

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 240 and 249

[Release No. 34–98738; File No. S7–08–22]

RIN 3235–AM34

### Short Position and Short Activity Reporting by Institutional Investment Managers

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (“Commission”) is adopting a new rule and new Form SHO pursuant to the Securities Exchange Act of 1934 (“Exchange Act”) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA”). The new rule and related form are designed to provide greater transparency through the publication of short sale-related data to investors and other market participants. Under the new rule, institutional investment managers that meet or exceed certain specified reporting thresholds are required to report, on a monthly basis using the related form, specified short position data and short activity data for equity securities. In addition, the Commission is adopting an amendment to the national market system (“NMS”) plan governing the consolidated audit trail (“CAT”) created pursuant to the Exchange Act to require the reporting of reliance on the bona fide market making exception in the Commission’s short sale rules. The Commission is publishing the text of the amendments to the NMS plan governing the CAT (“CAT NMS Plan”) in a separate notice.

#### DATES:

*Effective date:* January 2, 2024.

*Compliance date:* The applicable compliance date is discussed in Part VI of this release.

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**SUPPLEMENTARY INFORMATION:** The Commission is adopting new 17 CFR 240.13f–2 (“Rule 13f–2”) and related

form 17 CFR 249.332 (“Form SHO”) under the Exchange Act to require certain institutional investment managers to report, on a monthly basis on new Form SHO, certain short position data and short activity data for certain equity securities as prescribed in Rule 13f–2.

The Commission is also adopting, in a separate notice published elsewhere in this issue of the **Federal Register**, an amendment to the CAT NMS Plan (“CAT Amendment”), pursuant to 17 CFR 242.608(a)(2) (“Rule 608(a)(2)”) and (b)(2) (“Rule 608(b)(2)”), that enables the Commission to adopt a rule to amend any effective NMS plan. For the text of the amendment to the CAT NMS Plan, please see the Notice of the Text of the Amendment to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-Related Data Collection.<sup>1</sup>

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<sup>1</sup> Notice of the Text of the Amendment to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-Related Data Collection, Exchange Act Release No. 34–98739 (Oct. 13, 2023).

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#### I. Overview

##### A. Background

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>2</sup> In order to deliver the security to the purchaser, the short seller will generally borrow the security, usually from a broker-dealer or an institutional investor, and later close out the position by purchasing equivalent securities on the open market and returning the security to the lender.

Short selling is generally used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand,<sup>3</sup> or

<sup>2</sup> See 17 CFR 242.200(a).

<sup>3</sup> Market liquidity is generally provided through short selling by market professionals, such as market makers, who offset temporary imbalances in the buying and selling interest for securities. Short sales effected in the market add to the selling interest of stock available to purchasers and reduce the risk that the price paid by investors 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. See *Amendments to Regulation SHO*, Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232, 11235 (Mar. 10, 2010) (“Rule 201 Adopting Release”).

to hedge the risk of a long position in the same security or a related security.<sup>4</sup> Short selling provides the market with important benefits, such as providing market liquidity and pricing efficiency.<sup>5</sup> While short selling can serve useful market purposes, such as facilitating price discovery, there are concerns that it could be used to drive down the price of a security, to accelerate a declining market in a security, or to manipulate stock prices.<sup>6</sup>

The Commission has plenary authority under section 10(a) of the Exchange Act to regulate short sales of securities as necessary or appropriate in the public interest or for the protection of investors.<sup>7</sup> Regulation SHO, which became effective on January 3, 2005,<sup>8</sup> imposes four general requirements with respect to short sales of equity securities. Under 17 CFR 242.200 (“Rule 200 of Regulation SHO”), broker-dealers must properly mark sale orders as “long,” “short,” or “short exempt.”<sup>9</sup>

<sup>4</sup> See, *Short Sales*, Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (“Regulation SHO Adopting Release”).

<sup>5</sup> See, e.g., Phil Mackintosh, *How Short Selling Makes Markets More Efficient*, NASDAQ (Oct. 1, 2020), available at <https://www.nasdaq.com/articles/how-short-selling-makes-markets-more-efficient-2020-10-01>. Efficient markets require that prices fully reflect all buy and sell interest. Market participants who believe a stock is overvalued may engage in short sales in an attempt to profit from a perceived divergence of prices from true economic values. Such short sellers add to stock pricing efficiency in part because their transactions inform the market of their evaluation of future stock price performance. This evaluation is reflected in the resulting market price of the security. See Rule 201 Adopting Release, 75 FR 11235 nn. 29 & 30. Historically, short sellers have, at times, through doing research, uncovered fraudulent behavior. See also generally discussion in *infra* Parts VIII.C.2 and VIII.C.4.

<sup>6</sup> See, e.g., Div. Econ. Risk Analysis, *Short Sale Position and Transaction Reporting* (June 5, 2014), at 6–7 (“DERA 417(a)(2) Study”), available at <https://www.sec.gov/files/short-sale-position-and-transaction-reporting0.pdf> (This is a study of the Staff of the U.S. Securities and Exchange Commission, which represents the views of Commission staff, and is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of this study and, like all staff statements, it has no legal force or effect, does not alter or amend applicable law, and creates no new or additional obligations for any person.); Rule 201 Adopting Release, 75 FR 11235 (describing a “bear raid” where an equity security is sold short in an effort to drive down the price of the security by creating an imbalance of sell-side interest, as an example of unrestricted short selling that could “exacerbate a declining market in a security by increasing pressure from the sell-side, eliminating bids, and causing a further reduction in the price of a security by creating an appearance that the security’s price is falling for fundamental reasons, when the decline, or the speed of the decline, is being driven by other factors”). See generally discussion *infra* Part VIII.C.1.

<sup>7</sup> 15 U.S.C. 78j(a).

<sup>8</sup> See Regulation SHO Adopting Release.

<sup>9</sup> See 17 CFR 242.200(g). A broker or dealer must mark all sell orders of an equity security as “long,”

Under 17 CFR 242.203 (“Rule 203 of Regulation SHO”), a broker-dealer must locate a source of shares that the broker-dealer reasonably believes can be delivered in time for settlement (commonly referred to as the “locate requirement”) before effecting a short sale.<sup>10</sup> Under 17 CFR 242.204 (“Rule 204”), if the broker or dealer that is a member of a registered clearing agency fails to deliver the security to the registered clearing agency in time for settlement, the broker or dealer must take action to close out the failure to deliver if that failure results from a long or short sale.<sup>11</sup> Separately, under 17 CFR 242.201 (“Rule 201”), trading centers<sup>12</sup> must have policies and procedures in place to restrict short selling when a covered security has triggered a short sale price test circuit breaker.<sup>13</sup> In addition, the Commission adopted an antifraud provision, 17 CFR 240.10b–21 (“Rule 10b-21”), to address failures to deliver in securities that have been associated with “naked” short selling.<sup>14</sup>

“short,” or “short exempt.” A sell order may only be marked “long” if the seller is “deemed to own” the security being sold and either (i) the security to be delivered is in the physical possession or control of the broker or dealer; or (ii) it is reasonably expected that the security will be in the physical possession or control of the broker or dealer no later than the settlement of the transaction. See 17 CFR 242.200(g). A person is deemed to own a security only to the extent that he has a net long position in such security. See 17 CFR 242.200(c). Once marked as long, short, or short-exempt, the order mark should not be changed regardless of any subsequent changes in the person’s net position. See *In re OZ Mgmt.*, Exchange Act Release No. 75445 (July 14, 2015) (settled) (discussing where OZ Management submitted short sale orders to its executing broker, but identified such sales as long sales to its prime broker, causing books and records of the prime broker to be inaccurate), available at <https://www.sec.gov/litigation/admin/2015/34-75445.pdf>.

<sup>10</sup> See 17 CFR 242.203(b)(1) and (2). The Regulation SHO locate requirement provides that broker-dealers may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker-dealer has (i) borrowed the security, or entered into a bona-fide arrangement to borrow the security; or (ii) reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (iii) documented compliance with this requirement (“locate requirement”).

<sup>11</sup> See 17 CFR 242.204. “Failures to deliver,” or “fails,” occur when a broker-dealer fails to deliver securities to the party on the other side of the transaction on the settlement date.

<sup>12</sup> Trading center in Regulation SHO means a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent. 17 CFR 242.200.

<sup>13</sup> See 17 CFR 242.201.

<sup>14</sup> See “Naked” Short Selling Antifraud Rule, Exchange Act Release No. 58774 (Oct. 14, 2008), 73 FR 61666, 61674 (Oct. 17, 2008) (In a “naked” short

Section 929X of the DFA added section 13(f)(2) of the Exchange Act, entitled “Reports by institutional investment managers,” requiring the Commission to prescribe rules to make certain short sale data publicly available no less frequently than monthly.<sup>15</sup> Specifically, section 13(f)(2) provides: “[t]he Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP [Committee on Uniform Securities Identification Procedures] 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. At a minimum, such public disclosure shall occur every month.”<sup>16</sup> In addition, the Commission has received multiple petitions to adopt reporting requirements for short sellers similar to those required for holders of long positions.<sup>17</sup>

sale, a seller does not borrow or arrange to borrow the necessary securities in time to deliver them to the buyer within the standard settlement period. Although abusive “naked” short selling is not defined in the federal securities laws, it refers generally to selling short without having stock available for delivery and intentionally failing to deliver stock within the standard settlement period. In addition, a seller misrepresenting its short sale locate source or ownership of shares may intend to fail to deliver securities in time for settlement and, therefore, engage in abusive “naked” short selling.).

<sup>15</sup> Public Law 111–203, sec. 929X, 124 Stat. 1376, 1870 (July 21, 2010).

<sup>16</sup> 15 U.S.C. 78m(f)(2).

<sup>17</sup> See, e.g., Letter from Elizabeth King, Corporate Secretary, NYSE Group, et al. (Oct. 7, 2015, Petition 4–689) (stating that rulemaking under 929X “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”), available at <https://www.sec.gov/rules/petitions/2015/petrn4-689.pdf>; Letter from Edward S. Knight, Executive Vice President, General Counsel and Chief Regulatory Officer, NASDAQ (Dec. 7, 2015, Petition 4–691) (requesting that the Commission “take swift action to promulgate rules to require public disclosure by investors of short positions in parity with the disclosure regime applicable to long positions”), available at <https://www.sec.gov/rules/petitions/2015/petrn4-691.pdf> (“NASDAQ Petition”); see also Letter from E. Carter Esham, Executive Vice President, Emerging Companies, Biotechnology Innovation Organization (BIO) (Mar. 11, 2016) (“BIO Letter”) (applauding reforms to the short disclosure framework proposed in the NASDAQ Petition and in the NYSE Petition and advocating for the promulgation of rules to ensure parity between public disclosures required of investors taking long and short positions), available at <https://www.sec.gov/comments/4-691/4691-5.pdf>; Letter from Andrew D. Demott, Jr., Chief Operating Officer, Superior Uniform Group (supporting NASDAQ Petition and advocating adoption of disclosure requirements for short sellers), available at <https://www.sec.gov/comments/4-691/4691-10.pdf>. Developments in the market with regard to “meme” stocks in early 2021, some of which were widely reported as involving large short sellers, also highlighted a need for more

Continued

## B. The Proposals

In February 2022, in an effort to increase transparency regarding short position and short activity data to both market participants and regulators, and to address the requirements of section 13(f)(2), the Commission proposed new rule 13f-2 (“Proposed Rule 13f-2”) and related form (“Proposed Form SHO”) under the Exchange Act.<sup>18</sup> Proposed Rule 13f-2 would require certain institutional investment managers (“Managers”) with gross short positions that meet certain quantitative reporting thresholds to report, on a monthly basis on new Proposed Form SHO, certain short position data and short activity data for certain equity securities. Proposed Form SHO included two parts: Information Table 1—reports of information including, but not limited to, data elements explicitly referenced in section 13(f)(2), gross end-of-month short positions in equity securities that meet the reporting thresholds, and whether such positions are fully hedged, partially hedged, or not hedged; and Information Table 2—reports of information including, but not limited to, certain daily activity data (including options assignments and exercises) that affect a Manager’s gross short positions during the calendar month reporting period. Managers would file Proposed Form SHO with the Commission via the Commission’s Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”) within 14 calendar days after the end of the calendar month. The Commission would then expect to publish on EDGAR aggregated information derived from the data reported on Proposed Form SHO within one month after the end of the reporting calendar month.

In the Proposing Release, the Commission stated that the required short sale disclosures that would be collected under Proposed Form SHO and the aggregated data published pursuant to Proposed Rule 13f-2 would increase transparency and provide

several important benefits to market participants and regulators. Such aggregated information would help inform market participants regarding the overall short sale activity by reporting Managers. More information about the short sale activity and gross short positions of reporting Managers may promote greater risk management among market participants and may facilitate capital formation to the extent that greater transparency bolsters confidence in the markets. As discussed in the Proposing Release, the Commission’s regular access to Proposed Form SHO data would bolster the Commission’s oversight of short selling, as Proposed Rule 13f-2 and Proposed Form SHO would improve the utility of information available to the Commission and other regulators.<sup>19</sup>

Additionally, to supplement the short sale data made available to the Commission in Proposed Form SHO filings, the Commission proposed a new rule at 17 CFR 242.205 prescribing a “buy to cover” order marking requirement under Regulation SHO (“Proposed Rule 205”) for certain purchase orders effected by a broker-dealer for its own account or for the account of another person at the broker-dealer, if, at the time of order entry, the purchaser had a gross short position in such security in the account for which the purchase is being made. The Commission also proposed amendments to the NMS plan governing the CAT (“Proposed CAT Amendments”) to require the reporting of “buy to cover” order marking information and of reliance on the bona fide market making exception in Rule 203(b)(2)(iii) of Regulation SHO (“BFMM locate exception”). Proposed Rule 205 and the Proposed CAT Amendments were designed to fill an information gap for the Commission and other regulators by providing insights into the lifecycle of a short sale that are not available under existing data sources.<sup>20</sup>

## C. Overview of Proposed Rule 13f-2, Proposed Form SHO, Proposed Rule 205 and Proposed CAT Amendments

### 1. Overview of Comments Received

The Commission received robust comment on Proposed Rule 13f-2, Proposed Form SHO, Proposed Rule 205, and the Proposed CAT Amendments (collectively, the “Proposals”). Comments were

submitted by individual investors as well as other market participants, such as trade associations, institutional investment managers, investment advisers, broker-dealers, non-profit organizations, and academicians. These comments, which are discussed in context below, included a variety of different viewpoints on various aspects of the Proposals.<sup>21</sup> Many commenters were supportive of the Proposals as a step toward increasing transparency into short sale activity.<sup>22</sup> Many commenters stated that short selling is a particularly opaque area of the market and that increasing transparency regarding short selling would be beneficial to market participants.<sup>23</sup>

<sup>21</sup> The comment letters on the Proposing Release (File No. S7-08-22) are available at <https://www.sec.gov/comments/s7-08-22/s70822.htm>. Over 98% of the over 3,000 comments received were from individual investors, most of whom (over 1,900) submitted a variation of a template letter from “We The Investors,” an advocacy group for retail investors. The remaining comments were from trade associations, financial services firms—including institutional investment managers and investment management firms, broker-dealers—and their advisors, non-profit organizations, academicians, and entities other than individual investors. See Comment Letter from We the Investors, available at <https://www.sec.gov/comments/s7-08-22/s70822-typea.pdf> (“WTI Letter”).

<sup>22</sup> See, e.g., Comment from Samuel Hudock (Mar. 2, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118373-271244.htm>; Comment from Michelle R. Bracke (Mar. 4, 2022) available at <https://www.sec.gov/comments/s7-08-22/s70822-20118531-271417.htm>; Comment from Joshua Barbee (Mar. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118530-271416.htm>; Comment from Robert Ross (Mar. 14, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20119365-272251.htm>; Comment from David Arkules (Feb. 28, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118071-270876.htm>; Comment from Gina Preziosi (Mar. 7, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118726-271589.htm>; Comment from Jessica Cooke (Mar. 9, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118963-271791.htm>; Comment from Mauricio Gonzalez (Oct. 12, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-310835.htm>; Comment from Liam Sutton (Oct. 19, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-311965.htm>; Comment from Nicholas Graham (Oct. 19, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-312051.htm>; Comment from Steffen Maier (Oct. 19, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-312049.htm>; Comment from Zachary D’Elia (Oct. 19, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-312047.htm>; Comment from Stephen Leachman (Oct. 19, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-312046.htm>; Comment from Sergio Herrera (Oct. 19, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-312042.htm>; Comment from David P. Miller Jr. (Oct. 19, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-312038.htm>.

<sup>23</sup> See, e.g., Comment from William Bloxham (Oct. 21, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-313372.htm>; Comment from Ricardo Gomez (Oct. 29, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316604.htm>; Comment from Victor Arriaza (Oct. 29,

consistent and consolidated short sale information. See, e.g., Robert Smith et al., “Short Squeeze” Spreads as Day Traders Hunt Next GameStop, *Fin. Times* (Jan. 27, 2021), available at <https://www.ft.com/content/acc1dbfe-80a4-4b63-90dd-05f27f21ceb2>; Are “Meme Stocks” Harmless Fun, or A Threat to the Financial Old Guard?, *Economist* (July 6, 2021) (retrieved from Factiva database). See also Sharon Nunn & Adam Kulam, *Short-Selling Restrictions During Covid-19*, Yale Sch. of Mgmt., Program on Fin. Stability (Jan. 12, 2021), available at <https://som.yale.edu/story/2021/short-selling-restrictions-during-covid-19> (discussing global short selling regulatory responses to the Covid-19 pandemic).

<sup>18</sup> *Short Position and Short Activity Reporting by Institutional Investment Managers*, Exchange Act Release No. 34-94313 (Feb. 25, 2022), 87 FR 14950 (Mar. 16, 2022) (“Proposing Release”).

<sup>19</sup> Proposing Release, at 14951.

<sup>20</sup> Because data obtained through CAT are not made public, the “buy to cover” and “bona fide market making” data reported pursuant to the Proposed CAT Amendments would not be made publicly available as a result of such reporting.

Some of these commenters stated that the increased information regarding short sales would allow investors to be better informed and make better investment decisions.<sup>24</sup> A number of these commenters urged the Commission to strengthen the proposed reporting requirements further by, for example, lowering or eliminating the thresholds triggering reporting obligations under Proposed Rule 13f-2.<sup>25</sup>

2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316625.htm>; Comment from Kyle Byrd (Oct. 29, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316701.htm>; Comment from Tarek Elseweifi (Oct. 29, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316706.htm>; Comment from Clay Wyant (Oct. 29, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316708.htm>; Comment from Yin Hung Lam (Oct. 29, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316601.htm>; Comment from Evan Anderson (Oct. 29, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316580.htm>; Comment from Connor Judson (Oct. 29, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316599.htm>; Comment from Nicky (Oct. 29, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316638.htm>.

<sup>24</sup> See, e.g., Comment from Eric Mills (April 27, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126810-287520.htm> (“[T]he proposals will serve the mission of the SEC by increasing transparency regarding short selling activity. On-going efforts by the SEC to increase market transparency and relieve information asymmetries promote efficiency, order, fairness, capital formation, and public trust. The result is an enhancement of investor ability to assess the market and make more informed decisions.”); Comment from Stanley Little (Mar. 8, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118870-271692.htm> (“The proposed rule is a[n] important missing link for investors. The ordinary person wishing to make money in the stock market should have all available information at their disposal to make informed decisions . . . The transparency rule is such a tool needed to make well informed decisions.”); Comment from Brendon Withers (Feb. 27, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118078-270936.htm> (supported “immediate implementation [of the proposals] to improve the US Stock Market and provide a more fair and free system in which market participants can have accurate information and make informed decisions based on CURRENT AND ACCURATE data.”).

<sup>25</sup> See, e.g., Letter from Stephen W. Hall, Legal Director and Securities Specialist, Better Markets, et al. (Apr. 26, 2022), at 12, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126822-287528.pdf> (“[T]he SEC should eliminate the proposed thresholds so as to reduce or eliminate the risk that unknown, hidden short positions could pose to investors and the markets.”) (“Better Markets Letter”); Comment from Matthew Sinex (Oct. 31, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-317106.htm>; Comment from Noah Tewahade (Oct. 30, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-317046.htm>; Comment from Luke Dansie (Oct. 31, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-317245.htm>; Comment Letter from Katherine Lander (Oct. 30, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-317266.htm>; Comment from Marco Alvarenga (Oct. 31, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316992.htm>; Comment Letter from Erika Jehle (Oct. 31, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316930.htm>.

As discussed in further detail below, some commenters recommended changes to the Proposals in response to their concerns about: the scope of Proposed Rule 13f-2; the underlying approach and levels of the proposed thresholds that would trigger a reporting obligation under Proposed Rule 13f-2; the feasibility of operationalizing Proposed Rule 205 in a manner that would result in the gathering of meaningful short sale-related data; and the necessity for the Proposed CAT Amendments.

Some commenters stated that the Commission did not sufficiently articulate the benefits of, or regulatory justification for, the Proposals and did not accurately estimate or adequately justify the costs and impacts of the new reporting requirements.<sup>26</sup> Some of these commenters expressed concern that the Proposing Release’s Economic Analysis did not adequately estimate the costs and burdens of the Proposals.<sup>27</sup>

317266.htm; Comment from Marco Alvarenga (Oct. 31, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316992.htm>; Comment Letter from Erika Jehle (Oct. 31, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316930.htm>.

<sup>26</sup> E.g., Comment Letter from Robert Toomey, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, et al. (Apr. 26, 2022), at 3, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126803-287514.pdf> (“SIFMA Letter”) (“SIFMA is concerned that such an expansive reporting regime would impose burdens and costs on reporting parties that would materially outweigh the benefit of the information they might yield, and that the SEC has not provided justification for why such information is necessary and/or cannot already be obtained through other means available to the SEC”); see also, Comment Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial (Apr. 26, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126856-287588.pdf> (“Virtu Letter”); Comment Letter from Thomas Deinet, Executive Director, Standards Board for Alternative Investments (Apr. 26, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126850-287575.pdf> (“SBAI Letter”); Comment Letter from Matthew B. Siano, Managing Director and General Counsel, Two Sigma (Apr. 26, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126808-287518.pdf> (“Two Sigma Letter”); Comment Letter from Richard F. Kerr, Partner, K&L Gates LLP (Apr. 26, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126848-287571.pdf> (“K&L Gates Letter”).

<sup>27</sup> See, e.g., SIFMA Letter, at 6 n. 15 (“SIFMA is concerned that the SEC’s economic analysis of the Proposed Rules does not adequately consider that the sum total of the proposed requirements may result in a burden that far exceeds the SEC’s estimates with respect to each individual component . . .”); Comment Letter from Jennifer Han, Executive Vice President, Chief Counsel and Head of Regulatory Affairs, Managed Funds Association (Apr. 26, 2022), at 7, 19, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126815-287523.pdf> (“MFA Letter”) (“[T]he SEC’s economic analysis and, specifically, the Proposal’s estimated costs are materially understated.”); Comment Letter from Mark A. Steffensen, Senior Executive Vice President and General Counsel, HSBC North American Holdings Inc. and HSBC

## 2. Final Rule 13f-2, Form SHO and CAT Amendment

For the reasons discussed more fully in Parts II–IV below, and to balance implementation and compliance costs and burdens with the Commission’s goal of enhancing transparency regarding short selling, the Commission is adopting Rule 13f-2 and related Form SHO with certain modifications in response to comments.<sup>28</sup> The new reporting regime of Rule 13f-2 provides disclosures that supplement the short sale-related information that currently is publicly available or accessible for a fee from existing short sale reporting regimes provided by some registered national securities exchanges (“exchanges”) and registered national securities associations (“RNSAs”).<sup>29</sup>

Final Rule 13f-2 will require Managers (defined in section 13(f)(6)(A) of the Exchange Act) to report to the Commission, on a monthly basis on related Form SHO, certain short position data and short activity data for certain equity securities. In particular:

- On the Cover Page of Form SHO, Managers will be required to report certain basic information including its name, mailing address, business telephone number and business email, as well as the name, title, business telephone number and business email of the Manager’s contact employee for the Form SHO report; and the date the report is filed. The Manager will also provide its non-lapsed Legal Entity Identifier (“LEI”) if it has one. If other Managers are required to be listed in the “Other Manager(s) Reporting for this Manager” section of the Cover Page, the Manager will also be required to include the name and non-lapsed LEI of each such “Other Manager” listed, if the LEI of such “Other Manager(s)” is available to the Manager filing the Form SHO report.

- With regard to each individual equity security reported on by Managers

Bank USA, N.A. (Jan. 24, 2023), at 15 n. 53, available at <https://www.sec.gov/comments/s7-08-22/s70822-20155771-324031.pdf> (“HSBC Letter”) (“We [ ] do not believe that the Commission’s economic analysis adequately considers the costs of Proposed Rule 13f-2 to market makers.”).

<sup>28</sup> Rule 13f-2 and Form SHO, as adopted, are responsive to the policy recommendations to increase transparency around short selling activities and improve short sale data of participants in the Government-Business Forums on Small Business Capital Formation held by the Commission in recent years. See, e.g., Report on the Report on the 41st Annual Small Business Forum, at 22, available at 2022 OASB Annual Forum Report (sec.gov); Report on the Report on the 40th Annual Small Business Forum, at 25, available at [https://www.sec.gov/files/2021\\_OASB\\_Annual\\_Forum\\_Report\\_FINAL\\_508.pdf](https://www.sec.gov/files/2021_OASB_Annual_Forum_Report_FINAL_508.pdf).

<sup>29</sup> See *infra* Part II.A.4. See also Proposing Release, at 14964–65.

in the Information Tables of Form SHO, Managers will report: the issuer's name and LEI if it has one, and the equity security's title of class, CUSIP, and Financial Instrument Global Identifier ("FIGI") (if any has been assigned).<sup>30</sup>

- With regard to Information Table 1 of Form SHO, the Manager will also report the number of shares of the reported equity security that represent the Managers' gross short position at the close of the last settlement date of the calendar month reporting period, as well as the corresponding U.S. dollar value of this reported gross short position.

- With regard to Information Table 2 of Form SHO, for each reported equity security, for each individual settlement date during the calendar month reporting period, a Manager will report "net" activity in the reported equity security. The net activity reported by a Manager will be expressed by a single identified number of shares of the reported equity security, and will reflect offsetting purchase and sale activity by Managers. A positive number of shares identified will indicate net purchase activity in the equity security on the specified settlement date, while a negative number of shares identified will indicate net sale activity in the equity security on the specified settlement date.

Managers will report such information regarding each equity security if the following thresholds are met:

- With respect to any equity security that is of a class of securities that is registered pursuant to Exchange Act section 12<sup>31</sup> or for which the issuer of that class of securities is required to file reports pursuant to Exchange Act section 15(d)<sup>32</sup> (a "reporting company issuer") in which the Manager meets or exceeds either: (1) a monthly average of daily gross short positions at the close of regular trading hours in the equity security with a U.S. dollar value of \$10 million or more, or (2) a monthly average of daily gross short positions at the close of regular trading hours as a percentage of shares outstanding in the equity security of 2.5 percent or more ("Threshold A").

- With respect to any equity security that is of a class of securities of an issuer that is not a reporting company issuer as described above (a "non-reporting company issuer") in which the Manager meets or exceeds a gross short position in the equity security with a U.S. dollar value of \$500,000 or more at the close

of regular trading hours on any settlement date during the calendar month. ("Threshold B").

The Commission will then publish aggregate information as follows:

- With regard to Information Table 1 of Form SHO, the Commission will publish, for each class of equity securities, as an aggregated number of shares across all reporting Managers, the number of shares of the reported equity security that represent the Managers' gross short position at the close of the last settlement date of the calendar month, as well as the corresponding aggregated U.S. dollar value of this reported gross short position.

- With regard to Information Table 2 of Form SHO, for each reported equity security, for each individual settlement date during the calendar month, the Commission will publish the net activity in the reported equity security, as aggregated across all reporting Managers.

The Commission is also adopting, substantially as proposed, the amendment to the CAT NMS Plan to require broker-dealers with a reporting obligation to CAT, to report whether an original receipt or origination of an order to sell an equity security is a short sale for which a market maker is claiming the BFMM locate exception. However, for the reasons discussed below, the Commission is not adopting Proposed Rule 205 or the CAT "buy to cover" reporting requirements.

*Changes Made to the Proposals:* In response to comments, and as discussed in more detail below, the Commission is modifying the proposal generally by:

- Streamlining Form SHO reports by not adopting as proposed the requirement to report hedging classifications on Information Table 1, and by requiring a lower level of granularity of reporting on Information Table 2;<sup>33</sup>

- Adjusting the calculation of the dollar value prong of the reporting threshold for equity securities of reporting company issuers (*i.e.*, Threshold A) to be based on a monthly average of daily gross short positions rather than the proposed daily calculation;

- Requiring in Rule 13f-2 and in the instructions to Form SHO that, for purposes of determining whether a Manager meets or exceeds a reporting threshold, a Manager shall determine its

<sup>33</sup> Because the proposed rule and form called for publication of only "net" activity based on the information reported in Information Table 2, this change in information reported on Form SHO as adopted does not affect the information published by the Commission from information derived from the Form SHO reports.

gross short position "at the close of regular trading hours" in the equity security, rather than at the "end of day" as was provided for in the instructions to Proposed Form SHO;

- Not adopting Proposed Rule 205 and, consequently, not adopting the Proposed CAT Amendment requiring a "buy to cover" order mark in order receipts and order origination reports submitted to the CAT; and

- Making modifications to the text of Rule 13f-2 and the instructions to Form SHO to provide context and enhance comprehensibility, such as—adding a reference in the definition of "gross short position" to "short sales" as defined in Rule 200(a) of Regulation SHO and making minor adjustments to phrasing in the definition;<sup>34</sup> adding language to the rule text to more precisely describe the equity securities for which information is reported in final Form SHO;<sup>35</sup> deleting the superfluous word "collectively" from the rule text to enhance overall readability; replacing the term "active LEI" on Proposed Form SHO with "non-lapsed LEI"<sup>36</sup> on final Form SHO; updating the contact information to be provided on the final Form SHO cover page,<sup>37</sup> and making corresponding modifications to conform the text of Rule 13f-2 and the instructions to Form SHO.

- Making non-substantive, technical changes to correct inadvertent

<sup>34</sup> Specifically, we made a non-substantive revision to change the word "including" to "such as" and removed the amphibological comma.

<sup>35</sup> To affirm that the Rule 13f-2 requirements apply to each class of an equity security about which information is being reported on Form SHO, and to more accurately indicate that classes of securities, not issuers, are registered pursuant to section 12 of the Exchange Act, Rules 13(a)(1) and Rule 13(a)(2) have been revised to refer to "each equity security *that is of a class of securities*" rather than "each equity security of an issuer . . . ." This distinction by class of security is also consistent with CUSIP procedures, under which, we understand, different classes of stock have distinct identifying codes. Rule 13f-2 requires that Managers provide CUSIP numbers for equity securities for which information is reported on Form SHO.

<sup>36</sup> For greater precision in the terminology used in Form SHO as adopted, an LEI that is currently in effect is referred to as a "non-lapsed LEI," rather than an "active LEI" (the terminology used in Proposed Form SHO), of a Manager. A non-lapsed LEI is an LEI for which the Manager is current on its periodic renewal fees needed to maintain the LEI. Further, to avoid any suggestion that a Manager filing a Form SHO report has an obligation to monitor the status of an issuer's LEI, Instructions 8.c and 9.c of Form SHO—"Column 3. Issuer LEI. If the issuer has an LEI, enter the issuer's active LEI"—have been revised to remove the term "active."

<sup>37</sup> The required Form SHO Cover Page contact information for the reporting Manager and its "Contact Employee" has been updated to reflect the greater reliance on the communication technology of email rather than facsimile.

<sup>30</sup> See *infra* nn. 36 & 218.

<sup>31</sup> 15 U.S.C. 78l.

<sup>32</sup> 15 U.S.C. 78o(d).

grammatical errors in the text of the adopted amendment to the CAT NMS Plan that requires a broker-dealer with a reporting obligation to CAT to indicate whether an order is a short sale effected by a market maker in connection with bona fide market making activities for which the BFMM locate exception is claimed.<sup>38</sup>

## II. Discussion of Final Rule 13f-2 and Form SHO

### A. Final Rule 13f-2

#### 1. Scope of Persons Covered by Final Rule 13f-2

##### a. Proposal

Exchange Act section 13(f) pertains to “Reports by Institutional Investment Managers.”<sup>39</sup> Proposed Rule 13f-2 would have required Managers to collect and file with the Commission via EDGAR certain short sale-related data on proposed Form SHO, within fourteen (14) calendar days after the end of each calendar month, with regard to each equity security over which the Manager and all accounts over which the Manager (or any other person under the Manager’s control) has investment discretion<sup>40</sup> that meet or exceed a quantitative reporting threshold (“Reporting Threshold”).

As defined in section 13(f)(6)(A) of the Exchange Act and for purposes of Proposed Rule 13f-2, “institutional investment manager” includes 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.<sup>41</sup> As such, the term “institutional investment manager” typically can include brokers and dealers, investment advisers, banks, insurance companies, pension funds and corporations.<sup>42</sup>

Proposed Rule 13f-2(b)(3) states that “investment discretion” has the same meaning as in 17 CFR 240.13f-1(b) (“Rule 13f-1(b) under the Exchange Act”),<sup>43</sup> and Rule 13f-1(b) states that “investment discretion” has the same meaning as in section 3(a)(35) of the Exchange Act. Rule 13f-1(b)’s definition

is comprehensive in that it covers all accounts over which the Manager, or any person under the Manager’s control, has investment discretion. This same definition of investment discretion was used by the Commission in adopting 17 CFR 240.10a-3T (“interim final temporary Rule 10a-3T”) in 2008, which required certain Managers to file weekly nonpublic reports with the Commission on Form SH regarding short sales and positions.<sup>44</sup> In addition, the Rule 13f-1(b) definition of investment discretion is used for Form 13F “long” position reporting by certain Managers.<sup>45</sup>

##### b. Comments and Final Rule

One commenter encouraged the Commission to expand the scope of market participants subject to reporting under Proposed Rule 13f-2 “beyond just Managers.”<sup>46</sup> This commenter believed the Commission’s determination “to omit a large group of market participants from Proposed Rule 13f-2’s scope will negatively affect the completeness and analytical sufficiency of the aggregated and disclosed short sale data, impeding the Commission’s ability to accurately reconstruct significant or unusual market events.”<sup>47</sup> This commenter believed that omitting a large group of market participants would “not provide the Commission with full visibility into the short sale market that it could otherwise achieve pursuant to Proposed Rule 13f-2” and believed that an “artificially narrow scope will not further the Commission’s stated goals of providing greater transparency and filling the information gaps for market participants and regulators.”<sup>48</sup> This commenter, however, did not identify what market participants were being omitted under the proposal and that should otherwise be included.

As a potential alternative to Proposed Rule 13f-2, however, this commenter suggested, in part, that the current FINRA short interest reporting regime could be enhanced, and subsequently

codified, to address potential limitations in the currently available short sale-related data. However, because FINRA’s short interest reporting is applicable only to broker-dealers that are FINRA member firms, Managers represent a more diverse group of market participants than is required under FINRA reporting (as was suggested as a potential alternative by the commenter). As stated above, Managers typically can include various market participants, including brokers and dealers, as well as investment advisers, banks, insurance companies, pension funds and corporations. Accordingly, the Commission is adopting as proposed Rule 13f-2(b)(1) to define institutional investment managers as having the same meaning as in Exchange Act section 13(f)(6)(A). Short sale-related data reported by Managers on Form SHO will provide additional context to, and otherwise supplement, currently available data by, for example, distinguishing directional short selling of Managers from short sale activity effected by market makers and liquidity providers. This approach should reduce the reporting of non-directional, “transient” short sales activity and provide market participants with more focused information on substantial short positions held by Managers.

Another commenter suggested that the Commission consider an exemption for certain types of Managers that do not regularly utilize short positions or that only utilize short positions for passive investing purposes.<sup>49</sup> By capturing short sale-related data from Managers who hold substantial gross short positions—regardless of the purpose for which they utilize short positions, the reporting regime of Rule 13f-2 will enhance transparency and provide useful information to market participants regarding overall short sale activity. Furthermore, having the reporting obligation under Rule 13f-2 triggered by a reporting threshold that is calculated based on a monthly average of daily gross short positions in certain equity securities, rather than the proposed

<sup>38</sup> Specifically, the preposition “for” was added before “a short sale” to clarify that reporting is required for a short sale in which the bona fide market maker exception is claimed, the article “the” was added before “exception,” and the preposition “in” was added before “Rule 203(b)(2)(iii)” to clarify that the BFMM locate exception is found in Rule 203(b)(2)(iii).

<sup>39</sup> 15 U.S.C. 78m(f).

<sup>40</sup> See Proposed Rule 13f-2(b)(3).

<sup>41</sup> See Proposed Rule 13f-2(b)(1).

<sup>42</sup> See also Instructions to Form 13F.

<sup>43</sup> See 17 CFR 240.13f-1(b).

<sup>44</sup> See *infra* discussion in Part II.A.3.a.

<sup>45</sup> See Form 13F (*sec.gov*), available at <https://www.sec.gov/pdf/form13f.pdf>.

<sup>46</sup> See Comment Letter from the Alternative Investment Management Association Ltd (Apr. 26, 2022), at 10–11, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126829-287533.pdf> (“AIMA Letter”); see also SBAI Letter, at 3 (stating that the proposed reporting only includes Managers, which would not provide a complete perspective of shorting activity). In raising concerns about reporting and monitoring burdens imposed by the reporting regime of Proposed Rule 13f-2, other commenters, however, did not question the application of the proposed rule to institutional investment managers.

<sup>47</sup> AIMA Letter, at 11.

<sup>48</sup> *Id.*

<sup>49</sup> See Comment Letter from Valerie Dahiya, Partner, Perkins Coie LLP (Apr. 26, 2022), at 3, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126839-287549.pdf> (“Perkins Coie Letter”) (stating that “for institutional investment managers that only selectively utilize short positions, or who only do so passively, these additional compliance costs in relation to the institutional investment manager’s usage of short positions could in turn impose unintended risks to the manager’s underlying investors if the institutional investment manager must divert additional time and resources for compliance and oversight”).



daily calculation,<sup>50</sup> is designed in part to alleviate concerns for Managers who only occasionally meet or exceed the prescribed reporting thresholds.

In addition, the Commission did not receive any comments regarding the definition of “investment discretion” as proposed. The Commission is adopting Rule 13f-2(b)(3) as proposed to define the term “investment discretion” as having the same meaning as in Rule 13f-1(b) (which, among other things, incorporates the definition in section 3(a)(35) of the Exchange Act). In addition, Managers that will file reports on adopted Form SHO likely have experience reporting on Form 13F, for which this same definition is used.<sup>51</sup>

## 2. Scope of Reported Securities

### a. Proposal

Under the proposed rule, a Manager would have had to file a Form SHO report with regard to:

- Any equity security of an issuer that is registered pursuant to section 12 of the Exchange Act<sup>52</sup> or for which the issuer is required to file reports pursuant to section 15(d) of the Exchange Act<sup>53</sup> in which the Manager meets or exceeds either (1) a gross short position in the equity security with a U.S. dollar value of \$10 million or more at the close of regular trading hours on any settlement date during the calendar month; or (2) a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5 percent or more (Threshold A); and
- Any equity security of an issuer that is not a reporting company issuer as described above in which the Manager meets or exceeds a gross short position in the equity security with a U.S. dollar value of \$500,000 or more at the close of regular trading hours on any settlement date during the calendar month (Threshold B).

As proposed, the reporting thresholds in Rule 13f-2(a)(1) and (2) (each a “Proposed Reporting Threshold”) applied to equity securities, as the term “equity security” is defined in section 3(a)(11) of the Exchange Act<sup>54</sup> and 17

CFR 240.3a11-1 (“Rule 3a11-1”).<sup>55</sup> This scope, which included both exchange-listed and over-the-counter securities, is consistent with the securities to which Rules 200, 203, and 204 of Regulation SHO apply.<sup>56</sup> The proposed scope would have included exchange-traded fund (“ETF”) securities, but would not have required Managers, in calculating a Proposed Reporting Threshold or Form SHO data, to consider short positions the ETF held in individual underlying equity securities.<sup>57</sup> And because the Proposed Reporting Thresholds were based on a Manager’s gross short position in the underlying equity security itself, the proposed rule would not have required the Manager to account for derivative exposure as part of the threshold calculation for the underlying equity security, but would have required Managers to report certain changes in their gross equity short positions derived from acquiring or selling the equity in connection with derivative activity, such as exercising an option.<sup>58</sup>

### b. Comments and Final Rule

The Commission received several comments on Proposed Rule 13f-2’s and Proposed Form SHO’s proposed scope of securities, with commenters expressing a variety of views. Most commenters took an expansive view, exemplified by one such commenter’s statement that “all different securities and ETFs should be required to report all short sale data. The more information that is available to every investor and the Commission the better.”<sup>59</sup> As discussed below, other commenters, by contrast, recommended narrowing the universe of “in scope” securities by, for example, aligning with similar Commission reporting and public dissemination regimes, limiting the scope to securities of U.S. reporting companies, or excluding ETFs, options and warrants and other convertibles, and derivatives. Some commenters focused on the impact on implementation and compliance costs

the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security. 15 U.S.C. 78c(a)(11).

<sup>55</sup> See Proposing Release, at 14956 n.59.

<sup>56</sup> See Regulation SHO Adopting Release, at 48012.

<sup>57</sup> Proposing Release, at 14958.

<sup>58</sup> As stated in the Proposing Release, the Commission believed this proposed approach balances Managers’ reporting costs with the utility such data provides to regulators. See Proposing Release, at 14962.

<sup>59</sup> Comment from Samuel Meadows (Mar. 26, 2022), at 1, available at <https://www.sec.gov/comments/s7-08-22/s70822-273456.htm> (“Samuel Meadows Comment”).

related to Proposed Rule 13f-2 reporting requirements and recommended that derivatives, options, warrants and other convertibles, and ETFs be excluded from the scope of equity securities subject to Proposed Rule 13f-2 reporting requirements.<sup>60</sup>

### Comments on the Scope of Covered Securities

Most commenters supported the applicability of Proposed Rule 13f-2 to short positions in ETFs, some expressing specific concerns about “improper” use of ETFs to leverage short positions.<sup>61</sup> However, one commenter advocating for the exclusion of ETFs from the universe of “in-scope” securities stated that, in most circumstances, Managers short ETFs largely for hedging purposes and not for the same reasons that Managers short stocks of reporting company issuers; this commenter stated that such information “will provide the public, and the SEC, very little in terms of useful information.”<sup>62</sup>

The Commission disagrees with the commenter that reporting about gross short positions in ETFs will not provide useful information to the public and the Commission. Establishing short positions in an ETF can provide short exposure to a diverse set of equity securities or create a directional short strategy such as leveraged shorting. Because of their multipurpose nature, ETFs are a substantial piece of the short-

<sup>60</sup> See, e.g., MFA Letter, at 11–12 (recommending that, to simplify compliance, provide clarity, and reduce costs, Commission should limit the reporting requirements to stocks of U.S. reporting company issuers, and exclude derivatives and ETFs); SIFMA Letter, at 20 (recommending reduction of compliance costs by creating a list of equity securities that would be subject to Proposed Rule 13f-2 reporting requirements that would exclude “extraneous securities, such as options, warrants, convertibles, and ETFs”); Comment Letter from Frank Vivirito, Compliance Officer, XR Securities LLC (Apr. 25, 2022), at 2 (“XR Securities Letter”) (stating “I feel strongly that highly liquid, higher priced, active and efficient ETFs (and perhaps even some single name equities) with limited or no settlement issues” should be excluded from Proposed Rule 13f-2 reporting requirements).

<sup>61</sup> See, e.g., Comment Letter from Nick Dougherty (Mar. 27, 2022), at 2, available at <https://www.sec.gov/comments/s7-08-22/s70822-20121466-273451.pdf> (“Nick Dougherty Letter”); Anonymously Submitted Comment (Mar. 21, 2022), at 1, available at <https://www.sec.gov/comments/s7-08-22/s70822-20120739-272894.pdf>. See generally, Anonymously Submitted Comment (Mar. 21, 2022), at 2, available at <https://www.sec.gov/comments/s7-08-22/s70822-20122297-278355.htm> (recommending that “[a]ll securities, including ETFs, OTC stocks, swaps etc. should have their positions data recorded and submitted to the SEC daily”); Samuel Meadows Comment, at 1 (“I strongly believe that all different securities and ETFs should be required to report all short sale data.”).

<sup>62</sup> MFA Letter, at 12.

<sup>50</sup> See *infra* Part II.A.3 for more discussion of the reporting thresholds in Proposed Rule 13f-2 and Rule 13f-2 as adopted.

<sup>51</sup> See *infra* Part VIII.B.1. Registered investment advisers, particularly those managing hedge funds, are the primary Managers likely to be affected by Rule 13f-2.

<sup>52</sup> 15 U.S.C. 78l.

<sup>53</sup> 15 U.S.C. 78o(d).

<sup>54</sup> Section 3(a)(11) of the Exchange Act defines “equity security” as any stock or similar security or 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 other security which

side market.<sup>63</sup> ETFs are subject to the requirements of Regulation SHO, and there is a benefit to applying the Rule 13f-2 reporting requirements to the same universe of securities subject to the Commission's short sale rules. Further, short sale-related data regarding ETFs will provide important transparency to a significant segment of market activity to both the marketplace and regulators alike.<sup>64</sup>

Some commenters recommended that fixed-income securities be added to the proposed scope of securities.<sup>65</sup> These commenters believed that all investment vehicles, including fixed income securities, should be included within the scope of securities subject to potential reporting. These commenters generally believed that short positions in fixed income securities would provide additional transparency to the marketplace. One of these commenters believed that fixed income securities should be included under the rule because "bonds play a large role in

market activities, along with the repo market" and that "corporate bond borrowing data provides an unparalleled insight into short positioning at a security and issuer level."<sup>66</sup>

Fixed income securities are not subject to the Commission's short sale rules. Market participants, including Managers, are currently accustomed to complying with the short sale rules with regard to equity securities that meet the definition of short sales in Rule 200(a) of Regulation SHO.<sup>67</sup> Further, the self-regulatory organizations ("SROs") currently collect and provide data on short sales of equity securities as defined by Rule 200(a) of Regulation SHO. Consistent with the discussion in the Proposing Release, the aggregated short sale-related data that will be published by the Commission under Rule 13f-2 will provide additional context to market participants regarding equity securities that are subject to the requirements of Regulation SHO.<sup>68</sup> For these reasons, the Commission is not including fixed income securities.

