
SEC Proposes Monthly Short Sale Reporting and Aggregated Public Disclosure

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On February 25, 2022, the Securities and Exchange Commission (SEC) proposed Rule 13f-2 under the Securities Exchange Act of 1934 (the Exchange Act) and the corresponding Form SHO, which, if adopted, would require institutional investment managers with large short positions to file a confidential monthly report with the SEC detailing the manager's month-end short positions in equity securities and certain related daily transaction activity.¹ As set forth in the proposed rule, "[t]he Commission plans to publish only aggregated [and anonymized] data derived from information provided in Form SHO reports."² Managers would be required to report their positions and activity within 14 days after month end, and the SEC will report the aggregated data approximately 30 days after month end.

The SEC believes the short sale–related information to be collected and published by the SEC under the proposed rule would fill an information gap for regulators and market participants by providing insights into how short positions change over time. The SEC emphasized that, in designing the proposed rule, it sought to balance the benefits of greater transparency with the potential negative impacts on short selling and thus market liquidity and pricing efficiency.

Notably, the proposed rule was approved unanimously by the SEC commissioners, garnering the support of Commissioner Hester Peirce, who has voted against many other recent SEC rulemaking proposals.

¹ Short Position and Short Activity Reporting by Institutional Managers, Exch. Act Rel. No. 94313 (Feb. 25, 2022) ("Proposing Release") available at <https://www.sec.gov/rules/proposed/2022/34-94313.pdf>.

² Proposing Release at 210.

Although the SEC plans to publish aggregated, anonymized data collected from managers, the SEC is also seeking comments on potential alternatives, including publication of anonymized manager-level (rather than aggregated) Form SHO data, publication of short sale data collected via CAT, or publication of additional short interest information by FINRA.

Comments on the proposal, including comments on the alternative proposal and approaches, are due on or before April 26, 2022 (or the date that is 30 days after the date of publication of the proposal in the *Federal Register*, if later).

Proposed Rule 13f-2 and Proposed Form SHO

1. Who is required to file monthly reports under proposed Rule 13f-2?

Proposed Rule 13f-2 would apply to all “institutional investment managers” (as defined by existing Section 13(f)(6)(A) of the Exchange Act) exercising investment discretion over short positions meeting certain specified thresholds (described below). The term “institutional investment manager” is very broad and not limited to registered investment advisers. The term includes (i) any natural person or entity that exercises investment discretion over any other person’s account and (ii) any entity that buys and sells securities for its own account. As the Proposing Release recognizes, the term “institutional investment manager” typically can include investment advisers, banks, insurance companies, broker-dealers, pension funds and corporations.³

The universe of investment managers to which the rule applies would include many managers that are Form 13F filers if those managers have any short positions in excess of the thresholds. The proposed rule, however, would extend to many investment managers that are not Form 13F filers given the different reporting thresholds.

The proposed rule seeks to limit duplicative reporting by providing that, where more than one manager with a reporting obligation has discretion over the same reportable position, only one manager would report the details, and the other would cross-reference the reporting manager on the cover page of the Form SHO report, in the same manner as for Form 13F.

2. What short positions would trigger the reporting requirement?

Institutional investment managers that have investment discretion over accounts that individually or collectively meet either of the following thresholds would be required to file Form SHO with the SEC:

³ See Proposing Release at fn. 15.

- **Threshold A:** For US public reporting companies, equity securities in which the manager has either (i) a gross short position of \$10 million or more as of the close of any settlement date during the calendar month, or (ii) a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5% or more⁴
- **Threshold B:** For all other issuers, a gross short position in equity securities of \$500,000 or more as of the close of any settlement date during the calendar month⁵

The determination of investment discretion is the same analysis managers conduct for purposes of Form 13F.

3. How is the SEC proposing to calculate “gross short positions” in a given “equity security”?

As defined in the rule, the term “gross short position” would mean “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.”⁶ The Proposing Release reiterates that the thresholds are based on a manager’s position “in the equity security itself, and do not include the calculation of derivative positions or long positions in the equity security.”⁷ The Proposing Release also states that proposed Rule 13f-2 would apply to equity securities that are subject to Regulation SHO in order to be consistent with those requirements.⁸

The proposed rule, however, also provides that the term “equity security” would have the same meaning as in Section 3(a)(11) of the Exchange Act and Rule 3a11-1 thereunder.⁹ This definition includes not only common and preferred stock but also “any security future on any such security; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.”¹⁰ Because this definition includes certain derivative instruments such as options and futures, it appears to be inconsistent with the SEC’s statements referenced above (i.e., that derivatives are not taken into account in reporting gross short positions on Form SHO).

