross short position at the close of regular trading hours in the equity security on each settlement date during the calendar month by the number of shares outstanding in such security at the close of regular trading hours on 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 in the month. The number of shares outstanding of the security for which information is being reported shall be determined by reference to an issuer’s most recent annual or quarterly report, and any subsequent update thereto, filed with the SEC.

⁵ Such value is determined by multiplying its gross short position at the close of regular trading hours in the equity security on each settlement date during the calendar month and multiplying that figure by the price at the close of regular trading hours on the settlement date. If such closing price is not available, the manager is required to use the price at which it last purchased or sold any share of that security.

- The number of shares of the reported equity security that represent the manager’s gross short position at the close of the last settlement date of the calendar month reporting period.
- The corresponding U.S. dollar value of this reported gross short position.

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.
- The daily net activity during such period in the security for which information is being reported (represented as a number of shares).

More specifically, managers will be required to report, for each settlement date during such period, any net change in the short position reflecting how the reported gross short position in shares of the security for which information is being reported are being closed out — or increased — as a result of the acquisition or sale of shares of that equity security. Managers must take into account certain prescribed types of purchase and sale activity (including through short sales, the exercise or trading of options or other derivatives, shares purchased to cover such short positions, shares obtained through secondary offerings or tendered conversions, or other activity that increases, reduces or closes a short position, such as shares resulting from exchange-traded funds creation or redemption activity).

Any errors that affect the accuracy of the information reported on a Form SHO must be amended within 10 calendar days of discovery of such error.

Public Disclosure/Confidentiality

The instructions to Form SHO explicitly provide that all information included in the form is deemed subject to a confidential treatment request under Rule 83 of the SEC’s Regulation Concerning Information and Requests.⁶ 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.

Within 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.

⁶ 17 CFR § 200.83.

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- The aggregate gross short position's dollar value.
- 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 manager's proprietary trading strategies.

Compliance Dates

Rule 13f-2 and related Form SHO will become effective 60 days following the date of publication of the adopting release in the *Federal Register*. However, compliance with the rule and related form will be 12 months after the effective date of the adopting release, with public dissemination of the aggregated reporting data by the SEC to follow three months later.

Impact on Investors

The new rule will require investors to implement systems that permit them to monitor their daily short position and related activity in order to timely file any required Form SHO. This will be particularly critical if investors have different affiliated managers, divisions or other groups that trade separately and must ensure the information is aggregated, reviewed and reported accurately.

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More information on the new rule and related form is available in the SEC's [press release](#) and [fact sheet](#).

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