Some commenters also recommended excluding options, warrants, and other convertibles from the rule.<sup>69</sup> Other commenters recommended that derivatives be included within the scope of Proposed Rule 13f-2<sup>70</sup>—including those not within the definition of equity security in section 3(a)(11) of the Exchange Act and Rule 3a11-1 thereunder.<sup>71</sup>

Certain derivatives, options, warrants, and convertibles are themselves equity securities for purposes of section 3(a)(11) of the Exchange Act and Rule 3a11-1 thereunder, and therefore for purposes of final Rule 13f-1.<sup>72</sup> Derivatives and other securities that are not equity securities within the definitions of section 3(a)(11) of the Exchange Act and Rule 3a11-1 thereunder, are not within the scope of

the rule. Managers are currently accustomed to complying with requirements for equity securities under Rule 200(a) of Regulation SHO. The Commission is not including derivatives and other securities that are not equity securities under the definitions of section 3(a)(11) of the Exchange Act and Rule 3a11-1 thereunder. Many commenters who requested that derivatives be included expressed concern that derivatives could be used to create substantial economic short positions, while avoiding Proposed Rule 13f-2's reporting requirements.<sup>73</sup> The Commission recognizes, as it did in the Proposing Release, that there is a risk that Rule 13f-2 could be a catalyst for growth in markets of economic equivalents of underlying equity securities as short sellers look for new avenues to take the economic equivalent of short positions while avoiding these proposed reporting requirements.<sup>74</sup> Managers do not have to account for economic exposure to an underlying equity security created through the use of equity derivatives when calculating the reporting thresholds for reporting short sales of that underlying equity security. However, once a Manager meets or exceeds a reporting threshold for an underlying equity security, the Manager will then be required to report certain short activity for each settlement date during the reporting calendar month, and that disclosure will take into account activity in options, tendered conversions, secondary offering transactions,<sup>75</sup> and other equity derivatives or activity that might affect the reported short positions on Form SHO, as discussed further below.<sup>76</sup> Managers must also report gross short positions of each equity security resulting from short sales as defined in Rule 200(a) of Regulation SHO to the extent the Manager's positions meet the relevant thresholds.<sup>77</sup> Finally, large

<sup>63</sup> ETFs are a popular trading tool that can be used in various ways, including, for example, to hedge a long position, or to establish a directional short position. See *Exchange-Traded Funds*, Investment Company Act Release No. 33646 (Sept. 25, 2019), 84 FR 57162 (Oct. 24, 2019) ("ETFs have become a popular trading tool, making up a significant portion of secondary market equities trading."). See also Giovanni Moriano & Brian Baker, *Best inverse and short ETFs—here's what to know before buying them*, Bankrate (Feb. 16, 2023), available at <https://www.bankrate.com/investing/best-inverse-etfs/> (describing traders' use of short ETFs to hedge against falling prices in other positions, to make directional bets on securities or indexes, or to magnify returns through leveraged short ETFs); *The Renaissance of ETFs*, Oliver Wyman (2023), available at <https://www.oliverwyman.com/our-expertise/insights/2023/may/exchange-traded-funds-are-fueling-market-opportunities.html> (stating "As of the end of December 2022, total ETF assets under management (AUM) have reached \$6.7 trillion across the US and Europe, growing at approximately 15% compound annual growth rate (CAGR) since 2010. . . . We expect a significant part of this growth to come from active ETFs."). Active ETFs can include inverse and short ETFs that seek to use short strategies or leverage.

<sup>64</sup> See *Experiences of US Exchange-Traded Funds During the COVID-19 Crisis*, Inv. Co. Inst. (Oct. 2020), available at <https://www.sec.gov/comments/credit-market-interconnectedness/cll10-2.pdf> ("Early in 2020, . . . ETF trading volume accounted for between 20 and 30 percent of total stock market trading on a daily basis. . . ."); see also Richard B. Evans et al., *ETF Short Interest and Failures-to-Deliver: Naked Short-Selling or Operational Shorting?*, U. Pa. Wharton Sch. (Jan. 2018), available at <https://jacobslevycenter.wharton.upenn.edu/wp-content/uploads/2018/08/ETF-Short-Interest-and-Failures-to-Deliver.pdf> (stating that ETFs constitute roughly 10% of U.S. equity market capitalization but over 20% of short interest, and that short interest for the ETF market has increased steadily over several years).

<sup>65</sup> See, e.g., Nick Dougherty Letter (Mar. 27, 2022), at 3 (stating that "fixed income securities should be included under Proposed rule 13f-2"); Anonymously submitted Comment (Mar. 21, 2022), at 1, available at <https://www.sec.gov/comments/s7-08-22/s70822-20120739-272894.pdf>.

<sup>66</sup> Anonymously submitted Comment (Mar. 21, 2022), at 1, available at <https://www.sec.gov/comments/s7-08-22/s70822-20120739-272894.pdf>.

<sup>67</sup> See Proposing Release, at 14956 n.59.

<sup>68</sup> See *id.* at 14956.

<sup>69</sup> SIFMA Letter, at 20.

<sup>70</sup> See, e.g., Better Markets Letter, at 9 (stating that "[i]n order for the final rule to actually serve its purpose, it must require that institutional investment managers include their short interest that arises from derivatives positions"); WTI Letter, at 4 (stating that not including derivatives contracts such as options and security-based swaps is a "huge hole that must be remedied" and "will inevitably result in firms exploiting the loophole. . . ."); Samuel Meadows Comment, at 1 (stating that "[a]ny and all short positions resulting from derivatives should be included in whether they meet a Reporting Threshold").

<sup>71</sup> See *supra* nn. 54 & 55 and accompanying text; see generally Part II.A.2.a.

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., Comment Letter from Oliver Davies, Apr. 20, 2022, available at <https://www.sec.gov/comments/s7-08-22/s70822-20124155-280554.htm> (expressing concern that "funds are using complex derivative positions like options and swaps to hide their true short positions"); Anonymously submitted Comment, Mar. 14, 2022, available at <https://www.sec.gov/comments/s7-08-22/s70822-20119368-272254.htm> (positing that excluding derivative positions can create opportunities to avoid triggering the reporting thresholds through other economically equivalent instruments).

<sup>74</sup> See *infra* Part VIII.C.8; see also Proposing Release, at 15001.

<sup>75</sup> See *infra* n. 285.

<sup>76</sup> See *infra* Part II.A.4.

<sup>77</sup> Option exercises or assignments can result in a short sale. See, e.g., Rule 201 Adopting Release, at 11263 n. 433 (explaining that short sales that result from option exercises or assignments are short sales but are not covered by the Rule 201 of



positions in options are currently reportable under a separate requirement.<sup>78</sup> In addition, there is a separate reporting regime for security-based swaps,<sup>79</sup> which may also lessen the likelihood of Managers attempting to avoid the requirements of Rule 13f-2 by using these instruments.

#### Comments on Creating a List

Some commenters recommended narrowing the universe of “in-scope” securities to lessen the burden on Managers and to help to ensure compliance with Proposed Rule 13f-2. Certain commenters recommended that the Commission create and publish a list of securities subject to Form SHO reporting, much like the Commission’s Official List of Section 13(f) Securities (“13F List”) required by statute to be made available to the public pursuant to section 13(f)(4) of the Exchange Act<sup>80</sup> for use in the preparation of quarterly reports filed with the Commission for purposes of long position reporting under Rule 13f-1. One such commenter suggested that providing such a list would “promote greater efficiency in validating reported short positions and consistency in reporting of those positions among managers.”<sup>81</sup> Another commenter recommended aligning Proposed Rule 13f-2 with the scope of other similar reporting and public dissemination regimes (e.g., Rule 13f-1, and prior Rule 10a-3T<sup>82</sup>) that are focused on a narrower set of securities,

Reg. SHO’s price test because there is no national best bid).

<sup>78</sup> FINRA Rule 2360 requires FINRA member firms to report large options positions to the Large Options Positions Report (“LOPR”), which FINRA uses to surveil for potentially manipulative behavior, including attempts to corner the market in the underlying equity, leverage an option position to affect the price, or move the underlying equity to change the value of a large option position.

<sup>79</sup> See Regulation SBSR, 17 CFR 242.900 through 242.909.

<sup>80</sup> 15 U.S.C. 78m(f)(4).

<sup>81</sup> Comment Letter from Sarah A. Bessin, Associate General Counsel & Nhan Nguyen, Assistant General Counsel, Investment Company Institute (Apr. 26, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126820-287527.pdf> (“ICI Letter”) at 9 n.28; see also MFA Letter, at 13 (positing that having an “official list” of securities subject to Form SHO reporting would reduce the burden on Managers to make judgments about whether a particular security is in-scope for Form SHO reporting and would reduce inconsistencies among reporting Managers in making such judgments in the absence of such a list); see also SIFMA Letter, at 20 (suggesting that the “Form SHO List” include securities that are included on the 13F List while excluding securities that should not be covered by Form SHO, as well as the total shares outstanding for each security).

<sup>82</sup> Rule 10a-3T and Form SH focused on certain section 13(f) securities and excluded options that are reportable on Form 13F.

namely certain section 13(f) securities that are included on the 13F List.<sup>83</sup>

Narrowing the scope of securities to the 13F List would effectively exclude certain equity securities that are subject to the requirements of Regulation SHO, which the Commission continues to believe would be inconsistent with the Commission’s objective to publish short sale-related data under Rule 13f-2 that will provide additional context to market participants regarding securities that are subject to the Commission’s current short sale rules.<sup>84</sup> As stated above, market participants, including Managers, are currently accustomed to complying with the short sale rules with regard to equity securities generally, so narrowing the scope to the 13F List that periodically changes, or to a list created for purposes of Rule 13f-2 that is similar in concept to the 13F List, could result in reduced Rule 13f-2 reporting and, consequently, less transparency of short sale-related data. Narrowing the scope to securities that are included on the 13F List could also result in additional administrative costs and burdens to Managers to the extent that Managers have to perform additional monitoring to ensure that their Form SHO reports cover, and the calculations required to determine whether a reporting obligation under Rule 13f-2 has been triggered because a Reporting Threshold has been met, apply to, only the narrower scope of securities (a subset of the equity securities currently subject to the Commission’s short sale rules). Such an outcome is inconsistent with the Commission’s objective of enhancing transparency, while balancing the interests of gathering and disclosing data that provides additional context to market participants regarding securities that are subject to the requirements of Regulation SHO against the potential costs to reporting Managers.

Additionally, with respect to long position reporting, section 13(f)(1) expressly provides that the Commission shall make available to the public a list of all equity securities that are subject to such reporting.<sup>85</sup> However, section

<sup>83</sup> HSBC Letter, at 13–14 (recommending that Commission align the reporting requirements of Proposed Rule 13f-2 to a narrower set of securities—e.g., the securities prescribed in Rule 13f-1—rather than with securities that are “in-scope” with Regulation SHO).

<sup>84</sup> See Proposing Release, at 14956.

<sup>85</sup> Section 13(f)(1) of the Exchange Act (15 U.S.C. 78m(f)(1)) requires any institutional investment manager exercising investment discretion over accounts holding at least \$100 million in fair market value of certain equity securities to file reports on Form 13F with the Commission at the times set forth in 17 CFR 240.13f-1 (“Rule 13f-1”). The statute directs the Commission to make

13(f)(2) does not require publication of such a list. Further, existing short sale-related reporting to exchanges and RNSAs does not rely on a published list of securities. For these reasons, it is not necessary to compile and periodically provide a list of securities covered by Rule 13f-2.

#### Comments To Limit Scope to Equity Securities of U.S. Reporting Company Issuers

Some commenters recommended tailoring the scope of securities subject to Rule 13f-2 reporting to the equity securities of U.S. reporting company issuers.<sup>86</sup> Many of these commenters raised concerns about the costs to Managers of developing new systems to capture trading of equity securities of non-reporting company issuers. Certain commenters focused on how a requirement to report short sales of equity securities of non-reporting company issuers would represent an expansion of reporting requirements beyond what is currently required under existing reporting regimes under Exchange Act sections 13(d), 13(f)(1), 13(g), and 16.<sup>87</sup> Other commenters believed that requiring Managers to report short position information in equity securities of non-reporting company issuers would be extremely costly and provide little public benefit.<sup>88</sup> Another such commenter stated that because securities of non-reporting company issuers can be held

available to the public, for a reasonable fee, a list of all equity securities described in section 13(d)(1) of the Exchange Act and to disseminate to the public the information contained in the reports.

<sup>86</sup> See, e.g., MFA Letter, at 11–12; Letter from Leigh R. Fraser, Partner, Ropes & Gray LLP (Apr. 26, 2022), at 9, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126853-287579.pdf> (“Ropes & Gray Letter”). Cf. SIFMA Letter, at 5 (recommending, rather than separate reporting thresholds for reporting company issuers and non-reporting company issuers, a single threshold apply to U.S. equity securities included in a “Form SHO List” akin to the 13F List that “would include securities that are included on the 13F List, while also excluding certain extraneous securities, such as options, warrants, convertibles, and ETFs that should not be covered by Proposed Form SHO reporting”).

<sup>87</sup> See, e.g., Ropes & Gray Letter, at 9 (stating that a requirement to report short sale-related data regarding equity securities of U.S. private companies would represent a “significant expansion” of reporting requirements imposed on investors beyond what currently is required under existing reporting regimes under Exchange Act sections 13(d), 13(f)(1), 13(g), 13(h), and 16).

<sup>88</sup> See, e.g., MFA Letter, at 11–12 (stating that because non-reporting company issuer securities are not publicly traded, information about transactions in such securities would not likely have an effect on price efficiency or market liquidity, but could have negative consequences for Managers—e.g., increasing the risk of exposing Managers, their short positions, and trading strategies, which could facilitate retaliatory and manipulative trading strategies).

by only a small number of U.S. investors, cannot be traded on U.S. securities exchanges, and can often be subject to contractual restrictions on transfer, short sales in such securities are rare due to the limitations on the number of shares available to borrow.<sup>89</sup> Another commenter stated that trading (including short selling) in securities of non-reporting company issuers is limited, which potentially makes Managers that file Form SHO reports with respect to such securities more susceptible to retaliatory and manipulative trading strategies.<sup>90</sup> As stated above, the Commission is adopting Rule 13f-2 and Form SHO to help enhance transparency regarding short selling in equity securities—including both exchange-listed and over-the-counter securities, and ETFs—that are already subject to Regulation SHO. Consistent with the discussion in the Proposing Release, through the publication of short sale-related data to investors and other market participants, the information published under Rule 13f-2 will provide additional context to market participants regarding equity securities that are subject to the requirements of Regulation SHO.<sup>91</sup> To that end, the Commission continues to believe that transparency regarding short selling in over-the-counter (“OTC”) equity securities, many of which are non-reporting company issuers,<sup>92</sup> is important to investors generally, including many retail investors. The Commission has previously stated that securities “that trade in the OTC market are primarily owned by retail investors.”<sup>93</sup> Consistent

with this view, it is important from a transparency perspective to include, as proposed, non-reporting issuers for purposes of reporting under Rule 13f-2. While the Commission is cognizant that information on non-reporting company issuers will be more difficult to obtain and more costly to report than information on reporting company issuers, the Commission disagrees there would be little benefit to the public from such information, particularly given the extent of trading in OTC market securities by retail investors.<sup>94</sup> Furthermore, OTC securities typically have lower prices, lower trading volume, and are by definition not traded on exchanges, making them potentially more prone to fraud.<sup>95</sup> In addition, as discussed further below, publication of aggregated data approximately one month following the reporting calendar month will alleviate concerns regarding potential retaliation against reporting Managers.

Other commenters raised questions as to whether the Commission’s jurisdiction extended to equity securities not traded in the U.S. One such commenter, highlighting the disparity between Proposed Rule 13f-2 reporting and reporting of long positions in the same securities, questioned why it would be in the public interest to require more expansive disclosure with respect to short positions than long positions, and stated that the “proposed scope of the rule would provide U.S. investors with information that is of limited value, particularly with respect to non-U.S. securities.”<sup>96</sup>

Exchange Act section 13(f)(2)’s cross-border reach is based on the territorial approach that the Commission has applied when crafting rules to implement other provisions of the Exchange Act.<sup>97</sup> Consistent with that territorial approach (which is based on Supreme Court precedent, including *Morrison v. National Australia Bank, Ltd.* and its progeny) the Commission examines the relevant statutory

provision to determine the domestic conduct that is covered by the provision.<sup>98</sup> The Commission understands section 13(f)(2), by its terms, to apply to any institutional investment manager already subject to U.S. reporting requirements. This indicates that the relevant domestic conduct under section 13(f)(2) is being an institutional investment manager operating in the U.S. securities markets such that the investment manager is subject to filing reports with the Commission. Thus, when that relevant domestic conduct is present here in the United States, section 13(f)(2)’s regulatory reporting obligation will generally apply.

The Commission is adopting Rule 13f-2 and Form SHO to help enhance transparency regarding short selling in equity securities—including both exchange-listed and over-the-counter securities, and ETFs. The Commission continues to believe that, through the publication of short sale-related data to investors and other market participants, the information reported by Managers will provide important additional context to market participants regarding short sale activity in these equity securities by Managers. The Commission disagrees that the reported information would be of “limited value” as was suggested by a commenter. Transparency regarding short selling by Managers of securities of U.S. and non-U.S. issuers is important regardless of where those sales occur.

## Final Rule

For the reasons discussed above, the Commission is adopting the scope of securities as originally proposed. Specifically, the final rule will cover equity securities as defined in section 3(a)(11) of the Exchange Act and Rule 3a11-1 thereunder. This scope of securities includes both exchange-listed and OTC equity securities, including, inter alia, ETFs, certain derivatives, and options, warrants and other convertibles, which is consistent with the equity securities to which Rules 200, 203, and 204 of Regulation SHO apply.<sup>99</sup>

<sup>98</sup> 561 U.S. 247. See, e.g., *Abitron Austria GmbH v. Hetronix Int’l, Inc.*, 600 U.S. \*\*, \*\*, 2023 WL 4239255, at \*4 (June 29, 2023) (stating that “[t]he Supreme Court has repeatedly and explicitly held that courts must ‘identify the statute’s ‘focus’ and as[k] whether the conduct relevant to that focus occurred in United States territory”).

<sup>99</sup> See Regulation SHO Adopting Release, at 48012.

<sup>89</sup> Ropes & Gray Letter, at 8–9.

<sup>90</sup> MFA Letter, at 11–12.

<sup>91</sup> See Proposing Release, at 14956.

<sup>92</sup> See, e.g., *Publication or Submission of Quotations Without Specified Information*, Exchange Act Release No. 89891 (Sept. 16, 2020) (“Adopting Release for Amendments to Rule 15c2-11”), 85 FR 68124, 68125 (Oct. 27, 2020) (“However, in other cases, there is no or limited current public information available about certain issuers of quoted OTC securities to allow investors or other market participants to make informed investment decisions.”).

<sup>93</sup> See, e.g., *Publication or Submission of Quotations Without Specified Information*, Exchange Act Release No. 89891 (Sept. 16, 2020), 85 FR 68124, 68125 (Oct. 27, 2020) (citing to Andrew Ang, et al., *Asset Pricing in the Dark: The Cross-Section of OTC Stocks*, 26 Rev. Fin. Stud. 2985–3028 (2013) (“Securities that trade in the OTC market are primarily owned by retail investors[.]”); see also *Unraveling the Mystery of Over-the-Counter Trading*, FINRA Inv’r Insights (Jan. 4, 2016), available at <https://www.finra.org/investors/insights/unraveling-mystery-over-counter-trading> (“OTC equities are largely owned by retail investors, according to a 2013 study from Columbia University, who may be attracted to the low price of many OTC equities, including so-called ‘penny stocks’ that trade at under \$5 a share. That activity is typically very speculative.”).

<sup>94</sup> See *id.* See also *infra* Part VIII.C.6 for a discussion of costs related to tracking non-reporting companies, and *infra* Part II.A.3 for discussion of possible benefit.

<sup>95</sup> See, e.g., *Adopting Release for Amendments to Rule 15c2-11*, 85 FR 68124, at 68185.

<sup>96</sup> HSBC Letter, at 13–14 (recommending that the reporting requirements of Proposed Rule 13f-2 be limited to equity securities of reporting company issuers that are traded on a Commission-registered trading platform).

<sup>97</sup> See, e.g., *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, Exchange Act Release No. 74244 (Feb. 11, 2015), 80 FR 14563, 14649 (Mar. 19, 2015) (“2015 Regulation SBSR Adopting Release”) (discussing the territorial approach to the cross-border application of Title VII requirements for regulatory reporting and public dissemination of security-based swap transactions).

### 3. Reporting Thresholds

#### a. Proposal

To balance the interests of gathering and disclosing data and the potential costs to reporting Managers, the Commission proposed separate thresholds for short positions in reporting company issuers, or Threshold A, and non-reporting company issuers, or Threshold B.<sup>100</sup> Threshold A, in Proposed Rule 13f-2(a)(1), involved a two-pronged approach that would have required reporting by Managers that have, with regard to each equity security of a reporting company issuer, either (i) a gross short position with a U.S. dollar value of \$10 million or more at the close of regular trading hours on any settlement date during the calendar month, or (ii) a 2.5 percent or higher monthly average gross short position as a percentage of shares outstanding.<sup>101</sup> Threshold B, in Proposed Rule 13f-2(a)(2), involved a single-pronged approach that would have required reporting by Managers that have, with regard to each equity security of a non-reporting company issuer, a U.S. dollar value of \$500,000 or more at the close of regular trading hours on any settlement date during the calendar month.<sup>102</sup> The Proposed Reporting Thresholds were based on comment letters and analysis of Form SH data collected under Rule 10a-3T, an interim temporary rule adopted by the Commission in October 2008, which required certain institutional investment managers to file weekly nonpublic reports with the Commission on Form SH regarding their short sales and short positions in certain section 13(f) securities, other than options.<sup>103</sup> Rule

10a-3T required reporting of short positions that were either greater than 0.25 percent of shares outstanding or \$10 million in fair market value.<sup>104</sup> This temporary rule was adopted in the wake of the 2008 financial crisis in response to concerns about high levels of volatility associated with short selling.<sup>105</sup> Proposed Threshold B was developed based on an analysis of OTC Markets data.<sup>106</sup> The Proposed Reporting Thresholds were structured to make it more difficult for Managers with substantial gross short positions to avoid disclosure by trading below a Proposed Reporting Threshold, particularly with lower market capitalization securities.

The approach to Threshold A, as described in the Proposing Release, was designed to ensure that a substantial short position in either a small capitalization security or a large capitalization security could potentially trigger a reporting obligation under Threshold A.<sup>107</sup> For example, it would be difficult for a Manager to trigger only a dollar threshold in a given security if the market capitalization of the reporting company issuer is small; likewise, it would be difficult for a Manager to trigger only a percentage threshold in a given security if the market capitalization of the reporting

company issuer is large. The Commission believed that this would help to ensure transparency into short sale-related activity that would be beneficial to both market participants and regulators. As stated above, the Proposed Reporting Thresholds were structured to make it more difficult for Managers with substantial gross short positions to avoid disclosure by trading below a Reporting Threshold, particularly with lower market capitalization securities. The proposed U.S. dollar value-based prong was designed to capture Managers with a substantial short position, even if the position was relatively small compared to the market capitalization of the issuer.<sup>108</sup> The prong based on percentage of shares outstanding was designed to capture Managers with gross short positions that are large relative to the size of the issuer and, therefore, could have a significant impact on the issuer.<sup>109</sup>

Regarding Threshold B, as discussed in the Proposing Release, a \$500,000 or more threshold for non-reporting company issuer securities is similar to the median dollar value of a position of 2.5 percent of the market capitalization of OTC stocks for which the Commission was able to obtain information on total shares outstanding.<sup>110</sup> The Commission believed that this approach with regard to non-reporting company issuers would help to ensure added transparency into short sale-related activity that would be beneficial to both market participants and regulators, because, as discussed in the Proposing Release, it would capture Managers with substantial short positions in an equity security of a non-reporting company issuer, even if such positions are relatively small compared to the market capitalization of the issuer.<sup>111</sup> Rather than a two-pronged reporting threshold for equity securities of non-reporting company issuers, however, the Commission proposed a single-pronged, dollar value-based, reporting threshold for non-reporting company issuer securities given its understanding that the number of total shares outstanding for non-reporting company issuers may not be readily and consistently accessible to Managers.<sup>112</sup>

As discussed in the Proposing Release, to determine whether the proposed dollar value prong of Threshold A (Proposed Rule 13f-2(a)(1)(i)) or Threshold B (Proposed

<sup>100</sup> As discussed above, an issuer of a class of securities that is registered pursuant to Exchange Act section 12 or for which the issuer is required to file reports pursuant to Exchange Act section 15(d) is referred to herein as a reporting company issuer; issuers not meeting those criteria are referred to herein as non-reporting company issuers.

<sup>101</sup> Proposed Rule 13f-2(a)(1). See Proposing Release, at 14962 (describing in detail the design of Threshold A).

<sup>102</sup> Proposed Rule 13f-2(a)(2). See Proposing Release, at 14962 (describing in detail the design of Threshold B).

<sup>103</sup> *Disclosure of Short Sales and Short Positions by Institutional Investment Managers*, Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008). The rule extended the reporting requirements established by the Commission's Emergency Orders dated Sept. 18, 2008, Sept. 21, 2008, and Oct. 2, 2008, with some modifications. See *Emergency Order Pursuant to Section 12(k)(2) of the Securities and Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments*, Exchange Act Release No. 58591 (Sept. 18, 2008), 73 FR 55175 (Sept. 24, 2008); *Amendment to Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments*, Exchange Act Release No.

58591A (Sept. 21, 2008), 73 FR 55557 (Sept. 25, 2008) (amending the Sept. 18, 2008 Emergency Order ("Order") to clarify certain technical issues and when the information filed by the institutional investment managers on a nonpublic basis would be made public by the Commission on a delayed basis); *Amendment to Order and Order Extending Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments*, Exchange Act Release No. 58724 (Oct. 2, 2008), 73 FR 58987 (Oct. 8, 2008) (extending effectiveness of the Order through Oct. 17, 2008, and stating that the Forms SH filed under the Order would remain nonpublic to the extent permitted by law).

<sup>104</sup> See Proposing Release, at 14963–65 (discussing the analysis of Form SH data).

<sup>105</sup> Rule 10a-3T remained in effect through July 2009, at which time the Commission stated that it and its staff would be working with several SROs to make certain short sale volume and transaction data publicly available through SRO websites. See Proposing Release, at 14954 (providing background on Rule 10a-3T and related Form SH).

<sup>106</sup> See Proposing Release, at 14964 n.82 ("This analysis was performed using data from OTC Markets Group Inc. available through Wharton Research Data Services, <https://wrds-www.wharton.upenn.edu/pages/about/data-vendors/otc-markets-group/>. The data were filtered to only include equities that had a closing price and short interest on September 30, 2020. Approximately 13% of the data did not have total shares outstanding available, representing approximately 14% of the dollar value of short interest. We use these data without shares outstanding as a proxy for non-reporting issuers. The Commission used September 2020 because that is the most recent date in which a dataset containing total shares outstanding for a broad set of OTC equities was available.").

<sup>107</sup> *Id.* at 14962.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 14962–63.

<sup>111</sup> Proposing Release, at 14962–63.

<sup>112</sup> *Id.* at 14962.

Rule 13f-2(a)(2)) is met, a Manager would be required to determine its end of day gross short position on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the relevant settlement date.<sup>113</sup> In circumstances where such closing price was not available in calculating Threshold B, a Manager would be required to use the price at which it last purchased or sold any share of that security, which would be readily available to the Manager.<sup>114</sup>

As discussed in the Proposing Release, to determine whether the second prong of Threshold A (Proposed Rule 13f-2(a)(1)(ii))—2.5 percent or higher monthly average gross short position as a percentage of shares outstanding in the equity security—is met, the Manager would be required to (a) identify its gross short position in the equity security at the close of each settlement date during the calendar month of the reporting period, and divide that figure by the number of shares outstanding in such security at the close of that settlement date, then (b) add together the daily percentages during the calendar month as determined in (a) and divide the resulting total by the number of settlement dates during the calendar month reporting period. The number of shares outstanding of the security for which information was being reported would have been determined by reference to an issuer's most recent annual or quarterly report, and any subsequent update thereto, filed with the Commission.<sup>115</sup>

#### b. Comments and Final Rule

As discussed below, the Commission received numerous comments regarding various aspects related to the Proposed Reporting Thresholds. Generally, these comments varied, with some commenters recommending, for example, that the Commission raise the thresholds (which would trigger less gross short position reporting) and others recommending the Commission lower or eliminate the thresholds (which would trigger additional gross short position reporting).<sup>116</sup> Some

commenters expressed general support for the Proposed Reporting Thresholds, or expressed support for certain aspects of those thresholds.<sup>117</sup>

#### Comments To Raise Threshold A

Some commenters recommended increasing the proposed Reporting Threshold A by, for example, doubling the percent of shares outstanding threshold from 2.5 percent to 5 percent so as to be consistent with the existing reporting requirements of 17 CFR 240.13d-1 (“Exchange Act Rule 13d-1”)<sup>118</sup> and the proposed reporting requirements of 17 CFR 240.10B-1 (“Exchange Act Rule 10B-1”)<sup>119</sup> related to large positions in security-based swaps.<sup>120</sup> Other commenters also

providing significant detail about positions that, in many cases, are not sufficiently sizable to impact the larger markets or raise the type of concerns that the Proposal was intended to address”); but see WTI Letter (stating that “it is important to set the threshold as low as possible to mitigate any effects and impacts from firms attempting to game the threshold”).

<sup>117</sup> See, e.g., SIFMA Letter, at 20 (stating that “while certain SIFMA members believe that the threshold should be higher, other SIFMA members did not object to the proposed threshold of 2.5 percent of the issuer’s TSO or \$10 million fair market value”); Schulte Roth & Zabel LLP Letter (Apr. 26, 2022), at 3, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126845-287561.pdf> (“Schulte Roth & Zabel Letter”) (stating that “[w]e believe that the 2.5 percent threshold identifies those situations where a short position could lead to market manipulation”).

<sup>118</sup> Rule 13d-1 (requiring long-side equity securities holders to file a Schedule 13D or Schedule 13G if the security holder owns over 5% of an issuer’s equity securities).

<sup>119</sup> See *Prohibition Against Fraud, Manipulation, or Deception in Connection With Security-Based Swaps: Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, Exchange Act Release No. 93784 (Dec. 15, 2021), 87 FR 6652, 6678 (Feb. 4, 2022) (“Rule 10B-1 Proposal”). See also *Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions*, Exchange Act Release No. 97762 (June 20, 2023), 88 FR 41338 (June 26, 2023) (proposing to require any person holding security-based swap positions to file a proposed Schedule 10B if they hold in excess of \$300 million in equity security-based swap positions or if the notional value of those security-based swap positions is 5% of the outstanding number of shares of a class of equity securities, whichever is less).

<sup>120</sup> See, e.g., Ropes & Gray Letter, at 6 (recommending increasing the threshold to 5% in order to “mitigate costs to investors and provide consistency with other reporting regimes”); K&L Gates Letter, at 5 (stating that 2.5% does not “represent a significant portion of an issuer’s outstanding equity securities,” and recommending increasing the threshold to more than 5% of an issuer’s voting equity securities in order to be consistent with the existing reporting requirements of Rule 13d-1); Perkins Coie Letter, at 6 (recommending alignment with requirements of Rule 13d-1(a) that require filing of Schedule 13D or 13G upon crossing a 5% threshold of ownership of any class of an equity security); ICI Letter, at 10 (stating that Commission identified 5% as a threshold over which a position could have a meaningful market impact in “recent” Rule 10B-1 proposal).

recommended doubling that same percentage of shares outstanding threshold from 2.5 percent to 5 percent, because the commenters believed that the proposed 2.5 percent threshold was not sufficiently sizable to have a market impact.<sup>121</sup> Additionally, one commenter believed that the lack of any reported instances of “short-side” manipulation did not justify a lower percentage threshold compared to Rule 13d-1 and proposed Rule 10B-1.<sup>122</sup>

Other commenters proposed that the U.S. dollar value-based threshold of Threshold A be raised.<sup>123</sup> One commenter suggested that it be increased from the proposed \$10 million to \$100 million because a \$100 million threshold would capture more substantial short positions and be consistent with the adjustment to the proposed percentage of shares outstanding threshold as compared to former Form SH (*i.e.*, a tenfold increase from 0.25 percent under Form SH to 2.5 percent under Proposed Form SHO).<sup>124</sup>

For reasons set forth below and discussed more fully in Part VIII, increasing the proposed Threshold A percentage-based threshold from 2.5 percent or more of total shares outstanding to 5 percent (*e.g.*, to be consistent with the existing 5 percent reporting threshold of Exchange Act Rule 13d-1 and the proposed reporting requirements of Exchange Act Rule 10B-1), as suggested by some commenters,<sup>125</sup> is not warranted or appropriate. In this regard, because the rules are designed for different purposes and utilize different reporting thresholds to meet their respective

<sup>121</sup> K&L Gates Letter, at 5; see also ICI Letter, at 9–10 (“However, we believe that a higher threshold would still provide the Commission with information on such large positions, while reducing the burdens on managers of reporting smaller positions that likely would have a lesser market impact.”).

<sup>122</sup> One commenter believed that the proposed Rule 13f-2 reporting regime was overly expansive and “asymmetric” to existing or other proposed reporting regimes in multiples ways, such as the proposed percentage reporting threshold of 2.5% being lower than the 5% threshold in Rules 13d-1 and 10B-1. See SIFMA Letter, at 3–4 (stating that there is “no empirical evidence” that short selling requires an “asymmetric” reporting regime and that “[t]his conclusion is consistent with the SEC’s own reported enforcement actions, *i.e.*, any reported instances of ‘short-side’ manipulation (*e.g.*, ‘short and distort’ campaigns) are dwarfed by the instances of ‘long-side’ manipulation (*e.g.*, ‘pump and dumps’). There thus is simply no basis for such asymmetric regulation.”).

<sup>123</sup> See, e.g., Virtu Letter, at 2 (positing that dollar value thresholds “are significantly lower than is necessary”); Perkins Coie Letter, at 2 (finding the \$10 million (USD) gross short position threshold of Threshold A too low); XR Securities Letter, at 2 (citing circumstance illustrating that \$10M prong of Threshold A may be too low).

<sup>124</sup> Schulte Roth & Zabel Letter, at 3.

<sup>125</sup> See *supra* nn. 121 & 122.

<sup>113</sup> *Id.* at 14957.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See, e.g., ICI Letter, at 9–10 (supporting a higher threshold, stating that “a higher threshold would still provide the Commission with information on such large positions, while reducing the burdens on managers of reporting smaller positions that likely would have a lesser market impact”); K&L Gates Letter, at 4–5 (supporting a higher threshold, and stating that “[u]nless the Reporting Thresholds are modified, we anticipate that the Commission will be inundated with reports

objectives, the Commission does not believe, as one commenter states, that comparing Rule 13f–2 with long-side Rule 13d–1, as well as comparing perceived instances of “short-side” and “long-side” manipulation, is an accurate assessment by which to determine Rule 13f–2’s Reporting Thresholds. Reporting under Exchange Act section 13(d) is intended to provide information to the public and the affected issuer about rapid accumulations of its equity securities in the hands of persons who have the potential to change or influence control of the issuer.<sup>126</sup> Reporting under Rule 13f–2, in contrast, is intended to capture Managers with gross short positions that are large relative to the size of the issuer and could therefore have a significant impact on the issuer, especially for issuers with a small market capitalization where the dollar-based threshold is less likely to be breached.<sup>127</sup> An increase in the percentage-based prong of Threshold A, from 2.5 percent to 5 percent, would reduce transparency into short positions in smaller stocks. Specifically, increasing the percentage from 2.5 percent to 5 percent would reduce transparency into stocks with less than a \$400 million market capitalization. This reduction could be meaningful given that, short and distort campaigns and other market manipulations are more likely to occur in stocks with lower market capitalizations and less public information.<sup>128</sup> As a result, the appropriate threshold for Rule 13d–1 is not necessarily the appropriate threshold for Rule 13f–2. Instead, the Commission continues to believe that a broader coverage of short position reporting (*i.e.*, using a 2.5 percent reporting threshold) is more appropriate for Rule 13f–2, especially given that the reported data are aggregated and anonymized before public dissemination with a delay. Here, the Commission is designing a reporting threshold that is appropriate for the purposes of section 13(f)(2). Based on analysis of Form SH, a 2.5 percent or higher monthly average gross short

position is an appropriate threshold.<sup>129</sup> For example, one exchange estimates that median short interest for small-cap issuers is only about 3 percent,<sup>130</sup> indicating that a single Manager breaching the 2.5 percent threshold would be significant for many issuers. Thus, a percentage-based Threshold A is appropriate to adopt as proposed.

Nor does the Commission believe that raising the dollar-based threshold of Threshold A from \$10 million to \$100 million to be consistent with the tenfold increase in percentage threshold is warranted or appropriate. Based on its analysis of Form SH data as discussed in the Proposing Release,<sup>131</sup> as well as the need to balance costs with the rule’s ultimate goal of transparency, \$10 million strikes an appropriate balance of limiting costs of reporting to Managers, while increasing transparency into short positions, especially for equity securities of issuers with mid or large market capitalizations that may not be captured under the percentage threshold. While issuers with small market capitalizations may have only one or a few large short sellers, issuers with mid or large market capitalizations may have tens or even hundreds of large short sellers, which diffuses the percentage of short interest for each short seller. The Commission considered this when setting a dollar-based threshold of Threshold A such that large short sellers are captured for all equity issuers.

#### Comments To Lower or Eliminate Reporting Thresholds

Other commenters recommended that the Proposed Reporting Thresholds be reduced or eliminated. Some of these commenters were concerned that the Proposed Reporting Thresholds could

be too lenient and under-inclusive,<sup>132</sup> and some of those commenters supported removing the thresholds entirely because of the possibility of Managers intentionally maintaining short positions just below the thresholds to avoid reporting.<sup>133</sup> One commenter stated that the final rule should “eliminate the proposed thresholds so as to reduce or eliminate the risk that unknown, hidden short positions could pose to investors and the markets.”<sup>134</sup> However, eliminating thresholds to capture all short sale data may result in the inclusion of “transient” short sales,<sup>135</sup> such as short sales due to market making or customer facilitation activity rather than directional short sales. By providing a properly calibrated threshold this type of “noise” should be reduced and allow market participants to instead focus on substantial short sales that are more likely to be directional. The reduction of “noisy” short position information also sets Rule 13f–2 apart from existing short sale data regimes, such as those provided by FINRA and the exchanges, which do not have thresholds. On the other hand, the threshold cannot be set so high that substantial short sales by Managers are out of scope. The Reporting Thresholds, as adopted, will help ensure added transparency into short sale-related activity that would be beneficial to both market participants and regulators, and will result in reporting by Managers with a substantial gross short position in both reporting and non-reporting company issuers.

#### Recommendations to Base Reporting Thresholds on a Single Metric

Some commenters, often in conjunction with recommendations to increase the Proposed Reporting Thresholds, suggested applying a single threshold metric. One commenter proposed the Commission adopt a single U.S. dollar value-based threshold for all issuers in order to limit the impact of

<sup>126</sup> See, e.g., *Filing and Disclosure Requirements Relating to Beneficial Ownership*, Release No. 34–14693 (Apr. 21, 1978), 43 FR 18501, 18484 (Apr. 28, 1978) (stating that the “legislative history [of Exchange Act section 13(d)] reveals that it was intended to provide information to the public and the affected issuer about rapid accumulations of its equity securities in the hands of persons who would then have the potential to change or influence control of the issuer”).

<sup>127</sup> See Proposing Release, at 14961–64.

<sup>128</sup> See *infra* Part VIII.C.1 (discussing market manipulations) and Part VIII.E.3 (discussing how thresholds are triggered at various dollar amounts).

<sup>129</sup> See *infra* Part VIII.E for discussion of different threshold options.

<sup>130</sup> See *Short Interest in Decline*, Nasdaq (Mar. 3, 2022), available at <https://www.nasdaq.com/articles/short-interest-in-decline>.

<sup>131</sup> As discussed in the Proposing Release, the Proposed Reporting Thresholds were based on comment letters and analysis of Form SH data collected under Rule 10a–3T. Proposing Release, at 14963–64. Rule 10a–3T required reporting of short positions that were either greater than 0.25% of shares outstanding or \$10 million in fair market value. Comment letters to Rule 10a–3T itself generally concurred with the dollar reporting obligation but expressed concerns that the percentage obligation was too low. Suggestions for a percentage reporting obligation ranged from 1% to 5% of shares outstanding. See, e.g., Seward Kissel LLP, available at <https://www.sec.gov/comments/s7-31-08/s73108-43.pdf>; Investment Adviser Association, available at <https://www.sec.gov/comments/s7-31-08/s73108-38.pdf>; and Securities Industry and Financial Markets Association, available at <https://www.sec.gov/comments/s7-31-08/s73108-52.pdf>.

<sup>132</sup> See, e.g., Comment from Peter Stauduhar (Mar. 6, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118728-271591.htm> (stating that “[t]he thresholds are a critical part of the success of this rule, and I urge the Commission to worry less about the burden the reporting will have on short sellers”).

<sup>133</sup> See, e.g., Comment from Travis Donovan (Mar. 14, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-272287.htm>; Comment from Steve B. (Mar. 14, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20119335-272221.htm> (“SteveB.Comment”); Anonymously Submitted Letter (Apr. 2, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20122297-278355.htm> (“I believe that all short sales should be recorded and reported. The minimum threshold should be a single short sale.”).

<sup>134</sup> Better Markets Letter, at 12.

<sup>135</sup> See Virtu Letter, at 2–3.

any potential ambiguity around identifying the number of shares outstanding for non-reporting company issuers.<sup>136</sup> Another commenter, however, recommended that the Commission adopt a single threshold based on percentage of shares outstanding, stating that it would “mitigate unnecessary operational and cost burdens on Managers,” as the commenter believed that a U.S. dollar value-based threshold would require more difficult system buildouts.<sup>137</sup>

The Reporting Thresholds are designed to require the filing of Form SHO by Managers with substantial gross short positions. The two-pronged approach of Threshold A measures the size of a Manager’s short position relative to both dollar amount and number of shares. The dollar value-based prong (Rule 13f–2(a)(1)(i)) captures Managers with substantial short positions, even if such positions are relatively small compared to the market cap of the issuer. The percentage of total shares outstanding-based prong (Rule 13f–2(a)(1)(ii)) captures Managers with gross short positions that are large relative to the size of the issuer and, therefore, could have a significant impact on the issuer. With respect to securities of non-reporting company issuers, however, the Commission understands that the number of total shares outstanding may not be readily and consistently accessible.<sup>138</sup> For this reason, a single-pronged, dollar value-based Reporting Threshold is an efficient way for Managers to determine whether they trigger Threshold B (Rule 13f–2(a)(2)) that avoids the additional cost and complexity of locating the number of total shares outstanding for the securities of a non-reporting company issuer that may be difficult or impossible to locate.<sup>139</sup>

#### Comments Recommending the Use of the Same Threshold for Reporting Company and Non-Reporting Company Issuers

Another commenter recommended not having differing thresholds for reporting company issuers and non-

reporting company issuers.<sup>140</sup> This commenter believed having two different reporting thresholds “would be unnecessarily complicated and burdensome.”<sup>141</sup> Furthermore, the commenter stated as an alternative the creation of a “Form SHO List” akin to the 13F List that would include total shares outstanding of each security to assist in threshold calculations.<sup>142</sup> As a result of the potential difficulties in accessing the total shares outstanding for non-reporting company issuers discussed above, using a percent of total shares outstanding-based approach would not be appropriate for non-reporting company issuers. Requiring total shares outstanding for both thresholds would be operationally difficult, potentially inaccurate and therefore costly for Managers to determine for some non-reporting companies. Requiring a dollar-based metric for both thresholds could be both under-inclusive and over-inclusive, as the markets for reporting and non-reporting companies differ. For example, a high dollar threshold (e.g., \$10 million) for both thresholds would under-include many non-reporting companies while a low dollar threshold (e.g., \$500,000) would over-include reporting companies. For these reasons, the Commission is adopting Threshold B as proposed.

For similar reasons, and as discussed in the “Scope of Reported Securities” section above, the Commission will not be publishing a “Form SHO List” with total shares outstanding to assist in Manager calculations, as one commenter suggested. The thresholds as adopted are designed to reduce operational burdens while capturing substantial short positions in both reporting and non-reporting company issuers. Adopting a much lower dollar threshold for non-reporting company issuers than that for reporting company issuers results in Managers not being required to determine percentages of total shares outstanding and, due to sparse data in non-reporting company issuer markets, Managers would avoid the difficulty of having to do so. A “Form SHO List” with total shares outstanding would not be necessary for Managers reporting positions in reporting company issuers

because, unlike Rule 13f–1 securities, Rule 13f–2 covers equity securities as discussed above,<sup>143</sup> rendering additional guidance on what securities qualify unnecessary. Additionally, as discussed above in the Scope of Reported Securities section, section 13(f)(1) expressly provides that the Commission shall make available to the public a list of all equity securities that are subject to such reporting,<sup>144</sup> while section 13(f)(2) does not require publication of such a list.

#### Comments Regarding Other Concerns Related to Thresholds

##### Implementation and Compliance Costs

Some commenters stated that the Proposing Release did not adequately account for the burdens associated with monitoring for whether a Reporting Threshold is met, i.e., whether a Manager has a Form SHO reporting obligation.<sup>145</sup> Specifically, these commenters stated that the Proposing Release did not address the costs of those Managers who would need to develop and implement reporting systems to monitor for whether a Reporting Threshold is met or exceeded, that may or may not ultimately result in a reportable gross short position.<sup>146</sup> The

<sup>143</sup> See *supra* Part II.A.2.