⁴ Proposed Rule 13f-2(a)(1).

⁵ Proposed Rule 13f-2(a)(2).

⁶ Proposed Rule 13f-2(b)(4).

⁷ Proposing Release at 41.

⁸ Proposing Release at 7.

⁹ Proposed Rule 13f-2(b)(2).

¹⁰ Exchange Act Rule 3a-11.

While the proposed rule does not include derivatives as part of the threshold calculation, the SEC is proposing to require managers to report changes in their gross short positions from derivative activity such as exercising an option or ETF creation or redemption activity (as further described below).

4. How frequently would Form SHO need to be filed?

Institutional investment managers meeting one of the above thresholds (Reporting Managers) would be required to file Form SHO monthly within 14 calendar days after each month end.¹¹

5. What information would be required on Form SHO?

The SEC is proposing to require Reporting Managers to provide the following information for each security in which the Reporting Manager meets one of the above thresholds:

- The name of the security and other identifying information
- End-of-month gross short position information (number of shares, dollar value)
- Whether a gross short position reported is fully hedged, partially hedged or not hedged
- Daily activity affecting the Reporting Manager’s gross short position for each settlement date during the monthly reporting period, including the following:
 - Name of issuer, title of the class of the security, active Legal Entity Identifier (LEI), CUSIP number, and Financial Instrument Global Identifier (FIGI) (in each case if applicable)
 - Number of shorted shares that settled on the settlement date
 - Number of shares purchased to cover (in whole or in part), an existing short position that settled on the settlement date
 - Number of shares purchased or sold in exercised or assigned option contracts that settled on the settlement date
 - Number of shares resulting from tendered conversions that settled on the settlement date
 - Number of shares obtained through secondary offering transactions that settled on the settlement date
 - “Other activity” that creates, increases, reduces or closes a short position (e.g., shares resulting from ETF creation or redemption activity)

Although the inclusion of “other activity” does not specifically reference security-based swaps such as total-return swaps or other similar derivatives, the language is broadly worded and would appear to include all such instruments.

¹¹ Proposed Rule 13f-2(a).

6. How often would the SEC publish aggregated short sale data?

The SEC estimates that it will publish aggregated information within one month after the end of the reporting calendar month.¹²

7. What information will the SEC publish?

While proposed Rule 13f-2 only speaks to the requirements that would be placed on managers, the SEC proposes to publish aggregated information regarding each equity security reported by all Reporting Managers. Specifically, the SEC proposes to publish the following data on an aggregated and anonymized basis:

- The name of the issuer, title of the class of the security, active LEI, CUSIP number and FIGI (in each case if applicable)
- Aggregate number of shares across all Reporting Managers that represent the aggregate gross short position at the close of the last settlement date of the calendar month, as well as the corresponding US dollar value of the reported gross short position
- Summary of Reporting Managers' reported hedging information with regard to the reported equity securities (i.e., the SEC will identify the percentage of the aggregate gross short position for a reported equity security that is reported as being fully hedged, partially hedged or not hedged)
- Net activity in a reported equity security determined by offsetting purchase and sale activity aggregated across all Reporting Managers on each settlement date. A positive number of shares identified would indicate net purchase activity, while a negative number would indicate net sale activity.¹³

All information that would reveal the identity of a manager filing a Form SHO report with the SEC would be considered confidential and deemed subject to confidential treatment under applicable SEC rules.

Proposed Alternatives Discussed in the Proposing Release

As noted above, the SEC included in the Proposing Release several "alternative" proposals for comment and consideration, leaving the door open to other approaches. These include the following:

¹² See Proposing Release at 38.

¹³ See Proposing Release at 38-40.