<sup>144</sup> Section 13(f)(1) of the Exchange Act (15 U.S.C. 78m(f)(1)) requires any institutional investment manager exercising investment discretion over accounts holding at least \$100 million in fair market value of certain equity securities to file reports on Form 13F with the Commission at the times set forth in Rule 13f–1. The statute directs the Commission to make available to the public, for a reasonable fee, a list of all equity securities described in section 13(d)(1) of the Exchange Act and to disseminate to the public the information contained in the reports.

<sup>145</sup> See, e.g., Virtu Letter, at 2 (“the dollar value thresholds referenced in the Proposal are significantly lower than is necessary”); MFA Letter, at 4 (recommending a single, dollar-based threshold only); SIFMA Letter, at 5 (recommending elimination of different thresholds for reporting and non-reporting companies in favor of one uniform threshold for U.S. equity securities); ICI Letter, at 9 (recommending a single, percentage-based threshold for both reporting and non-reporting company issuers); Ropes & Gray Letter, at 2 (recommending that all thresholds “be determined using average positions over a month rather than daily positions.”).

<sup>146</sup> See, e.g., MFA Letter, at 10–11; see also ICI Letter, at 5 (stating that Proposed Rule 13f–2 would require a Manager to continuously monitor and record any activity that could potentially be subject to future reporting on Form SHO). While the costs would likely be higher if Managers choose to monitor daily, Rule 13f–2 does not require daily monitoring, either for reporting or non-reporting company issuers. Managers may choose to do this threshold calculation on a rolling basis, or to do the calculation after the month has ended. While some Managers may choose to incur the higher costs of daily tracking and calculation for purposes of compliance with Rule 13f–2, the final rule’s Reporting Threshold for reporting company issuers is not based on a Manager’s gross short position on

<sup>136</sup> See MFA Letter, at 4 (stating that “[a] dollar-based approach would be more simple and less costly for managers to employ”).

<sup>137</sup> See, e.g., ICI Letter, at 8–9 (stating “we recommend that the Commission adopt a single reporting threshold level that is an average short position in an equity security based on a percentage of shares outstanding rather than on a dollar value”); see also K&L Gates Letter, at 5 (recommending a threshold triggered only by “a position representing more than 5 percent of an issuer’s voting equity”).

<sup>138</sup> Proposing Release, at 14962.

<sup>139</sup> *Id.*

<sup>140</sup> See SIFMA Letter, at 19–20 (stating that “the proposed distinction between the thresholds that would apply to Reporting Company securities and Non-Reporting Company securities would be unnecessarily complicated and burdensome”).

<sup>141</sup> *Id.*

<sup>142</sup> SIFMA suggested that the “Form SHO List” include securities that are included on the 13F List, while excluding securities that should not be covered by Form SHO. *Id.* at 20. SIFMA further suggested that the “Form SHO List” include, for each security, the total shares outstanding.



comments are addressed in the Economic Analysis, in Part VIII below.

#### “Gross” Short Position versus “Net” Short Position

Some commenters requested that the Reporting Thresholds be calculated based on “net” short position rather than “gross” short position as proposed. Multiple commenters expressed concern that using a gross short position calculation would not accurately reflect risk in the markets.<sup>147</sup> However, other commenters supported the use of the proposed gross short position data either instead of or in conjunction with net short position data.<sup>148</sup> One commenter proposed requiring net short position reporting by Managers that are solely reporting on Form SHO with regard to one issuer while requiring gross short position reporting for Managers with short positions in more than one issuer.<sup>149</sup> One commenter proposed that, if a gross short position calculation is used, market makers should not be subject to adopted Rule

a single trading date, reducing the need for daily tracking. *See infra* Part VIII.C.6.b.

<sup>147</sup> *See, e.g.*, Virtu Letter, at 3 (stating that “the requirement to report such positions on a gross rather than net basis would likely distort the actual degree of short positions as it will capture circumstances where a firm is net long but may have short positions among its accounts.”); Perkins Coie Letter, at 3–4, 6. (recommending that “[r]ather than set a low threshold and over capture short position information, the SEC should revise the requirement to \$10 million net short position as opposed to gross.”); Schulte Roth & Zabel Letter, at 2 (stating that “net short position data would more accurately reflect actual positions taken by institutional investment managers and provide useful transparency to the Commission and to the marketplace.”); ICI Letter, at 10 (recommending that “the Commission streamline and simplify how managers account reflect hedging positions by adopting a net short position threshold and eliminating the required indication of whether a position is hedged or not in Form SHO.”); Comment Letter from Anonymous Fund Manager at 1–2, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126773-287490.pdf> (“Anonymous Fund Manager Letter”) (recommending that the Commission “modify the proposed threshold requirements to reference short positions on a net ‘delta-adjusted’ basis as opposed to a gross basis or, in the alternative, exclude from the reporting obligations under the Proposed Rules ‘bona fide hedging activity’ as such term would be defined in the final rules.”).

<sup>148</sup> *See, e.g.*, Comment from Josh Allen (Mar. 14, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-272295.htm>; Comment from An Investor (Apr. 4., 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20122297-278355.htm> (supported including both net and gross short positions in reporting).

<sup>149</sup> Perkins Coie Letter, at 4 (stating that “the SEC should consider amending its proposal to require net position reporting by certain types of managers that do not regularly utilize short positions. For instance, the SEC could require net short position reporting by filers that are solely reporting on Form SHO with regards to one issuer. For any filer reporting more than one issuer, the SEC could require gross short position reporting.”).

13f–2’s reporting requirements.<sup>150</sup> However, another commenter supported applying the rule’s requirements to market makers.<sup>151</sup> One commenter stated that, even though market makers do not typically carry overnight positions and would likely not trigger the Proposed Reporting Thresholds, market makers would still incur the costs of end-of-day calculations to determine whether they meet or exceed the Proposed Reporting Thresholds.<sup>152</sup>

As discussed in the Proposing Release, under the proposal, a Manager would report its “gross” short position in an equity security without offsetting such gross short position with “long” shares of the equity security or economically equivalent long positions obtained through derivatives of the equity security.<sup>153</sup> For example, if a Manager has investment discretion over multiple accounts, some of which have long positions in an equity security and some have short positions in the same equity security, only the total gross short position in the “short accounts” is reported, without being offset by the long positions in the “long accounts.” Requiring a Manager to report its daily gross short position in a security will provide a more complete view of short positions held by Managers in a security, particularly once the data is aggregated for publication.<sup>154</sup> Permitting Managers to “net” positions would dilute the usefulness of the data in providing market participants with a sense of substantial short positions. For example, requiring net short position reporting by Managers that are solely reporting on Form SHO with regard to

<sup>150</sup> HSBC Letter, at 16 (stating that “[b]ecause Proposed Rule 13f–2 requires disclosure of gross positions, market makers could be required to report large positions, even if a market makers’ [sic] net position is close to zero (*i.e.*, because such short positions are typically hedged via options or swaps). Subjecting market makers to Proposed Rule 13f–2 may, therefore, result in market participants receiving unhelpful and misleading information about the short sale market.”).

<sup>151</sup> *See* Samuel Meadows Comment, at 2 (stating that “Market Makers should NOT be except [sic] from reporting for any reason. Market Makers should report short sales the same as everyone else should they pass the Reporting Threshold.”).

<sup>152</sup> *See* SIFMA Letter, at 11–12 (stating that “[h]owever, as the Proposing Release notes, requiring Institutional Investment Managers to consider intraday short sale activity, which would not be captured in the ‘gross short position’ as reflected on their trade date stock records, in determining whether the threshold has been exceeded, would be incredibly onerous—particularly, for example, for market makers that generally may not carry large overnight short positions.”).

<sup>153</sup> Proposing Release, at 14956.

<sup>154</sup> In addition, commenters stated they would be uncertain how to “offset” positions when discussing the hedging indicator. *See infra* Part II.A.4.d.iii.(B). Netting would raise similar concerns.

one issuer, or for other types of Managers infrequently using short positions, as one commenter suggested, would provide minimal cost savings and create misleading data that could be difficult to aggregate and confusing to market participants. Further, the data collected and provided by FINRA<sup>155</sup> and the exchanges is not netted.<sup>156</sup> By providing aggregate gross positions reported by Manager in a security, the final rule will supplement such existing short sale information with additional context on substantial gross short sale positions.

In addition, the Commission is making additional modifications, discussed further below, that should alleviate burdens on market makers that may otherwise need to undertake the obligation of calculating reporting thresholds despite generally holding positions below such thresholds. Specifically, the Commission is modifying the threshold calculations to a monthly average of daily gross short positions rather than a single daily position, as discussed under the subheading “When the Reporting Obligation is Triggered” below. Further, as discussed in Part III below, the Commission is not adopting the proposed requirement to report “buy to cover” activity, which a commenter<sup>157</sup> stated would be more difficult if gross positions are required to be reported. The Commission, in adopting Rule 13f–2, will require a Manager to report its “gross” monthly short position as

<sup>155</sup> *See, e.g.*, *Short Interest—What It Is, What It Is Not*, FINRA Inv’r Insights (Jan. 25, 2023), available at <https://www.finra.org/investors/insights/short-interest> (“The short interest data is just a snapshot that reflects short positions held by brokerage firms at a specific moment in time on two discrete days each month. The Short Sale Volume Daily File reflects the aggregate volume of trades within certain parameters executed as short sales on individual trade dates.”).

<sup>156</sup> *See, e.g.*, *Frequently Asked Questions (FAQ) about Short Interest Reporting*, FINRA, available at <https://www.finra.org/filing-reporting/regulatory-filing-systems/short-interest/faq> (“Q1: Rule 4560 applies to short interest positions resulting from: (1) a “short sale,” as defined by Regulation SHO Rule 200(a); or (2) where the transaction that caused the short position was marked “long,” consistent with Regulation SHO Rule 200(g), due to the firm’s or the customer’s net long position at the time of the transaction. For example, a sale may be marked as “long” because the overall net position in the security within an aggregation unit is long at the time of the sale. If the execution results in a short position in a specific account (or subaccount) held within the aggregation unit, this position is reportable pursuant to Rule 4560.”; Q11: “Where, as part of a strategy, an account holds both a short and long position in the same security simultaneously, the short position is reportable as short interest pursuant to Rule 4560 and must be reported in full, *i.e.*, not netted against the long position.”).

<sup>157</sup> SIFMA Letter, at 24.

proposed under Proposed Rule 13f-2(b)(4).

#### When the Reporting Obligation Is Triggered

To ease reporting burdens and reduce costs, some commenters proposed decreasing the frequency of certain aspects of the U.S. dollar value-based aspects of the Reporting Thresholds by instead using monthly average positions, instead of the proposed “close of regular trading hours on any settlement date” frequency.<sup>158</sup> Alternatively, one commenter suggested that the proposed monthly reporting requirement should only be triggered if a Manager holds a short position in excess of the Proposed Reporting Thresholds as of the last settlement day of the month.<sup>159</sup> Commenters stated that by using average monthly positions rather than the proposed rule’s use of any settlement date within the reporting period, the reporting burden required of Managers would be substantially lessened, since Managers may transiently cross the reporting thresholds through activities such as market making, hedging, and customer facilitation activity.<sup>160</sup> Requiring reporting for Managers who temporarily cross these thresholds on an intraday basis through such activity, one commenter stated, would not adhere to the legislative intent of DFA section 929X.<sup>161</sup> Commenters stated that transiently crossing these thresholds would not produce reported data that would be valuable to the Commission; for example, short-term market disruptions may trigger reporting under the proposed frequency for Managers that do not hold substantial short positions.<sup>162</sup> For reasons discussed below, the Commission is modifying Proposed Rule 13f-2(a)(1)(i) (the U.S. dollar value-based prong of Threshold A) to trigger reporting requirements when a Manager has a monthly average of daily gross short positions (“monthly average”) with a U.S. dollar value of \$10 million or more at the end of the

calendar month, rather than, as proposed, a \$10 million or more gross short position at the close of regular trading hours on any settlement date during the calendar month.<sup>163</sup>

Threshold A, as adopted, will require reporting by Managers that have, for each equity security of a reporting company issuer, either (1) a monthly average gross short position at the close of regular trading hours in the equity security with a U.S. dollar value of \$10 million or more,<sup>164</sup> or (2) a monthly average gross short position at the close of regular trading hours as a percentage of shares outstanding in the equity security of 2.5 percent or more.<sup>165</sup> Using

<sup>163</sup> This change to “monthly average” is responsive, in part, to commenters’ concerns about certain aspects of the U.S. dollar value-based Reporting Thresholds. For reasons discussed below, however, the Commission is adopting Threshold B as proposed (Proposed Rule 13f-2(a)(2)), which employs an “at the close of regular trading hours on any settlement during the calendar month” approach. The Form SHO “Instructions For Calculating Reporting Threshold,” discussed below, explain in detail the method for determining whether the modified threshold is met.

<sup>164</sup> To determine whether this Reporting Threshold has been met, a Manager shall determine its gross short position at the close of regular trading hours in the equity security (as defined in Rule 13f-2) on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the settlement date (“end of day dollar value”). The Manager shall then add all end of day dollar values during the calendar month and divide that sum by the number of settlement dates in the month to arrive at a “monthly average” for each equity security the Manager traded during that calendar month reporting period.

<sup>165</sup> The methods of calculation of the Reporting Thresholds are prescribed in “Instructions for Calculating Reporting Threshold” in Form SHO. Rule 13f-2 and the instructions in Form SHO, require that for purposes of determining whether a Manager meets or exceeds a Reporting Threshold, a Manager shall determine its gross short position “at the close of regular trading hours” in the equity security, rather than at the “end of day” as was provided for in the instructions to Proposed Form SHO. Accordingly, the Commission is making a modification to the instructions for calculating Threshold A and replacing “end of day gross short position” with “gross short position at the close of regular trading hours.” Addressing any potential ambiguity in terminology should facilitate more consistency in reporting by Managers and more comparability of the data reported on Form SHO. With this change, the calculation instructions for Threshold A provide that to determine whether the percentage threshold of Threshold A has been met, a Manager shall (a) determine its gross short position at the close of regular trading hours in the equity security (as defined in Rule 13f-2) on each settlement date during the calendar month, and divide that figure by the number of shares outstanding in such security at the close of regular trading hours on the settlement date, and (b) add up the daily percentages during the calendar month as determined in (a) and divide that sum by the number of settlement dates in the month to arrive at a “monthly average” for each equity security the Manager traded during that calendar month reporting period. 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

a “monthly average” dollar value for reporting company issuers will result in Form SHO reporting by Managers that consistently carry large gross short positions during the reporting month. This approach should reduce the reporting of non-directional, “transient” short sales activity<sup>166</sup> and provide market participants with more focused information on substantial short positions held by Managers. The modification should also reduce the burdens of certain Managers, specifically those Managers, including market makers, that periodically meet or exceed the \$10 million or more threshold on a given settlement date during a calendar month, but that do not typically carry a large gross short position throughout the month that will meet or exceed the monthly average reporting threshold, by eliminating the need to calculate (and potentially trigger) the threshold on a daily basis. This will help the Commission to distinguish directional short selling of Managers from short sale activity effected by market makers and liquidity providers.<sup>167</sup>

In addition, similar to the discussion in the Proposing Release regarding the use of a monthly average gross short position of 2.5 percent or more of total shares outstanding,<sup>168</sup> the Commission continues to believe that using a monthly average gross short position at the close of regular trading hours of \$10 million or more, rather than an end of each settlement date calculation as was originally proposed, will reduce the risk that a Manager may time its short sales to avoid triggering the adopted reporting threshold.<sup>169</sup>

any subsequent update thereto, filed with the Commission.

<sup>166</sup> See *supra* n. 135 and accompanying text.

<sup>167</sup> See Proposing Release, at 14953.

<sup>168</sup> Proposing Release, at 14962 (“In addition, the Commission believes that requiring the reporting of short positions with a 2.5% or higher monthly average gross short position would capture Managers with gross short positions that are large relative to the size of the issuer, and could therefore have a significant impact on the issuer. Using a monthly average gross short position, rather than an end of month gross short position, is also designed to prevent the scenario where a Manager engages in trading activity on the last day of the month in order to avoid reporting.”).

<sup>169</sup> In addition, the Commission is making a modification to specify in Rule 13f-2 and in the instructions in Form SHO that, for purposes of determining whether a Manager meets or exceeds Threshold A, a Manager shall determine its gross short position “at the close of regular trading hours” in the equity security, rather than at the “end of day” as was provided for in the instructions to Proposed Form SHO. Reducing any potential ambiguity in terminology should facilitate more consistency in reporting by Managers and more comparability of the data reported on Form SHO.

<sup>158</sup> See, e.g., Virtu Letter, at 3 (stating that “[w]e also object to the reporting requirement being triggered by the existence of a short position on any settlement date within a reporting period.”); Ropes & Gray Letter, at 2 (stating that “[a]ll filing thresholds should be determined using average positions over a month rather than daily positions.”).

<sup>159</sup> SIFMA Letter, at 15 (advocating “that the proposed monthly reporting under Information Table 1 of Proposed Form SHO should be triggered only if the Institutional Investment Manager holds a gross short position in an equity security, as of the last day of such month, in excess of the threshold(s) for reporting.”).

<sup>160</sup> See Virtu Letter, at 2.

<sup>161</sup> See SIFMA Letter, at 4.

<sup>162</sup> See Ropes & Gray Letter, at 6–7.

Threshold B, as proposed, and as adopted, will require reporting by Managers that have, for each equity security of a non-reporting company issuer, a gross short position in the equity security with a U.S. dollar value of \$500,000 or more at the close of regular trading hours on any settlement date during the calendar month.<sup>170</sup> A single, dollar-based prong approach (using the \$500,000 or more on any settlement date metric) for securities of non-reporting company issuers (Rule 13f-2(a)(2)) will capture Managers with large gross short positions, even if such positions are relatively small compared to the market capitalization of the issuer. As discussed above, the markets for non-reporting company issuers are more opaque and could benefit more from transparency. Additionally, due to their lower liquidity, equity securities of non-reporting companies can be more sensitive to strategic trading than those of reporting companies.<sup>171</sup> As a result, for those securities, a single dollar threshold that can be triggered on any day of a month is more appropriate than the two-prong threshold calculated as monthly averages for equity securities issued by reporting companies.

#### Basing Reporting Thresholds on Form SH Data

Some commenters maintained that the Commission should not have based the Proposed Reporting Thresholds on Form SH data, as the Form SH data was collected during “a period of abnormal market conditions that does not reflect recent changes in the markets,” and urged the Commission to more robustly support its rationale for selecting the Reporting Thresholds.<sup>172</sup> These

commenters essentially suggested that the use of Form SH data was unrealistic, and suggested that the Commission consider whether the Reporting Thresholds are appropriate based on more recent data and analysis.<sup>173</sup> In the Proposing Release, the Commission stated that to perform the underlying Reporting Thresholds analysis, Form SH data on daily short positions for November 2008 through February 2009 were filtered and matched to Center for Research in Security Prices, LLC for daily closing prices and Compustat for daily shares outstanding. The Commission recognized that the results of an analysis of Form SH data may not fully reflect the status quo but that the analysis used appropriate data because it involved the same type of entities (Managers) and the same activity (short positions).<sup>174</sup> As discussed in the Proposing Release, the Commission believed that it struck a reasonable balance in proposing the Reporting Thresholds with regard to the fundamental economic tradeoff of the value of the data versus the cost of collecting the data.<sup>175</sup>

The Commission disagrees with one commenter that stated that Form SH data was “stale and limited.”<sup>176</sup> The Commission continues to believe that Form SH data is highly relevant for determining the Reporting Thresholds. Form SH is the only existing data source of individual Manager-level short sale positions.<sup>177</sup> Form SH data was collected from October 17, 2008, until August 1, 2009, and the Commission analyzed daily data submitted from November 2008 until February 2009 as representative of short positions held by Managers. By the time Form SH was in effect, the global financial crisis was winding down, and is considered by

some to have calmed by approximately June 2009.<sup>178</sup> Thus, data was analyzed for several months during which the economy was returning to normalcy. Although the commenter suggested such data does not address “recent changes in the financial markets,” the commenter did not elaborate on what “recent changes” would have impacted an analysis of the Form SH data or the time period in which the data was analyzed. Markets undergo periods of volatility and stability and are constantly evolving over time. The data from Form SH involves the same type of entities (Managers) and the same activity (short positions) as Form SHO. The time period for which the Form SH data was studied is sufficiently informative to provide a reasonable assessment of appropriate reporting thresholds for purposes of Form SHO.<sup>179</sup>

#### 4. Form SHO

##### a. Reporting via EDGAR

##### i. Proposal

To enhance transparency of short sale-related data reported and published pursuant to Proposed Rule 13f-2, Proposed Rule 13f-2(a)(3) provided that Managers would file Form SHO (and any amendments thereto) with the Commission on EDGAR.<sup>180</sup> The Commission believed that most Managers should be familiar with filing forms on EDGAR—for example, Form 13F<sup>181</sup>—and relying on EDGAR to access registration statements, periodic reports, and other filings with the Commission that are made publicly available.<sup>182</sup> The Commission believed

<sup>178</sup> The National Bureau of Economic Research considers the global financial crisis as having officially started Dec. 2007 and ended June 2009. See, e.g., Nat'l Bureau of Econ. Research, Business Cycle Dating, available at <https://www.nber.org/research/business-cycle-dating>.

<sup>179</sup> See discussion of Form SH in Part VIII.C.6.a.

<sup>180</sup> See Proposed Rule 13f-2(a)(3) (providing that “Form SHO and any amendments thereto must be filed with the Commission via the Commission’s Electronic Data Gathering, Analysis, and Retrieval System (“EDGAR”), in accordance with Regulation S-T. Certain information regarding each such equity security reported by institutional investment managers on Form SHO and filed with the Commission via EDGAR will be published by the Commission on an aggregated basis.”).

<sup>181</sup> EDGAR filing is mandatory for all public Form 13F submissions. See *Rulemaking for EDGAR System*, Exchange Act Release No. 34–40934 (Jan. 12, 1999), 64 FR 2843 (Jan. 19, 1999); see also *Electronic Submission of Applications for Orders under the Advisers Act and the Investment Company Act, Confidential Treatment Requests for Filings on Form 13F, and Form ADV-NR; Amendments to Form 13F*, Exchange Act Release No. 34–95148 (June 23, 2022), 87 FR 38943 (June 30, 2022).

<sup>182</sup> See, e.g., *About EDGAR*, available at <https://www.sec.gov/edgar/about>; see also *Important*

<sup>170</sup> The methods of calculation of the Reporting Thresholds are prescribed in “Instructions for Calculating Reporting Threshold” in Form SHO. To determine the dollar value-based Reporting Threshold described in Threshold B has been met, a Manager shall determine its gross short position at the close of regular trading hours in the equity security (as defined in Rule 13f-2) on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the settlement date. If such closing price is not available, a Manager shall use the price at which it last purchased or sold any share of that security.

<sup>171</sup> See *infra* Part VIII.E.3 (discussing difficulty in obtaining information on non-reporting company issuers, and that data is often stale and inaccurate).

<sup>172</sup> Comment Letter from Barbara Bliss, Associate Professor of Finance, et al. (Apr. 25, 2022), at 3, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126591-287247.pdf> (“Law and Finance Professors Letter”) (“we believe the Commission could and should more robustly support its rationale for these thresholds before adopting any final rule.”); see also AIMA Letter, at 11–12 (commenter was critical of Reporting Thresholds based on “stale and limited” data). For a discussion of Form SH applicability to the current period, see *infra* Part VIII.C.6.a.

<sup>173</sup> See, e.g., AIMA Letter, at 12 (stating that the Commission should “review and analyze current short interest market data for reporting issuers to ensure that any final threshold based on a gross position’s dollar value accounts for the latest and most complete data”); Law and Finance Professors Letter, at 3 (stating that the Commission should “consider more carefully whether the stated disclosure thresholds are appropriate, based on more recent data and analysis, and whether there should be a mechanism that would permit these thresholds to change over time”); Two Sigma Letter, at 7 (stating that Form SH burden estimates are an “unrealistic benchmark”).

<sup>174</sup> Proposing Release, at 14963 n.80.

<sup>175</sup> Proposing Release, at 14963–64, 15007.

<sup>176</sup> See AIMA Letter, at 11–12.

<sup>177</sup> While there are various limitations to be considered when using Form SH data, Form SH data are the most relevant and applicable source of data available for the purposes of estimating the costs of the design and analysis of Rule 13f-2. There are no other data sources, public or regulatory, which specifically track Managers’ short position activities in the U.S. See *infra* Part VIII.C.6.a.

that requiring Proposed Form SHO to be reported via EDGAR would enhance the accessibility, usability, and quality of the Proposed Form SHO disclosures for the Commission, and would allow the Commission to download disclosures from Form SHO directly, facilitating efficient access, organization, and evaluation of the reported information.<sup>183</sup> The Commission further believed that the improved quality and scope of information available for the Commission's use in examining market behavior and recreating market events would bolster the Commission's oversight of short selling activity and enhance investor protections.<sup>184</sup>

## ii. Comments and Final Rule

Several commenters raised concerns about how the confidentiality of the data reported on Form SHO via EDGAR would be preserved.<sup>185</sup> Most of these commenters spoke of a need to establish robust data security protocols for the "valuable and proprietary" information that would be reported on Proposed Form SHO via EDGAR. Several such commenters expressed concerns about cyberattacks or other breaches of account information.<sup>186</sup>

While no technology system or infrastructure is impervious to cyberattack, the Commission employs an array of actions to safeguard and protect the confidentiality and security of all information reported to EDGAR, which will include data reported on

Form SHO.<sup>187</sup> The Commission has stated that it has "engaged in a multi-year, multi-phase effort to modernize the EDGAR system, including both internal and public-facing components. Security and modernization enhancements were deployed in June 2020, focusing on technology upgrades internal to the system."<sup>188</sup> Moreover, as discussed in Part I.A.4.f.ii below, the Commission is adopting an approach to the confidential treatment of information provided on Form SHO reports that all such information will be deemed subject to a confidential treatment request under 17 CFR 200.83 ("Rule 83"). Accordingly, the Commission is adopting Rule 13f-2(a)(3) as proposed.

## b. Filing Form SHO Reports

### i. Proposal

As described in the Proposing Release, Managers would use Proposed Form SHO for reports to the Commission required by Proposed Rule 13f-2. The Commission proposed that Managers would file a report on Proposed Form SHO with the Commission within 14 calendar days after the end of each calendar month with regard to each equity security in which the Manager meets or exceeds a Reporting Threshold.<sup>189</sup> The Commission proposed that Managers would file the Form SHO with the Commission via the Commission's EDGAR system in an eXtensible Markup Language ("XML") specific to Form SHO ("custom XML" or "Form SHO-specific XML"),<sup>190</sup> a structured machine-readable data language. The Commission also proposed that Managers would either be able to file Form SHO using a fillable web form the Commission would provide on EDGAR to input Form SHO disclosures, or a Manager could use its own software tool to file Form SHO to EDGAR directly in Form SHO-specific XML.<sup>191</sup> Reporting via EDGAR, as described in the Proposing Release, would facilitate efficient access, organization, and

evaluation of reported information by the Commission.

The Commission stated in the Proposing Release that requiring Form SHO to be filed in custom XML format, since it is a structured, machine-readable data language, would facilitate more thorough review and analysis of the reported short sale disclosures by the Commission, which would increase the efficiency and effectiveness with which the Commission could identify manipulative short selling strategies.<sup>192</sup> Furthermore, the Commission stated most Managers have experience filing EDGAR forms that use similar EDGAR Form-specific XML-based data languages, such as Form 13F and Form ATS-N.<sup>193</sup>

As proposed, if a Manager uses the web-fillable Proposed Form SHO on EDGAR and encounters a technical error when filling out the form, such Manager would be required to correct the identified technical error before being permitted to file the Proposed Form SHO through EDGAR. If a Manager uses its own software tool to file a Proposed Form SHO filing to EDGAR directly in Proposed Form SHO-specific XML, and a technical error is identified by EDGAR after the filing is sent, such Manager would receive an error message that the filing has been suspended, and would be required to correct the identified technical error and re-file the Proposed Form SHO through EDGAR.<sup>194</sup>

Information about EDGAR, available at [https://www.sec.gov/edgar/searchedgar/aboutedgar.htm#:~:text=EDGAR%2C%20the%20Electronic%20Data%20Gathering,and%20Exchange%20Commission%20\(SEC\)](https://www.sec.gov/edgar/searchedgar/aboutedgar.htm#:~:text=EDGAR%2C%20the%20Electronic%20Data%20Gathering,and%20Exchange%20Commission%20(SEC)) ("The [EDGAR] system processes about 3,000 filings per day, serves up 3,000 terabytes of data to the public annually, and accommodates 40,000 new filers per year on average.").

<sup>183</sup> Proposing Release, at 14957.

<sup>184</sup> *Id.*

<sup>185</sup> See, e.g., K&L Gates Letter, at 5–6 (any final rule or final Form SHO should ensure "indefinitely" the confidentiality of information that could reveal the identity of the reporting Manager).

<sup>186</sup> See, e.g., AIMA Letter, at 14 (stating that the Commission has not explained how it will protect the commercially sensitive data that will be reported on Proposed Form SHO or acknowledged that its systems are susceptible to data breaches); MFA Letter, at 8 (positing that "the risk of increased cyberattacks or other breaches of confidential account information far outweigh any incremental benefit associated with requiring [Managers] to individually report short position information"); Two Sigma Letter, at 3–5 (cautioning that information on Proposed Form SHO reports "will be private only so long as the Commission does not have its systems breached, its personnel do not misappropriate the information, the information is not unintentionally released, or policies do not change retroactively"); SIFMA Letter, at 22 n.60 (citing cyber security, theft, and inadvertent data breach concerns as chief among the risks of providing sensitive and confidential information regarding short positions and short activity).

<sup>187</sup> See Annual Report on SEC website Modernization Pursuant to Section 3(d) of the 21st Century Integrated Digital Experience Act (Dec. 2022), available at <https://www.sec.gov/files/21st-century-idea-act-report-2022-12.pdf>.

<sup>188</sup> *Id.*

<sup>189</sup> Proposing Release, at 14956.

<sup>190</sup> *Id.* at 14955.

<sup>191</sup> See *id.* at 14955. The filing options described for Proposed Form SHO are consistent with other EDGAR filings that are filed in form-specific XML-based languages. See, e.g., *Regulation of NMS Stock Alternative Trading Systems*, Exchange Act Release No. 83663 (July 18, 2018), 83 FR 38768 (Dec. 9, 2021) (requiring new EDGAR Form ATS-N to be filed in an XML-based language specific to that Form).

<sup>192</sup> See Proposing Release, at 14997 ("By requiring a structured machine-readable data language and a centralized filing location (EDGAR) for the disclosures on Proposed Form SHO, the Commission would be able to access and download large volumes of Proposed Form SHO disclosures in an efficient manner.").

<sup>193</sup> See, e.g., Proposing Release at 14960, 14999 (first citing Form 13F, available at <https://www.sec.gov/pdf/form13f.pdf>) (then citing *Regulation of NMS Stock Alternative Trading Systems*, Exchange Act Release No. 83663 (July 18, 2018), 83 FR 38768 (Aug. 7, 2018)) (requiring new EDGAR Form ATS-N to be filed in an XML-based language specific to that Form); see also *Money Market Fund Reforms*, Investment Company Act Release No. 34441 (Dec. 15, 2021), 87 FR 7248 (Feb. 8, 2022) (Form N-CR); *Securities Offering Reform for Closed-End Investment Companies*, Exchange Act Release No. 88606 (Apr. 8, 2020), 85 FR 33290 (June 1, 2020) (Form 24F-2).

<sup>194</sup> The Commission stated in the proposing release that the XML schema (*i.e.*, the set of technical rules associated with Proposed Form SHO-specific XML) for Proposed Form SHO would incorporate validations of each data field on Proposed Form SHO to help ensure consistent formatting and completeness. For example, letters instead of numbers in a field requiring only numbers, would be flagged by EDGAR as a "technical" error that would require correction by the reporting Manager in order to complete its Proposed Form SHO filing. Field validations act as an automated form completeness check when a Manager files Proposed Form SHO through EDGAR; they do not verify the accuracy of the information

Continued

As an alternative, the Commission also discussed whether Proposed Form SHO should be required to be filed in Inline eXtensible Business Reporting Language (“Inline XBRL”).<sup>195</sup> The Commission stated that, compared to the proposal, the Inline XBRL alternative, which is both machine-readable and human-readable, would provide more sophisticated validation, presentation, and reference features for filers and data users.<sup>196</sup> However, the Commission stated that given the fixed and constrained nature of the disclosures to be reported on Proposed Form SHO, the benefits of the Inline XBRL alternative would be muted, and therefore Managers would not be able to take advantage of customization and presentation features.<sup>197</sup> Furthermore, the Commission stated in the Proposing Release that the alternative Inline XBRL approach would create greater initial implementation costs, such as licensing XBRL filing preparation software, because many Managers may not have prior experience structuring data in Inline XBRL.<sup>198</sup>

## ii. Comments and Final Rule

The Commission received some comments about the use of Form SHO-specific XML in filing Form SHO. In response to Q39 in the Proposing Release,<sup>199</sup> which asked whether the use of Form SHO-specific XML would make the reported data more useful to users, one commenter stated that data prepared in consistent, structured format would be “significantly more functional and useful.”<sup>200</sup> Regarding the costs and benefits of an Inline XBRL requirement as compared to Proposed Form SHO-specific XML, this commenter supported using XBRL in a comma-separated value (“CSV”) format, which is a text file that uses delimiters such as commas to separate data fields.<sup>201</sup> The commenter stated that this would be the most appropriate standard “for capturing high volume, granular data in a compact format,” and urged the Commission to adopt XBRL rather than custom XML.<sup>202</sup> The commenter stated that XBRL–CSV has several advantages over the Commission’s

proposed use of a custom XML format, such as reducing preparation costs and processing costs, as well as improving validation.<sup>203</sup> In addition, the commenter disagreed with the Commission’s view in the Proposing Release that the benefits of the additional features of XBRL would be muted if used for Form SHO due to the fixed and constrained nature of the disclosures to be reported. The commenter stated that several other agencies, such as the FDIC and FERC, have recently adopted XBRL format over custom XML format. However, the commenter acknowledges that initial implementation costs will be higher and familiarization with the format will take longer for reporting entities. Alternatively, another commenter supported the use of Form SHO-specific XML, stating that “XML is a widely used language and therefore implementation and maintenance would keep costs low and efficiency high,” and thought it would allow for efficient review of the reported data.<sup>204</sup>

The Commission is adopting the custom XML data reporting requirement as proposed. As explained in the Proposing Release, the filing options for Form SHO are consistent with other EDGAR filings that are filed in Form-specific XML-based languages.<sup>205</sup> The Commission also continues to believe that because many Managers have been using custom XML-based languages through other releases, they are more familiar with this language than other languages, such as XBRL, so the use of XML will promote efficiency in filing and review of Form SHO reports. Familiarity with custom XML formats will reduce implementation and ongoing compliance costs when compared to introducing XBRL-based formats that may be unfamiliar to Managers. Managers’ greater familiarity with custom XML formats should also reduce the possibility of data input errors when compared to XBRL formats. The above noted commenter likewise stated that XBRL formats would entail higher initial implementation costs and that familiarization with the XBRL formats would take longer for reporting entities. The costs of using XBRL formats in implementation and user retraining, along with the inconsistencies relative to other filings

that use Form-specific XML-based languages, do not justify the potential data formatting benefits of XBRL. Further, the commenter stated a preference for using XBRL specifically in CSV format. In addition to the above concerns about XBRL-based languages generally, the Commission believes that custom XML format is more appropriate than an XBRL–CSV format for the purposes of Form SHO because XML format is more human-readable than CSV format, and XML is more flexible when using more complex data.

Finally, the Commission’s XML schema is designed to include validations for each data field on Form SHO to help ensure consistent formatting and completeness. The Commission continues to believe that requiring Form SHO to be filed via Form-SHO specific XML, a structured machine-readable data language, will facilitate more thorough review and analysis of the reported short sale disclosures by the Commission, increasing the efficiency and effectiveness of the Commission’s understanding of short selling and systemic risk. Additionally, most Managers have experience filing EDGAR forms that use similar EDGAR Form-specific XML-based data languages, such as Form 13F.<sup>206</sup>

## c. Timing of Reporting by Managers and Publication by Commission

### i. Proposal

Under Proposed Rule 13f–2(a), a Manager would have been required to file the required information on Form SHO with the Commission within 14 calendar days after the end of each calendar month. Proposed Rule 13f–2(a)(3) provides that certain information reported on Proposed Form SHO would be published by the Commission on an aggregated basis. No time frame for publication by the Commission was provided in Proposed Rule 13f–2. In the Proposing Release, however, the Commission estimated that it would publish the aggregated information within one month after the end of the calendar month.

### ii. Comments and Final Rule

Comments on the frequency of reporting and publication varied. Some commenters called for more frequent reporting by Managers and, by implication, more frequent publishing by the Commission of information from Form SHO reports. Several of these commenters suggested that technology permits more frequent—i.e., daily, if not

filed in Proposed Form SHO filings. Proposing Release, at 14960 n.72.

<sup>195</sup> See Proposing Release, at 15010–11.

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>198</sup> See *id.*

<sup>199</sup> Proposing Release, at 15012.

<sup>200</sup> Comment Letter from Campbell Pryde, President and CEO, XBRL US (Apr. 26, 2022), at 1 (“XBRL Letter”), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126860-287597.pdf>.

<sup>201</sup> See *id.* at 2.

<sup>202</sup> See *id.* at 2–5.

<sup>203</sup> See *id.*

<sup>204</sup> Comment from An Investor (Apr. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20122297-278355.htm>.

<sup>205</sup> See, e.g., Regulation of NMS Stock Alternative Trading Systems, Exchange Act Release No. 83663 (July 18, 2018), 83 FR 38768 (Dec. 9, 2021) (requiring EDGAR Form ATS–N to be filed in an XML-based language specific to that Form).

<sup>206</sup> See Form 13F, available at <https://www.sec.gov/pdf/form13f.pdf>.

monthly—reporting.<sup>207</sup> Several of these comments also expressed concern that the Commission's estimated month-long delay in publishing the aggregated information would produce stale data that would undermine the goal of greater transparency in the markets.<sup>208</sup> The Commission acknowledges that the technology exists for frequent reporting of transactions and faster data processing. The Commission is concerned, however, about the accuracy of the data reported by Managers and the aggregated data published by the Commission pursuant to Rule 13f-2 reporting requirements. The Commission believes that the data reported by Managers on Form SHO is more likely to be complete and accurate if Managers are afforded sufficient time to gather, assemble, and review the reported data.<sup>209</sup> The Commission continues to believe that 14 calendar days after the end of each month provides a reasonable period of time for Managers to meet their Rule 13f-2 reporting requirements. The Commission is also concerned that increasing the frequency of Commission publication of aggregated data may increase the risk of short squeezes or other manipulative activities that could interfere with the price discovery function of equity markets. The timeframes as proposed and as adopted balance such concerns with some commenters' desire for faster transparency.

Commenters taking the opposite view recommended that additional time be given for Manager reporting and Commission publication. One such commenter recommended that the Commission align the proposed timelines for preparing and filing Form SHO reports with existing filing requirements for other Commission

reports and forms, to allow for better coordination of the process of including short sale-related data in multiple reporting frameworks.<sup>210</sup> Another such commenter suggested an initial filing period be extended to within 28 calendar days upon crossing the threshold and then 14 calendar days for any subsequent filing.<sup>211</sup> Another commenter suggested that a minimum of 45 days before publication of aggregated data by the Commission was necessary to protect Managers from the risk that their positions and strategies would be used in a "short squeeze or other market-driven reaction" or as part of a copycat strategy.<sup>212</sup>

While adopting the proposed timeframes will delay the public dissemination of aggregate short positions by about a month, the Commission believes a longer delay such as 28 days for initial filings or 45 days for all filings is unnecessary. FINRA's current short interest reporting, for example, is published twice a month, resulting in a delay of about two weeks.<sup>213</sup> The final rule here requires slightly more time than FINRA's current reporting regimes because Managers need additional time following determination of whether they meet a Reporting Threshold at the end of each calendar month to prepare and file the data on Form SHO through EDGAR. Additionally, the Commission believes that providing Managers with a reasonable period of time to file complete and accurate short sale-related information in the first instance will reduce the need for Managers to file amendments to Form SHO. However, having an asymmetric filing deadline of 28 days for initial filing and 14 days thereafter, as one commenter suggested, would create negligible cost savings for Managers. Meanwhile, it may have detrimental effects on the timing of data aggregation and publication, which could unnecessarily affect the timing

and quality of aggregated published data.

#### Final Rule

After considering comments, the Commission is adopting Rule 13f-2(a) as proposed, and continues to estimate that it will publish aggregated data derived from Form SHO reports within one calendar month after the end of the reporting calendar month.<sup>214</sup> For example, for data reported by Managers on Form SHO for the month of October, the Commission expects to publish aggregated information derived from such data no later than the last day of November. The Commission continues to believe that 14 calendar days after the end of each calendar month provides Managers with sufficient time for Managers that meet the Reporting Threshold to prepare and file Form SHO data.

#### d. Contents of Form SHO

Form SHO, as proposed, consists of two parts: Cover Page and Information Tables. As discussed more fully below:

- The *Cover Page* presents certain identifying information about the Manager(s) filing the Form SHO report, the calendar month for which the Manager is reporting, the type of Form SHO report being made, and whether the Manager is filing the Form SHO report as an amendment;<sup>215</sup>
- *Information Table 1* presents a Manager's monthly gross short position in the equity security on which information is being reported, as well as certain identifying information about that security and about the issuer of that security;<sup>216</sup> and
- *Information Table 2* presents daily activity affecting a Manager's gross short position during a calendar month reporting period, as well as certain identifying information about that security and about the issuer of that security.<sup>217</sup>

#### i. Financial Identifiers

##### (A) Proposal

The Commission proposed that a Manager provide the active LEI, if any, of each Manager listed on the Cover Page. The Commission also proposed that a Manager report on each of the Proposed Form SHO Information Tables the FIGI and CUSIP number of each security on which information is being reported, and the active LEI, if any, of

<sup>207</sup> See, e.g., Comment from Regina Murrell (Mar. 25, 2023) available at <https://www.sec.gov/comments/s7-08-22/s70822-20121170-273336.htm> (suggesting that technology be used to report short positions daily); Anonymously Submitted Comment (Mar. 14, 2022) (calling for reporting to regulators within twenty-four hours); Anonymously Submitted Comment (Apr. 26, 2022) (calling for daily, if not intraday, Form SHO reporting rather than monthly reporting, as proposed); Anonymously Submitted Comment (Mar. 17, 2022) (stating that technology permits more frequent reporting and release of short sale-related data to the public in shorter timeframes); see also Better Markets Letter, at 13 (predicting that the Commission's "fairly significant delay" in publishing the aggregated information derived from Form SHO reports will lead to published information that is "less timely and less informative").

<sup>208</sup> See, e.g., Comment of Estaban Oliveras (Mar. 14, 2022) available at <https://www.sec.gov/comments/s7-08-22/s70822-20119372-272258.htm> (commenting "If data is neither accurate nor timely, then what is the point of collecting data?").

<sup>209</sup> See Proposing Release, at 14956.

<sup>210</sup> ICI Letter, at 12 (stating that aligning Form SHO reporting requirements with those of Form N-Port, for example, would give Managers 30 days, rather than the proposed 14 days, after the end of a calendar to file a Form SHO).

<sup>211</sup> See Perkins Coie Letter, at 3 (stating a request to extend the initial filing period to within 28 calendar days upon crossing the threshold in order "to reduce the monitoring and compliance burdens for infrequent short position users").

<sup>212</sup> MFA Letter, at 18.

<sup>213</sup> See, e.g., FINRA, Short Interest Reporting, available at <https://www.finra.org/filing-reporting/regulatory-filing-systems/short-interest> (presenting "due dates" for reporting short interest to FINRA and publication of short interest data by FINRA). FINRA Rule 4560 requires FINRA member firms to report their short positions in exchange-listed and over-the-counter equity securities to FINRA twice each month. FINRA publishes the short interest reports it collects from member firms for all such equity securities.

<sup>214</sup> Publication of the aggregated information may be delayed for an initial period following effectiveness of Rule 13f-2 and Form SHO.

<sup>215</sup> See *infra* Part II.A.4.d.ii.

<sup>216</sup> See *infra* Part II.A.4.d.iii.

<sup>217</sup> See *infra* Part II.A.4.d.iv.



the issuer of those securities. These items are discussed in Special Instructions 8.c, 8.e, and 8.f regarding Columns 3, 5, and 6 of Information Table 1, and in Special Instructions 9.c, 9.e, and 9.f regarding Columns 3, 5, and 6 of Information Table 2.

#### (B) Comments and Final Rule

The Commission received only a few comments regarding the proposed requirement to report certain financial identifiers, including CUSIP and FIGI (which identify specific securities), and LEI (which identifies specific entities) on Form SHO.<sup>218</sup> Two commenters stated that the Commission should only require that CUSIP be reported on Form SHO, and that the inclusion of additional financial identifiers could cause confusion.<sup>219</sup> Another commenter stated that the LEI and the FIGI of issuers is “not commonly provided” in other holding reports and would therefore cause Managers to incur additional costs.<sup>220</sup> Another commenter, citing “substantial CUSIP licensing costs,” expressed concern that requiring the reporting of CUSIP could create an “unnecessary financial burden” on Managers.<sup>221</sup> However, another commenter stated that the inclusion of multiple financial identifiers in addition to CUSIP, such as FIGI and LEI, could help foster competition that ultimately reduces costs and improves data quality.<sup>222</sup>

In DFA section 929X, Congress specifically directed the Commission to include CUSIP in short sale disclosure rules.<sup>223</sup> CUSIP is a universally recognized identifier that has been used for a wide array of financial instruments since 1964, allowing securities

transactions to be easily identified, cleared, and settled, including short sales. Furthermore, market participants and investors are familiar with CUSIPs, which are widely and publicly available and used to identify most U.S. stocks.<sup>224</sup> Many companies display their CUSIPs on their websites, and brokers and dealers often provide investors with search engines to look up stocks by CUSIPs.<sup>225</sup> Accordingly, while the Commission recognizes that there are licensing costs associated with the CUSIP, the Commission is adopting, as proposed, the requirement that Managers report in Column 5 of each of the Form SHO Information Tables the CUSIP for the equity security for which information is reported to help facilitate market participants’ understanding of the reported data.

The Commission will also adopt, as proposed, the requirement that Managers report in Column 6 of each of the Form SHO Information Tables the FIGI of the equity security for which information is being reported, if a FIGI has been assigned. Like CUSIP, FIGI provides a methodology for identifying securities, and reporting a FIGI, if assigned, will provide additional identifying information that will provide additional clarity, not confusion, to market participants and the public. Unlike CUSIPs,<sup>226</sup> however, FIGIs are provided for free.<sup>227</sup>

To aid in the identification of the issuers referenced in Form SHO reports, the Commission is also adopting a requirement that Managers report in Column 3 of each Form SHO Information Table, the LEI, if any, of the issuer of the security about which information is reported on Form SHO.<sup>228</sup>

With respect to the proposed requirement that a Manager provide its

own LEI, if it had one, and, if available to the Manager making the Proposed Form SHO filing, the active LEI of each Manager listed on the Form SHO Cover Page as an “Other Manager Reporting for” the Manager making the Proposed Form SHO filing, the Commission sought comment on whether it should require every Manager filing a Proposed Form SHO to obtain an LEI.<sup>229</sup> One commenter supporting the requirement to report financial identifiers on Form SHO stated that all Managers should be required to obtain and maintain a non-lapsed LEI, as opposed to the proposal, which stated that Managers would be required to report their LEI, if any.<sup>230</sup> Another commenter, however, expressed uncertainty regarding such a requirement, stating that registration or renewal of an LEI is “not monetarily costless.”<sup>231</sup>

The Commission acknowledges that LEIs do provide a precise and consistent means of identification of legal entities. However, after considering the comments received, and because LEIs would supplement existing identifying information provided for Managers and issuers listed in Form SHO filings, the Commission is not requiring Managers subject to Rule 13f-2 to obtain (and maintain non-lapsed) LEIs to provide on the Cover Page of Form SHO reports and, when appropriate for the “Other Manager(s) Reporting for this Manager” section of the Form SHO Cover Page to be completed, to provide a non-lapsed LEI for each Manager listed in the “Other Manager(s) Reporting for this Manager” of the Form SHO Cover Page. However, the Commission may consider this issue in the future.

#### ii. Cover Page

##### (A) Proposal

As proposed, and pursuant to Special Instructions 2–5 of Proposed Form SHO, a Manager would report on the Cover

<sup>218</sup> FIGI and LEI each serve different functions. FIGIs identify securities, whereas LEIs identify entities. Thus, a single issuer’s LEI could be associated with multiple FIGIs. Conversely, multiple FIGIs could be associated with the same issuer’s LEI. Furthermore, identifying reporting Managers on Form SHO would require an entity identifier (LEI) rather than a security identifier (FIGI).

<sup>219</sup> See, e.g., Comment Letter from CUSIP Global Services (Apr. 25, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126577-287237.pdf> (“CUSIP Letter”); Comment Letter from American Bankers Association (Apr. 26, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126641-287311.pdf> (“ABA Letter”).

<sup>220</sup> Jennifer Han, Executive Vice President, Chief Counsel and Head of Regulatory Affairs, Managed Funds Association (June 15, 2023), at 9, available at <https://www.sec.gov/comments/s7-08-22/s70822-206120-414822.pdf> (“MFA Letter 2”).

<sup>221</sup> See Letter from Anonymous Fund Manager, at 9.

<sup>222</sup> See Comment Letter from Gregory Babyak, Glob. Head Regul. Affs., Bloomberg L.P., at 5 (May 2, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20127745-288932.pdf>.

<sup>223</sup> Public Law 111–203, sec. 929X, 124 Stat. 1376, 1870 (July 21, 2010).

<sup>224</sup> See, e.g., Fast Answers: CUSIP Number, available at <https://www.sec.gov/answers/cusip> (referencing CUSIP Global Services).

<sup>225</sup> See, e.g., Chad Langager, *How to Locate the CUSIP Number for a Stock*, Investopedia (Apr. 6, 2022), available at <https://www.investopedia.com/ask/answers/06/cusipforspecificstock.asp>.

<sup>226</sup> See, e.g., Fees for CUSIP Assignment, CUSIP Glob. Servs., available at <https://www.cusip.com/pdf/FeesforCUSIPAssignment.pdf> (“For an offering requiring a single CUSIP identifier, the assignment fee is \$200.”).

<sup>227</sup> See, e.g., Unlock the Power of Efficiency with Open Symbolology, OpenFIGI, available at <https://www.openfigi.com/>.

<sup>228</sup> This practice is in keeping with current requirements of other Commission forms. For example, the registrant filing Form N-POR need not report LEIs for counterparties that do not have one. In addition, as noted above, to avoid any suggestion that a Manager filing a Form SHO report has an obligation to monitor the status of an issuer’s LEI, Instructions 8.c and 9.c of Form SHO—“Column 3. Issuer LEI. If the issuer has an LEI, enter the issuer’s active LEI—have been revised to remove the term “active.” See *supra* n. 36.

<sup>229</sup> See Proposing Release, at 14965. Because the Cover Page, as proposed, would also present the name and, if available to the Manager making the Proposed Form SHO filing, the active LEI of each Manager listed on the Form SHO Cover Page as an “Other Manager Reporting for” the Manager making the Proposed Form SHO filing, the query covered those Managers as well.

<sup>230</sup> Anonymously Submitted Comment (Apr. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-2012297-278355.htm> (“Every manager that has a part of trading any form of security or derivative on any market should be forced to have a Legal Entity Identifier (LEI). That way, specific bad actors can be easily identified.”).

<sup>231</sup> See Comment Letter from Aaron Franz, available at <https://www.sec.gov/comments/s7-18-21/s71821-20120685-272855.pdf> (“I’m uncertain that Managers should be required to obtain an LEI. Registration or renewal of an LEI is not monetarily costless. The same information can be submitted by Managers without a tracking number with a cost.”).

Page: (i) certain basic information, including its name, mailing address, business telephone and facsimile numbers, and active LEI, if any, as well as the name, title, business telephone and facsimile numbers of the Manager's contact employee for the Form SHO report, and the date the report is filed; (ii) the period end date—*i.e.*, the last settlement date of the calendar month for which the Manager is reporting; (iii) the type of Form SHO report being filed;<sup>232</sup> and (iv) whether the Form SHO is being filed as an amendment.<sup>233</sup> The Manager filing the report will include the representation that “all information contained herein is true, correct and complete, and that it is understood that all required items, statements, schedules, lists, and tables, are considered integral parts of this form.”<sup>234</sup>

#### (B) Comments and Final Rule

Other than with respect to financial identifiers as discussed above, the Commission did not receive any comments on the contents of the Cover Page. As a result, the Commission is adopting Special Instructions 2–5 of Form SHO as proposed, with minor technical modifications. For greater precision (but no change in the meaning) in the terminology used in Form SHO as adopted, an LEI that is currently in effect is referred to as a

<sup>232</sup> The Commission proposed that the reporting Manager designate the report type for the Form SHO by checking the appropriate box in the “Report Type” section of the Cover Page and include, where applicable, the name and active LEI of each other Manager reporting for this Manager. If all of the information that a Manager is required by proposed Rule 13f–2 to report on related Form SHO is reported by another Manager (or Managers), the Manager shall check the box for Report Type “FORM SHO NOTICE,” include on the Cover Page the name and active LEI (if available) of each of the other Managers reporting for this Manager, and omit the Information Tables. If all of the information that a Manager is required by proposed Rule 13f–2 to file on Form SHO is included in the report, the Manager shall check the box for Report Type “FORM SHO ENTRIES REPORT,” omit from the Cover Page the name and active LEI of each other Manager reporting for this Manager, and include the Information Tables. If only a part of the information that a Manager is required by proposed Rule 13f–2 to file on Form SHO is included in the report filed by the Manager, the Manager shall check the box for Report Type “FORM SHO COMBINATION REPORT,” include on the Cover Page the name and active LEI of each of the other Managers reporting for this Manager, if available, and include the Information Tables. See Proposing Release, at 14958.

<sup>233</sup> If the Manager is filing the Form SHO report as an amendment, then the Manager must check the “Amendment and Restatement” box on the Cover Page and enter the Amendment and Restatement number. Each amendment must include a complete Cover Page and Information Tables. Amendments must be filed sequentially. See Proposing Release, at 14960–61.

<sup>234</sup> See Proposing Release, at 14958.

“non-lapsed LEI” rather than an “active LEI” (the terminology used in Proposed Form SHO). Also, the Cover Page contact information for the reporting Manager and its “Contact Employee” has been updated to require the use of email rather than facsimile.<sup>235</sup>

#### iii. Information Table 1: “Manager’s Monthly Gross Short Position”

##### (A) Proposal

Under Proposed Rule 13f–2, Managers meeting a Reporting Threshold would report certain information, including end of month gross short position information regarding transactions that have settled during the calendar month being reported, and certain hedging information that would help to indicate whether the reported gross short position is directional or non-directional in nature.<sup>236</sup>

Specifically, as proposed, the Manager would report the following information on Information Table 1:

- In Column 1, a Manager would enter the last day of the calendar month being reported by the Manager on which a trade settles. This information would identify the month being reported by the Manager.

- In Column 2, a Manager would enter the name of the issuer to identify the issuer of the equity security for which information is being reported.

- In Column 3, a Manager would enter the issuer’s active LEI, if any. The LEI provides standardized information that would enable the Commission and market participants to more precisely identify the issuer of each equity security for which information is being reported.

- In Column 4, consistent with section 13(f)(2), a Manager would enter the title of the class of the equity security for which information is being reported.

- In Column 5, consistent with section 13(f)(2), a Manager would enter the nine (9) digit CUSIP number of the equity security for which information is being reported, if applicable.

- In Column 6, a Manager would enter the twelve (12) character, alphanumeric FIGI of the equity security for which information is being reported, if a FIGI has been assigned. Like CUSIP, FIGI provides a methodology for identifying securities.

- In Column 7, a Manager would enter the number of shares that represent the Manager’s gross short position in the equity security for which information is being reported at the close of regular trading hours on the last

settlement date of the calendar month of the reporting period. The term “gross short position” means the number of shares of the 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).

- In Column 8, a Manager would enter the U.S. dollar value of the shares reported in Column 7, rounded to the nearest dollar. A Manager would report the corresponding dollar value of the reported gross short position by multiplying the number of shares of the security for which information is being reported by the closing price at the close of regular trading hours on the last settlement date of the calendar month. In circumstances where such closing price is not available, the Manager would use the price at which it last purchased or sold any share of that security. This additional information regarding the dollar value of the reported short position would provide additional transparency and context to market participants and regulators.

- In Column 9, a Manager would indicate whether the identified gross short position in Column 7 is fully hedged (“F”), partially hedged (“P”), or not hedged (“O”) at the close of the last settlement date of the calendar month of the reporting period.<sup>237</sup>

<sup>237</sup> As stated in the proposal, a Manager would indicate that a reported gross short position in an equity security is “fully hedged” if the Manager also holds an offsetting position that reduces the risk of price fluctuations for its entire position in that equity security, for example, through “delta” hedging (in which the Manager’s reported gross short position is offset 1-for-1), or similar hedging strategies used by market participants. A Manager would report that it is “partially hedged” if the Manager holds an offsetting position that is less than the identified price risk associated with the reported gross short position in that equity security. This additional hedging information would help to indicate whether the reported gross short position is directional or non-directional in nature. More specifically, a short position that is not hedged could be an indicator that the short seller has a negative view of the security, believes that the price of the equity security will decrease, and accepts the market risk related to its short position. A short position that is fully hedged could be an indicator that the short seller has a neutral or positive view of the security and is engaged in hedging activity to protect against potential market risk. A short position that is partially hedged could be an indicator that the short seller has a negative, neutral, or positive view of the security. Whether the hedge itself is full, partial, or non-existent might provide further context to market participants regarding the short seller’s view of the equity security. Hedging information also can assist with distinguishing position trading, which typically has corresponding hedging activity, from other strategies such as arbitrage.

<sup>235</sup> See *supra* n. 37 and accompanying text.

<sup>236</sup> *Id.* at 14959.

## (B) Comments and Final Rule

Comments regarding the contents of Information Table 1 raised concerns about the proposal to require hedging information in Column 9. As discussed below, the Commission is adopting Information Table 1, as proposed, except that the Commission will not require Managers to report hedging information as originally proposed in Column 9 of the table.

## Comments Regarding Hedging Indicators

## Implementation Challenges

The proposal would have required Managers to report on Information Table 1 whether they were “fully hedged” or “partially hedged” based on whether a Manager held an offsetting position that completely or partially reduced the risk of price fluctuations for its position in that equity security, respectively.<sup>238</sup> Further, the proposal required Managers to report on Information Table 1 that their short position was “not hedged” if the Manager did not hold any offsetting positions.<sup>239</sup> A number of commenters raised concerns about the costs to implement this proposed requirement.<sup>240</sup> One such commenter expressed concerns that the requirement to report hedging status would be “operationally difficult to implement,” as the reporting would be produced by back-office systems that “generally do not have any linkage information to allow them to match a hedge to a short position,” necessitating the development of costly new systems.<sup>241</sup> One industry group commenter expressed a concern about “complications that can arise from the hedging classification,” particularly for large portfolios for which it will not always be clear when a position is intended to be a hedge for another position, or clear or obvious whether a position acts as “one-to-one offset” of price risk for another position.<sup>242</sup>

## Non-Universal Terminology

Some commenters expressed concerns about the meaning of “fully hedged” and “partially hedged” under the proposed rule. These commenters expressed the view that because there is no universal definition of hedging in the

marketplace, or clear guidance on this matter from the Commission, Managers can reasonably come to different conclusions regarding the extent to which similar positions are hedged.<sup>243</sup> Because the meanings of “fully” and “partially” hedged are subject to interpretation, these commenters believed that the reporting of hedging data would be inconsistent, imprecise, potentially misleading, and subject to misinterpretation. Several such commenters posited that due to what they described as the ambiguity of the hedging definitions, the proposed hedging reporting could result in inaccurate or misleading data—such as misleading market signals of Managers’ sentiments—as Managers may interpret the hedging indicators differently.<sup>244</sup> Similarly, a commenter stated that due to the lack of detail surrounding the “partially hedged” designation in particular, the data may be misleading as to the level of price risk associated with certain positions.<sup>245</sup> A commenter stated that there is no universal definition of what constitutes a “hedge” and that the Commission’s guidance in the Proposing Release and the instructions in Proposed Form SHO as to how a Manager determines whether or when a position is fully or partially hedged, or not hedged, are insufficient to create a universal understanding and consistent reporting.<sup>246</sup> That commenter further stated that the Commission provided only one example (the use of delta hedging in a one-to-one offset between short and long positions), even though Managers use a variety of other hedging techniques, such as portfolio hedging, ETFs, baskets of securities, and securities that have historic trading correlations, among others.<sup>247</sup> Under these circumstances, several commenters predicted, Managers would likely default to a “partially hedged” designation,<sup>248</sup> resulting in data of

limited utility.<sup>249</sup> These commenters stated that due to what they viewed as the ambiguous and non-universal nature of the terms, many Managers may simply default to marking transactions as “partially hedged” when it is unclear to what extent the positions are hedged, due to the wide range of positions encompassed by the proposed partially hedged indicator.<sup>250</sup> To mitigate this concern and to improve transparency, some commenters critical of the hedging indicators suggested reducing the qualitative nature of the proposed terms by dividing the “partially hedged” term into smaller, well-defined units or even percentage increments.<sup>251</sup> More specifically, these commenters expressed concern that the proposed hedging classifications could prove challenging to apply consistently across Managers and could result in significant

example, if a manager has discretion over one fund with a short position, and another unrelated fund with a long position, the manager would be required to report the short position as “partially hedged” when in fact, the short position is not hedged at all.” Depending on the facts and circumstances, the commenter is correct that the positions in the two funds managed by the same Manager may have to be aggregated under Rule 200(c) of Regulation SHO for marking purposes.

<sup>249</sup> See, e.g., Ropes & Gray Letter, at 5 (stating that difficulty in defining “fully,” “partially,” or “not,” hedged would likely lead to inconsistent reporting that, in turn would limit the “meaningfulness” of the reported information to investors and the Commission); T. Rowe Price Letter, at 4 (raising concern that lack of consistency in how reporting Managers would apply the hedging classification could lead to “weaknesses” in the hedging data reported that would make the Commission’s publication of aggregated hedging classifications across reporting Managers of little value to, and potentially misinterpreted by, the public); MFA Letter, at 4 (stating “[b]ecause (i) there is no universal definition of ‘hedging’ in the industry, and (ii) the reported gross short position must encompass short positions aggregated across funds, clients and affiliated managers, any hedging-related designation would be meaningless. Inclusion of this data would result in inconsistent reporting and would be costly and time consuming for managers to produce.”); SIFMA Letter at 21 (stating information reported in Column 9 of Proposed Form SHO would be “inherently inconsistent and precise and, therefore, of very little value to regulators in that it could be highly misleading”); see also AIMA Letter, at 13 (stating hedging classification will involve “level of subjectivity that is unlikely to be applied uniformly across Managers”).

<sup>250</sup> See, e.g., Ropes & Gray Letter (arguing that the possible exaggerated use of the partially hedged indicator is “unlikely to elicit comparable reporting across managers”).

<sup>251</sup> See Comment from Peyton Bailey (Mar. 14, 2022) (“Peyton Bailey Comment”), available at <https://www.sec.gov/comments/s7-08-22/s70822-272291.htm> (proposing to use percentage points or “majority” (≤50%) and “minority” (≤50%) hedging indicators instead of partially hedged); Nick Dougherty Letter (proposing to use percentage points); WTI Letter (proposing to use percentage points); Comment from Alex Fleming (Oct. 31, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-317348.htm> (proposing to use numerical or percentage scale).

<sup>238</sup> Proposing Release, at 14959.

<sup>239</sup> *Id.*

<sup>240</sup> See, e.g., MFA Letter, at 4 (stating that inclusion of hedging classification on Form SHO would be costly and time consuming for reporting Managers to produce); Virtu Letter, at 3 (advocating that requirement to report short positions as fully, partially, or not hedged would be “operationally difficult to implement” and should be eliminated).

<sup>241</sup> Virtu Letter, at 3.

<sup>242</sup> AIMA Letter, at 13.

<sup>243</sup> See, e.g., ICI Letter, at 10; see also Comment Letter from Mehmet Kinak, Head of Equity Trading, T. Rowe Price, et al. (Apr. 26, 2022), at 4, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126777-287493.pdf> (“T. Rowe Price Letter”) (stating that hedging data may be “especially vulnerable to lack of consistency in terms of how various managers apply the classification.”); AIMA Letter, at 13 (predicting that hedging classification will involve “level of subjectivity that is unlikely to be applied uniformly across Managers” and that determining such classification will “prove even more complicated for a large quantitative portfolio”).

<sup>244</sup> See, e.g., AIMA Letter, at 13; MFA Letter, at 16.

<sup>245</sup> See ICI Letter, at 10.

<sup>246</sup> See MFA Letter, at 16–17.

<sup>247</sup> See *id.*

<sup>248</sup> See, e.g., MFA Letter, at 17. The MFA Letter suggested that “almost all short positions held by a large manager will be partially hedged—for

costs for data of limited value.<sup>252</sup> One commenter stated that the act of market participants reporting the proposed hedging classification would create a chilling effect.<sup>253</sup>

Another commenter stated that although a change in hedging status may correspond with a change in manager sentiment, it is also possible that such a change may simply be the result of other unrelated objectives, such as rebalancing a portfolio.<sup>254</sup> Similarly, another commenter agreed that the purpose of defensive tactics that hedging strategies often entail, such as hedging a long position, contrasts with the purpose of unhedged short strategies.<sup>255</sup> That commenter expressed the view that such “defensive” hedging should not be included in the reporting as it would provide limited utility to the public. Some commenters took the position that reporting on “bona fide” hedging activity would not align with the goals in the Proposing Release and that such activity is unlikely to be abusive or manipulative.<sup>256</sup>

Some commenters that supported requiring hedging indicators generally rejected complaints about the costs and burdens related to the proposed reporting of hedging status as part of Information Table 1, stating that with modern technology, the requirements are “easily automated and with minimal cost incurrence.”<sup>257</sup> Support for the collection of hedging information generally came from commenters favoring steps to enhance the transparency of short sale-related data to facilitate a better understanding of short selling dynamics.<sup>258</sup> One commenter stated that the hedging classification, if made public, would illustrate market sentiment, and that it would help to uncover “short and distort” campaigns,

particularly in sectors that have higher than normal rates of short selling.<sup>259</sup> The commenter further explained that under the status quo, it is unclear whether short positions are used for hedging long positions or whether they are being used to speculate on perceived overvaluation in the market in recent years.<sup>260</sup> Another commenter stated that publishing hedging information regarding the actions of hedge funds and other large market participants would inform the decision making of retail investors.<sup>261</sup> Other commenters posited that the proposed “not hedged” indicator would provide the most useful information to the market because unhedged short positions may be the most likely to be riskier or manipulated.<sup>262</sup>

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After considering the comments received,<sup>263</sup> the Commission is not

<sup>259</sup> BIO Letter, at 7.

<sup>260</sup> *Id.* at 2.

<sup>261</sup> Peyton Bailey Comment.

<sup>262</sup> See Comment from Max Knaus (Oct. 30, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316957.htm>; Comment Letter from Brendan Casey (Oct. 30, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20149998-319181.pdf>.

<sup>263</sup> One commenter stated that the proposed hedging requirement “fails to appreciate the difficulty—particularly for multi-service broker-dealers that use aggregation units and investment funds with multiple strategies—of calculating and determining such information for reporting purposes.” SIFMA Letter, at 20. Under Regulation SHO, a person shall be deemed to own a security only to the extent it has a net long position in that security. See Rule 200(c). See also Rule 200(g)(1) (an order shall be marked long only if the seller is deemed to own the security and the security is in the physical possession or control of the broker or dealer or it is reasonably expected that the security will be in the physical possession or control of the broker or dealer by settlement date). Under Rule 200(f), a broker must aggregate all of its positions in a security to determine its net position, unless it qualifies for independent trading unit aggregation. If the broker or dealer qualifies for independent aggregation units, each independent trading unit shall aggregate all of its positions in a security to determine its net position. See Rule 200(f). Qualification requires that the independent aggregation unit meet four conditions. See Rule 200(f)(1) through (4). For instance, all traders in an aggregation unit must pursue only the particular trading objective(s) or strategy(s) of that aggregation unit and may not coordinate that strategy with any other aggregation unit. See Rule 200(f)(3). In adopting Rule 200(f), the Commission stated that “conditions are necessary to prevent potential abuses associated with establishing aggregation units within multi-service broker-dealers.” Regulation SHO Adopting Release, at 48011. Thus, to be eligible for the aggregation unit exception, the broker or dealer’s units must operate independently, with defined trading strategies, and one unit’s trades or positions cannot be used to offset or hedge another unit’s trades or positions. See, e.g., Rule 200(f)(3); see also Regulation SHO Adopting Release, at 48011 (each unit must be engaged in separate trading strategies). While information barriers between aggregation units may be useful, as the commenter suggests, such barriers

adopting the hedging reporting requirement as proposed. Specifically, when filing Form SHO Information Table 1, a Manager will not be required to indicate whether the identified gross short position in Column 9 of Information Table 1 is fully hedged (“F”), partially hedged (“P”), or not hedged (“O”) at the close of the last settlement date of the calendar month of the reporting period; Column 9 will be removed from Information Table 1 of Form SHO as adopted.

While the Commission laid out the rationale behind the hedging reporting requirement in the Proposing Release, comments received, as discussed above, persuaded the Commission that such reported data may not result in as consistent and accurate data as it originally envisioned. In addition to the definitional challenges discussed above, the Commission recognizes the challenges of applying the Rule 13f–2 reporting requirements in the scenario when a Manager has investment discretion over multiple accounts. For example, purchases and sales in different accounts may not be intended to hedge one another, but the proposal would have required that the Manager indicate that it was “partially-hedged” nonetheless. Such information would not be an accurate reflection of the Manager’s hedging status, and thus would not be useful. As another example, a Manager that has purchased a few shares of a security (for example, 100 shares) for which it holds a substantial short position (for example, 1 million shares) would have had to report that it was “partially hedged” without regard for the scale of such purchases in relation to the position for which it would have had to report it was hedging. That said, the Commission continues to believe, as did some commenters favoring the proposed requirement, that if accurate data on hedging could be collected, such information would be useful to regulators.

alone are not sufficient for eligibility for Rule 200(f). See e.g., Rule 200(f)(3); see also Regulation SHO Adopting Release at 48011 (conditions are intended to limit potential for abuse associated with coordination among units and to maintain the independence of the units). Thus, a broker or dealer that has created multiple units with fungible trading strategies as a means of affecting order marking may not be eligible for aggregation unit treatment under Rule 200(f) of Regulation SHO. See e.g., *In re Morgan Stanley & Co., LLC*, 34–90046 (Sept. 30, 2020) (*settled case*), available at <https://www.sec.gov/litigation/admin/2020/34-90046.pdf> (long-only and short-only aggregation units were not independent and separate trading strategies, but were instead operated by the same employees, managed by the same manager, and consisted of the same trading strategies).

<sup>252</sup> See MFA Letter, at 4, 16–17.

<sup>253</sup> See Comment Letter from Joshua Russell (Oct. 26, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20147825-314190.pdf>.

<sup>254</sup> See T. Rowe Price Letter, at 4.

<sup>255</sup> See K&L Gates Letter, at 2.

<sup>256</sup> See K&L Gates Letter, at 2–3, T. Rowe Price Letter, at 2–4, Anonymous Fund Manager Letter, at 1.

<sup>257</sup> Letter from Andrew Patrick White, CEO & Founder, FundApps (Mar. 2, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118368-271239.pdf>.

<sup>258</sup> See, e.g., Comment Letter from Anonymous (March 14, 2022) (positing that managers should report whether, and to what extent, they are hedged, along with an explanation of what that means; such information is valuable in determining a manager’s position with regard to the associated risks); see also Comment Letter from Biotechnology Innovation Organization (Apr. 25, 2022) at 3, available at <https://www.sec.gov/comments/s7-08-22/s70822-20126539-287214.pdf> (“BIO Letter”) (positing that transparency into hedging data would facilitate understanding of price and behavior dynamics).

The Commission considered whether, as suggested by a commenter, the hedging indicator could be simplified so that Managers would be required only to report whether a position is not hedged.<sup>264</sup> While short positions that are unhedged may involve greater risk, this alternative could be too easily circumvented by, for example, simply purchasing a nominal number of shares of the security and stating the position is therefore hedged (or partially hedged under the rule as proposed). The Commission also considered another commenter's suggestion that hedged short positions should be exempted from reporting.<sup>265</sup> This alternative would create a similar circumvention scenario to the one mentioned above (i.e., using a nominal long position to create an exempt hedged position).

Accordingly, the Commission is not adopting the hedging reporting requirement as proposed.

#### iv. Information Table 2: "Daily Activity Affecting Manager's Gross Short Position During the Reporting Period"

##### (A) Proposal

As proposed, Information Table 2 of Form SHO captures daily activity that increases or decreases a Manager's short position for each settlement date during the calendar month reporting period. More specifically, on proposed Form SHO, a Manager would report the number of shares of the equity security that: (i) were sold short; (ii) were purchased to cover, in whole or in part, an existing short position in the security; (iii) were acquired through the exercise or assignment of an option, through a tendered conversion, or through a secondary offering transaction,<sup>266</sup> that reduces or closes a

short position on the (underlying) security; (iv) were sold through the exercise or assignment of an option that creates or increases a short position on the (underlying) security; (v) resulted from other activity not previously reported in the Information Table that reduces or closes, or creates or increases a Manager's short position on the security, including, but not limited to, ETF creation or redemption activity. Pursuant to Proposed Rule 13f-2, Managers would assemble, review, and file the required information with the Commission on new Form SHO within fourteen (14) calendar days after the end of the calendar month. As noted above, the Commission would then publish aggregated information derived from the data reported on new Form SHO, aggregated across all reporting Managers, within one month after the end of the reporting calendar month.

Specifically, as proposed, the Manager would report the following information on Information Table 2 for each date during the reporting period on which a trade settled (settlement date) during the calendar month.

- In Column 1, a Manager would enter the date during the reporting period on which a trade settled for the activity reported. This would identify the settlement date activity being reported.
- In Column 2, consistent with section 13(f)(2), a Manager would enter the name of the issuer, to identify the issuer of the security for which information is being reported.
- In Column 3, a Manager would enter the issuer's active LEI, if the issuer had an active LEI. The LEI provides standardized information that would enable the Commission and market participants to more precisely identify the issuer of each equity security for which information is being reported.
- In Column 4, consistent with section 13(f)(2), a Manager would enter the title of the class of the security for which information is being reported.
- In Column 5, consistent with section 13(f)(2), a Manager would enter the nine (9) digit CUSIP number of the equity security for which information is being reported, if applicable.
- In Column 6, a Manager would enter the twelve (12) character, alphanumeric FIGI of the equity security for which information is being reported, if a FIGI has been assigned. Like CUSIP, FIGI provides a methodology for identifying securities.

- In Column 7, for the settlement date set forth in Column 1, a Manager would enter the number of shares of the equity security for which information is being reported that resulted from short sales and settled on that date.

- In Column 8, for the settlement date set forth in Column 1, a Manager would enter the number of shares of the security for which information is being reported that were purchased to cover, in whole or in part, an existing short position in that security and settled on that date. This activity information would allow the Commission and other regulators to more quickly identify a potential "short squeeze," which could be evidenced by short sellers closing out short positions by purchasing shares in the open market. If it appeared that a short squeeze may have occurred through potential manipulative behavior involving short selling, the Commission could perform further analysis regarding the squeeze. Increased risk of detection could deter some market participants seeking to orchestrate a short squeeze.

- In Column 9, for the settlement date set forth in Column 1, a Manager would enter the number of shares of the security for which information is being reported that are acquired in a call option exercise that reduces or closes a short position on that security and settled on that date. The exercise or assignment of an option position can reduce or close a short position in the underlying equity security.

- In Column 10, for the settlement date set forth in Column 1, a Manager would enter the number of shares of the security for which information is being reported that were sold in a put option exercise that created or increased a short position on that security and settled on that date. Options can be used to create economic short exposure such that an exercise or assignment of an option could create or increase a short position in the underlying equity security.

- In Column 11, for the settlement date set forth in Column 1, a Manager would enter the number of shares of the security for which information is being reported that were sold in a call option assignment that created or increased a short position on that security and settled on that date. Options can be used to create economic short exposure such that an exercise or assignment of an option could create or increase a short position in the underlying equity security.

- In Column 12, for the settlement date set forth in Column 1, a Manager would enter the number of shares of the security for which information is being reported that were acquired in a put option assignment that reduced or

<sup>264</sup> See Comment from Max Knaus (Oct. 30, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-316957.htm>; Comment Letter from Brendan Casey (Oct. 30, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20149998-319181.pdf>.

<sup>265</sup> Perkins Coie Letter, at 6 (stating that "[o]r, alternatively, the SEC should consider exempting hedged short positions from reporting on Form SHO").

<sup>266</sup> The term "sale" under the Securities Act includes contract of sale. See *Securities Offering Reform*, Exchange Act Release No. 52056 (July 19, 2005), 70 FR 44722, 44765 (Aug. 3, 2005); *Short Selling in Connection With a Public Offering*, Exchange Act Release No. 56206 (Aug. 6, 2007), 72 FR 45094, 45102 (Aug. 10, 2007). The Commission has previously stated that, in a short sale, the sale of securities occurs at the time the short position is established, rather than when shares are delivered to close out that short position, for purposes of section 5 of the Securities Act of 1933 ("Securities Act"). See, e.g., *Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules Thereunder to Trading in Security Futures Products*, Exchange Act Release

No. 46101 (June 21, 2022), 67 FR 43234, 43236 (June 27, 2002) (see Questions 3 and 5); *Short Selling in Connection With a Public Offering*, 72 FR 45094.

closed a short position on that security and settled on that date. The exercise or assignment of an option position can reduce or close a short position in the underlying equity security.

- In Column 13, for the settlement date set forth in Column 1, a Manager would enter the number of shares of the security for which information is being reported that are acquired as a result of tendered conversions that reduced or closed a short position on that security and settled on that date. Holders of convertible debt often hold short positions to hedge their convertible position. When the shares of the convertible debt are converted, they can reduce or close a short position in the equity security.

- In Column 14, for the settlement date set forth in Column 1, a Manager would enter the number of shares of the security for which information is being reported that were obtained through a secondary offering transaction that reduces or closes a short position on that security and settled on that date. Purchasing securities in a secondary offering<sup>267</sup> can reduce or close a short position in the equity security.

- In Column 15, for the settlement date set forth in Column 1, a Manager would enter the number of shares of the security for which information is being reported that resulted from other activity not previously reported in Information Table 2 that creates or increases a short position on that security and settled on that date. Other activity to be reported includes, but is not limited to, shares resulting from ETF creation or redemption activity.

- In Column 16, for the settlement date set forth in Column 1, a Manager would enter the number of shares of the security for which information is being reported that resulted from other activity not previously reported on

Information Table 2 that reduces or closes a short position on that security and settled on that date. Other activity to be reported includes, but is not limited to, shares resulting from ETF creation or redemption activity.

The Commission stated in the Proposing Release that it believes that the information in Columns 9, 12, 13, 14, and 16 of proposed Information Table 2 would be useful in providing the Commission additional context and transparency into how and when short positions in the reported equity security are being closed out or reduced.<sup>268</sup> The Commission also stated that the information in Columns 10, 11, and 15 would be useful in providing the Commission additional context and transparency into how and when short positions in the reported equity security are being created or increased.<sup>269</sup>

Such daily activity information would provide market participants and regulators with additional context and transparency into whether, how, and when reported gross short positions in the reported equity security are being closed out (or alternatively, increased) as a result of the acquisition or sale of shares of the equity security resulting from call options exercises or assignments; put options exercises or assignments; tendered conversions; secondary offering transactions;<sup>270</sup> and other activity. The Commission stated that it believed that such activity data would also assist the Commission in assessing systemic risk and in reconstructing unusual market events, including instances of extreme volatility.

#### (B) Comments and Final Rule

The Commission solicited and received comment on the categories of short sale activity data that a Manager would be required to report on new Form SHO Information Table 2. Commenters differed on the appropriate level of transparency of the short sale-related data presented. Some commenters called for robust—if not complete—transparency of short sale-related data, while other commenters expressed concerns about the breadth of the activity information to be reported, the related cost burdens to report such information, and data security.

Individual investor commenters, generally, were critical of the opacity of current short position and short activity data disclosure. A group consisting of retail investors stated there was a “lack of transparency around short positions,

the inability to adequately quantify short interest, and the ability for firms to skirt regulation through derivative positions such as options and security-based swaps.”<sup>271</sup> Some individual investor commenters viewed Proposed Rule 13f–2 and related Form SHO as a first step toward achieving the full transparency in disclosure they perceived as necessary for a fair and efficient market.<sup>272</sup> To these commenters, greater transparency is a means to level the playing field for retail investors.<sup>273</sup>

Other commenters acknowledged the Commission’s authority to promulgate rules to capture short sale-related data but took the position that Form SHO reporting should be limited to the bare minimum necessary to satisfy the statutory mandate of DFA section 929X (*i.e.*, Exchange Act section 13(f)(2)).<sup>274</sup> These commenters expressed concerns about requiring the reporting of anything beyond the data elements expressly specified in section 13(f)(2) of

<sup>271</sup> WTI Letter.

<sup>272</sup> *Id.* See also Anonymously Submitted Comment (Mar. 11, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20119226-272030.htm> (“any and all information” should be accessible by any investors); Anonymously Submitted Comments (Apr. 26, 2022, May 10, 2022, Oct. 9, 2022, Oct. 26, 2022); Comment from Erin Ashford (Oct. 9, 22), available at <https://www.sec.gov/comments/s7-08-22/s70822-309605.htm> (calling for “robust and complete transparency”); *cf.* Anonymously Submitted Comment (Mar. 17, 2022) (raising concerns about data integrity when the reporting system is based on reporting).

<sup>273</sup> See, *e.g.*, Comment from Richards (Oct. 31, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-317124.htm> (“Market fairness and transparency is an important part of this democracy. It helps to level the playing field.”); Anonymously Submitted Comment (Oct. 19, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20146713-312005.pdf> (“In summary, I, like many others, support the above proposal to increase transparency in the markets, and to somewhat level the playing field for smaller, independent investors and retail alike.”); Comment from Jonathan Patterson (Mar. 14, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-272193.htm> (“Shedding some light into the transactions of short sellers would be very supportive for retail investors and would help to level the playing field.”).

<sup>274</sup> See T. Rowe Price Letter, at 2 (urging a measured approach to meeting the 929X reporting obligation so that “the public reporting of short sale information only satisfies the specific data elements and minimum frequency of dissemination referenced in section 929X and goes no further.”); Comment Letter from Robert Sloan, Managing Partner, S3 Partners, LLC (May 20, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20129426-295541.pdf> (recommending reporting be limited to public disclosure of “only those data elements required by Section 13(f)(2)”) (“S3 Letter”); see also AIMA Letter (positing that Information Table 1 of Form SHO, without the requirement to report hedging information, would alone be sufficient for the Commission to carry out its statutory mandate and achieve its goals).

<sup>267</sup> Such offering purchases must be reported whether they occurred outside or within the restricted period of 17 CFR 242.105, Rule 105 of Regulation M, which makes it unlawful for a person who sells short a security that is the subject of an offering to purchase in the offering if the short sale occurred during the restricted period. Rule 105 originally prohibited persons from covering short sales with offering purchases but was amended to prohibit any purchases of offering shares if the person sold short during the restricted period (with limited exceptions) “to end the progression of schemes and structures engineered to camouflage prohibited covering.” *Short Selling in Connection with a Public Offering*, Exchange Act Release No. 34–54888 (Dec. 6, 2006), 71 FR 75002 at 75005 (Dec. 13, 2006). The amendment was designed to address a proliferation of trading strategies and structures attempting to accomplish the economic equivalent of the activity that the rule seeks to prevent, specifically, attempts to obfuscate the prohibited “covering” of the short sale. See, *e.g.*, *Short Selling in Connection with a Public Offering*, Exchange Act Release No. 34–56206 (Aug. 6, 2007), 72 FR 45094 (Aug. 10, 2007).

<sup>268</sup> Proposing Release, at 14960.

<sup>269</sup> *Id.*

<sup>270</sup> See *supra* n. 263.



the Exchange Act.<sup>275</sup> Expressing concerns that the data required in Information Table 2 of Proposed Form SHO is too granular and contains an excessive amount of commercially sensitive information that, if misappropriated, would lead to commercial harm, these commenters recommended that, at a minimum, the scope of information required to be reported on Information Table 2 of Proposed Form SHO be substantially limited, or that Information Table 2 be eliminated altogether.<sup>276</sup> Some of these commenters suggested that the Commission rely instead on existing sources of short-sale related data, such as CAT or short sale-related data provided to FINRA and the exchanges.<sup>277</sup> Other commenters questioned the utility of the reported information proposed to be required.<sup>278</sup>

<sup>275</sup> See, e.g., SIFMA Letter, at 2 (positing that “expansive reporting regime contemplated under the Proposed Rules would extend significantly beyond what Congress intended in passing Section 929X . . . .”); Comment Letter from James Toes, President & CEO, et al., Security Traders Association (Apr. 26, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126796-287509.pdf> (“STA Letter”) (criticizing rulemaking proposal as going far beyond mandate of 929X of Dodd-Frank Act to prescribe rules providing for public disclosure of short sales and recommending more alignment of Proposed Rule 13f-2 reporting requirements with those of Form 13F); T. Rowe Price Letter, at 2.

<sup>276</sup> See, e.g., Two Sigma Letter, at 3–4 (raising concerns about potential data breaches and unintended public dissemination of daily short position data); see also AIMA Letter, at 14 (citing negative ramifications for Managers, markets and the Commission if commercially sensitive and valuable data reported in Information Table 2 were to be compromised). See also discussion in *supra* Part II.A.4.a.ii.

<sup>277</sup> See, e.g., AIMA Letter, at 2 (calling for elimination of Information Table 2 because it is “too granular”); MFA Letter, at 4 (calling for elimination of Information Table 2 in favor of “less burdensome alternative”); see also Ropes & Gray Letter, at 2 (stating that much of the information to be reported under Proposed Rule 13f-2 “is, or soon should be” available from existing reporting regimes—e.g., CAT, and information reported by broker-dealers to FINRA and the exchanges); SIFMA Letter, at 15–19 (recommending elimination of Information Table 2 altogether or alternatively that reporting of short activity data be limited to reporting only gross short positions at the end of each settlement day when a reporting threshold is breached (excluding detailed purchase and sale activity); cf. T. Rowe Price Letter, at 3 (recommending that Commission not use the permissive authority granted in section 13(f)(2) of the Exchange Act to gather additional information that would not be beneficial to the market and would be challenging for Managers to compile). See also discussion in *supra* Part II.A.4.a.i.

<sup>278</sup> See, e.g., Ropes & Gray Letter, at 3, 6 (stating that it would be difficult to “to discern market sentiment or levels of activity from the net number published by the Commission, and the utility of publishing daily net transactions data to market participants will also likely be limited”); see also K&L Gates Letter, at 2 (questioning the “value and impact” of the information called for under Proposed Rule 13f-2, that would supplement information currently available from other sources).

Several commenters expressly or effectively questioning the need for Information Table 2, also raised the concern that the short activity monitoring necessary to comply with the reporting requirements of Proposed Form SHO would require any Manager that engages in short selling to expend significant time and resources to enhance or revamp its systems to monitor activity continuously, without certainty as to if or when its short selling activity would meet or exceed the reporting thresholds.<sup>279</sup> These commenters concluded that the costs to operationalize Rule 13f-2 had not been adequately weighed against any benefits to regulators or the public.<sup>280</sup>

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The Commission continues to believe that publication of aggregated short position data, on a delayed basis, is a reasonable means of minimizing the potential negative impacts of short position and short activity disclosures on short selling and allaying data security concerns raised by commenters while at the same time increasing transparency.<sup>281</sup> This rationale applies to Information Table 2, which is about daily activities. Eliminating Information

<sup>279</sup> See, e.g., Two Sigma Letter, at 7 (commenting that the “commercial risk and operational burdens created by daily reporting of individual short positions” was not adequately justified in the Proposing Release); MFA Letter, at 9–10 (raising concern that costs and consequences of Proposals would have a chilling effect on institutional investment managers’ pursuit of short strategies); Perkins Coie Letter, at 2–3 (stating that the benefits of the reported information would be outweighed by compliance costs for Managers that do not regularly utilize short positions “[f]or institutional investment managers that only selectively utilize short positions, or who only do so passively, these additional compliance costs in relation to the institutional investment manager’s usage of short positions could in turn impose unintended risks to the manager’s underlying investors if the institutional investment manager must divert additional time and resources for compliance and oversight. This appears to be yet another affirmative reporting requirement that will increase compliance and overhead cost, without a [commensurate] benefit.”).

<sup>280</sup> See, e.g., MFA Letter, at 14 (describing categories of information required in Information Table 2 as “unclear, requir[ing] complicated judgments on the part of [M]anagers, and . . . likely to yield inconsistencies in reporting and results that are not accurate.”); Ropes & Gray Letter, at 3 (positing that reporting under Proposed Rule 13f-2 would impose “significant costs” on Managers, would not result in disclosure of “actionable information to market participants,” and is not necessary to allow the Commission to perform “effective market surveillance”); see also S3 Letter, at 2 (predicting that short activity monitoring required by Information Table 2 of Form SHO will be a “substantial lift” for Managers’ administrative systems); SBAI Letter, at 2 (positing that proposed Form SHO data collection framework not justified from a cost benefit perspective and provides “very limited” additional insight in an untimely manner).

<sup>281</sup> Proposing Release, at 14955.

Table 2 would not further the goal of enhancing the transparency of short sale-related data.<sup>282</sup> And for reasons stated below, the data available from existing sources of short sale-related information have limitations, so they do not extinguish the need for additional transparency in the short sale market.<sup>283</sup>

The data to be reported in the following columns of Information Table 2 in Proposed Form SHO will provide regulators with additional context and transparency into how and when reported gross short positions were closed out or increased, which will help the Commission assess systemic risk.<sup>284</sup> These columns are as follows:

- *Column 7:* Number of Shares Sold Short
- *Column 8:* Number of Shares Purchased to Cover an Existing Short Position
- *Column 9:* Number of Shares Purchased in Exercised Call Option Contracts
- *Column 10:* Number of Shares Sold in Exercised Put Option Contracts
- *Column 11:* Number of Shares Sold Short in Assigned Call Option Contracts
- *Column 12:* Number of Shares Purchased in Assigned Put Option Contracts
- *Column 13:* Number of Shares Resulting from Tendered Conversions
- *Column 14:* Number of Shares Obtained Through Secondary Offering Transaction<sup>285</sup>
- *Column 15:* Other Activity that Creates or Increases Manager’s Short Position
- *Column 16:* Other Activity that Reduces or Closes Manager’s Short Position

However, the Commission is modifying the design of Information Table 2 of Proposed Form SHO to help reduce the costs and burdens of complying with the reporting requirements of Proposed Rule 13f-2 without sacrificing the level of

<sup>282</sup> See Proposing Release, at 14987–14988, 14991 (discussing how existing sources of short sale-related data are not sufficiently granular, for example, to provide sufficient insights to further understanding of short selling strategies, to distinguish short sale transactions that impact short positions and those that do not, or into the timing with which short positions are established or covered).

<sup>283</sup> See *infra* Part VIII.B.4.