- *SEC Publication of Anonymous Reporting Manager-Level Data.* In a section of the Proposing Release titled “Potential Alternative Approach to proposed Rule 13f-2 Regarding How the Information Reported on proposed Form SHO is Published by the Commission,” the SEC summarized and requested comment on a possible alternative to aggregated public reporting whereby the information collected on proposed Form SHO would be published exactly as reported to the SEC by Reporting Managers, except that the SEC would remove all identifying information, including the manager’s name and active LEI (if applicable).¹⁴ In the Proposing Release, the SEC acknowledges that under this approach, “despite measures designed to help anonymize published information, it may still be possible for market participants to identify certain reporting Managers,”¹⁵ which in turn could lead to unintended consequences such as retaliation against identified short sellers.

- *SEC Publication of Certain Aggregated CAT Data.* The SEC described one potential alternative as publishing short sale data collected via CAT (the consolidated audit trail plan created pursuant to the requirements of Rule 613 of the Exchange Act).¹⁶ This alternative would effectively eliminate the thresholds for reporting and would instead aggregate data from a broader number of market participants. The SEC noted, however, that this approach “would result in less clarity about bearish sentiment among [Reporting] Managers.”¹⁷ For example, the data published under this alternative would be less accurate in terms of estimating positions and changes in positions, as they would not include certain activity, such as options and assignments, that are not collected in CAT but may affect a short position. The SEC also noted that due to technical limitations, this alternative could not be implemented until the CAIS system in CAT is fully operational, unless the SEC were to implement a scaled-back version of this approach.

- *FINRA Reporting.* The SEC noted that it could require FINRA to publish a version of its short interest information that specifically identifies the aggregate short interest of managers, separate from other short interest reported by FINRA.¹⁸ The SEC noted that reporting broker-dealers could identify short positions that originate from managers and FINRA could compile both total short interest, as it currently does, and manager-specific short interest. This would not require a significant technical build-out. The SEC noted, however, that this approach would provide limited information about changes in short

¹⁴ See Proposing Release at 58-59. This alternative proposal is notable because it received its own dedicated section of the proposing release, which directly followed the discussion of Proposed Rule 13f-2 and proposed Form SHO and was upstream of the economic analysis and its discussion of “reasonable alternatives.”

¹⁵ *Id.*

¹⁶ See Proposing Release at 164-168.

¹⁷ Proposing Release at 166.

¹⁸ See Proposing Release at 169-170.

interest and hedging and therefore “would likely not provide much incremental value over the existing short interest data.”¹⁹

The SEC also briefly covered other alternatives, which included using prime brokers to report on behalf of managers (which presents complications because many managers use multiple prime brokers) and crafting proposed Rule 13f-2 to harmonize with short selling reporting requirements under European regulations, which generally require short sale reporting above certain thresholds to be made on the following trading day.²⁰

Additional Related Rulemaking

Concurrent with the short sale proposal, the SEC also (i) proposed a new provision of Regulation SHO under the Exchange Act — proposed Rule 205 — as well as amendments to CAT that, if adopted, would require broker-dealers to collect and submit additional data on “purchases to cover” short sales as well as additional data on assertions of Regulation SHO’s bona fide market-making exceptions²¹ and (ii) reopened the comment period for proposed Rule 10c-1 under the Exchange Act regarding reporting of securities lending activity for the same period as the comment period on the proposed short sale rule.²²

Steps for Managers to Take

WilmerHale’s Securities and Investment Management attorneys are actively engaged in discussions with clients regarding interpretation of and possible responses to these proposals, as well as the myriad recent SEC proposals affecting industry participants. Should you have any questions about how best to position your firm, please contact us.

¹⁹ Proposing Release at 169.

²⁰ Proposing Release at 170-172.

²¹ Notice of the Text of the Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-related Data Collection, Exch. Act Rel. No. 94314 (Feb. 25, 2022), available at <https://www.sec.gov/rules/proposed/2022/34-94314.pdf>.

²² Reopening of Comment Period for Reporting of Securities Loans, Exch. Act Rel. No. 94315 (Feb. 25, 2022), available at <https://www.sec.gov/rules/proposed/2022/34-94315.pdf>.

Contributors



Timothy F. Silva
PARTNER

timothy.silva@wilmerhale.com

+1 617 526 6502



Elizabeth L. Mitchell
PARTNER

elizabeth.mitchell@wilmerhale.com

+1 202 663 6426



Aaron Friedman
SENIOR ASSOCIATE

aaron.friedman@wilmerhale.com

+1 202 663 6469