<sup>284</sup> Proposing Release, at 14959.

<sup>285</sup> A secondary offering transaction for purposes of this requirement means an offering, other than an initial public offering, or “IPO,” for the same class of security that is the subject of the short sale. Such an offering could be made by the issuer and include newly created and or treasury shares and could also include or be made exclusively by selling shareholders.

transparency of short sale activity data made available to market participants as prescribed in Proposed Rule 13f-2(a)(3).

Under the reporting regime of Proposed Rule 13f-2, Managers would have been required to report each category of short activity information included in Columns 7–16 (above) of Information Table 2 of Proposed Form SHO.<sup>286</sup> The Commission, for each individual column, would then tabulate the information reported to determine and publish the net activity in each reported equity security, as aggregated across all reporting Managers. That net activity would be expressed by a single identified number of shares of the reported equity security and be determined by offsetting the purchase and sale activity reported by Managers in Columns 7–16 of Information Table 2 of Proposed Form SHO.

Under the adopted version of Information Table 2, Columns 7–16 of Information Table 2 of Proposed Form SHO are replaced by a single, new Column 7, in which Managers will report net activity in the security for which information is being reported (represented as a number of shares). More specifically, Special Instruction 9.g of Form SHO, as adopted, requires Managers to report net change in short position reflecting how the gross short position in shares of the security for which information is being reported are being closed out—or alternatively, increased—as a result of the acquisition or sale of share activity determined by offsetting prescribed types of purchase and sale activity. Those prescribed types of purchase and sale activities correspond to the purchase and sale activities identified in Columns 7–16 of Proposed Form SHO. The net activity will be determined by Managers—rather than by the Commission—and reported to the Commission. The Commission will then aggregate the reported daily net change numbers across Managers for public dissemination. Under the adopted version of Information Table 2, the Commission will receive less granular information from reporting Managers than was proposed. The Commission, however, will receive net activity information from reporting Managers for each settlement date during the calendar month which will provide additional context and transparency into whether the reported gross short positions in the reported equity security are being closed out (or alternatively, increased) as a result of the acquisition or sale of shares of the equity security resulting from call

options exercises or assignments; put options exercises or assignments; tendered conversions; secondary offering transactions; and other activity. The Commission believes that this is a reasonable approach that considers both those comments that supported additional transparency with regard to short sale-related information that would result from Information Table 2 reporting, and also comments about cost and data security concerns with regard to such reporting. This reported net activity information will assist the Commission in assessing systemic risk and in reconstructing unusual market events, including instances of extreme volatility.<sup>287</sup>

These modifications in the final rule for Information Table 2 of Form SHO result in no change to the net activity information that will be made publicly available by the Commission. Under Proposed Rule 13f-2 and Proposed Form SHO, the Commission would publish net activity information for each reported equity security, aggregated across all categories of activity in Columns 7–16 of Information Table 2 of Proposed Form SHO, and aggregated across all reporting Managers. Under Rule 13f-2 and Form SHO, the Commission will publish this same net activity information for each reported equity security as originally proposed by the Commission.<sup>288</sup> And for this reason, Information Table 2 as adopted will not sacrifice transparency to market participants.

#### e. Filing Amendments

##### i. Proposal

To facilitate the Commission's process of aggregating the short sale-related information reported on Form SHO for publication, the Commission proposed that amendments to Form SHO must restate the Form SHO in its entirety. To inform the Commission that the filing is an amendment of a previously filed Form SHO, the Commission proposed that a Manager must check the box on the Form SHO Cover Page to indicate that the filing is an "Amendment and Restatement." On the Cover Page of each Amendment and Restatement filed, the Commission proposed that a Manager must provide a written description of the revision being made, explain the reason for the revision, and

indicate whether data from any additional Form SHO reporting period(s) (up to the past 12 calendar months) is/are affected by the amendment. If other reporting periods have been affected, the Commission proposed that a Manager shall complete and file a separate Amendment and Restatement for each previous calendar month so affected and provide a description of the revision being made and explain the reason for the revision.

In cases where a revision is reported in an Amendment and Restatement that changes a data point reported in the Form SHO by twenty-five (25) percent or more, the Commission proposed that the Manager must notify the Commission staff via the Office of Interpretation and Guidance of the Division of Trading and Markets ("TM OIG") at [TradingAndMarkets@sec.gov](mailto:TradingAndMarkets@sec.gov) within two (2) business days after filing the Amendment and Restatement.

##### ii. Comments and Final Rule

The Commission received some comments on the issue of amendments and restatements. One comment stated that the notification requirement for an amendment of 25 percent or more is too large, and that lower percentage revisions can be considered significant.<sup>289</sup> The commenter further recommended that the notification requirement for amendments be reduced to revisions of 15 percent or more and that the number of revisions allowed for individual Managers be limited.<sup>290</sup> Another commenter stated that if a non-material error has been made, a Manager should not have to restate Form SHO in its entirety, and that a simple note or addendum should suffice.<sup>291</sup> This commenter also encouraged the Commission to adopt a materiality threshold for other errors or omissions, *i.e.*, if the error does not "materially impact the data the Commission intends to publish, then the Manager should not be required to restate Proposed Form SHO in its entirety," stating that this would "eliminate the need for the Commission to collect even more commercially sensitive and valuable data and, in turn, relieve Managers of the time and costs that would be required to calculate, populate, and re-file an entirely new Proposed Form SHO." <sup>292</sup>

<sup>286</sup> See Special Instructions 9.g of Proposed Form SHO.

<sup>287</sup> See *infra* Part VIII.C.1 for a discussion of how the Rule 13f-2 (and the adopted CAT amendment) will enhance the Commission's ability to protect investors and investigate market manipulation by providing a clearer view into the short selling market and improving the Commission's and other regulators' reconstruction of significant market events.

<sup>288</sup> Proposing Release, at 14961.

<sup>289</sup> Comment Letter from Anonymous (Mar. 21, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20120739-272894.pdf>.

<sup>290</sup> See *id.*

<sup>291</sup> AIMA Letter, at 15.

<sup>292</sup> *Id.*

The Commission is adopting procedures for filing and amending Form SHO consistent with the Proposing Release but modified to no longer require Managers to separately notify the Commission that the reporting discrepancies presented in an Amendment and Restatement have occurred. A Manager that determines or is made aware that it has filed a Form SHO with errors that affect the accuracy of the information reported must file an amended Form SHO within ten (10) calendar days of discovery of the error. The Commission continues to believe that filing an amended Form SHO within 10 calendar days of discovery of the error will provide Managers with a reasonable period of time to prepare the Form SHO amendment, while helping to ensure that accurate information is received by the Commission in a timely manner.

The Commission is adopting the requirement, as proposed, that amendments to a previously filed Form SHO restate the Form SHO in its entirety, as described in Special Instruction 3 to Form SHO. Form SHO Special Instruction 3.a provides that on the Cover Page of each amended and restated Form SHO filing, a Manager must: check the box to indicate that the filing is an “Amendment and Restatement,” provide a written description of the revision being made, explain the reason for the revision, and indicate whether data from any additional calendar month reporting period(s) (up to the past 12 calendar months) is/are affected by the amendment. Consistent with the proposed procedures for filing an amended Form SHO, if other reporting periods have been affected, a Manager must complete and file a separate Amendment and Restatement for each previous calendar month so affected, and provide a description of the revision being made and explain the reason for the revision. As proposed and discussed further below, the Commission will provide aggregated data on a rolling twelve-month basis, with prior months’ data updated as necessary to reflect data from Amendments and Restatements. The Commission continues to believe that limiting the requirement to file an amended Form SHO to twelve months will reduce the burden and cost on Managers.<sup>293</sup> In response to comments requesting a materiality threshold, requiring a Form SHO to be restated in its entirety should add little if any additional burden, as the Manager will have already compiled such data, and

thus no additional data collection will be required other than to correct the data point that is being amended. A materiality threshold could create additional complexity in determining how and when to file an amendment to Form SHO, and as such, the Commission is adopting the straightforward approach that any revision requires the Manager to restate Form SHO in its entirety when filing an amendment.

The Commission is not adopting, however, the requirements that a Manager provide the Commission notice of the revision(s) reported in an Amendment and Restatement and an explanation of the reason(s) for the revision(s), as prescribed in Proposed Form SHO Special Instruction 3.b and 3.c;<sup>294</sup> and each of those Special Instructions in Proposed Form SHO is deleted from Form SHO as adopted. This change will reduce compliance costs for Managers filing Amendments and Restatements by not requiring them to provide a separate notice regarding information that has been reported, and therefore is available, to the Commission via EDGAR, without sacrificing transparency.

Consistent with the proposed procedures for publishing data reported on or derived from Form SHO reports—including any Amendments and Restatements, the Commission plans to update prior months’ aggregated Form SHO data on EDGAR to reflect information reported in Amendments and Restatements and will add an asterisk (*i.e.*, \*) or other mark for any updated data for which a Manager notified Commission staff that it filed an Amendment and Restatement that changes a data point reported in the Form SHO by 25 percent or more to highlight for market participants that the published aggregated data includes significantly revised data. The Commission will publish the aggregated Form SHO data for the latest reporting period along with aggregated Proposed

<sup>294</sup> Special Instruction 3.b of Proposed Form SHO provided that if a data being reported in an Amendment and Restatement affects the data reported on the Form SHO reports filed in at least three of the immediately preceding Form SHO reporting periods, the Manager, within two (2) business days after filing the Amendment and Restatement, must provide the Commission staff, via TM OIG at [TradingAndMarkets@sec.gov](mailto:TradingAndMarkets@sec.gov), with notice of (1) this circumstance; and (2) an explanation of the reason for the revision. Special Instruction 3.c of Proposed Form SHO provided that if a revision reported in an Amendment and Restatement changes a data point reported in the Form SHO that is being amended by 25% or more, the Manager must notify the Commission staff via TM OIG at [TradingAndMarkets@sec.gov](mailto:TradingAndMarkets@sec.gov) within two business days after filing the Amendment and Restatement.

Form SHO data for the prior twelve months on a rolling basis. The published aggregated Form SHO data will include a disclaimer that the Commission does not ensure the accuracy of the data being published.<sup>295</sup> Maintaining these requirements will help preserve the integrity of the reported short sale data and alert market participants to any potential issues with published data.<sup>296</sup>

#### f. Confidential Treatment

##### i. Proposal

The instructions to Proposed Form SHO provided that all information that would reveal the identity of a Manager filing a Proposed Form SHO report with the Commission would be deemed subject to a confidential treatment request under 17 CFR 240.24b–2 (“Rule 24b–2”).<sup>297</sup> As discussed in the Proposing Release, the Commission proposed to publish only aggregated data derived from information provided in Proposed Form SHO reports. Proposed Form SHO, by its terms, ensured that information reported on the form that could reveal the identity of the reporting Manager would be deemed subject to a confidential treatment request. Pursuant to section 13(f) of the Exchange Act, the Commission may prevent or delay public disclosure of all other information reported on Proposed Form SHO in accordance with the Freedom of Information Act (“FOIA”), section 13(f)(4) and (5), Rule 24b–2(b) under the Exchange Act, and any other applicable law.

##### ii. Comments and Final Rule

The Commission received a single comment regarding confidential treatment. Stating that there are a variety of valid reasons beyond the example provided in the Proposing Release that a Manager might seek confidential treatment of information reported on Proposed Form SHO, the commenter urged the Commission to adopt a more flexible process for seeking confidentiality that would enable Managers and the Commission staff to determine whether confidential treatment is appropriate.<sup>298</sup> The Commission is adopting an approach consistent with the Proposing Release but modified to refer to Rule 83 (17 CFR 200.83), and to provide that all

<sup>295</sup> See Proposing Release, at 14961.

<sup>296</sup> See *id.*

<sup>297</sup> *Id.* at 14957.

<sup>298</sup> Schulte Roth & Zabel Letter, at 5 (urging the Commission to permit confidential treatment requests with respect to the data to be included in the aggregated data to be published by the Commission on a case-by-case basis).

<sup>293</sup> Proposing Release, at 14960.

information will be deemed subject to a confidential treatment request under Rule 83.

As proposed, the instructions to Form SHO expressly provided that all information that would reveal the identity of a Manager filing a Proposed Form SHO report with the Commission would be deemed subject to a confidential treatment request under Rule 24b–2, as described in the “Filing of Form SHO” section of the General Instructions to Form SHO. Because the Commission does not intend those filings to be public, Rule 83 includes appropriate and less burdensome procedures and, accordingly, is revising the General Instructions to provide that data will also be deemed subject to a confidential treatment request under Rule 83.

As with the Proposed Rule, the Commission currently plans to publish only aggregated data derived from information provided in Proposed Form SHO reports. While it is possible a person may be able to determine the identity of a Manager (or reverse engineer a Manager’s trading strategies) in a situation where only one person was selling short, especially where the short seller has publicly disclosed that it has a short position in a specific security, the Commission continues to believe that excluding such data from the aggregated data published by the Commission could affect the integrity of the data. The Commission anticipates that the risk of exposing a single short seller will be mitigated by the delay in publication of the aggregated data.

The Commission does not anticipate disclosing information in Form SHO, other than to the extent the data is included in the Commission’s aggregated disclosures, and the Commission will deem the information included in Form SHO as being subject to a confidential treatment request under Rule 83. Accordingly, the Commission is further revising the General Instructions to provide that all information included in the Form SHO is deemed subject to a confidential treatment request under Rule 83. Pursuant to section 13(f) of the Exchange Act, the Commission may prevent or delay public disclosure of all other information reported on Form SHO in accordance with FOIA, section 13(f)(4) through (5), Rule 83, and any other applicable law.<sup>299</sup>

<sup>299</sup> The Commission will follow Rule 83 procedures in addressing any requests for information reported on Form SHO deemed subject to a confidential treatment request.

## g. Preventing Duplicative Reporting

### i. Proposal

The rules to prevent duplicative reporting of information regarding short positions and short activities of an equity security in Proposed Form SHO were partially modeled after those in Form 13F.<sup>300</sup> More specifically, as described in the General Instructions to Proposed Form SHO, if two or more Managers, each of which would be required by Proposed Rule 13f–2 to file Proposed Form SHO for the reporting period, exercise investment discretion with respect to the same security, only one such Manager would be required to report information regarding that security in its Proposed Form SHO report. The Commission proposed that if a Manager were required to file a Proposed Form SHO report with respect to a security and chose to rely on the duplicative reporting provisions of the General Instructions to Proposed Form SHO, then such Manager would be required to identify on the cover page of its Proposed Form SHO report any other Managers filing a Proposed Form SHO report with respect to such security on behalf of the Manager, in the manner described in Special Instruction 5 of Proposed Form SHO. Duplicative reporting could result in unnecessary costs to Managers and could make the aggregated data published by the Commission less accurate.

### ii. Comments and Final Rule

The Commission did not receive any comments regarding duplicative reporting, and for the reasons stated in the Proposing Release, is adopting Special Instruction 5 to Form SHO as proposed.

## h. Verification of Short Sale Data

### i. Proposal

The Commission stated in the Proposing Release that it does not intend to verify the accuracy of the data reported by Managers, but may consider doing so in the future after assessing whether such verification would be useful or necessary to enhance the integrity of the data.<sup>301</sup> The Commission further stated that field validations act as an automated form completeness check when a Manager files Proposed Form SHO through EDGAR, and that the validations do not verify the accuracy of the information filed in the Proposed Form SHO filings.<sup>302</sup>

<sup>300</sup> See “Rules to Prevent Duplicative Reporting” in the “General Instructions” of Form 13F, available at <https://www.sec.gov/pdf/form13f.pdf>.

<sup>301</sup> Proposing Release, at 14955.

<sup>302</sup> Proposing Release, at 14960 n.72.

## ii. Comments and Final Rule

The Commission received many comments on the issue of Manager reporting and data verification. The comments supported implementing a Commission verification system for reported data, stating that reporting as proposed would lead to inconsistencies. Commenters expressed concerns regarding the self-reporting of data, citing the potential for errors or intentional manipulation of data.<sup>303</sup> One commenter stated that Managers have incentives to report inaccurately, especially if there is concern over unveiling short selling strategies.<sup>304</sup> Other commenters cited examples of instances of potential issues with data resulting from under-reporting, over-reporting, and misreporting.<sup>305</sup> One commenter stated, without further detail, that orders were being mismarked as short exempt in order to circumvent the short sale circuit breaker of Rule 201 of Regulation SHO.<sup>306</sup> Other commenters suggested that the Commission verify the accuracy of reported data via a random audit, such as auditing reporting at a rate applicable to five percent of reported data per quarter.<sup>307</sup> Several commenters also suggested that short sale transactions be placed on a publicly available,

<sup>303</sup> See, e.g., Comment from Dale Eaglen (Feb. 25, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20117894-270815.htm>; Comment from Michael Behrens (Feb. 25, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-270806.htm> (“Michael Behrens Comment”); Comment from Stephen (Mar. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118671-271537.pdf>; Comment from Kevin B. (Mar. 14, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20119357-272243.htm>; see also Steve B. Comment (expressing concern that “[s]hort positions are currently ‘self regulated’”), Comment Letter from Mike Monisky (Mar. 4, 2022) available at <https://www.sec.gov/comments/s7-08-22/s70822-20118657-271529.pdf> (expressing concerns about misreporting of securities transactions to FINRA) (“Mike Monisky Letter”), Comment from Jonathan Dumaine (Mar. 14, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20119364-272250.htm> (expressing general concern for potential for abuse whenever self-reporting on forms is involved) (“Jonathan Dumaine Comment”).

<sup>304</sup> Comment from J. T. (Oct. 2, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-309405.htm>.

<sup>305</sup> See, e.g., Michael Behrens Comment; Mike Monisky Letter; Jonathan Dumaine Comment.

<sup>306</sup> See Michael Behrens Comment.

<sup>307</sup> See, e.g., Michael Behrens Comment; Comment from Jana Caperton (Mar. 12, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20119201-272007.htm>; Comment from Jim Lee (May 26, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-295810.htm> (“Jim Lee Comment”); Comment from Gerry T. (Oct. 31, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-317082.htm>; Comment Letter from Wayne C. Smith (Dec. 3, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20152504-320238.pdf>.

immutable log, perhaps using blockchain technology, as a solution to the issue of verification.<sup>308</sup> Finally, one commenter suggested that it should be the duty of exchanges and broker-dealers to report eligible short positions.<sup>309</sup>

The Commission is adopting the reporting requirement as proposed. Consistent with the Commission's statement in the Proposing Release, the Commission does not intend to verify the accuracy of the data received from the Managers but may consider doing so after assessing whether such verification would be useful or necessary to enhance the integrity of the data. The reporting Managers are responsible for the completeness, timeliness, and accuracy of information included in their mandatory filings to the Commission. The Commission has the ability to conduct examinations to help evaluate whether reporting Managers are in compliance and, where necessary, the Commission may bring enforcement actions where potential violations are believed to have occurred.

#### i. New Reporting Regime—Comments and Final Rule

Rather than create a new reporting regime by adopting the Proposals, several industry commenters urged the Commission to leverage the existing data frameworks of FINRA, CAT, and other data filed with the Commission (e.g., Form N-PORT).<sup>310</sup> These

commenters stated that leveraging existing reporting frameworks would alleviate compliance burdens and associated costs,<sup>311</sup> and that existing reporting frameworks were already sufficient for short interest reporting.<sup>312</sup> These commenters stated, and the Commission acknowledges,<sup>313</sup> that there are multiple sources of existing public and non-public data related to short sales. FINRA and most exchanges collect and publish daily aggregate short sale volume data, and on a one month delayed basis publish aggregated information regarding short sale transactions. FINRA collects and aggregates short interest data from broker-dealer member firms, by security, twice each month.

In assessing how the Commission might leverage existing data to satisfy the mandate of section 929X, it is important to note differences in reporting entities, timing, and the specific data being collected in existing public and non-public sources of short sale-related data. The letters submitted by industry commenters critical of the Proposed Rule 13f-2 reporting regime did not explain with any specificity how the Commission could leverage existing sources of short data so that the Commission would receive equal or comparable data to that which will be reported on Form SHO, nor did Commenters articulate how short data that is currently available to market participants is comparable to data which would be reported on Form SHO and published by the Commission, rather the comments referenced leveraging of existing sources generally.<sup>314</sup>

After considering the viewpoints of commenters, the Commission believes that a new reporting regime will increase transparency into short positions consistent with the goals of DFA 929X, and that market participants and regulators alike will benefit from the required Form SHO disclosures, as they are distinct from existing short sale reporting regimes. Further, the short sale-related information that will be collected under Rule 13f-2 and Form SHO will fill an information gap for market participants and regulators by providing insights into increases and

decreases in reported short positions. As stated in the Proposing Release, the Commission believes that the short position data reported pursuant to Rule 13f-2 on Form SHO will supplement the short sale information that is currently publicly available from FINRA and the exchanges.<sup>315</sup> In the Proposing Release, the Commission elaborated on the limitations of using existing data, such as the CAT or FINRA data, to reconstruct market events like the “meme” stock events of January 2021.<sup>316</sup> The Commission stated that while some existing sources report daily short sale volume, there are several limitations with regard to using existing data sources to accurately represent the short exposure of Managers. The short sale data reported on Form SHO will include the daily “net” activity by reporting Managers on each settlement date during the calendar month in the security for which information is being reported, and such information is not currently available from FINRA or the exchanges. Moreover, because FINRA's existing short interest data reports aggregate short positions on a bimonthly basis,<sup>317</sup> those reports do not reflect the timing with which short positions increase or decrease in the two-week period between the two reporting dates. The short sale data reported on Form SHO will help to fill that information gap. The Commission continues to believe that publication of this additional aggregated information can help to further inform market participants regarding overall short sale activity by Managers with substantial short positions and will provide regulators as well as market participants with important information regarding the timing of increases and decreases in the reported short positions.<sup>318</sup> Finally, compared to other existing reporting regimes, the Reporting Thresholds in Rule 13f-2 are designed to require the reporting of only substantial, hence more informative, short positions.<sup>319</sup>

Further, the Commission understands that while FINRA makes publicly

<sup>308</sup> See, e.g., Comment from Joseph M. Grato (Mar. 21, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20120589-272777.htm> (“Joseph Grato Comment”); Jim Lee Comment.

<sup>309</sup> Jonathan Dumaine Comment.

<sup>310</sup> See, e.g., Ropes & Gray Letter, at 2; Two Sigma Letter, at 9–10; ICI Letter, at 5; see also K&L Gates Letter, at 2 (stating that the Proposal “is unnecessary and, on balance, overly burdensome given the sufficiency of existing data availability”); Virtu Letter, at 2 (stating that the Commission “has not proffered a regulatory need or justification for why the current reporting regime is inadequate”); SIFMA Letter, at 13 (“respectfully disagree[ing] with the Commission’s assertions that the data available to it through the existing reporting regimes is not sufficient to allow the SEC to meet its obligations under Section 929X”); Perkins Coie Letter, at 2; AIMA Letter, at 8–10 (stating that “[w]ith tailored refinements to FINRA reporting and the combination of the proposed CAT amendments . . . the Commission can still fulfill the statutory mandate and achieve the goals outlined in the Proposal but without creating additional reporting requirements, burdens and costs for many market participants”); SBAI Letter, at 2 (stating that instead of implementing a new reporting regime, the Commission should “[f]ocus should instead lie on making enhancements to FINRA’s existing collection and activity fit for purpose.”); T. Rowe Price Letter, at 3 (stating that “[g]iven the extensive data already available to the SEC through FINRA’s existing short interest reporting, stock exchanges’ reporting of short sale activity, and the [CAT], the SEC should extract the short data it desires from these sources, rather than create new reporting

obligations for managers whose activity is already captured by these existing frameworks.”).

<sup>311</sup> See, e.g., Ropes & Gray Letter, at 2; SIFMA Letter, at 19.

<sup>312</sup> See, e.g., SIFMA Letter, at 9–10; K&L Gates Letter, at 2; Virtu Letter, at 2.

<sup>313</sup> See Proposing Release, at 14953–4.

<sup>314</sup> See, e.g., Virtu Letter, at 2 (stating that the Commissions should “explore ways to utilize the existing sources of data that already are available to the SEC rather than establishing yet another pool of short sale data.”).

<sup>315</sup> See Proposing Release, at 14981–82. See also *infra* Part VIII.B.4.

<sup>316</sup> See Proposing Release, at 14981–82.

<sup>317</sup> The short interest data reported reflects aggregate short positions as of the specified reporting dates.

<sup>318</sup> Proposing Release, at 14995.

<sup>319</sup> With regard to Threshold B, as discussed in the Proposing Release, a \$500,000 or more threshold for non-reporting company issuer securities is similar to the median dollar value of a position of 2.5 percent of the market capitalization of OTC stocks for which the Commission was able to obtain information on total shares outstanding. Hence, it is proportional to Threshold A in capturing substantial short positions. See *supra* Part II.A.3.a for additional discussion of Reporting Thresholds.

available short sale-related data pertaining to both exchange-traded equity securities and OTC equity securities that is reported to it by its member firms,<sup>320</sup> some of the exchanges require payment of a fee to access short sale-related data, which may make it difficult for some investors to access the data. The reporting regime under Rule 13f-2, by contrast, will provide aggregated short sale-related data in a readily accessible location (*i.e.*, EDGAR or the Commission website), free and accessible to all investors and other market participants. The Commission continues to believe that providing free, accessible, and more complete information to market participants regarding short sale-related data will aid market participants in their understanding of the level of negative sentiment about a particular equity security and the actions of short sellers collectively and aid the Commission's oversight of short selling.<sup>321</sup>

Other industry commenters were concerned about reporting burdens for smaller Managers, and one such commenter predicted that the increased reporting costs resulting from the Proposals and other related Commission proposed rulemakings could lead to industry consolidation and decrease competition and investor choice.<sup>322</sup> The Commission continues to believe that application of the Reporting Thresholds will not result in Rule 13f-2 applying to a significant number of small entities, especially considering the modification to Threshold A to be based on a monthly average gross short position rather than the proposed daily calculation.<sup>323</sup>

In response to comments about reporting burdens, the Commission is not adopting the proposed hedging requirement, not adopting Proposed Rule 205 and "buy to cover" reporting to CAT, and is streamlining Information Table 2, thus reducing the costs of reporting from the proposed rule and form as compared to Rule 13f-2 and Form SHO as adopted.<sup>324</sup>

<sup>320</sup> In mid-to-late Dec. 2022, FINRA began publishing short sale information for exchange-traded as well as OTC equity securities. See *Equity Short Interest Files*, FINRA, available at <https://www.finra.org/finra-data/browse-catalog/equity-short-interest/files>.

<sup>321</sup> Proposing Release, at 14952.

<sup>322</sup> See, *e.g.*, MFA Letter, at 2 (positing that combined costs of compliance with the Proposals and other related Commission proposed rulemakings would be "insurmountable for small and newly-formed advisers"); Anonymous Fund Manager Letter, at 7–8. See *infra* Parts VIII.B, VIII.C.6.f, VIII.D.2 for a discussion of interactions between the economic effects of the adopted rule and other Commission rulemakings.

<sup>323</sup> See *infra* Part IX.

<sup>324</sup> See generally *infra* Part VIII.

## B. Data Aggregation and Publication of Information by the Commission

### 1. Proposal

The Commission proposed to require Managers exercising investment discretion over short positions meeting specified thresholds to report information relating to end-of-the-month short positions on Information Table 1, and certain daily activity affecting such short positions on Information Table 2, of a new Form SHO. The Commission would aggregate the reported data by security, including daily short sale activity data, and then, on a delayed basis, make such aggregated data available to the public. As proposed, data would be aggregated across all reporting Managers for each reported equity security prior to publication. The Commission stated its belief that publicly disclosing the identity of individual reporting Managers may not be necessary to advance the policy goal of increasing public transparency into short selling activity, and that aggregating across reporting Managers would help safeguard against the concerns noted above related to retaliation against short sellers, including short squeezes, and the potential chilling effect that such public disclosure may have on short selling.<sup>325</sup>

As proposed, the Commission would publish aggregated information derived from data reported on Proposed Form SHO. The Commission estimated that it will publish such aggregated information within one month after the end of the reporting calendar month—*e.g.*, for data reported by Managers on Proposed Form SHO for the month of January, the Commission would expect to publish aggregated information derived from such data no later than the last day of February. This additional time prior to publication of data by the Commission following receipt of the monthly Proposed Form SHO reports would be used to aggregate the data received from the reporting Managers, and would also help to reduce the risk of imitative trading activity by market participants and help to protect report Managers' proprietary trading strategies.<sup>326</sup> In proposing an approach for reporting the short sale-related information gathered, the Commission sought to balance calls to level the playing field for retail investors by, for example, taking steps to enhance the transparency of short sale-related data, with, among other things, concerns raised—primarily by institutional

investors—regarding potential "chilling effect[s]" on short selling and potential issuer and investor retaliation against an identified short seller.<sup>327</sup>

The Commission also presented, and sought comment on, an alternative approach for its publishing of information reported on proposed Form SHO that would offer greater transparency and less anonymization of the published short sale-related data.<sup>328</sup> Specifically, under this alternative, the Commission would publish the information reported to it at the individual Manager level rather than aggregate that information across all reporting Managers.<sup>329</sup> Before publication, a reporting Manager's identifying information would be removed to anonymize the information published.

### 2. Comments

Several commenters raised concerns about potential negative consequences of more detailed short position disclosures—particularly, negative effects on liquidity and price discovery, the facilitation of copycat trading, and the greater susceptibility of holders of short positions to short squeezes.<sup>330</sup> These commenters also preferred an "aggregation" approach to the alternative of publishing data at the individual Manager level, due to the commercially sensitive investment and trading information that Managers are required to report under Rule 13f-2.<sup>331</sup>

These commenters stated, however, that aggregation would not go far enough to lower the risk that the trading and investment behavior reported

<sup>327</sup> See *id.*, at 14955.

<sup>328</sup> See *id.*, at 14967.

<sup>329</sup> *Id.*

<sup>330</sup> *E.g.*, SBAI Letter, at 2 (concluding that "only aggregate, anonymized, and delayed public reporting of short positions" mitigates concerns about the potential risks of short position disclosures); Two Sigma Letter, at 1–3 (expressing concerns that disclosure of individual short positions could lead to revelation of commercially sensitive systematic investment strategies and to front-running and other actions that undermine those strategies, and that such disclosures would provide incomplete information, and potentially misleading signals, to investors); see also T. Rowe Price Letter, at 2 (raising concerns about the effects the rulemaking proposal would have on liquidity and price discovery); Law and Finance Professors Letter, at 2–3 (stating potential chilling effect on short selling if identities of short sellers are publicly disclosed).

<sup>331</sup> *E.g.*, Schulte Roth & Zabel Letter, at 4 (alternative proposal to publish anonymized short sale-related data reported on an individual Manager would risk eviscerating potential confidentiality protections of reporting Managers and jeopardize the confidentiality of a Manager's positions, strategies or proprietary business information); MFA Letter, at 3 (stating the need for "robust data security protocols" to protect information reported pursuant to Proposed Rule 13f-2).

<sup>325</sup> See Proposing Release, at 14955.

<sup>326</sup> See *id.*, at 14955.



would be attributable to a single Manager or set of Managers.<sup>332</sup> Commenters stated that the risk of Manager attribution would be heightened when only one Manager or a small set of Managers report a short position in the relevant security. Under these circumstances, market participants could use the information reported on Form SHO to extrapolate an individual Manager's overall position, and potentially the Manager's strategies or portfolio management methods across different clients.<sup>333</sup> One commenter expressed concern that Manager attribution/identification could result in retaliation against Managers by market participants.<sup>334</sup>

By contrast, other commenters favored the alternative approach of publishing reported information at the individual Manager level after removing all identifying information of the reporting Manager that the Commission sought comment on in the Proposing Release.<sup>335</sup> While expressing general support for rulemaking that increases transparency of short sale-related data,

<sup>332</sup> *E.g.*, MFA Letter, at 3 (stating that publishing aggregated short position data can help mitigate the risk of identification of Manager(s), but is not "foolproof, . . . the effectiveness will depend on what data is published and with what frequency"); AIMA Letter, at 4 (stating that "even if the data is anonymized, market participants could still identify certain reporting Managers."); *see also* SIFMA Letter, at 5 (positing that reporting anonymized short sale data at the Manager level without first aggregating such information is inconsistent with the directive in 929X of DFA and could expose investment strategies of institutional investment managers and their clients to their detriment); T. Rowe Price Letter, at 2 (positing that "attribution or anonymized manager-level data in public reports would be inappropriate and . . . create unacceptable risks to . . . [market] participants and discourage a useful source of liquidity provision.").

<sup>333</sup> *See, e.g.*, ICI Letter, at 7–8 (further stating that risk of Manager identification "may be especially high" for [regulated investment] funds that currently disclose their identities as well as their individual short positions on Form N–PORT filings with the Commission).

<sup>334</sup> MFA Letter, at 9 (citing potential for retaliation against short sellers if Manager's confidential information reported on Proposed Form SHO is leaked).

<sup>335</sup> *See, e.g.*, Better Markets, at 13; Comment from An Investor (Apr. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20122297-278355.htm>; Comment from Rick Sweeney (Oct. 10, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-309597.htm> (Rick Sweeney Comment). *But see* Samuel Meadows Comment ("It would be strongly against retail's best interests to have the reports published at the managers level. This would make finding and understanding the scope of shorting very difficult. I believe it is best to have the report aggregated with other reporting Managers reports. Ease of access to this information is critical in creating fairer markets."); Comment Letter from Matthew D. Brusch, Interim President and CEO, National Investor Relations (Apr. 28, 2023), at 4, available at <https://www.sec.gov/comments/s7-08-22/s70822-20127576-288806.pdf> ("NIRI Letter"); K&L Gates Letter, at 5–6. *See* Proposing Release, at 14967.

proponents of this alternative approach also criticized Proposed Rule 13f–2 for not going far enough.<sup>336</sup> These commenters pointed to a need for complementary reporting of long and short positions, and downplayed industry concerns about potential risks of greater transparency of short sale data, including, the costs and challenges of operationalizing Rule 13f–2 and the threat of "copycat trading" if short positions are disclosed pursuant to Rule 13f–2.<sup>337</sup> These commenters supported publishing short sale-related data that is "current."<sup>338</sup> Two such commenters suggested that the Commission publish, or at least share on a confidential basis with issuers of the securities for which information is reported on Form SHO, the names of the firms shorting securities.<sup>339</sup> Other commenters further recommended that the Commission glean more from and build upon the experience of the European Union ("EU") with publishing short sale-related data in developing an approach

<sup>336</sup> In addition to underscoring the need for transparency in the reporting of short sale-related data, commenters recommended ways to enhance the transparency of U.S. stock market transactions with the creation of a "transparent and publicly viewable platform" through which U.S. stock market securities would be traded, and the use of block chain technology to allow verification of transactions in real time. *See, e.g.*, Joseph Grato Comment; Anonymously Submitted Comment (Mar. 7, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-271636.htm>; Comment from Jason Payne (Mar. 7, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118798-271634.htm>; Comment from Lex Stultz (Mar. 13, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20119199-272005.htm>; Comment from Devon Turcotte (Mar. 15, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20119399-272285.htm>.

<sup>337</sup> *See* WTI Letter. These and other commenters expressed concern for the danger to "fair and free" U.S. markets posed by "the lack of transparency, the inability to adequately quantify short interest, and the ability of firms to skirt regulations through derivative positions such as options and security-based swaps." These commenters also called for symmetry in the level of disclosures and transparency for short positions as is currently the case for long positions, to allow retail and institutional investors to conduct the same type of analysis regarding short positions as is currently possible for long positions using data from Form 13F.

<sup>338</sup> *See, e.g.*, NIRI Letter, at 4 (stating that the alternative approach to publishing Form SHO reports would bring short position information to the marketplace faster, closer in real time to when the Form SHO is filed).

<sup>339</sup> *See id.* (recommending confidential disclosures of short position and identifying Manager information reported on Form SHO to an issuer whenever a "large short position" is reported for a security of that issuer, or alternatively, only to those issuers that request such confidential information); Letter from Tim Quast, President and Founder, Modern Networks IR LLC (Apr. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20122528-278558.pdf> (urging Commission to publish the names of reporting Managers) ("Modern IR Letter").

for gathering and reporting such data.<sup>340</sup> A few commenters also pointed out ways that, by monitoring the published information from Form SHO reports, the public and reporting companies could serve as watchdogs for the SEC, a "first line of defense against abusive practices."<sup>341</sup>

### 3. Final Rule

The approach taken for publishing short sale-related data reported on Form SHO must balance competing interests of public transparency against the potential negative impacts on price discovery, and of short position and short activity disclosures on short selling as well as data security concerns. After considering the comments received, the Commission continues to believe that the indirect costs of publishing information reported at the individual Manager level would likely exceed those of publishing information aggregated across all reporting Managers.<sup>342</sup> More specifically, the Commission continues to believe that if the Commission were to release the information reported on Form SHO as filed, there would be a greater potential to reveal a reporting Manager's trading strategies and to signal whether a Manager has a large and potentially vulnerable short position. It would also make it easier for a market participant to deduce the identity of a reporting Manager, even if that Manager's identity remains anonymous.<sup>343</sup> The easier it is for a market participant to deduce the identities of individual short sellers, the greater the risk of retaliation, copycat trading and other market activity that might have an undesired chilling effect on price discovery.<sup>344</sup> For these reasons, and in response to commenters that raised concerns about potential negative consequences of more detailed short position disclosures, the Commission believes that the anticipated benefit of enhanced transparency by publishing reported information at the individual Manager level after removing all

<sup>340</sup> Better Markets Letter, at 13 (suggesting reliance on "EU's experience with publishing much more comprehensive, specific, and current information" in developing an approach for gathering and reporting short sale data that enhances the usability of short position information to be published pursuant to Proposed Rule 13f–2 without "inviting some of the more damaging consequences" of doing so). More generally, a few commenters recommended harmonizing Proposed Rule 13f–2 requirements with potentially overlapping EU and UK regulations. *See, e.g.*, WTI Letter, at 2–3; HSBC Letter, at 14–15.

<sup>341</sup> *E.g.*, Anonymously Submitted Comments (Oct. 14, 2022, Oct. 24, 2022, Oct. 29, 2022, Oct. 31, 2022, Nov. 1, 2022); Rick Sweeney Comment.

<sup>342</sup> *See infra* Part VIII.E.2.a.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

identifying information of the reporting Manager does not justify the costs were the Commission to take that approach in publishing information reported to it on Form SHO.

Some commenters suggested the Commission adopt an approach similar to that of the EU structure whereby individual short sellers' names are made public.<sup>345</sup> The final rule, as modified, addresses the potential risk of retaliation towards individual short sellers, and the potential chilling of the incentive of gathering information and price discovery.<sup>346</sup> For more discussion of the EU's approach and the Commission's decision to aggregate and publish anonymized data instead, see Part VIII.E.1.c.

Further, aggregating across reporting Managers will address certain non-financial costs and burdens identified by commenters by helping to safeguard against the concerns raised about potential chilling effects on short selling and data security regarding the information reported by Managers on Form SHO.<sup>347</sup> Additionally, the Commission anticipates that many potential negative effects on the market will be mitigated by the delay in publication of the aggregated data. Accordingly, the Commission is adopting as proposed the approach of publishing, on a delayed basis, aggregated short sale-related data reported on Form SHO and treating each filed Form SHO confidentially.

### III. Proposed Amendment to Regulation SHO To Aid Short Sale Data Collection

#### A. Proposed Rule 205

Under Proposed Rule 205, a broker-dealer would be required to mark a purchase order as "buy to cover" if, at the time of order entry, the purchaser (i.e., either the broker-dealer or another person) has a gross short position in such security in the specific account for which the purchase is being made at such broker-dealer. A broker-dealer would be required to mark a purchase order as "buy to cover," regardless of the size of such purchase order in relation to the size of the purchaser's gross short position in such security in the account, and regardless of whether the gross short position is offset by a long position held in the purchaser's account at the broker-dealer at the time of order entry. Unlike the netting requirements under Rule 200 of Regulation SHO, the "buy to cover" order marking determination under

Proposed Rule 205 would be made on a "gross" basis. Under the proposed rule, short positions held by the purchaser in any account(s) other than the purchasing account, as well as offsetting long positions held by the purchaser in the purchasing account or any other account(s), would not be considered by a broker-dealer when making a "buy to cover" order marking determination. The Proposed CAT Amendments, discussed below, would require CAT reporting firms to report "buy to cover" order marking information to CAT.

#### B. Comments

Some commenters expressed support to adopt Proposed Rule 205, and generally applauded the potential added transparency that "buy to cover" order marking could help provide.<sup>348</sup> Other commenters stated that the proposed rule would assist the Commission in monitoring short selling activity and help to ensure compliance with the requirements of Regulation SHO.<sup>349</sup>

The Commission also received numerous comments that opposed the adoption of Proposed Rule 205.<sup>350</sup> In

<sup>348</sup> See, e.g., Comment from Mark Tate (Mar. 1, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20118151-271054.htm> ("Mark Tate Comment") (believed that increased information about marking trades as "buy to cover" is a "good thing for the market"); Comment from An Investor (Apr. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20122297-278355.htm> (expressing general support for Proposed Rule 205 and the "gross" short position approach); Comment from Jean Garcia-Gomez (Oct. 9, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-309610.htm> ("Jean Garcia-Gomez Comment") (expressing general support for "buy to cover" order marking); Comment from Aladdin Erzurumly (Oct. 19, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-312058.htm> (expressing general support for "buy to cover" order marking); Comment from Brian Herrmann (Jan. 20, 2023), available at <https://www.sec.gov/comments/s7-08-22/s70822-323670.htm> (expressing general support for Proposed Rule 205).

<sup>349</sup> See, e.g., Better Markets Letter (stating that "buy to cover" order marking should assist the Commission in monitoring short sale activity and actually ensure compliance with Regulation SHO requirements); ICI Letter (Apr. 26, 2022) (stating that, to the extent that the Commission requires information on close outs of open short positions, ICI supports the proposed approach of amending Rule 205 of Regulation SHO to require a broker-dealer to mark transactions as "buy to cover," and supports the simplified single account gross short position approach as proposed); BIO Letter (stating that "buy to cover" reporting would assist in understanding "the full lifecycle of short positioning in the biotechnology industry").

<sup>350</sup> See, e.g., SIFMA Letter; Virtu Letter; AIMA Letter; Comment Letter from Joanna Mallers, Secretary, FIA Principal Traders Group (Apr. 27, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20127313-288259.pdf> ("FIA PTG Letter"); Comment Letter from Howard Meyerson, Managing Director, Financial Information Forum (Apr. 25, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20126605-287256.pdf> ("FIF Letter"); STA Letter; XR Securities Letter;

opposing Proposed Rule 205, these commenters voiced concerns regarding the extensive costs and burdens associated with anticipated systems changes necessary to implement and report "buy to cover" order marking as proposed.<sup>351</sup> A number of these commenters stated that a "buy to cover" order mark does not currently exist and would require broker-dealers to effectively redesign and update their order creation systems and communications protocols to accommodate the recording and downstream reporting of a "buy to cover" order mark.<sup>352</sup> One commenter stated that all industry participants (which it described as "all institutions and all broker-dealers") will also need to create a new "buy to cover" order type and capture that in their respective books and records protocols and regulatory reporting systems.<sup>353</sup> One commenter suggested that costs to implement changes necessary to comply with the requirements of Proposed Rule 205 could range from \$5 million to \$10 million, or more.<sup>354</sup>

Some commenters that opposed the adoption of Proposed Rule 205 expressed general concerns that the proposed single account "gross" short position methodology (which, by design, does not require the broker-dealer to consider the purchaser's other positions held in that account, in other accounts at the broker-dealer, or elsewhere) could routinely result in inaccurate "buy to cover" order marking reporting by broker-dealers.<sup>355</sup> Some commenters also questioned whether

Comment Letter from Kirsten Wegner, Chief Executive Officer, Modern Markets Initiative (Apr. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20122473-278481.pdf> ("MMI Letter").

<sup>351</sup> See, e.g., FIA PTG Letter, at 2 (requiring the reporting of orders on an order-by-order basis with either a "buy to cover" or bona fide market making attestation appears unnecessary from an added transparency perspective and therefore unnecessarily costly); MMI Letter, at 2; Virtu Letter, at 3 ("If this aspect of the Proposal were adopted, firms would have to reprogram their systems to recognize a 'buy to cover' order. We believe that this would be exceedingly burdensome, costly, and challenging for broker-dealers to make the required changes and provide the required information."); STA Letter, at 4 (stating that "buy to cover" as proposed would "impose tremendous costs on industry firms by essentially forcing them to keep two separate position aggregations" and suggesting that there be an exemption for firms with "low" amounts of "buy to cover" order types); FIF Letter, at 10; XR Securities Letter, at 2; SIFMA Letter, at 3; FIA PTG Letter, at 2.

<sup>352</sup> See, e.g., SIFMA Letter, at 23–24; Virtu Letter, at 3; FIF Letter, at 3; STA Letter, at 6; XR Securities Letter, at 2; FIA PTG Letter, at 2–3.

<sup>353</sup> See FIF Letter, at 3.

<sup>354</sup> See SIFMA Letter, at 24.

<sup>355</sup> See, e.g., Virtu Letter, at 5; AIMA Letter, at 16; SIFMA Letter, at 22–23; FIF Letter, at 6.

<sup>345</sup> See WTI Letter at 2–3; Better Markets Letter at 13 and 16. See also Proposing Release, at 15005.

<sup>346</sup> See *supra* Part II.A.2.b.

<sup>347</sup> *Id.*

the proposed “buy to cover” order marking reporting would provide regulatory benefits, including identifying signals of a “short squeeze,” as was suggested by the Commission in the proposing release.<sup>356</sup>

Commenters highlighted the inherent differences and resulting complexities between Proposed Rule 205’s single account “gross” short position methodology for purchases, and Regulation SHO’s all accounts net position order marking requirements for sales. These commenters generally stated that if Proposed Rule 205 were adopted, broker-dealers would be required to create and maintain, at great expense, two separate order marking systems that utilize very different methodologies—one for determining whether a purchase order should be marked as “buy” or “buy to cover,” and another for determining whether a sell order should be marked as “long” or “short.”<sup>357</sup> Some of these commenters suggested that if the Commission were intent on adopting a “buy to cover” order marking reporting requirement, it should instead consider utilizing the Commission’s “alternative” approach.<sup>358</sup> These commenters stated that utilizing this “alternative” approach would help to ensure that Proposed Rule 205 would operate in a manner that is more consistent with current Regulation SHO order marking requirements, which would effectively help reduce complexity and interpretive confusion for broker-dealers. Another commenter suggested that the Commission consider an exception for

firms with “low” amounts of “buy to cover” order types.<sup>359</sup>

One commenter stated that additional guidance or clarification would be necessary if the Commission adopted Proposed Rule 205.<sup>360</sup> Another commenter stated that Proposed Rule 205 fails to recognize that broker-dealers would need to rely on representations from purchasers/account holders in order to accurately report “buy to cover” order marking information, similar to how broker-dealers currently rely on account holders when marking sale orders “long” or “short.”<sup>361</sup> One commenter stated that this would be especially true where the broker-dealer does not custody the purchaser’s positions (*i.e.*, where the customer’s positions are custodied “away,” such as at a prime broker or bank), and for a number of operational reasons, be equally true even when the broker-dealer custodies the purchaser’s positions.<sup>362</sup>

The Commission is not adopting Proposed Rule 205 in light of questions raised by commenters regarding potential operational issues with the requirement as proposed that merit further consideration, and the Commission will continue to evaluate the issues raised to determine if any further action is appropriate.

#### IV. Amendments to CAT

In July 2012, the Commission adopted 17 CFR 242.613 (“Rule 613 of Regulation NMS”), which required national securities exchanges and national securities associations (the “Participants”)<sup>363</sup> to jointly develop and submit to the Commission a national market system plan to create, implement, and maintain a CAT that captures customer and order event information for orders in NMS securities.<sup>364</sup> The goal of Rule 613 was

to create a modernized audit trail system that provides regulators with more timely access to a sufficiently comprehensive set of trading data, thus enabling regulators to more efficiently and effectively reconstruct market events, oversee market behavior, and investigate misconduct. On November 15, 2016, the Commission approved the national market system plan required by Rule 613, the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan”).<sup>365</sup>

Section 6.4(d) of the CAT NMS Plan provides that each Participant, through its Compliance Rule,<sup>366</sup> must require Industry Members<sup>367</sup> to record and electronically report certain information to the CAT Central Repository. Compliance rules have been adopted by each Participant. As such, any broker-dealer that is a member of a national securities exchange or a member of a national securities association must report each order and reportable event, which includes the original receipt or origination, modification, cancellation, routing, execution (in whole or in part) and allocation of an order, and receipt of a routed order to the CAT.<sup>368</sup> This requirement is designed to provide regulators, including the Commission, access to comprehensive information regarding the lifecycle of orders, from origination to execution, as well as the post-execution allocation of shares.

<sup>365</sup> Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (“CAT NMS Plan Approval Order”). The CAT NMS Plan is Exhibit A to the CAT NMS Plan Approval Order. See CAT NMS Plan Approval Order, 81 FR 84943 at 84696. The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability company formed under Delaware state law through which the Participants conduct the activities of the CAT (the “Company”). Each Participant is a member of the Company and jointly owns the Company on an equal basis. The Participants submitted to the Commission a proposed amendment to the CAT NMS Plan on Aug. 29, 2019, which they designated as effective on filing. Under the amendment, the limited liability company agreement of a new limited liability company named Consolidated Audit Trail, LLC serves as the CAT NMS Plan, replacing in its entirety the CAT NMS Plan. See Exchange Act Release No. 87149 (Sept. 27, 2019), 84 FR 52905 (Oct. 3, 2019).

<sup>366</sup> “Compliance Rule” means, with respect to a Participant, the rule(s) promulgated by such Participant as contemplated by section 3.11 of the CAT NMS Plan. See CAT NMS Plan, section 1.1.

<sup>367</sup> An “Industry Member” means a member of a national securities exchange or a member of a national securities association. See CAT NMS Plan, section 1.1.

<sup>368</sup> “Central Repository” means a repository responsible for the receipt, consolidation, and retention of all information reported to the CAT pursuant to Rule 613 of Regulation NMS and the CAT NMS Plan. See CAT NMS Plan, section 1.1.

<sup>356</sup> See *e.g.*, Virtu Letter, at 6 (“The Proposal’s rationale for requiring broker-dealers to mark transactions a ‘buy to cover’—*i.e.* to facilitate the identification of potential ‘short squeeze’ activity—is equally unpersuasive. As described above, the data that will be reported under this provision will bear little resemblance to a firm’s actual short sale positions and therefore will not yield meaningful information that would allow the Commission to target short squeeze activity.”); SIFMA Letter, at 23 (believed there is only a remote chance that Proposed Rule 205 reporting might identify signals of a short squeeze that would not otherwise be identifiable to the Commission through other currently available information).

<sup>357</sup> See, *e.g.*, STA Letter, at 4; FIF Letter, at 8; FIA PTG Letter, at 2–3; MMI Letter, at 2; SIFMA Letter, at 24; XR Securities Letter, at 2; Virtu Letter, at 5.

<sup>358</sup> See, *e.g.*, MMI Letter at 2; FIF Letter, at 2. In the Proposing Release, the Commission explained that it had considered an “alternative approach” that would have required the broker-dealer, when making a “buy to cover” order marking determination, to net all positions (long positions and short positions) held by the purchaser in any account, whether at the broker-dealer itself, or elsewhere. See Proposing Release, at 14968.

<sup>359</sup> STA Letter, at 5.

<sup>360</sup> XR Securities Letter, at 2.

<sup>361</sup> SIFMA Letter, at 23.

<sup>362</sup> SIFMA Letter, at 23.

<sup>363</sup> The Participants include: BOX Exchange LLC; Cboe BYX Exchange, Inc.; Cboe BZX Exchange, Inc.; Cboe C2 Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Cboe Exchange, Inc.; Financial Industry Regulatory Authority, Inc.; Investors’ Exchange LLC; Long-Term Stock Exchange, Inc.; MEMX LLC; Miami International Securities Exchange LLC; MIAX Emerald, LLC; MIAX PEARL, LLC; Nasdaq BX, Inc.; Nasdaq GEMX, LLC; Nasdaq ISE, LLC; Nasdaq MRX, LLC; Nasdaq PHLX LLC; The Nasdaq Stock Market LLC; New York Stock Exchange LLC; NYSE American LLC; NYSE Arca, Inc.; NYSE Chicago, Inc.; and NYSE National, Inc.

<sup>364</sup> See *Consolidated Audit Trail*, Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (Aug. 1, 2012).

Broker-dealers, through the Compliance Rule adopted pursuant to the CAT NMS Plan, are required to report certain short sale order data, including for sell orders, whether an order is long, short, or short exempt,<sup>369</sup> but not other short sale order data, including when a buy order is designed to close out an existing short position, or whether a market participant is relying on the bona fide market making exception to the Regulation SHO locate requirement in Rule 203. To supplement the short sale-related data that would be reported by Managers to the Commission pursuant to Proposed Rule 13f-2 and on Proposed Form SHO, the Commission proposed to amend the CAT NMS Plan to require the Participants to require CAT reporting firms to report certain additional short sale-related data to the CAT, as discussed below.

#### A. Proposal To Require “Buy to Cover” Order Marking

The Commission proposed that Industry Members be required to report to the CAT “buy to cover” information, which was proposed to be collected pursuant to Regulation SHO through Proposed Rule 205 (discussed above). Specifically, the Commission proposed to amend section 6.4(d)(ii) of the CAT NMS Plan by adding new paragraph 6.4(d)(ii)(D) which would require the Participants to update their Compliance Rules to require Industry Members to report for the original receipt or origination of an order to buy an equity security, whether such buy order is for an equity security that is a “buy to cover” order as defined by Proposed Rule 205(a).<sup>370</sup> This provision would have required Industry Members to identify “buy to cover” equity orders received or originated by Industry Members and Customers<sup>371</sup> as “buy to cover” orders in order receipt and order origination reports submitted to the CAT Central Repository.

The Commission, as discussed in Part III above, is not adopting Proposed Rule 205 which would have established a new “buy to cover” order marking requirement. Accordingly, the

Commission is likewise not adopting an amendment to add new paragraph 6.4(d)(ii)(D) to the CAT NMS Plan which would have required the Participants to update their Compliance Rules to require Industry Members to report “buy to cover” order marking information to CAT.

#### B. Proposal To Require Reporting of Reliance on Bona Fide Market Making Exception

The Commission also proposed to require CAT reporting firms that are reporting short sales to indicate whether such reporting firm is asserting use of the bona fide market making exception under Regulation SHO for the locate requirement in Rule 203(b)(2)(iii) (*i.e.*, the BFMM locate exception) for the reported short sales. Specifically, the Commission proposed to amend section 6.4(d)(ii) of the CAT NMS Plan to add a new paragraph (E) which would require Participants to update their Compliance Rules to require Industry Members to report to the CAT, for the original receipt or origination of an order to sell an equity security, whether the order is a short sale effected by a market maker in connection with bona fide market making activities in the security for which the BFMM locate exception is claimed.<sup>372</sup> The Commission believed that this information would provide valuable data to both the Commission and other regulators regarding the use of this narrow exception. The Commission believed that requiring Industry Members to identify short sales for which they are claiming the bona fide market making exception would provide the Commission and other regulators an additional tool to determine whether such activity qualifies for the exception, or instead could be indicative of, for example, proprietary trading instead of bona fide market making activity.

Rule 203(b)(1) of Regulation SHO generally prohibits a broker-dealer from accepting a short sale order in an equity security from another person, or effecting a short sale in an equity security for its own account, unless the broker-dealer (i) has borrowed the security, (ii) has entered into a bona fide arrangement to borrow the security, or (iii) has reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due.<sup>373</sup> This is generally referred to as the locate requirement. Rule 203(b)(2) of Regulation SHO provides an exception to the locate requirement for short sales

effected by a market maker in connection with bona fide market making activities.<sup>374</sup> To qualify for the BFMM locate exception,<sup>375</sup> a market maker must be engaged in bona fide market making activities at the time they effect a short sale. The Commission adopted this narrow exception to Regulation SHO’s locate requirement for market makers that may need to facilitate customer orders in a fast moving market without possible delays associated with complying with such a requirement.<sup>376</sup>

#### Comments and Final Rule

Some commenters supported requiring CAT reporting firms to report the use of the BFMM locate exception to CAT.<sup>377</sup> These commenters were in favor of the potential added transparency that BFMM locate exception reporting could provide.<sup>378</sup>

<sup>374</sup> 17 CFR 242.203(b)(2). The Commission has provided guidance on indicia of bona fide market making activities eligible for the locate exception. See Regulation SHO Adopting Release (setting forth examples of activities that would not be considered to be bona fide market making activities); see also Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61698 at 61690 (Oct. 17, 2008) (“2008 Regulation SHO Amendments”) (adopting amendments to Regulation SHO and providing additional guidance on what constitutes bona fide market making). Only market makers that are engaged in bona fide market making activity in the security at the time they effect a short sale are eligible for the locate exception. See 2008 Regulation SHO Amendments, at 61699.

<sup>375</sup> Rule 204 of Regulation SHO also provides an extended close-out period for a fail to deliver resulting from bona fide market making activities. 17 CFR 242.204.

<sup>376</sup> See Regulation SHO Adopting Release, at 48015 n.67; see also Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 58166 (July 15, 2008); Amendment to Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 58190 (July 18, 2008) (excepting from the Emergency Order bona fide market makers); see also Proposing Release, at 14970–71 (Mar. 16, 2022) (“To qualify for the bona fide market making exception, however, a firm must be engaged in bona fide market making at the time of the short sale in question. The Commission adopted this narrow exception to Regulation SHO’s locate requirement for market makers that may need to facilitate customer orders in a fast moving market without possible delays associated with complying with such a requirement.”).

<sup>377</sup> Virtually all these comments were submitted by individual investors, with the vast majority being submitted through an identical (or nearly identical) base letter from a grassroots advocacy campaign “by, and for, retail investors.” These commenters stated that they were part of a self-identified group called “We the Investors” (“WTI”). WTI supported the adoption of BFMM locate exception reporting. WTI also suggested that the BFMM locate exception be eliminated altogether. See WTI Letter.

<sup>378</sup> See e.g., Michael Behrens Comment; Mark Tate Comment; Comment from Taj Reilly (Mar. 14,

<sup>369</sup> Section 1.1 of CAT NMS Plan defines “Material Terms of the Order,” which includes, for sell orders, “whether the order is long, short, [or] short exempt[.]”

<sup>370</sup> See Proposed section 6.4(d)(ii)(D) of the CAT NMS Plan; Proposed Rule 205(a) of Regulation SHO, 17 CFR 242.205(a)).

<sup>371</sup> Section 1.1 of the CAT NMS Plan defines the term “Customer” as (a) the account holder(s) of the account at a registered broker-dealer originating the order; and (b) any person from whom the broker-dealer is authorized to accept trading instructions for such account, if different from the account holder(s). See also 17 CFR 242.613(j)(3).

<sup>372</sup> See Proposed section 6.4(d)(ii)(E) of the CAT NMS Plan.

<sup>373</sup> 17 CFR 242.203(b)(1).

Other commenters stated that such reporting would help the Commission to monitor short selling activity and ensure compliance with Regulation SHO's requirements, and stated that it is important that the Commission have the surveillance tools and data such as BFMM locate exception reporting to improve the Commission's oversight of financial markets and compliance with existing regulations and otherwise "police" the markets.<sup>379</sup>

Other commenters opposed the adoption of BFMM locate exception reporting to CAT.<sup>380</sup> These commenters generally believed that the costs and burdens associated with the proposal, including costs to update systems to accommodate BFMM locate exception reporting to CAT, would materially outweigh the benefit of the information reported to CAT.<sup>381</sup> These commenters, however, did not provide cost estimates. The Commission continues to believe, as stated in the Proposing Release, that Industry Members will incur an initial, one-time external expense for software and hardware to facilitate reporting of the new data elements to CAT, and separately estimated such costs for Industry Members that report directly to the CAT, and those that use third-party reporting agents for CAT reporting. The Commission continues to believe that the ongoing burden associated with reporting to the CAT is already accounted for in the existing information collections burdens associated with Rule 613 and the CAT NMS Plan Approval Order submitted under Office of Management and Budget (OMB) number 3235-0671.<sup>382</sup>

One commenter stated that adopting the proposed BFMM locate exception would be operationally difficult and costly to implement.<sup>383</sup> This commenter stated that, under the proposal, the BFMM locate exception information would be required to be reported at the time the short sale order is effected, requiring that order entry systems, and other downstream systems, be updated

to allow the BFMM locate exception information to be reported to CAT.<sup>384</sup> To implement the rule, the Commission expects that Industry Members will incur an initial, one-time external expense for software and hardware to facilitate reporting of the new data elements to CAT but believes that the benefits of such data, as discussed further below, will justify such costs. Brokers or dealers generally include fields in order-entry systems, and related downstream systems, to indicate whether the broker or dealer obtained a locate as well as the source of such locate under Rule 203(b). As stated by the commenter, brokers or dealers may wish to update their order entry systems and related downstream systems as a convenient method to track their use of the BFMM locate exception to ensure accurate reporting of the use of the BFMM locate exception to CAT. As a result, brokers or dealers may wish to make one-time updates to such systems to add a field or notation to indicate whether the broker or dealer is claiming the BFMM locate exception for the short sale transaction. However, brokers or dealers may also use other means to ensure compliance with the final rule.

This commenter agreed with the Commission that a broker-dealer is required to determine whether the firm is eligible for the BFMM locate exception at the time a short sale is effected but expressed concerns that market makers that quote and trade on multiple trading venues, for example, might encounter certain systematic or operational difficulties in making, and reporting, such determination using existing systems design. Specifically, this commenter stated that "it may be systematically and/or operationally difficult for the broker to define when it is globally acting in a bona fide market maker capacity given the granular details of a market maker's many activities, and the existing systems design."<sup>385</sup> However, the final rule does not alter the requirements for the use of the BFMM locate exception. The final rule requires that brokers or dealers report their use of the BFMM locate exception as provided under Regulation SHO.

Rule 203(b)(2)(iii) provides an exception to the locate requirement for "[s]hort sales effected by a market maker in connection with bona-fide market making activities in the security for which this exception is claimed."<sup>386</sup>

Thus, for purposes of qualifying for the BFMM locate exception, "a market maker must also be a market maker in the security being sold, and must be engaged in bona-fide market making in that security at the time of the short sale."<sup>387</sup>

Some commenters stated that the Commission and other regulators can currently request a particular market maker to provide information regarding its use of the BFMM locate exception, and questioned why the Commission would need to require such costly reporting to CAT.<sup>388</sup> Another commenter stated that there is no data or evidence in the Proposing Release to suggest that the Commission's access to such data has been limited in any way under the current request process.<sup>389</sup> However, the Commission has stated that Regulation SHO does not require market makers to specifically record whether they are relying on the BFMM locate exception,<sup>390</sup> although brokers or dealers should be able to identify what trading activity qualifies for the BFMM locate exception so a firm can demonstrate its eligibility for the asserted exception.<sup>391</sup> To the extent a broker or dealer has documented such eligibility, the Commission and its staff have access to such documents.<sup>392</sup> The final rule will capture information regarding the use of the BFMM locate

applies. See Rule 203(b)(1). A broker or dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has: (i) borrowed the security, or entered into a bona-fide arrangement to borrow the security; or (ii) reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (iii) documented compliance with Rule 203(b)(1).

<sup>387</sup> See 2008 Regulation SHO Amendments, at 61699; *Shortening the Securities Transaction Settlement Cycle*, Exchange Act Release No. 96930 (Feb. 15, 2023), 88 FR 13872, 13911–12 at n.411 (May 5, 2023) ("Settlement Cycle Adopting Release").

<sup>388</sup> See e.g., SIFMA Letter, at 24–25 ("Given that the information that would result from this proposed reporting requirement is already available to the SEC and other regulators on demand, SIFMA believes that the cost and burden of implementing the requirement would materially outweigh the benefit of such information."); Virtu Letter, at 6 ("The Proposal offers no data or evidence that its access to data about the use of the exception has been limited in any way under the current process it uses to collect such information from broker-dealers, nor that there are widespread violations or other abuses of the exception that warrant imposing substantial costs and burdens on market makers also to report this information to CAT.").

<sup>389</sup> Virtu Letter, at 6.

<sup>390</sup> Proposing Release, at 14971.

<sup>391</sup> See Regulation SHO Adopting Release, 48011 n.27 ("As with any rule, broker-dealers relying on [an] exception should be prepared to monitor for compliance with its conditions, and maintain records documenting such compliance.").

<sup>392</sup> See, e.g., section 17(b) of the Exchange Act.

2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20119322-272211.htm>; Comment from Sebastian Stankiewicz Comment (Mar. 15, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-272501.htm>; Comment from An Investor (Apr. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20122297-278355.htm>; Jean-Garcia Gomez Comment; Comment from Andrew Gatley (Oct. 31, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-317527.htm>. See also WTI Letter.

<sup>379</sup> See e.g., Better Markets Letter; WTI Letter.

<sup>380</sup> See e.g., SIFMA Letter; Virtu Letter; STA Letter; XR Securities Letter; FIA PTG Letter.

<sup>381</sup> See e.g., SIFMA Letter, at 24–25; FIA PTG Letter, at 3; Virtu Letter, at 6.

<sup>382</sup> See *infra* Part VII.C.

<sup>383</sup> See, e.g., SIFMA Letter, at 24–25; Virtu Letter, at 5.

<sup>384</sup> SIFMA Letter, at 24–25.

<sup>385</sup> SIFMA Letter, at 25 n.64.

<sup>386</sup> 17 CFR 242.203(b)(2)(iii). Further, the locate is required prior to each short sale order unless the broker or dealer has determined that an exception

exception to Regulation SHO<sup>393</sup> which will provide the Commission and SROs with comprehensive information about market practices with respect to the use of the BFMM locate exception.<sup>394</sup> Because brokers or dealers asserting the BFMM locate exception are already required to demonstrate eligibility for the exception, the costs of reporting should be confined primarily to the one-time implementation costs related to updating CAT and any methods elected by the broker or dealer, such as updating order entry systems and related systems, to ensure compliance.

Another commenter stated that regulators should utilize other existing short sale data available through CAT that could identify activity that is “disproportionate to the usual market making patterns of practices of the broker-dealer” in order to determine if the BFMM locate exception is being misused.<sup>395</sup> The commenter, however, did not provide detail describing how disproportionate the activity would be before the Commission could determine whether the exception is being misused. Data showing the existence of short sales would not be sufficient to assess whether the exception is being misused. Another commenter suggested that CAT already has ample existing data fields, including a market maker account holder designation field, and questioned the need for a BFMM locate exception data field.<sup>396</sup> Further, a broker or dealer’s status as a market maker under an exchange’s rules, or by self-assertion, is not sufficient by itself to establish eligibility to use the BFMM locate exception; the broker or dealer that is a market maker must be effecting short sales “in connection with bona-fide market making activities in the security for which [the] exception is being claimed.”<sup>397</sup> Further, as discussed above, the broker or dealer, whether it calls itself a market maker, or has an account it describes as a market maker account, must still determine eligibility for the BFMM locate exception for each transaction rather than globally.<sup>398</sup> Therefore, collecting the data regarding

the use of the BFMM locate exception will be useful for the Commission, including to assess the use of the exception throughout the industry.

Another commenter stated that there was no data or evidence in the Proposing Release to suggest that there are widespread violations or abuses of the BFMM locate exception that warrant the costs imposed by the CAT reporting requirements for the BFMM locate exception.<sup>399</sup> As the Commission stated in the Proposing Release, there are a number of settled enforcement actions against brokers or dealers in connection with their use of the exception.<sup>400</sup> In addition, one commenter stated that “it may be systematically and/or operationally difficult for the broker to define when it is globally acting in a bona fide market maker capacity given the granular details of a market maker’s many activities, and the existing systems design.”<sup>401</sup> However, this comment concerns compliance with Regulation SHO rather than reporting of the use of the BFMM locate exception in CAT; the new requirements do not affect compliance with Regulation SHO.

Another commenter did not believe that the BFMM locate exception information reported to CAT would assist the Commission in identifying violations or misuse of the BFMM locate exception “because the data can be manipulated by bad actors and is susceptible to human errors of inappropriately marking short sales with the BFMM indicator when they are not eligible.”<sup>402</sup> The fact that bad actors may act contrary to the requirement is not an appropriate reason not to adopt a requirement. Similarly, human error is always possible. In addition, the human error the commenter describes, if widespread, could be an indication of noncompliant use of the BFMM locate exception.

Another commenter stated that if BFMM locate exception reporting were adopted, “most market making firms will simply tag that new [BFMM locate exception] field with the affirmative.”<sup>403</sup> Again, the fact that a commenter speculated that some brokers or dealers may violate the requirement by providing incorrect data is not a reason to not adopt a requirement. Understanding whether market makers always claim the BFMM locate exception (as this commenter suggests), sometimes claim the exception, or never claim the exception,

will provide important information and context regarding how market makers use the exception.<sup>404</sup>

Some commenters asked that the Commission provide additional clarity regarding what constitutes bona fide market making activities eligible for the BFMM locate exception, and requested that the Commission confirm that certain market making activity (e.g., through wholesale market making and other activities in connection with facilitating customer orders in the OTC market) was bona fide market making activity for purposes of claiming the BFMM locate exception.<sup>405</sup> One of these commenters expressed concerns regarding recent Commission statements related to the BFMM locate exception.<sup>406</sup> The statements that the

<sup>404</sup> One commenter disagreed with existing Regulation SHO order marking requirements, with a specific focus on a statement made by Commission staff that a broker or dealer should generally not continue to mark orders “long” if it has submitted orders beyond the number of shares for which it is long. See *Virtu Letter*, at 3–5; see also *FAQ 2.5, Responses to Frequently Asked Questions Concerning Regulation SHO*, Division of Market Reg., available at <https://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm>. This commenter generally stated that this results in virtually all sell orders being marked as short sales and thus, information that is reported to CAT under the proposal would not be representative of the market maker’s “actual” short position and would not be useful short sale-related information. Brokers or dealers must mark sell orders “long,” “short,” or “short exempt,” and must obtain a locate for all sales marked short unless the broker or dealer can determine that the short sale is “effected by a market maker in connection with bona-fide market making activities in the security for which this exception [BFMM locate exception] is claimed.” See 17 CFR 242.203(b)(2)(iii).

<sup>405</sup> See SIFMA Letter, at 25 (“Moreover, and especially to the extent that there is a requirement to identify reliance on the exception through CAT, the SEC should re-confirm that, while bona fide market making is based on certain ‘facts and circumstances’ as set forth in prior interpretive guidance, there are different ways in which broker-dealers engage in bona fide market making, including not only through making markets on exchanges, but equally through wholesale market making and other activities in connection with facilitating customer orders in the OTC market.”); see also STA Letter, at 3 (STA recommends that the Commission clarify its views on the scope of the BFMM exception, citing as an example an “OTC market makers that provide extensive liquidity for retail trades but do not affect the trades pursuant to published quotations.”).

<sup>406</sup> See SIFMA Letter, at 25 n.67 (“SIFMA further notes the SEC’s recent statements in its recent proposing release on registration of significant market participants that ‘bona fide market-making exceptions under Regulation SHO are only available to registered broker-dealers that publish continuous quotations for a specific security in a manner that puts the broker-dealer at economic risk’, that ‘[b]roker-dealers that do not publish continuous quotations, or publish quotations that do not subject the broker-dealer to such risk (e.g., quotations that are not publicly accessible, are not near or at the market, or are skewed directionally towards one side of the market), would not be eligible for the bona fide market maker exceptions’ and that

Continued

<sup>393</sup> Proposing Release, at 14971.

<sup>394</sup> FIA PTG Letter, at 3 (“Requiring the reporting of orders on an order-by-order basis with either a ‘buy to cover’ or bona fide market making attestation appears unnecessary from an added transparency perspective and therefore unnecessarily costly.”).

<sup>395</sup> STA Letter, at 3.

<sup>396</sup> XR Securities Letter, at 2.

<sup>397</sup> See, e.g., Rule 203(b)(2)(iii), which requires that the broker or dealer (1) be a market maker; (2) that is effecting short sales in connection with bona-fide market making activities, and (3) in the security for which the exception is claimed. Section 3(a)(38) defines the term “market maker.”

<sup>398</sup> See *supra* n.374.

<sup>399</sup> *Virtu Letter*, at 6.

<sup>400</sup> See Proposing Release, at 14971.

<sup>401</sup> See SIFMA Letter, at 25 n.64.

<sup>402</sup> STA Letter, at 3.

<sup>403</sup> XR Securities Letter, at 3.



commenter references in particular releases are restatements of multiple prior Commission statements regarding the BFMM locate exception.<sup>407</sup> One commenter expressed concerns that the proposal to require BFMM locate exception reporting to CAT was an effort by the Commission to further limit the availability of the BFMM locate exception in a manner that would be inconsistent with Commission's original Regulation SHO guidance.<sup>408</sup> This commenter expressed particular concerns with the Commission's statement in the Proposing Release that the proposed BFMM locate exception reporting would be an additional tool to determine whether such activity qualifies for the BFMM locate exception or conversely "could be indicative of, for example, proprietary trading instead of bona fide market making." The Commission has consistently stated that the BFMM was intended to be a "narrow" exception,<sup>409</sup> and the collection of information about its usage will be helpful for the Commission to determine whether it is being used appropriately as such. The reported information will indeed be used as an "additional tool to determine whether such activity qualifies" for the BFMM locate exception as part of the Commission's regulation of short sales, for example, by determining whether brokers or dealers are using the exception for proprietary trading, which is not appropriate. Other commenters called for the elimination of the BFMM locate exception itself.<sup>410</sup> Such requests

are outside the scope of this rulemaking. However, the BFMM locate exception is useful for brokers and dealers that are, for example, trying to meet demand in fast-moving markets where they might otherwise be forced to back away from published, marketable quotes being hit by prospective purchasers solely because of the locate requirement.

One commenter stated that the costs imposed on market makers to implement and maintain the proposed regulatory requirements might result in wider spreads, reduced liquidity, and might represent a barrier to entry for new market participants.<sup>411</sup> To the extent the commenter is concerned that the costs of implementing reporting may be passed on in the form of wider spreads or reduced liquidity, on balance the benefits of transparency justify such costs. Importantly, it is unclear how reporting the data would create negative results on spreads or market liquidity because the reported exception data will only be provided to regulators and not made public. If the commenter is concerned that once the data is reported, the Commission may become more aware of potential misuse of the BFMM locate exception as described by commenters, the consequences identified by the commenter would not flow from the requirement to report the use of the exception, but may instead result from the misuse of it. Collecting the data will help the Commission with its oversight of the use of the exception, including with regard to potentially abusive "naked" short selling.<sup>412</sup> The BFMM locate exception, if properly utilized, benefits investors and the market by preserving market liquidity,<sup>413</sup> but it should not be used for speculative<sup>414</sup> or potentially abusive "naked" short selling.<sup>415</sup> Instead, the

BFMM locate exception data reported to the CAT will provide the Commission with a better understanding of the use of this limited exception, which should help to ensure that the exception is not subject to misuse by brokers or dealers in violation of the Commission's short selling rules.

In response to commenters that generally requested additional guidance<sup>416</sup> regarding the scope of bona fide market making activity eligible for the BFMM locate exception, the primary requirement is that a broker or dealer that is a market maker provide widely accessible, continuous quotations at or near the market for which it is at risk.<sup>417</sup> For example, the Commission has stated that for purposes of Regulation SHO, a market maker engaged in bona fide market making is a "broker-dealer that deals on a regular basis with other broker-dealers, actively buying and selling the subject security as well as regularly and continuously placing quotations in a quotation medium on both the bid and ask side of the market."<sup>418</sup> Moreover, the Commission has stated that "[b]roker-dealers that do not publish continuous quotations, or publish quotations that do not subject the broker-dealer to such risk (e.g., quotations that are not publicly accessible, are not near or at the market, or are skewed directionally towards one side of the market), would not be eligible for the bona-fide market-maker

<sup>407</sup> broker-dealers that publish quotations but fill orders at different prices than those quoted would not be engaged in bona fide market making for purposes of Regulation SHO. SIFMA cited to Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer, Exchange Act Release No. 94524 (Mar. 28, 2022), 87 FR 23054, 23068–69 at n.157 (Apr. 18, 2022).

<sup>408</sup> See 2008 Regulation SHO Amendments, at 61698–99; Regulation SHO Adopting Release, at 48015.

<sup>409</sup> SIFMA Letter, at 25.

<sup>410</sup> See 2008 Regulation SHO Amendments, at 61698–99; Regulation SHO Adopting Release, at 48015.

<sup>411</sup> See Better Markets Letter, at 14 ("The SEC has correctly concluded that naked short sales are abusive. The SEC established this loophole, which permits the largest proprietary trading firms to engage in naked short selling, on the theory that it facilitates trading in hard-to-borrow securities. However, the SEC's settlement regulations with respect to mandatory buy-ins already provide special accommodations to market-makers that cannot close out their short positions within the standard failure-to-deliver close-out timeframe. This accommodation already in place calls into serious question whether the large loophole in the locate requirement serves any legitimate purpose. At the very least, the SEC must closely monitor the information it receives regarding reliance on this exception to determine whether elimination of this exception is warranted."); see also WTI Letter.

<sup>412</sup> See STA Letter, at 4.

<sup>413</sup> See generally *Amendments to Regulation SHO*, Exchange Act Release No. 60388 (July 27, 2009), 74 FR 38266, 38267–68 (July 31, 2009) ("2009 Regulation SHO Amendments").

<sup>414</sup> See Regulation SHO Adopting Release, at 48025 ("[e]xcepting bona-fide market making activity from the locate requirement will benefit investors and the market by preserving necessary market liquidity.").

<sup>415</sup> See, e.g., 2008 Regulation SHO Amendments, at 61699 ("For example, the Commission has stated that bona-fide market making 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."); see also Regulation SHO Adopting Release, at 48015.

<sup>416</sup> See, e.g., 2008 Regulation SHO Amendments, at 61691 ("We have previously noted that abusive 'naked' short selling, while not defined in the federal securities laws generally refers to selling short without having stock available for delivery and intentionally failing to deliver stock within the standard . . . settlement cycle."); see also

Regulation SHO Adopting Release, at 48009, n.10; Exchange Act Release No. 56212 (Aug. 7, 2007), 72 FR 45544, n.3 (Aug. 14, 2007) ("2007 Regulation SHO Final Amendments"); Exchange Act Release No. 57511 (Mar. 17, 2008), 73 FR 15376 (Mar. 21, 2008) ("Naked Short Selling Anti-Fraud Rule Proposing Release").

<sup>417</sup> See, e.g., SIFMA Letter, at 25; STA Letter, at 3.

<sup>418</sup> See, e.g., Settlement Cycle Adopting Release, at n.411 ("Under Regulation SHO's bona fide market making exceptions, the broker-dealer generally should be holding itself out as standing ready and willing to buy and sell the security by continuously posting widely accessible quotes that are near or at the market. The market maker must be at economic risk for such quotes."); see also 2008 Regulation SHO Amendments, at 61699. Thus, a market-maker that continually executed short sales away from its posted quotes would generally be unable to rely on the bona-fide market making exceptions of Regulation SHO. See Regulation SHO Adopting Release, at 48015 n.68. The market-maker must also be engaged in bona fide market making in that security at the time of the short sale for eligibility for the exceptions. See 2008 Regulation SHO Amendments, at 61699.

<sup>419</sup> See, e.g., 2008 Regulation SHO Amendments, at 61699; see also *Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Close-Out Requirements for Short Sales and an Interpretation on Prompt Receipt and Delivery of Securities*, Exchange Act Release No. 32632 (July 14, 1993), 58 FR 39072, 39074 (July 21, 1993); see also Settlement Cycle Adopting Release, at 13911–12 n.411.

exceptions under Regulation SHO.”<sup>419</sup> Notably, “broker-dealers that publish quotations but fill orders at different prices than those quoted would not be engaged in bona-fide market making for purposes of Regulation SHO.”<sup>420</sup>

After considering the comments received regarding the proposal to require CAT reporting firms that are reporting short sales to indicate whether such CAT reporting firm is asserting use of the BFMM locate exception, the Commission is adopting this proposed amendment to CAT with a few technical modifications to improve the readability of the amendment.<sup>421</sup> The Commission recognizes that there will be costs to broker-dealers to implement changes to their respective systems and processes to accommodate the reporting of the BFMM locate exception information to CAT. For the reasons described above, as well as reasons stated in the Proposing Release, the Commission believes that the benefits to the Commission in its administration of short sale regulations will justify the burdens and costs to CAT reporting firms. This reporting requirement will not adversely affect short selling activity or liquidity in the market as it requires that brokers or dealers that are market makers provide information that is, or should be, readily available to the market maker at the time they effect a short sale, to the Commission without having to request access. The requirement does not change how such brokers or dealers that are market makers use the exception itself, and the data will not be published.

## V. Other Comments

Other commenters also discussed issues that were beyond the scope of the rulemaking, such as suggestions for the Commission to ban short selling, enhance Regulation SHO’s locate or close-out requirements, address potentially abusive “naked” short selling, and reduce the reporting

timeframes or requirements for Form 13F reporting, among others.<sup>422</sup>

## VI. Compliance Date

The Commission received one comment regarding a compliance date for Rule 13f–2 reporting requirements; that commenter recommended that Managers be given at least 18 months to comply with the new requirements.<sup>423</sup> Specifically, the commenter stated that “[g]iven the complexity and significance of the operational build required by the proposed rule, we think a minimum of 18 months would be an appropriate implementation timeframe to give advisers adequate time to come into compliance with any new requirements.”<sup>424</sup> Due to the modifications from the proposal which will reduce the complexity of the operational build, Managers should require less time than suggested by the commenter. Although the data that will result from the Rule 13f–2 reporting requirements will be useful to market participants and regulators as soon as it is available, it is prudent to implement the rule at a measured pace to help ensure that Managers have adequate time to update systems to meet the reporting requirements of Rule 13f–2. Accordingly, a compliance date of 12 months after the effective date of this release for Rule 13f–2 strikes the appropriate balance between the Commission’s goal of increasing transparency of short sale-related information and providing Managers with adequate time to implement systems and processes to comply with the Rule 13f–2 reporting requirements.<sup>425</sup>

The Commission will begin publishing the aggregated short sale related data collected, pursuant to Rule

13f–2, three months after the above stated compliance date of 12 months after the effective date of this release. The three-month window for the Commission to publish aggregated Form SHO data is intended to ensure that Commission systems are operating as designed in order to publish the aggregated data.

Consistent with a suggestion by the commenter, the compliance date for the CAT amendments will be 18 months after the effective date of this release, as there were not modifications to that requirement from proposal. This will allow CAT reporting firms adequate time to update systems to facilitate reporting to CAT.<sup>426</sup> An 18-month compliance period for the amendment to CAT strikes the appropriate balance between improving the Commission’s administration of short sale regulations and providing CAT reporting firms adequate time to implement changes to their respective systems and processes to accommodate the reporting of BFMM locate exception information to CAT, and is reasonable given that the information to be reported is, or should be, readily available to the market maker at the time they effect a short sale.<sup>427</sup>

## VII. Paperwork Reduction Act Analysis

### A. Background

Certain provisions of Rule 13f–2, Form SHO, and the Amendment to CAT impose “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>428</sup> The title for the collection of information is: “Amendments to Enhance Short Sale Data” (OMB Control No. 3235–0804). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid control number. The requirements of this collection of information are mandatory for Managers under Rule 13f–2 and Form SHO, and Plan Participants and CAT reporting firms under the Amendment to CAT.

<sup>426</sup> For discussion of the compliance date for the adopted amendment to the CAT NMS Plan to require the reporting to the CAT of reliance on the bona fide market making exception in Regulation SHO, see *Notice of the Text of the Amendment to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-Related Data Collection*, Exchange Act Release No. 34–98739 (Oct. 13, 2023), published elsewhere in this issue of the **Federal Register**, which will have an effective date of 60 days after date of publication in the **Federal Register** and a compliance date of 18 months after the effective date.

<sup>427</sup> See *supra* Part IV.B. See also *infra* Part VII.C for discussion of costs and burden estimates related to compliance with the amendment to CAT.

<sup>428</sup> 44 U.S.C. 3501 *et seq.*

<sup>419</sup> See Settlement Cycle Adopting Release, at 13911–12 n.411.

<sup>420</sup> *Id.* See also Regulation SHO Adopting Release, at 48015 n.68 (“Moreover, a market maker that continually executed short sales away from its posted quotes would generally be unable to rely on the bona-fide market making exception” of Regulation SHO).

<sup>421</sup> The amendment includes the following non-substantive, technical changes to the rule text: adding the word “for” preceding “a short sale” to clarify that reporting is required for a short sale in which the bona fide market maker exception is claimed, adding “the” preceding “exception” and adding “in” preceding Rule 203(b)(2)(iii) to clarify that the bona fide market making exception is found in Rule 203(b)(2)(iii).

<sup>422</sup> One commenter understood the rule as a “self-reporting” rule rather than as a mandatory reporting rule. Comment from Sarah (Feb. 25, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20117824-270590.htm>.

<sup>423</sup> MFA Letter 2, at 3 (stating that the Commission should “provide an appropriate amount of time for firms to comply with any new requirements [under Rule 13f–2] (18 months at a minimum)” due to the operational build required for compliance with Proposed Rule 13f–2 and Proposed Form SHO).

<sup>424</sup> *Id.*

<sup>425</sup> In addition, with respect to the compliance date, several commenters requested the Commission to consider interactions between the proposed rule and other recent Commission rules. In determining compliance dates, the Commission considers the benefits of the rules as well as the costs of delayed compliance dates and potential overlapping compliance dates. For the reasons discussed throughout the release, to the extent that there are costs from overlapping compliance dates, the benefits of the rule justify such costs. See *infra* Parts VIII.B, VIII.C.6.f, and VIII.D.2 for a discussion of the interactions of the final rule with certain other Commission rules.

In accordance with the PRA, the Commission is submitting the final amendments to the rules to the Office of Management and Budget (OMB) for review. The Commission published a request for comments on these collection of information requirements in the Proposing Release,<sup>429</sup> and submitted the proposed requirements to the Office of Management and Budget (OMB) for review in accordance with the PRA.<sup>430</sup> The Commission received some comments regarding the Commission's estimates of paperwork burdens and costs associated with anticipated compliance of Rule 13f-2, Form SHO, and the Amendment to CAT, which are addressed in this section.

As discussed above, Rule 13f-2 and related Form SHO are designed to provide greater transparency of short sale-related data to regulators, investors, and other market participants by requiring certain Managers to file monthly on Form SHO, through EDGAR in Form SHO-specific XML, certain short position and activity data. Under Rule 13f-2 and Form SHO, only those Managers that meet a specified Reporting Threshold for an equity security will be required to file Form SHO. Such information will provide additional context to the Commission and other regulators regarding the lifecycle of short sales, assist in reconstructing market events, and improve Commission oversight of short selling.

The Amendment to CAT is intended to supplement the short sale-related data that will be reported by certain broker-dealers to the Commission pursuant to Rule 13f-2 and Form SHO. The Commission's amendment to CAT requires, for original receipt or origination of an order for equities, the Participants' Compliance Rules require their broker-dealer members record and report whether the order is a short sale for which the BFMM locate exception in Rule 203 under Regulation SHO for the reported short sale is being claimed. This information will provide valuable data to both the Commission and other regulators regarding the use of the BFMM locate exception. Given the differences in the information collections applicable to these parties, the burdens applicable to Managers and broker-dealers are separated in the analysis below.

## *B. Burdens for Managers Under Rule 13f-2 and Form SHO*

### 1. Applicable Respondents

As discussed above, Rule 13f-2 and Form SHO require Managers that trigger a Reporting Threshold to file monthly via EDGAR, on Form SHO, certain short position and activity data. Under section 13(f)(6)(A) of the Exchange Act and for purposes of Rule 13f-2, Managers include any person, other than a natural person, investing in or buying and selling securities for its own account, and any person (including a natural person) exercising investment discretion with respect to the account of any other person.<sup>431</sup> Thus, the requirements of Rule 13f-2 could apply, for example, to investment advisers that exercise investment discretion over client assets, including investment company assets; broker-dealers; insurance companies; banks and bank trust departments; and pension fund managers or corporations that manage corporate investments or employee retirement assets.

In the Proposing Release, the Commission stated that it believed that the burden associated with Proposed Rule 13f-2 and the related Proposed Form SHO reporting in EDGAR would be similar to a Manager's reporting requirements under former Form SH. In October 2008, the Commission adopted interim final temporary Rule 10a-3T, which required institutional investment managers that exercise investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value of at least \$100 million to file Form SH with the Commission following a calendar week in which it effected a short sale in a section 13(f) security, with some exceptions. Form SH included information on short sales and positions of section 13(f) securities, other than options.<sup>432</sup> The Commission estimated in the Proposing Release, that based on Form SH data, each month, approximately 1,000 Managers would trigger a Reporting Threshold for at least one security, and therefore be required to file a Proposed Form SHO.<sup>433</sup> The

Commission did not receive any comments regarding the estimated number of Managers that would be required to file a Form SHO, or an alternative estimated number of Managers that commenters believed would be more appropriate.

As discussed above, the Commission is adopting aspects of the Proposal with certain modifications to Form SHO reporting requirements. For example, the modified reporting threshold for the U.S. dollar value-based prong of Threshold A for reporting company issuer securities is being adopted as a monthly average rather than a daily end-of-day calculation, which could result in fewer Managers being subject to Form SHO reporting requirements under Threshold A than under the Proposed Reporting Thresholds. However, the Commission continues to believe that 1,000 Managers is an accurate estimate when considering (1) Managers with discretion over less than \$100 million, which were not required to file Form SH; (2) the fact that Form SH was only required to be filed for 13(f) securities that are included on the 13F List as opposed to all equity securities of both reporting and non-reporting company issuers; and (3) the fact that Form SH did not include a second, lower threshold (Threshold B) for short positions in securities of non-reporting company issuers. As such, the Commission continues to estimate that, each month, approximately 1,000 Managers will trigger a Reporting Threshold for at least one security, and therefore be required to file a Form SHO.

### 2. Burdens and Costs

The Commission explained in the Proposing Release that it believed that the burden associated with Proposed Rule 13f-2 and the related Proposed Form SHO reporting in EDGAR would be similar to a Manager's reporting requirements for former Form SH.<sup>434</sup> The Commission continues to believe

opposed to weekly, filing, and therefore the Commission estimates fewer overall filings per month. Additionally, the estimate accounts for the estimate by the Commission staff that 252 Form SH filers would have been required to file had a threshold of 2.5% of shares outstanding or \$10 million monthly average gross short position in an equity security been imposed during the analyzed time period. The estimate of 1,000 is higher than the 252 estimated Form SH filers to account for: (1) Managers with discretion over less than \$100 million, which were not required to file Form SH; (2) the fact that Form SH was only required to be filed for 13(f) securities as opposed to all equity securities of both reporting and non-reporting company issuers; and (3) the fact that Form SH did not include a second, lower threshold (Threshold B) for short positions in securities of non-reporting company issuers.

<sup>434</sup> See Proposing Release, at 14972-73.

<sup>431</sup> See also Instructions to Form 13F.

<sup>432</sup> *Disclosure of Short Sales and Short Positions by Institutional Investment Managers*, 73 FR 61678. The rule extended the reporting requirements established by the Commission's Emergency Orders dated September 18, 2008, September 21, 2008, and October 2, 2008, with some modifications. See *supra* n.103.

<sup>433</sup> This estimate is similar to the estimate provided in the *Disclosure of Short Sales and Short Positions by Institutional Investment Managers*, Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008). However, the number of estimated Form SHO filers represents a monthly, as

<sup>429</sup> See Proposing Release, at 14980-81.

<sup>430</sup> 44 U.S.C. 3507(d); 5 CFR 1320.11.

that the burden associated with Rule 13f-2 and related Form SHO reporting in EDGAR is similar to a Manager's reporting requirements for former Form SH. With respect to each applicable section 13(f) security, the Form SH filing identified the issuer and CUSIP number of the relevant security and required the Manager's start of day short position, the number and value of securities sold short during the day, the end of day short position, the largest intraday short position, and the time of the largest intraday short position.<sup>435</sup> In adopting interim temporary Rule 10a-3T, which required certain Managers to file weekly non-public reports via Form SH, the Commission estimated that Managers would spend approximately 20 hours to prepare and file each Form SH.<sup>436</sup> The Commission estimated in the Proposing Release for Form SHO that the burden associated with preparing and filing Form SHO in EDGAR would be approximately 20 hours per filing, consistent with that of former Form SH.<sup>437</sup>

Some commenters were concerned about the Commission's reliance on prior Form SH data in estimating Form SHO reporting burdens, as well as the estimated time burden of 20 hours for preparing and filing each required Form SHO.<sup>438</sup> One commenter stated that the estimated 20 hours to file Form SHO was "not realistic" and felt that reliance on Form SH for Form SHO burden estimates was not adequately justified in the Proposing Release.<sup>439</sup> Specifically, some commenters stated that the Proposing Release underestimated the costs of preparing proposed Information Table 2 in relying on the Form SH and Rule 10a-3T estimates, emphasizing the complexity of Form SHO as compared to Form SH.<sup>440</sup> One commenter stated that the Proposing Release's estimate of 20 hours needed to process and file Form SHO per month may be too low, and even if accurate, will impose a

"substantial ongoing burden."<sup>441</sup> However, these commenters did not provide the Commission with alternative burden estimates for reporting Form SHO, or alternative sources of data for which to base Form SHO burden estimates.

In contrast, one commenter believed that Managers were not being genuine about their concerns regarding costs and burdens of complying with Form SHO reporting requirements, stating that they were able to comply with Form SH requirements.<sup>442</sup> The commenter also stated that the requirements of Form SHO should be less burdensome than the requirements of Form SH due to the decreased frequency of reporting.

Regarding comments of Form SHO's complexity as compared to Form SH, the adopted Form SHO, as described above, does not include the proposed requirement to report hedging status, which several commenters thought would be particularly burdensome or operationally difficult to implement.<sup>443</sup> As adopted, Form SHO also includes a streamlined Information Table 2, which reduces the granularity of the information reported, decreasing the costs and burdens that more detailed reporting of daily activity data as proposed would have imposed, further reducing complexity from the proposed rule and form.

As the Commission acknowledged in the Proposing Release, and continues to acknowledge, the information required under former Form SH differs from that required under Form SHO. However, the Commission continues to believe that Form SH is an appropriate basis for Form SHO burden estimates. Form SH involved the same type of entities (Managers) and the same activity (short positions) as Form SHO. While recognizing that the information required under former Form SH differs from that required under Form SHO, the Commission continues to believe that both forms require the reporting of short sale-related data of similar depth and complexity.<sup>444</sup> Notably, Rule 13f-2

requires monthly reporting if certain conditions are met, as opposed to the weekly reporting required by Form SH for Managers that effected short sales within the preceding week,<sup>445</sup> which is anticipated to decrease the overall volume of reports required to be filed by Managers under Form SHO in comparison to Form SH.

As such, and since the Commission did not receive comments citing alternative sources of data that commenters believed would result in more accurate Form SHO burden estimates, the Commission continues to believe that Form SH is an appropriate basis for which to estimate Form SHO burdens. The Commission continues to estimate that the burden associated with preparing and filing Form SHO in EDGAR will be approximately 20 hours per filing, consistent with the corresponding burdens for former Form SH, and consistent with estimates in the Proposing Release.<sup>446</sup> Accordingly, the Commission estimates that the burden associated with preparing and filing Form SHO across all managers collectively is approximately 240,000 hours per year.<sup>447</sup>

The Commission received one comment regarding the approximate overall cost of \$217.55 per Form SHO filing from the Proposing Release. This commenter stated that this cost was "not realistic," but, again, did not provide a more accurate cost estimate, or alternative data source for which to base a cost estimate.<sup>448</sup> The Commission believes that the hourly cost of internal expertise required for each filing will be \$251.36, which includes a blended calculation of the estimated hourly rate for a compliance attorney, senior programmer, and in-house compliance clerk, an increase from the Proposing

short position, for that security during each calendar day of the prior week. *See Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action To Respond to Market Developments*, Exchange Act Release No. 58591 (Sept. 18, 2008), 73 FR 55175, 55176 (Sept. 24, 2008).

<sup>445</sup> *See id.*

<sup>446</sup> Proposing Release, at 14973.

<sup>447</sup> 20 hours per filing  $\times$  1,000 filings by Managers each month  $\times$  12 months = 240,000 hours. In the Proposing Release PRA, the Commission estimated that 346 Form SH filers would have been required to file Form SHO had a threshold of 2.5% of shares outstanding or \$10 million position dollar value been imposed during the analyzed time period. Due to the change in the Threshold A calculation of the dollar value prong of the Reporting Threshold for equity securities of reporting company issuers to be based on a monthly average gross short position rather than the proposed daily calculation, the estimated number of Form SH filers that would have been required to file a Form SHO decreased from 346 to 252. However, the Commission continues to estimate that 1,000 Managers will be subject to Form SHO reporting per month.

<sup>448</sup> *See* Two Sigma Letter, at 5-7.

<sup>435</sup> Form SH was adopted in the wake of the 2008 financial crisis and remained in effect until July 2009.

<sup>436</sup> *See Disclosure of Short Sales and Short Positions by Institutional Investment Managers*, 73 FR 61686 (stating that, "[t]he 20 hour per filing estimate is based on data received from a small sample of actual filers and a random sample of filings conducted by our Office of Economic Analysis.").

<sup>437</sup> *See* Proposing Release, at 14973-74.

<sup>438</sup> *See, e.g.*, MFA Letter, at 15; Two Sigma Letter, at 5-7.

<sup>439</sup> Two Sigma Letter, at 5-7 (citing letters received by the Commission that it had underestimated the burden of Form SH and describing the complexity of Form SHO as compared to Form SH).

<sup>440</sup> *See, e.g.*, MFA Letter, at 15; Two Sigma Letter, at 5-7.

<sup>441</sup> Anonymous Fund Manager Letter, at 8.

<sup>442</sup> *See* WTI Letter, at 2 ("The protests of the industry in terms of the effort required to comply with the Proposal ring hollow given the Commission's experience with interim temporary Rule 10a-3T—firms had no problem complying and the data provided was useful to the Commission. Indeed, the Proposal is easier to comply with, given the monthly rather than weekly reporting of interim temporary Rule 10a-3T.").

<sup>443</sup> *See, e.g.*, T. Rowe Price Letter, at 3-4; Virtu Letter, at 3; MFA Letter, at 4.

<sup>444</sup> Under Form SH, Managers who met the applicable threshold and effected a short sale in a section 13(f) security in the preceding week were required to file a report identifying the open short position, closing short position, largest intraday short position, and the time of the largest intraday

Release's estimated \$217.55 to account for inflation.<sup>449</sup> Taken together, the estimated burden hours and hourly rate for the filing of Form SHO result in an estimated annual cost to the industry of \$60,326,400.<sup>450</sup> The Commission, however, recognizes that advances in technology over time could result in Managers spending less time preparing and filing Form SHO than is estimated above.<sup>451</sup>

Consistent with its estimates in the Proposing Release, the Commission also anticipates that most Managers will file Form SHO directly in the structured XML-based data language for Form SHO,<sup>452</sup> rather than using the fillable web form provided by EDGAR, resulting in some limited additional costs for each filing. While the Commission received comments about the use of Form SHO-specific XML generally,<sup>453</sup> it did not receive comments regarding the PRA burden estimates of using Form

SHO-specific XML. The Commission estimates that Managers that file Form SHO using a structured XML-based data language could incur an additional burden of 2 hours of work by a programmer,<sup>454</sup> at an estimated cost of \$772.<sup>455</sup> The Commission further estimates that Managers will collectively spend up to approximately 24,000 hours and \$9,264,000 per year to file Form SHO directly in a structured XML-based data language.<sup>456</sup> The Commission also estimates that a similar, additional burden of 2 hours of work by a programmer per filing will apply to Managers filing an amended Form SHO directly in a structured XML-based data language.

Also consistent with the estimates in the Proposing Release, the Commission estimates that approximately 3.5 percent of the Managers that file Form SHO each month will also file an amended Form SHO, resulting in an additional burden

and cost for an estimated 35 Managers each month.<sup>457</sup> The additional burden could take up to the original 20 hours to process and file, as it will require the filing of an entirely new Form SHO.<sup>458</sup> The associated wage rate for filing the amended Form SHO is consistent with the cost of expertise required to file the original Form SHO, estimated to be \$251.36 per hour.<sup>459</sup> The Commission also estimates that each amended Form SHO will be filed directly using a structured XML-based data language, resulting in a corresponding additional burden of 2 hours of work by a programmer per amended Form SHO filing. The Commission did not receive any comments regarding the estimated percentage of Managers that will file an amended Form SHO each month, or the costs and burden estimates of filing an amended Form SHO.

PRA TABLE 1—ESTIMATED MANAGER BURDEN AND COSTS ASSOCIATED WITH FORM SHO REPORTING

	Managers (monthly)	Form SHO reports processed and filed (annual)	Hours needed to process and file Form SHO (average)	Total industry burden hours to process and file Form SHO (annual)	Wage rate (average)	Total industry cost burden (annual)
Form SHO Filings .....	1,000	12,000	20	240,000	\$251.36	\$60,326,400
Use of Structured XML-Based Data Language in Form SHO Filings .....	1,000	12,000	2	24,000	386	9,264,000
Amended Form SHO Filings .....	35	420	20	8,400	251.36	2,111,424
Use of Structured XML-Based Data Language in Amended Form SHO Filings .....	35	420	2	840	386	324,240
<b>Total .....</b>				<b>273,240</b>		<b>72,026,064</b>

<sup>449</sup> The \$251.36 wage rate reflects current estimates of the blended hourly rate for an in-house compliance attorney (\$425), a senior programmer (\$386) and in-house compliance clerk (\$82). \$251.36 is based on the following calculation:  $((\$425) + (((\$386 + \$82) \div 2) \times 10)) \div 11 = \$251.36$ . The estimated proportion of compliance attorney (1/11th) to senior programmer and in-house compliance clerk (10/11th) time burden is based on commenter input and computation of the estimated burden for the filing of Form 13F-HR. See *Electronic Submission of Applications for Orders*, Exchange Act Release No. 93518 (Nov. 4, 2021), 86 FR 64839 (Nov. 19, 2021) at 64860–61 (“Electronic Submission of Applications for Orders”). The \$425 per hour and \$386 per hour figures for a compliance attorney and a senior programmer, respectively, are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association’s Office Salaries in the Securities Industry 2013 (“SIFMA Report”), modified by Commission staff to account for an 1,800-hour work year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. The \$82 per hour figure for a compliance clerk is based on salary information from the SIFMA Report, modified by Commission staff to account for an 1,800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits, and overhead. See also *Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity*

*Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting*, Release No. IA–6297, 88 FR 38146, 38195–98 (June 12, 2023).

<sup>450</sup> 20 hours per filing  $\times$  1,000 filings by Managers each month  $\times$  12 months  $\times$  \$251.36 per hour = \$60,326,400.

<sup>451</sup> See *Electronic Submission of Applications for Orders*, 86 FR 64859 (stating that “[c]ommenters stated that the advances in technology have made the process of completing and filing Form 13F highly automated, reducing the time and external costs to managers in complying with this requirement.”).

<sup>452</sup> Most Managers will be familiar with other EDGAR Form-specific XML data languages, the use of which is required for the filing (by Managers that exercise investment discretion with respect to accounts holding 13(f) securities having an aggregate fair market value on the last trading day of any month of any calendar year of at least \$100 million) of Form 13F. See Frequently Asked Questions About 13F, available at <https://www.sec.gov/divisions/investment/13faq.htm>. The Commission estimates that all of the 1,000 Managers estimated to file Form SHO each month will do so directly using the structured XML-based data language rather than the fillable web form provided by EDGAR.

<sup>453</sup> See XBRL Letter; Comment from An Investor (Apr. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20122297-278355.htm>.

Comments regarding the use of XML are addressed in Part II.A.4.

<sup>454</sup> The 2-hour estimated burden is consistent with similar estimates for the use of structured XML data formats for the filing of Form N-CR and Form 24F-2. See *Money Market Fund Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N-CSR and Form N-1A*, Exchange Act Release No. 34–97876 (July 12, 2023), 88 FR 51404, 51514 (Aug. 3, 2023); see also *Securities Offering Reform for Closed-End Investment Companies*, Exchange Act Release No. 88606 (Apr. 8, 2020), 85 FR 33290, 33329 n.439 (June 1, 2020) (stating that “[w]e assume that the burden of tagging Form 24F-2 in a structured XML format would be 2 hours for each filing.”).

<sup>455</sup> The \$386 per hour figure for a senior programmer is based on salary information from the SIFMA Report.  $2 \text{ hours} \times \$386 = \$772$ .

<sup>456</sup>  $2 \text{ hours per filing} \times \$386 \text{ per hour} \times 1,000 \text{ filings each month} \times 12 \text{ months} = \$9,264,000$ .

<sup>457</sup> The estimate of 3.5% of Regulation SHO filers that are anticipated to file an amended Form SHO is based on the frequency of recent filings of amended Form 13F. For the reporting period of Dec. 31, 2022, there were 6,924 holdings reports for Form 13F-HR submitted, 244 of which were amended.  $(244 \div 6,924 = 3.5\%)$ .

<sup>458</sup> See Form SHO, Special Instructions, at 4.

<sup>459</sup> See Proposing Release, at 14974.

Consistent with estimates in the Proposing Release, in addition to the costs associated with the reporting burden, Managers could incur an initial technology-related burden of 325 hours, at an hourly estimated wage rate of \$366,<sup>460</sup> for an estimated total cost of \$118,950 per Manager,<sup>461</sup> to update their current systems to capture the required information and automate and facilitate the completion and filing of Form SHO. The Commission generally believes that the type of Managers that will trigger a Reporting Threshold will likely have sophisticated technologies and be able to implement systems to help automate the reporting requirements of Rule 13f-2. As discussed in the Proposing Release, the estimate of 325 initial technology-related burden hours for Managers filing Form SHO was based on the estimated initial filing burden (325 hours) for large hedge fund advisers to fulfill amendments to the reporting requirements for Form PF,<sup>462</sup> and is

similar to the initial technological infrastructure-related burden (355 hours) for the proposed security-based swap position reporting requirements of proposed Rule 10B-1(a).<sup>463</sup> While Managers most likely have other existing reporting obligations, the Commission recognizes that Managers may need to update their systems to ensure timely and accurate filing of the specific information required under Form SHO.

One commenter stated that the estimated 325 hours initial technology-related burden was “not realistic” but did not provide an alternative estimate.<sup>464</sup> One commenter stated that the initial estimated costs for initial technology projects per Manager represented a “significant portion” of a smaller Manager’s information technology budget but did not state that the estimate was inaccurate.<sup>465</sup> As a result of not adopting the proposed hedging requirement, which a number of commenters thought would be

operationally difficult to implement,<sup>466</sup> the technology-related burden will likely be reduced from that which was estimated in the Proposing Release.

The Commission did not receive any comments that provided an alternative hourly estimate for the initial technology related burden for Managers filing Form SHO, or an alternative, more accurate source for which to base the initial technology related burden for Managers filing Form SHO. Additionally, in response to the comment that the Commission generally underestimated the initial technology-related burden, and that the technology-related burden is likely reduced from the Proposing Release given the Commission’s decision not to adopt the proposed hedging requirement, the Commission continues to believe that an estimate of 325-hours for the initial technology-related burden is appropriate.

**PRA TABLE 2—ESTIMATED MANAGER BURDEN AND COSTS ASSOCIATED WITH FORM SHO INITIAL TECHNOLOGY PROJECTS**

	Managers with proposed Form SHO reportable short interest positions	Number of hours needed for initial technology projects (average)	Industry burden hours for initial technology projects	Wage rate (average)	Total industry cost burden
Form SHO Initial Technology Projects .....	1,000	325	325,000	\$366	\$118,950,000

### *C. Burdens and Costs Associated With the Amendment to CAT*

#### 1. Summary of Collections of Information

The amendment to the CAT NMS Plan requires Participants to update their Compliance Rules to require reporting by Industry Members of whether an original receipt or origination of an order to sell an equity security is a short sale for which a market maker is claiming the bona fide market making exception to the locate

requirement in Rule 203(b)(2)(iii) of Regulation SHO.<sup>467</sup>

#### 2. Use of Information

As discussed above, reporting of certain short sale information to the CAT provides valuable information for the Commission and other regulators in investigations and reconstruction of market events. Requiring Industry Members to identify short sales for which they are claiming the BFMM locate exception will provide the Commission staff and other regulators an additional tool to determine whether

such activity qualifies for the exception, or instead is indicative of, for example, proprietary trading instead of bona fide market making.

#### 3. Respondents

##### a. National Securities Exchanges and National Securities Associations

The respondents for the amendment to CAT include the 25 Plan Participants (the 24 national securities exchanges and one national securities association (FINRA)).<sup>468</sup>

<sup>460</sup> The Commission estimates that, of a total estimated burden of 325 hours, approximately 195 hours will most likely be performed by compliance professionals and 130 hours will most likely be performed by programmers working on system configuration and reporting automation. Of the work performed by compliance professionals, we anticipate that it will be performed equally by a compliance manager at a cost of \$360 per hour and a senior risk management specialist at a cost of \$416 per hour. Of the work performed by programmers, we anticipate that it will be performed equally by a senior programmer at a cost of \$386 per hour and a programmer analyst at a cost of \$280 per hour.  $((\$360 \text{ per hour} \times 0.5) + (\$416 \text{ per hour} \times 0.5)) \times 195 \text{ hours} + ((\$386 \text{ per hour} \times 0.5) + (\$280 \text{ per hour} \times 0.5)) \times 130 \text{ hours} = \$366$ . See *Form PF; Event Reporting for Large Hedge Fund Advisers*

and *Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting*, Release No. IA-6297 (May 3, 2023), 88 FR 38146, 38195 (June 12, 2023). See also SIFMA Report.

<sup>461</sup>  $325 \text{ initial technology-related burden hours} \times \$366 \text{ per hour} = \$118,950$ .

<sup>462</sup> See *Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting*, Release No. IA-6297 (May 3, 2023), 88 FR 38146, 38195 (June 12, 2023). (The Commission recognizes that adopted Rule 13f-2 will cover persons other than large hedge fund advisers, and that large hedge fund advisers may generally be more accustomed to existing Commission reporting requirements than some other persons that will be covered by adopted Rule 13f-2.).

<sup>463</sup> See Rule 10B-1 Proposal.

<sup>464</sup> See Two Sigma Letter, at 5.

<sup>465</sup> See Anonymous Fund Manager Letter, at 6–7.

<sup>466</sup> See Virtu Letter, at 3.

<sup>467</sup> See *supra* Part IV.

<sup>468</sup> The Participants are: BOX Options Exchange LLC; Cboe BZX Exchange, Inc.; Cboe BYX Exchange, Inc.; Cboe C2 Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX, Inc.; Cboe Exchange, Inc.; Financial Industry Regulatory Authority, Inc.; Investors Exchange Inc.; Long-Term Stock Exchange, Inc.; MEMX, LLC; Miami International Securities Exchange LLC; MIAX PEARL, LLC; MIAX Emerald, LLC; NASDAQ BX, Inc.; NASDAQ GEMX, LLC; NASDAQ ISE, LLC; NASDAQ MRX, LLC; NASDAQ PHLX LLC; The NASDAQ Stock Market LLC; New York Stock Exchange LLC; NYSE MKT LLC; and NYSE Arca, Inc., NYSE Chicago Stock Exchange, Inc., NYSE National, Inc.



b. Members of National Securities Exchanges and National Securities Associations

The respondents for the Amendment to CAT also include the Participants' broker-dealer members, that is, Industry Members. The Commission understands that there are currently 3,501 registered broker-dealers;<sup>469</sup> however, not all broker-dealers are expected to have new CAT reporting obligations under the Amendment to CAT.<sup>470</sup> Based on an analysis of CAT data from May 2023, conducted by Commission staff, the Commission estimates that approximately 100 broker-dealers will be required to report for the original receipt or origination of an order to sell an equity security whether the order is a short sale effected by a market maker in connection with bona fide market making activities in the security for which the BFMM locate exception in Rule 203(b)(2)(iii) of Regulation SHO is claimed. This is a decrease from the Commission's estimate in the Proposing Release of 104 broker-dealers that would be required to report for the original receipt or origination of an order to sell an equity security whether the order is a short sale effected by a market maker in connection with bona-fide market making activities in the security for which the exception in Rule 203(b)(2)(iii) of Regulation SHO is claimed, because there were 104 CAT reporters listed as equity market makers in CAT in November 2021, and 100 CAT reporters listed as equity market makers in CAT in May 2023.<sup>471</sup> The Commission also included an estimate of 1,218 broker-dealers that would have been required to report "buy to cover" information on buy orders for equity securities to CAT in the Proposing Release,<sup>472</sup> but since the Commission is not adopting the proposed "buy to cover" reporting requirement, such estimate is not included here. The Commission did not receive any comments on the estimated number of respondents under the proposed amendments to CAT.

#### 4. Total Initial and Annual Reporting and Recordkeeping Burdens

The Commission received comments regarding the costs and burdens of the proposed amendments to CAT generally<sup>473</sup> but did not receive specific comments regarding the Proposing

Release's PRA estimates related to the proposed CAT amendments. General comments regarding costs and burdens of the proposed CAT amendments are addressed in Part IV. The Commission's total burden estimates in this Paperwork Reduction Act section reflect the total burden on all Participants and Industry Members. The burden estimates per Participant or Industry Member are intended to reflect the average paperwork burden for each Participant or Industry Member, but some Participants or Industry Members may experience more burden than the Commission's estimates, while others may experience less. The burden figures set forth in this section are based on a variety of sources, including Commission staff's experience with the development of the CAT and estimated burdens for other rulemakings. Because the CAT NMS Plan applies to and obligates the Participants and not the Plan Processor, the Commission believes it is appropriate to estimate the Participants' external cost burden based on the estimated Plan Processor staff hours required to comply with the proposed obligations.<sup>474</sup> Put another way, pursuant to the Amendment to the CAT NMS Plan, the Participants will be obligated to make changes to the CAT, but the CAT is managed by the Plan Processor pursuant to contractual agreement, and so the Participants will be required to engage the Plan Processor to make any required changes.

#### a. Participant Burdens

The Amendment to CAT will require the Participants to engage the Plan Processor to modify the Central Repository to accept and process the new BFMM locate exception information on order receipt and origination reports. The Commission estimates that the Participants will incur an initial, one-time burden of 130 hours, or 5.2 hours per Participant, of staff time required to supervise and implement the changes necessary for the Plan Processor to accept and process the new data elements, and an initial, one-time, external cost of \$113,800, or a per Participant expense of approximately \$4,552 to compensate the Plan Processor for staff time required to make the initial necessary programming and systems changes to accept and process the new data elements, based on an estimate that it will take 300 hours of Plan Processor

staff time to implement these changes.<sup>475</sup> The Commission did not receive comment on these estimates.

The Commission continues to believe that other Paperwork Reduction Act burdens that will apply to the Participants, including ongoing burdens and external expenses for the Plan Processor's acceptance and processing of the new data elements, are already accounted for in the existing Paperwork Reduction Act estimate that applies for Rule 613 and the CAT NMS Plan Approval Order, submitted under OMB number 3235-0671.<sup>476</sup> The prior Paperwork Reduction Act analysis incorporates any other potential Paperwork Reduction Act burdens for the Participants, because the existing Paperwork Reduction Act analysis accounts for initial and ongoing costs for, among other things, operating and maintaining the Central Repository, including the cost of systems and connectivity upgrades or changes necessary to receive and consolidate the reported order and execution information from Participants and their members, the cost to store data and make it available to regulators, the cost of monitoring the required validation parameters, and management of the Central Repository.<sup>477</sup> In addition, the Commission anticipates that each exchange and national securities association will file one Form 19b-4 filing to implement updated Compliance Rules. While such filings may impose certain costs on the exchanges, those burdens are already accounted for in the comprehensive Paperwork Reduction Act Information Collection submission for Form 19b-4.<sup>478</sup> The Commission does not expect the baseline number of 19b-4 filings to increase as a result of the Amendment to CAT, nor does it believe that the incremental costs exceed those costs used to arrive at the average costs and/

<sup>475</sup> The estimated 300 hours of Plan Processor staff time include 200 hours by a Senior Programmer, 40 hours by a Senior Database Administrator, 40 hours for a Senior Business Analyst, and 20 hours for an Attorney. The Commission estimates that the initial, one-time external expense for Participants will be \$113,800 = (Senior Programmer for 200 hours at \$386 an hour = \$77,200) + (Senior Database Administrator for 40 hours at \$379 an hour = \$15,160) + (Senior Business Analyst for 40 hours at \$305 an hour = \$12,200) + (Attorney for 20 hours at \$462 an hour = \$9,240).

<sup>476</sup> See CAT NMS Plan Approval Order, 81 FR 84911-43; see also OMB Control No. 3235-0671, 85 FR 37721 (June 23, 2020) (notice of submission of request for approval of extension).

<sup>477</sup> See CAT NMS Plan Approval Order, 81 FR 84918.

<sup>478</sup> See OMB Control No. 3235-0045 (Aug. 19, 2016), 81 FR 57946 (Aug. 24, 2016) (Request to OMB for Extension of Rule 19b-4 and Form 19b-4 PRA).

<sup>469</sup> This is based on FOCUS quarterly filings for 2023 Q1.

<sup>470</sup> See *supra* Part IV.B.

<sup>471</sup> See Proposing Release, at 14977.

<sup>472</sup> *Id.*

<sup>473</sup> See, e.g., SIFMA Letter, at 25; FIA PTG Letter, at 3; Virtu Letter, at 6.

<sup>474</sup> The Commission derives estimated costs associated with Plan Processor and Industry Member staff time based on per hour figures from the SIFMA Report, modified by Commission staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

or burdens reflected in the Form 19b-4 PRA submission.

#### b. Broker-Dealer Burdens

The Commission anticipates that certain Industry Members will have initial, one-time burdens and costs relating to the Amendment to CAT, to update systems and processes as necessary to capture and report use of the BFMM locate exception to CAT. The Commission has estimated these initial burdens and costs below.

The Amendment to CAT will impose an ongoing annual burden relating to, among other things, personnel time to monitor each broker-dealer's reporting of the required data and the maintenance of the systems to report the required data and implementing changes to trading systems that might result in additional reports to the Central Repository. However, the Commission estimates that the ongoing burden imposed by the Amendment to CAT related to reporting to the CAT is already accounted for in the existing information collections burdens associated with Rule 613 and the CAT NMS Plan Approval Order submitted under OMB number 3235-0671.<sup>479</sup> Specifically, the CAT NMS Plan Approval Order takes into account requirements on broker-dealer members to comply with the CAT NMS Plan, including the requirement to maintain the systems necessary to collect and transmit information to the Central Repository,<sup>480</sup> provides aggregate burden hour and external cost estimates for the broker-dealer data collection and reporting requirement of Rule 613, and did not quantify the burden hours or external cost estimates for each individual component of the broker-dealer's data collection and reporting responsibility.<sup>481</sup> The Amendment to CAT will not require any Industry Member to submit new reports to the CAT, but to add limited additional information to existing reports in certain circumstances for certain Industry

Members. The Commission does not believe that this will alter the estimates of ongoing burden and external costs in the existing Paperwork Reduction Act Analysis and the ongoing burden associated with these new collection requirements are accounted for in the existing Paperwork Reduction Act Analysis.

The Amendment to CAT will impose additional burdens on Industry Members that trade equity securities and rely upon or plan to rely upon the BFMM locate exception. Based on an analysis of data reported to the CAT in May 2023, and specifically the identification of all unique CAT Reporters that were identified as equity market makers (including different classes of market makers such as "designated" or "lead" market makers, and secondary liquidity providers), approximately 100 CAT Reporters will be subject to the new reporting obligation. Some broker-dealers that rely upon this exception may retain records regarding their eligibility for this exception for specific orders or for orders originated by specific desks or units of their business.

Regarding the obligation to report the BFMM locate exception information to the CAT, the Commission believes that it is appropriate to divide the 100 Industry Members, *i.e.*, the CAT reporters listed as equity market makers in CAT as of May 2023, that will be required to report this information into two categories: (i) Industry Members that report directly to the CAT; and (ii) Industry Members that use third-party reporting agents for CAT reporting. For purposes of this Paperwork Reduction Act analysis, the Commission estimates that of the 100 Industry Members that will be required to report this information, 58 Industry Members will be reporting this information directly to the CAT, and 42 Industry Members will be reporting this information through third-party reporting agents. The Commission believes this is a reasonable estimation because the majority of Industry Members that are identified as market makers in the CAT have developed their own systems and technology to report directly to the CAT. The Commission believes that the majority of market makers handle reporting themselves because they likely submit a sufficient number of reportable events. The Commission did not receive any comments regarding the estimated number of broker-dealers that would be required to report for the original receipt or origination of an order to sell an equity security whether the order is a short sale effected by a market maker in connection with bona-fide market

making activities in the security for which the exception in Rule 203(b)(2)(iii) of Regulation SHO is claimed, or about the estimated proportion of insourcing vs. outsourcing Industry Members. As such, the Commission is keeping the proportion of insourcing vs. outsourcing Industry Members the same as in the Proposing Release, but reflective of the estimated 100 broker-dealers rather than 104 broker-dealers from the Proposing Release.

The Commission estimates that the 58 insourcing Industry Members that report directly to the CAT will incur an initial, aggregate, one-time burden of 15,080 hours, or that each of these CAT Reporters will incur an initial, average one-time burden of 260 hours, and that each of these 58 insourcing Industry Members will incur an initial, aggregate, one-time external expense of approximately \$870,000 for software and hardware to facilitate reporting of the new data elements to CAT, or that each insourcing Industry Member will incur an initial, average one-time external expense of approximately \$15,000.<sup>482</sup> The Commission did not receive any comments about the cost and burden estimates for insourcing Industry members.

The Commission estimates that the 42 outsourcing Industry Members that use third-party reporting agents to report to the CAT will incur an initial, aggregate, one-time burden of 420 hours, or that each of these outsourcing Industry Members will incur an initial, one-time burden of 10 hours on average, and that these 42 outsourcing Industry Members will incur an initial, aggregate, one-time external expense of approximately \$42,000 for software and hardware to facilitate reporting use of the BFMM locate exception to CAT, or that each outsourcing Industry Member will incur an initial, average one-time external expense of approximately \$1,000.<sup>483</sup>

<sup>482</sup> The Commission is basing this figure on the estimated burden and external costs for a broker-dealer that handles orders subject to customer specific disclosures required by Rule 606(b)(3) to update their systems to capture the data and produce a report to comply with Rule 606. See *Disclosure of Order Handling Information*, Exchange Act Release No. 84528 (Nov. 2, 2018), 83 FR 58338, 58383 (Nov. 19, 2018). This is a reasonable proxy for estimating the burdens and costs associated with updating data capture systems for reporting purposes here because in both rulemakings broker-dealers were required to update in-house data reported for pre-existing reporting obligations.

<sup>483</sup> The Commission believes that the estimated burden and external costs for outsourcing Industry Members is reasonable because the burden on individual Industry Members should be significantly lower than insourcing Industry Members because of the difference in how these

<sup>479</sup> See CAT NMS Plan Approval Order, 81 FR 84911-43. While there is no recordkeeping requirement related to reporting use of the BFMM locate exception, brokers or dealers should be prepared to monitor for compliance with conditions and maintain records documenting such compliance. See Regulation SHO Adopting Release, 48011 n.27 ("As with any rule, broker-dealers relying on [an] exception should be prepared to monitor for compliance with its conditions, and maintain records documenting such compliance."). There would be a minimal additional ongoing burden for such brokers or dealers to record that they have determined such eligibility for each transaction reported to CAT.

<sup>480</sup> See, *e.g.*, CAT NMS Plan Approval Order, 81 FR 84930.

<sup>481</sup> See CAT NMS Plan Approval Order, 81 FR 84930.

The Commission did not receive any comments about the cost and burden estimates for outsourcing Industry Members.

As discussed above, the Commission continues to believe that the ongoing burden associated with reporting to the

CAT is already accounted for in the existing information collections burdens associated with Rule 613 and the CAT NMS Plan Approval Order submitted under OMB number 3235–0671.<sup>484</sup> Because this information is already collected and maintained by market

makers that engage in equity trading and claim the exception pursuant to 17 CFR 240.17a–3 (“Rule 17a–3 of the Exchange Act”), there is no new ongoing burden associated with collecting or recording the information necessary to effectuate CAT reporting of this new element.

**PRA TABLE 3—SUMMARY OF ESTIMATED INITIAL ONE-TIME BURDENS RELATED TO CAT BFMM AMENDMENT**

Name of information collection	Type of burden	Number of entities impacted	Initial one-time hourly burden	Aggregate one-time hourly burden	Initial one-time cost	Aggregate one-time cost
CAT: Central Repository—Short Sale Data .....	Recordkeeping .....	25	5.2	130	\$4,552	\$113,800
CAT: Reporting of Bona Fide Market Making Exception—Insourcers.	Direct Report .....	58	260	15,080	15,000	870,000
CAT: Reporting of Bona Fide Market Making Exception—Outsourcers.	Third Party Disclosure .....	42	10	420	1,000	42,000

#### *D. Collection of Information Is Mandatory*

The information collections are required under Rule 13f–2 and Form SHO for Managers that meet the Reporting Threshold and the Amendment to CAT for Plan Participants to collect and process new CAT reportable information and for CAT Industry Members that engage in certain short sale activity.

#### *E. Retention Period of Recordkeeping Requirement*

Pursuant to 17 CFR 240.17a–4(b)(7) (“Exchange Act Rule 17a–4(b)(7)”), a broker-dealer must preserve for a period of not less than three years, the first two years in an easily accessible place, all written agreements (or copies thereof) entered into by such member, broker or dealer relating to its business as such, including agreements with respect to any account.

Pursuant to 17 CFR 240.17a–4(e)(7), a broker-dealer must maintain and preserve in an easily accessible place each compliance, supervisory, and procedures manual, including any updates, modifications, and revisions to the manual, describing the policies and practices of the member, broker or dealer with respect to compliance with applicable laws and rules, and supervision of the activities of each natural person associated with the member, broker or dealer until three years after the termination of the use of the manual.

Pursuant to 17 CFR 240.17a–1, every national securities exchange and national securities association shall keep and preserve at least one copy of all documents, including all

correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such and in the conduct of its self-regulatory activity for a period of not less than five years, the first two years in an easily accessible place, subject to the destruction and disposition provisions of 17 CFR 240.17a–6 (“Rule 17a–6”).

#### *F. Confidentiality*

As discussed above, Rule 13f–2 requires certain Managers to file monthly in EDGAR, on Form SHO, certain short sale volume data and short interest position data. However, the Commission will aggregate the information reported by Managers on Form SHO prior to publication to protect the identity of reporting Managers.

To the extent that the Commission receives—through its examination and oversight program, through an investigation, or by some other means—records or disclosures from a broker-dealer that relate to or arise from the Rule that are not publicly available, such information will be kept confidential, subject to the provisions of applicable law.

With respect to the Amendment to CAT, Rule 613, and the CAT NMS Plan, information collected and electronically provided to the Central Repository will only be available to the national securities exchanges, national securities association, and the Commission. Further, the CAT NMS Plan includes policies and procedures designed to ensure the security and confidentiality of all information submitted to the Central Repository, and to ensure that

all SROs and their employees, as well as all employees of the Central Repository, shall use appropriate safeguards to ensure the confidentiality of such data. The Commission will receive confidential information pursuant to this collection of information, and such information will be kept confidential, subject to the provisions of applicable law.

### **VIII. Economic Analysis**

#### *A. Introduction*

The Commission is adopting a new rule and related form as well as an amendment that introduce new reporting requirements in connection with short sales. Rule 13f–2, Form SHO, and the amendment to CAT (collectively, the “adoptions”) will improve the transparency of short selling activity to regulators, market participants and the investing public. The data provided by these adoptions will close informational gaps in the currently available data, which in turn will benefit market participants and help foster fair and orderly markets. The adoptions will also improve regulatory oversight and enhance regulators’ examination of market behavior and recreation of significant market events. These improvements may, in turn, discourage market manipulation to the extent that it occurs.<sup>485</sup>

The Commission is mindful of the economic effects that may result from the adoptions of Rule 13f–2, Form SHO, and the amendment to CAT, including the benefits, costs, and the effects on efficiency, competition, and capital

firms report to the CAT. Outsourcing Industry Members will not be required to change internal CAT reporting systems, but instead will be responsible for making any updates necessary for CAT reporting agents to report this information to the CAT. The outsourcing Industry Members will

have external costs associated with paying CAT reporting agents for any additional fees relating to the change, but because CAT reporting agents can report on behalf of numerous outsourcing Industry Members at the same time, the costs of any updates

to their systems can be distributed amongst outsourcing Industry Members.

<sup>484</sup> See *supra* n.476.

<sup>485</sup> See *infra* Part VIII.C.1 for additional discussion on potential market manipulation.

formation.<sup>486</sup> The Commission recognizes that the adoptions might impose significant compliance costs on market participants. Requiring Managers<sup>487</sup> to report large positions and short sale activity will likely impose significant initial and ongoing costs on Managers. The amendment to CAT will also impose compliance costs on broker-dealers. The Commission is cognizant of these costs and has modified the Proposals in a way that is intended to reduce the burdens incurred by market participants without sacrificing the transparency that is expected to result from the adoption of the Proposals. Modifications from the proposed rule and form that are likely to reduce reporting costs to Managers relative to the Proposals include: revising a key reporting threshold based on a monthly average calculation instead of a daily calculation, which is expected to reduce the number of reporting entities; streamlining the reporting requirements of Forms SHO; not adopting the “buy to cover” CAT reporting requirement; and not adopting Rule 205. Overall, the Commission has sought to balance the costs of the adoptions against the benefit to transparency that will be provided to regulators and the public.

The Commission recognizes that the adoptions may lead to tradeoffs in market quality, with a risk of negative effects on price efficiency. A potential reduction in market manipulation through improved regulatory oversight stemming from the adoptions may have a positive impact on market quality. Furthermore, the adoptions will provide market participants with improved transparency into short selling activity, which might also lead to improved price efficiency. On the other hand, Rule 13f-2 and the disclosures Form SHO

requires will increase the costs and risks of implementing large short positions, which might reduce price efficiency by reducing short selling and the positive effects of such short selling. Furthermore, public disclosure of information resulting from Rule 13f-2 and Form SHO might facilitate short squeezes, which in turn might also reduce market quality.<sup>488</sup>

The Commission has considered the economic effects of the adoptions and wherever possible, has quantified their likely economic effects. The Commission is providing both a qualitative assessment and quantified estimates of the adopted rule and CAT amendment’s economic effects where feasible. The Commission has received comments on the Proposals and has addressed commenters’ concerns with the economic analysis. The Commission has incorporated data and other information to assist it in the analysis of the economic effects of the adoptions. However, as explained in more detail below, because the Commission does not have, and in certain cases does not believe it can reasonably obtain data that may inform the Commission on certain economic effects, the Commission is unable to quantify certain economic effects. Further, even in cases where the Commission has some data, quantification is not practicable due to the number and type of assumptions necessary to quantify certain economic effects, which render any such quantification unreliable. Our inability to quantify certain costs, benefits, and effects does not imply that the Commission believes such costs, benefits, or effects are not significant.

The Commission is adopting the Manager reporting and disclosures to implement the statutory mandate of section 929X of the Dodd-Frank Act. Accordingly, many of the costs and benefits of Rule 13f-2 and Form SHO stem from the Commission’s implementation of the statutory mandate. In addition, the Commission is

exercising discretion in its design and implementation of Rule 13f-2 and Form SHO and recognizes that this discretion has economic effects. Specifically, the Commission is using this discretion to ensure that the disclosures are additive to currently available data and will be useful to both market participants and regulators, with a focus on addressing data limitations exposed by market events, especially the market volatility in January 2021. Additionally, the Commission is adopting a Proposed CAT amendment in order to address such data limitations outside of the context of the statutory mandate of section 929X.

The Commission has access to several sources of data that provide some short selling information, one of which is CAT. CAT data can be used by regulators for regulatory purposes, including analysis and reconstruction of broad-based market events; in market analysis in support of regulatory decisions; in market surveillance, investigations, and other enforcement activities. At times, these regulatory functions can benefit from information on short sale positions of market participants and how these positions change over time. CAT does not include data that can be used to track such positions, and as discussed further above, Commission staff experience in reconstructing the events of January 2021 provided insights into the challenges of using existing CAT data for this purpose. Other existing data sources, including public data sources, are also limited for these purposes as well as for informing members of the public and market participants. Specifically, current data fail to distinguish the type of trader engaged in short selling or identify individual short positions, as well as the fluctuation in those positions, even for regulatory use. Furthermore, current data do not track the use of the bona fide market maker exemption when short selling without the “locate”.<sup>489</sup> The adopted rule will serve to increase the Commission’s awareness and understanding of short sale activity by Managers with large short sale positions by requiring reporting of their reliance on the bona fide market maker locate exception. The adopted amendment will serve the Commission in its regulatory capacity.

<sup>489</sup> See *supra* note 10 for description of the locate requirement of Rule 203 of Regulation SHO.

<sup>486</sup> Exchange Act section 3(f) requires the Commission, when it is engaged in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. See 15 U.S.C. 78c(f). In addition, Exchange Act section 23(a)(2) requires the Commission, when making rules pursuant to the Exchange Act, to consider among other matters the impact that any such rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. See 15 U.S.C. 78w(a)(2).

<sup>487</sup> See *infra* note 506 and the accompanying discussion in the text on the definition of “Manager”.

<sup>488</sup> See *infra* Part VII.C.1. The Commission expects that for many securities, a limited number of Manager positions may surpass the reporting requirement thresholds. Given the eventual public release of the aggregate position sizes, there is a risk that other market participants will be able to potentially identify the Managers with large short positions and orchestrate short squeeze efforts against them (should they seem vulnerable against a short squeeze). Nevertheless, the Commission maintains the ability of identifying such behavior using CAT data, which could mitigate initiation of such behavior.

Existing data sources fail to accurately represent economic short positions of Managers due to several limitations.<sup>490</sup> While FINRA publishes aggregate short interest on a bimonthly basis, these data do not reflect the timing with which short positions expand or shrink in the two-week period between reporting dates.<sup>491</sup> Some other data sources report daily short sale volume<sup>492</sup> without distinguishing between short sale transactions that affect economic short positions and short sale transactions meant for purposes such as liquidity provision or hedging of long positions. As such, these existing short volume

data may not be combined with the bimonthly short interest data to construct aggregate daily short positions of any particular Manager. Securities lending data, bolstered by the recently adopted 17 CFR 240.10c-1a (“Exchange Act Rule 10c-1a”), will offer a clearer picture of the relationship between short interest and securities being lent;<sup>493</sup> however, this does not allow the Commission or the public to observe and monitor large short positions of Managers.<sup>494</sup> No existing data identify short positions of individual traders. Even though some regulatory data, *e.g.*, CAT data, identify short transactions of individual traders, they may not be utilized to reconstruct short positions because economic short positions may change in the absence of any short sale transactions. Thus, the Commission is adding to the existing data sources to further illuminate the short selling market.<sup>495</sup>

These data limitations inhibit regulators from performing functions such as market surveillance and market reconstruction. For example, the

Commission does not have regular access to information about Managers who hold large short positions, even if those positions are held for a long period of time. If the positions are sufficiently large and prices move against the positions, the Commission currently cannot efficiently assess the risk that these positions impose on the market more broadly.<sup>496</sup> Further, with existing data, the Commission may have difficulty reconstructing significant market events, thereby inhibiting the Commission from quickly understanding market events and providing efficient market oversight.

### B. Baseline

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the final rule are measured consists of the current state of the equity market, current practices of Managers and broker-dealers, and the current regulatory framework. The economic analysis considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the final rule are measured.<sup>497</sup>

<sup>496</sup> See *infra* Part VIII.C.1 for discussion of how the Commission might use Form SHO data for understanding market events.

<sup>497</sup> See, *e.g.*, *Nasdaq v. SEC*, 34 F.4th 1105, 1111–15 (D.C. Cir. 2022). This approach also follows SEC staff guidance on economic analysis for rulemaking. See Staff’s “Current Guidance on Economic Analysis in SEC Rulemaking” (March 16, 2012), available at [https://www.sec.gov/divisions/riskfin/rsfi\\_guidance\\_econ\\_analy\\_secrulemaking.pdf](https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf) (“The economic consequences of proposed rules (potential costs and benefits including effects on efficiency, competition, and capital formation) should be measured against a baseline, which is the best assessment of how the world would look in the absence of the proposed action.”); *Id.* at 7 (“The baseline includes both the economic attributes of the relevant market and the existing regulatory structure.”). The best assessment of how the world would look in the absence of the proposed or final action typically does not include recently proposed actions, because doing so would improperly assume the adoption of those proposed actions.

<sup>490</sup> One commenter stated that the data reported from Form SHO would only provide very limited additional relevant insight relative to FINRA short interest data. See SBAI Letter at 2. The Commission reiterates that Form SHO data are additive to existing data, including FINRA short interest data. More specifically, publicly released Form SHO data will indicate which equities have large short positions held by institutional investment managers. This is different from seeing large short interest, which may indicate many smaller positions, including those held by retail investors. Large short positions accumulated by Managers are often based on fundamental research, in contrast to smaller positions which more likely stem from hedging or arbitrage strategies. Therefore, information on the magnitude of aggregate large short positions, especially in relation to overall short interest, may highlight the degree to which short sales of a particular security are concentrated among Managers guided by fundamental research relative to hedging or arbitrage strategies. Thus, Form SHO will provide novel information on short sale behavior relative to other short sale data sources.

<sup>491</sup> FINRA requires all members to report settled short positions in equities of all customer and proprietary accounts twice per month. According to the schedule it has adopted, FINRA publishes the short sale data about a week after each reporting due date. See, *e.g.*, Short Interest Reporting, available at <https://www.finra.org/filing-reporting/regulatory-filing-systems/short-interest>.

<sup>492</sup> FINRA reports daily off-exchange short sale volume data that aggregate, for each exchange-listed security, short sale transactions reported to a FINRA TRF or ADF. See *Short Sale Volume Data*, FINRA, available at <https://www.finra.org/finra-data/browse-catalog/short-sale-volume-data>. Registered exchanges also report daily short sale volume aggregated at the security level, often charging a fee. See, *e.g.*, *TAQ Group Short Sales & Short Volume*, New York Stock Exchange, available at <https://www.nyse.com/market-data/historical/taq-nyse-group-short-sales>.

<sup>493</sup> Specifically, one will be able to look at a particular securities lending data to see if changes in short interest correspond to many smaller lending transactions or a smaller quantity of large securities loans, which may indicate market sentiment towards the particular company. However, it is impossible to discern whether these securities loans are being borrowed by numerous short sellers or instead concentrated among a small number of large short sellers. This information will be covered by Rule 13f-2 if the short seller(s) crosses the Report Thresholds. In addition, unlike FINRA short interest data, Rule 13f-2 data will incorporate Managers that are not FINRA members. Furthermore, while fees are required to access exchanges’ short volume and short transaction data, market participants will not have to pay a fee to view publicly released Form SHO data.

<sup>494</sup> Unlike the Commission, however, the public will observe anonymized, aggregated data covering gross short sale positions of Managers that exceed at least one of the Reporting Thresholds.

<sup>495</sup> One commenter stated that Form SHO data collected by the Commission would not fully capture the short selling market. See SBAI Letter at 3. The Commission has not stated that Form SHO data provides a complete perspective of the short selling market. However, Form SHO data will reveal large short positions of Managers, which is not readily available from any other data source.

Several commenters requested the Commission consider interactions between the economic effects of the proposed rule and other recent Commission proposals.<sup>498</sup> Commenters indicated there could be interactions between this rulemaking and five proposals<sup>499</sup> that have since been adopted: Rule 10c-1a,<sup>500</sup> Beneficial Ownership Reporting,<sup>501</sup> Private Fund

<sup>498</sup> See, e.g., MFA Letter 2, at 3–4 (“We believe the Commission should take into account the sheer scope of all its recently proposed rules when determining whether to adopt any final rules or in setting compliance dates for any of the new requirements”); Eric J. Pan, President and CEO, and Susan Olson, General Counsel, Investment Company Institute (Aug. 17, 2023), at 3, available at <https://www.sec.gov/comments/s7-04-22/s70422-246959-547222.pdf> (“ICI Letter 2”) (“we request that the Commission . . . publish a thorough analysis of the cumulative effects of the Interconnected Rules that accounts for interconnections and dependencies among them”).

<sup>499</sup> *Reporting of Securities Loans*, Release No. 34-93613 (Nov. 18, 2021), 86 FR 69802 (Dec. 8, 2021) (see Jiří Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association Ltd (Aug. 11, 2023), at 4, available at <https://www.sec.gov/comments/s7-08-22/s70822-243880-514482.pdf>) (“AIMA Letter 2”); *Modernization of Beneficial Ownership Reporting*, Release No. 33-11030 (Feb. 10, 2022), 87 FR 13846 (Mar. 10, 2022) (see MFA Letter 2, at 3; Jennifer Han, Executive Vice President, Chief Counsel and Head of Regulatory Affairs, Managed Funds Association, and National Association of Private Fund Managers (July 21, 2023), at 14–15, available at <https://www.sec.gov/comments/s7-08-22/s70822-233179-486723.pdf>) (“NAPFM Letter”); ICI Letter 2, at 7 n. 13); *Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers*, Release No. IA-5950 (Jan. 26, 2022), 87 FR 9106 (Feb. 17, 2022) (see MFA Letter 2, at 3; NAPFM Letter 10–12); *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, Release No. 1A-5955 (Feb. 9, 2022), 87 FR 16886 (Mar. 24, 2022) (see MFA Letter 2, at 3; NAPFM Letter 10–12); *Shortening the Securities Transaction Settlement Cycle*, Release No. 34-94196 (Feb. 9, 2022), 87 FR 10436 (Feb. 24, 2022) (see ICI Letter 2 at 7 n. 13).

<sup>500</sup> See *Reporting of Securities Loans*, Release No. 34-98737 (Oct. 13, 2023) (“Rule 10c-1a”). The securities loan reporting rule requires any person who loans a security on behalf of itself or another person to report information about securities loans to a registered national securities association (namely, FINRA) and requires FINRA to make certain information it receives available to the public. The covered persons will include market intermediaries, securities lenders, broker-dealers, and reporting agents. The final rule’s compliance dates require that FINRA propose its rules within four months of the effective date of final Rule 10c-1a, or approximately May 2024, and finalize them no later than 12 months after the effective date of final Rule 10c-1a, or approximately January 2025; that FINRA implement data retention and availability requirements for reporting 24 months after the effective date of final Rule 10c-1a, or approximately January 2026; that covered persons report Rule 10c-1a information to FINRA starting on the first business day thereafter; and that FINRA publicly report Rule 10c-1a information within 90 calendar days thereafter, or approximately May 2026. See Rule 10c-1a, Part VIII.

<sup>501</sup> See *Modernization of Beneficial Ownership Reporting*, Release No. 33-11253 (Oct. 10, 2023) (“Beneficial Ownership Reporting”). Among other

Advisers,<sup>502</sup> Settlement Cycle,<sup>503</sup> and the May 2023 SEC Form PF Amending Release.<sup>504</sup> These rules were not included as part of the baseline in the Proposing Release because they were not adopted at that time. In response to commenters, this economic analysis considers potential economic effects arising from any overlap between the compliance period for the final amendments and each of these recently adopted rules.<sup>505</sup>

things, the amendments generally shorten the filing deadlines for initial and amended beneficial ownership reports filed on Schedules 13D and 13G, and require that Schedule 13D and 13G filings be made using a structured, machine-readable data language. The new disclosure requirements and filing deadlines for Schedule 13D are effective 90 days after publication in the **Federal Register**. The new filing deadline for Schedule 13G takes effect on September 30, 2024, and the rule’s structured data requirements have a one-year implementation period ending December 18, 2024. See Beneficial Ownership Reporting, Part II.G.

<sup>502</sup> See *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, Release No. IA-6383 (Aug. 23, 2023), 88 FR 63206 (Sept. 14, 2023) (“Private Fund Advisers Adopting Release”). The Private Fund Advisers Adopting Release includes new rules designed to protect investors who directly or indirectly invest in private funds by increasing visibility into certain practices and restricting other practices, along with amendments to the Advisers Act books and records rule and compliance rule. The amended Advisers Act compliance provision for registered investment advisers has a November 13, 2023 compliance date. The compliance date is March 14, 2025 for the rule’s quarterly statement and audit requirements for registered investment advisers with private fund clients. For the rule’s adviser-led secondaries, restricted activity, and preferential treatment requirements, the compliance date is September 14, 2024 for larger advisers and March 14, 2025 for smaller advisers. See Private Fund Advisers Adopting Release, Parts IV, V.I.C.1.

<sup>503</sup> See Settlement Cycle Adopting Release. Settlement Cycle Adopting Release shortens the standard settlement cycle for most broker-dealer transactions from two business days after the trade date to one business day after the trade date (“T+1”). With certain exceptions, the rule has a compliance date of May 28, 2024. See Settlement Cycle Adopting Release, Parts VII, VII.B.3.

<sup>504</sup> See *Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting*, Release No. IA-6297 (May 3, 2023), 88 FR 38146 (June 12, 2023) (“May 2023 SEC Form PF Amending Release”). The Form PF amendments require large hedge fund advisers and all private equity fund advisers to file reports upon the occurrence of certain reporting events. For new sections 5 and 6 of Form PF, the compliance date is December 11, 2023; for the amended, existing sections, it is June 11, 2024. See May 2023 SEC Form PF Amending Release, Part II.E.

<sup>505</sup> In addition, commenters indicated there could also be overlapping compliance costs between the final amendments and proposals (or in the case of Release No. 34-93784, a portion of the proposal) that have not been adopted. *Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies*, Release No. 33-11028 (Feb. 9, 2022), 87 FR 13524 (Mar. 9, 2022) (see MFA Letter 2, at 3; NAPFM Letter 18–19); *Outsourcing by Investment Advisers*, Release No. IA-6176 (Oct. 26, 2022), 87 FR 68816 (Nov. 16, 2022) (see MFA Letter 2, at 3; NAPFM Letter 17–18); *Enhanced Disclosures by*

## 1. Institutional Investment Managers

The potential universe of persons who meet the definition of Manager is broad and diverse. Exchange Act section 13(f)(6)(A) defines the term “institutional investment manager” as “includ[ing] 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.”<sup>506</sup> Exchange Act section 3(a)(9) states that “[t]he term ‘person’ means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.” “‘Company’ means a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under title 11 of the United States Code or similar official or any liquidating agent for any of the foregoing, in his capacity as such.”<sup>507</sup> As a result, Managers exercising discretion over the accounts of others include but are not limited to

*Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices*, Release No. 33-11068 (May 25, 2022), 87 FR 36654 (June 17, 2022) (see MFA Letter 2, at 3; NAPFM Letter 19–20); *Safeguarding Advisory Client Assets*, Release No. IA-6240 (Feb. 15, 2023), 88 FR 14672 (Mar. 9, 2023) (see MFA Letter 2, at 3; NAPFM Letter 9–10); *Prohibition Against Fraud, Manipulation, or Deception in Connection With Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, Release No. 34-93784 (Dec. 15, 2021), 87 FR 6652 (Feb. 4, 2022) (see MFA Letter 2, at 3; NAPFM Letter 13–14; AIMA Letter 2, at 3; ICI Letter 2, at 7 n. 13); *Prohibition Against Conflicts of Interest in Certain Securitizations*, Release No. 33-11151 (Jan. 25, 2023), 88 FR 9678 (Feb. 14, 2023) (see MFA Letter 2, at 3; NAPFM Letter at 21–22); *Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer*, Release No. 34-94524 (Mar. 28, 2022), 87 FR 23054 (Apr. 18, 2022) (see NAPFM Letter 12–13); *Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities*, Release No. 34-95763 (Sept. 14, 2022), 87 FR 64610 (Oct. 25, 2022) (see NAPFM Letter 16–17); *Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities*, Release No. 34-94062 (Jan. 26, 2022), 87 FR 15496 (Mar. 18, 2022) (see NAPFM Letter 22–23). To the extent those proposals are adopted, the baseline in those subsequent rulemakings will reflect the existing regulatory requirements at that time.

<sup>506</sup> See also Exchange Act section 3(a)(35) defining when a person exercises “investment discretion” with respect to an account.

<sup>507</sup> See section 2(a)(8) of the Investment Company Act. The term “company” in the Exchange Act “ha[s] the same meaning[] as in the Investment Company Act of 1940.” Exchange Act section 3(a)(19).



investment advisers exercising investment discretion over client assets, including investment company assets such as mutual funds, ETFs, and closed-end funds; banks and bank trust corporations offering investment management services; pension fund managers; firms, including broker-dealers and insurance companies, managing corporate or employee investment assets; and individuals exercising investment discretion over the accounts of others. Also, as a result of the definition of Manager, the set of Managers excludes natural persons buying and selling securities only for their own account but does include natural persons exercising discretion over the account of another person.<sup>508</sup>

Notwithstanding the broad statutory definition of Manager, it is the Commission's understanding that only a fraction of Managers is believed to engage in short selling and fewer still engage in any substantial short selling. Registered broker-dealers' market making operations, for example, engage in short selling but, with the exception of option market makers, generally do not hold large positions overnight. The Commission is also aware, for example, that advisers to both hedge funds and registered investment companies engage in short selling to varying degrees. However, with the exception of hedge funds, institutional investors are viewed as "largely absent" from the short selling portion of the financial markets.<sup>509</sup> Using actual investment strategies employed by registered investment companies<sup>510</sup> as a proxy for

the number of Managers in the public fund markets engaged in short selling, the number of such Managers is likely to be relatively small. A Division of Economic and Risk Analysis White Paper survey of all mutual fund Form N-SAR filings in 2014 found that "[w]hile 64 percent of all funds were allowed to engage in short selling, only 5 percent of all funds actually did so."<sup>511</sup> As of December 2022, there were 7,164 registered investment companies with total equity positions valued at approximately \$14.7 trillion. Of those, 138 funds had short positions with a total short position value of approximately \$15 billion. Of the funds with short positions, only 15 funds held positions equal to or greater than \$10 million.<sup>512</sup> Additionally, according to an analysis of publicly available Form PF data, approximately sixteen percent of single-strategy hedge funds employ strategies involving short selling.<sup>513</sup>

While information about Managers' investments other than from funds managed by investment advisers is limited, the Commission understands that such other Managers, other than options market makers due to their

number of registered investment companies and their total net assets are based on an analysis of Form N-CEN filings as of July 31, 2023. For open-end management funds, closed-end funds, and management company separate accounts, total net assets equals the sum of monthly average net assets across all funds in the sample during the reporting period. See Item C.19.a (Form N-CEN). For UITs, we use the total assets as of the end of the reporting period, and for UITs with missing total assets information, we use the aggregated contract value for the reporting period instead. See Item F.11 and F.14.c in Form N-CEN.

<sup>511</sup> Daniel Deli *et al.*, Use of Derivatives By Registered Investment Companies at 8, *DERA White Paper* (2015), available at <https://www.sec.gov/files/derivatives12-2015.pdf>.

<sup>512</sup> This is based on an analysis of data provided by registered investment companies to the Commission on Form N-PORT filings received through July 31, 2023.

<sup>513</sup> As of 2022 Q4, there are 1,107 hedge funds out of 6,553 Equity Single-Strategy hedge funds (excluding fund-of-funds hedge funds) that employ short selling in an Long/Short and Short Bias strategy. Assets under management (AUM) in these types of hedge funds total approximately \$1.165 trillion. 2022 Q2 Private Fund Statistics, Division of Investment Management Analytics Office, available at <https://www.sec.gov/divisions/investment/private-funds-statistics.shtml>. Data includes both U.S. and non-U.S. domicile hedge funds managed by SEC-registered investment advisers with at least \$150 million in private fund assets under management. The data do not include hedge funds that were classified as multi-strategy on Form PF. These hedge funds could employ short selling as part of their multi-strategy. Data for non-U.S. domicile hedge funds with an equity short-bias strategy is not publicly available for 2022 Q2. In this case the last publicly available values were used (7 funds with a total AUM of \$1 billion) from 2019 Q3. As of the end of 2021, hedge fund assets totaled approximately \$4 trillion. Global Hedge Fund Industry Assets Top \$4 Trillion for the First Time, Reuters (Jan. 20, 2022) (retrieved from Factiva database).

routine use of hedging transactions, do not frequently establish short positions that would be large enough to be subject to the rule's reporting requirement.<sup>514</sup> One possible proxy for the number of Managers that might potentially have a reporting obligation is a fraction of the number of Managers reporting positions on Form 13F because such persons by definition manage accounts holding section 13(f) securities having an aggregate fair market value of at least \$100 million, making such Managers more likely to have the resources to engage in short selling that exceeds Rule 13f-2's thresholds. As of March 31, 2023, 8,551 Managers<sup>515</sup> with investment discretion over approximately \$38.79 trillion reported holdings on Form 13F in Section 13(f) securities.<sup>516</sup> The Commission also believes that registered investment advisers, particularly those managing hedge funds, are the primary Managers likely to be affected by Rule 13f-2. Though the Commission lacks data to quantify the exact number affected parties, the Commission estimates that the total number of Managers with reporting obligations will be between 252 and 1,000.<sup>517</sup>

## 2. Short Selling

Short selling is a widely used market practice, which allows investors to

<sup>514</sup> For example, according to Molk and Partnoy "insurance companies generally are not active short sellers. Short selling by insurance companies is used almost exclusively to hedge positions, and generally is not used with respect to equity positions at all." *Supra* note 509, at 850. See also Molk and Partnoy discussion about banks and trusts. "Trust administrators . . . have a history of adopting conservative investment strategies. Although shorting can be used to reduce risk when matched with similar long positions, using short selling as an income generation tool is not consistent with the overall conservative investment tradition." *Id.* at 854.

<sup>515</sup> A portion of these filings are Form 13Fs filed to declare that the filer's holdings are reported on another filer's Form 13F. Thus, not all 8,551 Managers' Form 13Fs represent unique holdings.

<sup>516</sup> The statistic is computed by the Commission from data filed on Form 13F.

<sup>517</sup> See *supra* Part VII.B.1 for more information on the estimates of how many Managers would have reporting obligations. The Commission estimated the number of reporting Managers using the short sale activity of Managers that submitted Form SH. Only Managers that exercised investment discretion over accounts with aggregate fair market values of at least \$100,000,000 in securities described in Rule 13f-1(c) under the Exchange Act, and effected short sales of those securities, were required to file Form SH. Given that Managers included in the Form SH data may be a subset of Managers with obligations under Rule 13f-2, the estimate of 252 Managers is likely lower than the number who will ultimately report Form SHO. However, the Commission lacks data to better estimate the universe of Managers with obligations under 13f-2. See also *infra* Part VIII for a discussion of the applicability of Form SH data to estimating the number of Managers affected by Rule 13f-2.

<sup>508</sup> To the extent that a natural person exercising discretion over the account of another person has a short position exceeding the thresholds, that natural person would be subject to the costs associated with Rule 13f-2 and the Form SHO. We expect such a natural person would likely use the fillable web form provided by EDGAR to input Form SHO disclosures. Few Managers that are natural persons would be likely to have short positions large enough to exceed the threshold. See *infra* Part VIII.C.6 for more information on Managers' costs.

<sup>509</sup> Peter Molk Frank Partnoy, *Institutional Investors as Short Sellers?*, 99 B.U. L. Rev. 837, 839 (2019). Molk and Partnoy's paper "identifies] the regulatory and other barriers that keep key categories of institutions, specifically, mutual funds, insurance companies, pension funds, banks, sovereign wealth funds, endowments, and foundations, from acquiring significant short positions." *Id.* at 844.

<sup>510</sup> As of Dec. 2021, there were 9,050 mutual funds (excluding money market funds) with approximately \$22,652 billion in total net assets, 2,819 ETFs organized as an open-end fund or as a share-class of an open-end fund with approximately \$5,910 billion in total net assets, 680 registered closed-end funds with approximately \$363 billion in total net assets, 701 unit investment trusts with approximately \$2,184 billion in total net assets, and 15 variable annuity separate accounts registered as management investment companies on Form N-3 with \$237 billion in total net assets. Estimates of the

profit if an asset declines in value or to hedge risks. Market participants can build an economic short position using traditional means (*i.e.*, borrowing shares and selling them into the market to buy back later) or they can gain short exposure using derivatives. This section provides an overview of the current state of obtaining short exposure to equities and the different means of short selling—*i.e.*, traditional means and using derivatives.

#### a. Short Selling Equities

A short sale is 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.<sup>518</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>519</sup> To short sell a stock, the short seller borrows shares of a stock from a lender—typically a long-term investor such as a mutual fund or pension fund—and sells those shares into the market. Later, the short seller purchases the same number of shares and returns them to the lender. The profit on the transaction for the short seller is the difference between the price at which the shares were initially sold and the price at which the investor re-purchased the shares—less any fees such as securities lending fees. If the price of the stock goes down then this difference will be positive and the short seller will make money. Short selling contributes to price efficiency when short sellers trade to incorporate negative information into stock prices.

In addition to short selling based on negative sentiment, market participants also short sell to hedge existing positions. Hedging is a particularly potent motive to short sell a stock for options market makers who can hedge the risk of writing a call option by short

selling the underlying stock in the stock market. Other investors use short selling to hedge out an unwanted component of a stock's return. For example, an investor who wants to buy a particular stock to trade on stock specific information but does not want to expose itself to industry risk can hedge industry risk by short selling an industry index ETF while purchasing the underlying security. Market makers also use short selling extensively to maintain two sided quotes in the temporary absence of inventory. Lastly, traders may use short selling as part of algorithmic trading strategies attempting to benefit from temporary pricing anomalies. While short selling to trade on information or to hedge generally results in short positions that are held for some time, registered broker-dealers engaged in market making operations and algorithmic technical traders generally close their positions by the end of the day and thus their short positions generally do not show up in existing measures of short interest.<sup>520</sup>

Short selling generally entails more risk than holding a long position. At worst, a buyer of a long position can lose its entire investment. This is not true for a short seller. If the stock price increases from the short sale price, the investor loses money and since prices could potentially rise indefinitely, the short seller could lose more than the value of its original investment. Additionally, margin requirements for short selling are typically 150 percent—including the proceeds of the short sale plus an additional 50 percent of the value of the short position.<sup>521</sup> If the stock price goes up, the investor may receive a margin call, which would require the investor to commit additional assets to meet margin requirements. To protect itself from losses, if an investor is unable to meet margin requirements, the broker-dealer may close the short position at a significant loss to the short seller. These dynamics can make it difficult for

investors to maintain short positions in highly volatile stocks.

Short selling is facilitated by the securities lending market. Borrowing shares generally occurs two days after the short sale is executed. This is because stock market transactions normally settle two business days after the transaction occurs, while securities lending transactions settle on the same day.<sup>522</sup> Consequently, a short seller (or its broker-dealer) will gauge the ability to borrow shares prior to executing the short sale, referred to as obtaining a “locate,” but would actually borrow the share on the day that it is required to deliver the share to settle the stock market transaction.

Short selling is prevalent in equity markets in general. A common ratio used to capture the amount of short selling is the short interest ratio, which measures the fraction of shares sold short at a given point in time divided by the total shares outstanding for that security. Figure 1 below presents the time series average for short interest outstanding for equities with different characteristics. This Figure shows that short interest tends to be higher for small-cap stocks than for mid- or large-cap stocks.<sup>523</sup>

Another way to measure the prevalence of short selling in financial markets is by analyzing the fraction of transactions that involve a short seller. Short sellers are involved in nearly 50 percent of trading volume, while only about 2 percent of shares outstanding are held short in the U.S. equity markets.<sup>524</sup> This average volume of short selling tends to be much higher than the typical changes in short interest,<sup>525</sup> suggesting that a significant fraction of short selling volume is reversed very quickly. Such short selling is indicative of the fact that short selling is a key component of modern market making strategies and technical algorithmic trading.<sup>526</sup>

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<sup>518</sup> See Rule 200(a) of Regulation SHO, 17 CFR 242.200(a). See also Regulation SHO Adopting Release.

<sup>519</sup> One commenter supported this statement, stating that short selling provides liquidity and is an important hedging tool. See SBAI Letter at 2.

<sup>520</sup> See *infra* Part VIII.B.4.i for a discussion of existing short interest data.

<sup>521</sup> Regulation T specifies that in most situations margin requirements for equity short sales must be 150%. See 12 CFR 220.12.

<sup>522</sup> On Feb. 15, 2023, the Commission adopted a rule to shorten the settlement cycle to one business day; compliance by broker-dealers will be required as of May 28, 2024. See Settlement Cycle Adopting Release.

<sup>523</sup> One commenter stated that biotechnology companies, 90% of which have market

capitalizations that would qualify as small-cap or micro-cap stocks, face an outsized proportion of short positions. See *infra* note 593.

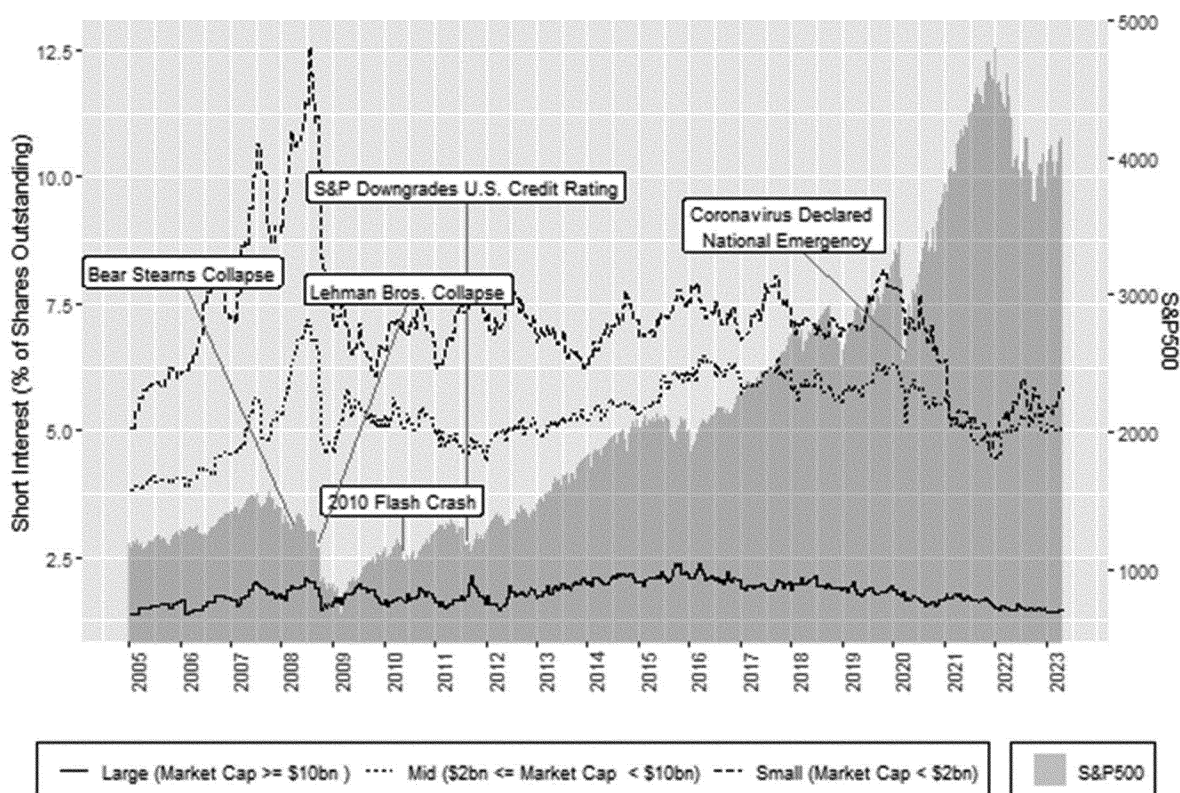
<sup>524</sup> See DERA 417(a)(2) Study, Figure F.1 in the DERA 417(a)(2) Study (showing that the level of short selling as a percentage of trading volume grew from 2007 to 2013 to about 50%). See also D. Rapach, M.C. Ringgenberg, and G. Zhou, *Short Interest and Aggregate Stock Returns*, J. of Fin. Econ. 46–65 (2016).

<sup>525</sup> The Commission analyzed trading volume for common shares during the year 2019. This analysis revealed that the average common share during this period traded approximately 5% of shares outstanding each week, with approximately half of all trades involving short sellers. Consequently, total short selling volume amounts to approximately 5% of shares outstanding every two weeks for a typical stock. In contrast, from 2015

through 2019, absolute changes in short interest approximately every two weeks have equaled about a half of a percent of shares outstanding. Thus, the total amount of short selling volume occurring is an order of magnitude larger than the changes in short interest over the same time period. These statistics suggest that the majority of short selling transactions likely do not involve long term traders building short positions. Additionally, the correlation coefficient for bimonthly changes in short interest and short selling volume in 2019 is only about 0.018. This low correlation suggests that the economic forces driving total short selling volume and changes in short interest are likely different.

<sup>526</sup> See *infra* Part VIII.C.3 for a more detailed discussion of short selling and liquidity provision.

Figure 1: Short Interest Ratio for Non-Financial Common Stocks, Jan. 2005 – Feb. 2023



This figure plots the weighted average short interest ratio for three groups of stocks based on market capitalization on a bi-weekly basis from for January 2005 to April 2023. Large cap stocks are defined as having a market capitalization of greater than \$10 billion, mid cap as \$2 billion to less than \$10 billion, and small cap as less than \$2 billion. We estimate the short interest ratio for each stock as the number of shares in short interest reported by the exchanges on a bi-weekly basis and obtained from the Compustat North America Supplemental Short Interest File (for NYSE- and Nasdaq-listed stocks), divided by shares outstanding obtained from the Center for Research in Security Prices, LLC (CRSP) daily stock files. Since short interest is reported as of the settlement date, we match short interest to the trading date two days prior to the short interest report date. The sample includes non-financial (i.e., excluding stocks with SIC code between 6000 and 6999) and common stocks (i.e., CRSP share code of 10 or 11). Following Blocher & Ringgenberg (2019), we discard stocks whose short interest ratio and adjusted short interest ratio (where the adjusted short ratio is adjusted for stock splits, buybacks, etc.) differ by more than 10%, in order to exclude potential asynchronous adjustments for stock splits in the shares outstanding and short interest datasets. Furthermore, stock-date observations for which a stock has multiple *gvkey*'s (Compustat identifier) or *permno*'s (CRSP identifier) per date are removed. We then take the value-weighted average short interest ratio within a group, using market capitalization as weights. Market capitalization is calculated as shares outstanding multiplied by the closing price (obtained from the CRSP daily stock files) two days prior to the short interest record date. S&P 500 values are obtained from the CRSP Index file. See Jesse Blocher, Matthew C. Ringgenberg, et al., *When Do Short Sellers Exit Their Positions?*, SSRN (Aug. 27, 2018), available at <https://ssrn.com/abstract=2634579>.

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## b. Taking Short Positions Via Derivatives

Trading in derivatives affects short selling in two key ways. First, derivatives offer investors an alternative means to express negative sentiment rather than short selling the stock. For instance, an investor wishing to profit

from the decline of a security's value can also trade in various derivative contracts, including options and security-based swaps. Providing evidence of this alternative means of short selling, academic research shows that investors do indeed use options as an alternative means to obtain short-like

economic exposure when standard short selling is restricted.<sup>527</sup>

<sup>527</sup> See Robert Battalio and Paul Schultz, *Regulatory Uncertainty and Market Liquidity: The 2008 Short Sale Ban's Impact on Equity Option Markets*, 66 J. of Fin. 2013–2053 (2011); B.D. Grundy, B. Lim, and P. Verwijmeren, *Do Option Markets Undo Restrictions on Short Sales? Evidence from the 2008 Short-Sale Ban*, 106 J. of Fin. Econ. 331–348 (2012). See also G.J. Jiang, Y. Shimizu, and

Among the most popular derivative contracts are options, specifically put and call options. Call options give the owner of the option the right but not the obligation to purchase a stock at a specific price on a future date. Put options are similar but give the owner of the option the right but not the obligation to sell a stock at a specific price at a future date. In a put option the seller of the option is taking a long position in the underlying security while the purchaser of the put is taking a short position. The opposite is true for a call option.

In addition to options, convertible securities (in which the security can be converted into an equity security) and security-based swaps can be used to create the same economic exposure as a short position.<sup>528</sup> Convertible debt securities offer the owner a stream of payments and the ability to convert the security into equity should the owner's strategy deem this beneficial.<sup>529</sup> Security-based swaps include total-return swaps in which two counterparties agree to exchange or "swap" payment with each other as a result of changes in a security characteristic, such as its price.<sup>530</sup> As with options, in each of these derivative contracts one party is inherently long and the other party is inherently short. These derivatives, and other more exotic derivatives, tend not to be as standardized as options, and are traded over-the-counter. Security-based swap transactions are reported to and publicly disseminated by security-based swap data repositories.<sup>531</sup>

C. Strong, *Back to the Futures: When Short Selling is Banned* (2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3420275](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420275).

<sup>528</sup> On Sept. 19, 2019, the Commission approved the "Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers" which established a regulatory regime for security-based swaps under Title VII of the Dodd-Frank Act. See *Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers*, Exchange Act Release No. 87005 (Sept. 19, 2019), 84 FR 68550 (Dec. 16, 2019), available at <https://www.sec.gov/rules/final/2019/34-87005.pdf>.

<sup>529</sup> Convertible debt securities are also employed in hedging strategies whereby the equity is sold short while the convertible security of that equity is held long.

<sup>530</sup> On July 9, 2012, the Commission approved rules and definitions of Security based swaps. See 17 CFR parts 230, 240, and 241; Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Commodity Futures Trading Commission and Securities and Exchange Commission, 77 FR 48208 (Aug. 13, 2012), available at <https://www.sec.gov/rules/final/2012/33-9338.pdf>.

<sup>531</sup> See, e.g., 2015 *Regulation SBSR Adopting Release*, supra note 97; Security-Based Swap Data Repository Registration, Duties, and Core

In addition to providing an alternative means of expressing a bearish sentiment, trading in derivatives frequently leads to related trading in the stock market as derivatives' counterparties seek to hedge their risk. For example, an options market maker who sells a put has taken on long exposure to the underlying security and may hedge this position by opening a short position in the underlying security. Thus, option market makers who sell large quantities of put options may amass large short positions in the underlying equities to hedge their options exposure.

### 3. Current Short Selling Regulations

The Commission adopted Regulation SHO<sup>532</sup> to update short sale regulation in light of numerous market developments since short sale regulation was first adopted in 1938 and to address concerns regarding persistent failures to deliver and potentially abusive "naked" short selling.<sup>533</sup>

In adopting Regulation SHO, the Commission recognized that short sales can provide important pricing information<sup>534</sup> and liquidity to the market.<sup>535</sup> However, the Commission was also concerned with the negative

Principles, Exchange Act Release No. 74246 (Feb. 11, 2015), 80 FR 14437 (Mar. 19, 2015); *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, Exchange Act Release No. 78321 (July 14, 2016), 81 FR 53545 (Aug. 12, 2016) ("2016 Regulation SBSR Adopting Release"). See also *Order Approving Application for Registration as a Security-Based Swap Data Repository*, 86 FR 8977 (Feb. 10, 2021), available at <https://www.sec.gov/rules/other/2021/34-91798.pdf>.

<sup>532</sup> See Regulation SHO Adopting Release.

<sup>533</sup> In a "naked" short sale, the seller does not borrow or arrange to borrow the securities in time to make delivery to the buyer within the standard two-day settlement cycle. As a result, the seller fails to deliver securities to the buyer when delivery is due (also known as a "failure to deliver").

<sup>534</sup> Efficient markets require that prices fully reflect all buy and sell interest. Market participants who believe a stock is overvalued may engage in short sales in an attempt to profit from a perceived divergence of prices from true economic values. Such short sellers add to stock pricing efficiency because their transactions inform the market of their evaluation of future stock price performance. This evaluation is reflected in the resulting market price of the security. See Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972 (Nov. 6, 2003), available at [https://www.sec.gov/rules/proposed/34-48709.htm#P179\\_15857](https://www.sec.gov/rules/proposed/34-48709.htm#P179_15857).

<sup>535</sup> Market liquidity is generally provided through short selling by market professionals, such as market makers, who offset temporary imbalances in the buying and selling interest for securities. Short sales effected in the market add to the selling interest of stock available to purchasers, and reduce the risk that the price paid by investors is artificially high due to a temporary contraction of selling interest. Short sellers covering their sales also may add to the buying interest of stock available to sellers. See Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972 (Nov. 6, 2003), available at [https://www.sec.gov/rules/proposed/34-48709.htm#P179\\_15857](https://www.sec.gov/rules/proposed/34-48709.htm#P179_15857).

effect that failures to deliver may have on shareholders and the markets. For example, large and persistent failures to deliver may deprive shareholders of the benefits of ownership, such as voting and lending, and sellers that fail to deliver securities on settlement date may attempt to use their failures to engage in trading activities to improperly depress the price of a security.

Due to continued concerns regarding failures to deliver, and to promote market stability and preserve investor confidence, the Commission has amended Regulation SHO on several occasions. For example, the Commission eliminated certain original exceptions to Regulation SHO's close-out requirements,<sup>536</sup> strengthened those same close-out requirements by adopting Rule 204,<sup>537</sup> and reintroduced a short sale price test restriction by adopting Rule 201.<sup>538</sup> In addition, the Commission adopted a targeted antifraud rule, Rule 10b-21, to further address failures to deliver in securities

<sup>536</sup> As initially adopted, Regulation SHO included two major exceptions to its then existing close out requirements: the "grandfather" provision and the "options market maker" exception. Due to continued concerns regarding failures to deliver, and the fact that the Commission continued to observe certain securities with failures to deliver that were not being closed out consistent with its then existing close out requirements, the Commission eliminated the "grandfather" provision in 2007 and the "options market maker" exception in 2008. See Exchange Act Release No. 56212 (Aug. 7, 2007), 72 FR 45544 (Aug. 14, 2007) (eliminating the "grandfather" provision to Regulation SHO's close out requirement), available at <https://www.sec.gov/rules/final/2007/34-56212fr.pdf>; Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690 (Oct. 17, 2008) (eliminating the "options market maker" exception to Regulation SHO's close out requirement), available at <https://www.sec.gov/rules/final/2008/34-58775fr.pdf>.

<sup>537</sup> In 2008, the Commission adopted 17 CFR 242.204T ("temporary Rule 204T"), and in 2009 adopted Rule 204. Rule 204 further strengthens Regulation SHO's close out requirements by making those requirements applicable to failing to deliver results from sales of all equity securities, while reducing the time-frame within which failures to deliver must be closed out. See Exchange Act Release No. 60388 (July 27, 2009), 74 FR 38266 (July 31, 2009), available at <https://www.sec.gov/rules/final/2009/34-60388fr.pdf>.

<sup>538</sup> In 2004, the Commission initiated a year-long pilot to study the removal of short sale price tests for approximately one-third of the largest stocks. After review of the pilot's data, the Commission proposed the elimination of all short sale price tests. In June 2007, the Commission adopted a rule that eliminated all short sale price tests, including Rule 10a-1, a predecessor to Regulation SHO. The rule became effective in July 2007. In 2010, the Commission reinstituted a short sale price test restriction by adopting Rule 201. See Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232 (Mar. 10, 2010), available at <https://www.sec.gov/rules/final/2010/34-61595fr.pdf>.

that have been associated with “naked” short selling.<sup>539</sup>

Regulation SHO requires broker-dealers to properly mark sale orders as “long,” “short,” or “short exempt,” to locate a source of shares prior to effecting a short sale (also known as the locate requirement), and to close out failures to deliver that result from long or short sales. In addition, if the price of an equity security has experienced significant downward price pressure, Regulation SHO temporarily restricts the price at which short sales may be effected.

Regulation SHO imposes certain recordkeeping obligations on broker-dealers. However, the Commission does not have market-wide information on how often the bona fide market making exception is used. Furthermore, bona fide market making information is not reported on a regular basis, instead the Commission must request bona fide market making records on a broker-dealer by broker-dealer basis.<sup>540</sup>

In addition, regulations currently do not require market participants to record, report, or track when short sellers “buy to cover” their short sales. This makes it difficult for regulators to assess compliance with Rule 105 and with close out requirements in Rule 204.

#### 4. Existing Short Selling Data

There are several sources of short selling data that are available both publicly and for regulatory purposes. In general, these data sources lack information about levels of and the timing of changes in economic short positions for specific Managers in specific securities. Some sources report aggregate short positions at the security level, but their content is not granular enough to further the understanding of short selling strategies. Other sources provide granular short volume information, but they are unable to distinguish short transactions that impact short positions from those that do not and do not contain all activity

that can change short positions. Some regulatory data sources report short transactions at the individual investor level, but using these data to estimate short positions would be significantly inaccurate and inefficient.

#### a. Bimonthly Short Interest Data

One of the primary data sources for aggregate short selling data is the bimonthly short interest data collected by FINRA.<sup>541</sup> FINRA collects aggregate short interest information in individual securities on a bimonthly basis as the total number of shares sold short in a given stock as of the middle and end of each month. Then the exchange that lists the given stock, or FINRA itself in the case of OTC stocks, distributes the collected data.<sup>542</sup> FINRA computes short interest using information it receives from its broker-dealer members pursuant to FINRA Rule 4560 reflecting all trades cleared through clearing broker-dealers.<sup>543</sup> FINRA Rule 4560 requires generally that broker-dealers that are FINRA members report “short positions” in customer and proprietary firm accounts in all equity securities twice a month through FINRA’s web-based Regulation Filing Applications (RFA) system.<sup>544</sup> FINRA defines “short positions” for this purpose simply as those resulting from “short sales” as defined in Rule 200(a) of Regulation SHO under the Exchange Act.<sup>545</sup> Member firms must report their short positions to FINRA regardless of position size.<sup>546</sup> The process of gathering and validating short interest data takes approximately two weeks.<sup>547</sup> Thus the data are available with approximately a two week lag.

FINRA short interest data are widely available and are used by academics and other market participants.<sup>548</sup>

Furthermore, these short interest data are found to predict future stock and market returns over the monthly and annual horizons, suggesting that the bimonthly short interest data capture the economic short selling based on fundamental research.<sup>549</sup> However, these data face two major limitations. First, the information does not provide insight into the timing with which short positions are established or covered over the two-week reporting period. This precludes the possibility of understanding the behavior of aggregate economic short selling in the two weeks leading up to the reporting date.<sup>550</sup> Second, given that short interest is aggregated at the security-level, the aggregation does not provide an understanding of certain aspects of the underlying short selling activity. For example, the data cannot inform on whether short sentiment is broadly or narrowly held or held by persons with larger positions. The data also does not inform on the extent to which short interest has been hedged.

#### b. Short Selling Volume and Transactions From SROs

Since 2009, many SROs have been publishing two short selling data sets, including same day publication of daily aggregated short sale volume in individual securities<sup>551</sup> and publication of short sale transaction information on no more than a two-month delay.<sup>552</sup>

<sup>549</sup> See, e.g., Peter N. Dixon and Eric K. Kelley, *Business Cycle Variation in Short Selling Strategies: Picking During Expansions and Timing During Recessions*, 57(8) J. of Fin. and Quantitative Analysis 3018–3047 (2022); see also Ekkehart Boehmer, Zsuzsa R. Huszar, and Bradford D. Jordan, *The Good News in Short Interest*, 96 (1) *Journal of Financial Economics* 80–97 (2010); Stephen Figlewski, *The Informational Effects of Restrictions on Short Sales: Some Empirical Evidence*, 16 (4) J. of Fin. and Quantitative Analysis 463–476 (1981).

<sup>550</sup> For example, the public will not have information on stock-specific volatility in real-time that may relate to short selling of the particular stock. Such volatility may be explained, though only through assumption, once the bimonthly short interest data becomes available. Assumption is necessary because the data are still not at the daily level.

<sup>551</sup> See *Short Sale Volume and Transaction Data*, available at <https://www.sec.gov/answers/shortsalevolume.htm> (showing hyperlinks to the websites where SROs publish this data). See also *supra* note 492. See, e.g., *FINRA’s Daily Short Sale Volume Files* (which provide aggregated volume by security on all short sale trades executed and reported to a FINRA reporting facility during normal market hours). See FINRA Information Notice, *Publication of Daily and Monthly Short Sale Reports* (Sept. 29, 2009), available at <https://www.finra.org/sites/default/files/NoticeDocument/p120044.pdf>.

<sup>552</sup> See *FINRA’s Monthly Short Sale Transaction Files* (which provide detailed trade activity of all short sale trades reported to a consolidated tape. See *supra* note 492. See also *Short Sale Volume and Transaction Data*, available at <https://www.sec.gov/answers/shortsalevolume.htm>. Additional

<sup>539</sup> Rule 10b–21 is an antifraud provision that supplements existing antifraud rules, including 17 CFR 240.10b–5 (“Rule 10b–5”), and was adopted to further evidence the liability of short sellers. Specifically, Rule 10b–21 applies to short sellers, including broker-dealers acting for their own accounts, who deceive specified persons about their intention or ability to deliver securities in time for settlement, while failing to deliver securities by settlement date. Among other things, the rule highlights the specific liability of short sellers who deceive their broker-dealers about their source of borrowable shares for purposes of complying with Regulation SHO’s locate requirement, or who misrepresent to their broker-dealers that they own the shares being sold and subsequently fail to deliver shares. See *supra* note 14, available at <https://www.sec.gov/rules/final/2008/34-58774.pdf>.

<sup>540</sup> See *supra* Part IV.B for a discussion on the use of the bona fide market making locate exception.

<sup>541</sup> See DERA 417(a)(2) Study at 17–18, *supra* note 6.

<sup>542</sup> See *FINRA Interest—What It Is, What It Is Not*, FINRA Inv’r Insights (Apr. 12, 2021), available at <https://www.finra.org/investors/insights/short-interest>.

<sup>543</sup> *Id.* (Short interest for a listed security at any date reported by FINRA is “a snapshot of the total open short positions in a security existing on the books and records of brokerage firms on a given date.”).

<sup>544</sup> FINRA Rule 4560 excludes short sales in “restricted equity securities,” as defined in Securities Act Rule 144, from the reporting requirement.

<sup>545</sup> See FINRA Rule 4560(b)(1).

<sup>546</sup> See FINRA Market Regulation Department, *General for Short Interest Reporting Instructions* (Dec. 18, 2008) (reporting instructions to FINRA member firms), available at <https://www.finra.org/Industry/Compliance/RegulatoryFilings/ShortInterestReporting/P037072>.

<sup>547</sup> See DERA 417(a)(2) Study at 17–18, *supra* note 6.

<sup>548</sup> See *supra* note 491. FINRA and the listing exchanges make these data publicly available with biweekly updates.

Some SROs make the historical daily short volume data available to market participants for a fee.<sup>553</sup> The fact that market participants and academic users pay these subscription fees indicate that these data are utilized. In addition to these daily short volume data, several SROs provide intraday short sale transaction information for the orders that execute on their respective venues. As an example, FINRA provides information from FINRA's Trade Reporting Facility ("TRF") and Alternative Display Facility ("ADF")<sup>554</sup> (the TRF and ADF are together referred to herein as "FINRA's Reporting Facilities"). Overall, these different sources of daily and intraday short volume data provide greater, though different, levels of granularity relative to the bimonthly short interest observations discussed earlier.

Despite offering higher granularity than bimonthly short interest data, these existing short volume data provided by the SROs, including FINRA, have a number of limitations. First, the data do not provide insight into the activities of either individual traders, or different trader types. Consequently, it is not possible with existing short selling data provided by the SROs to separate trading volume associated with market makers, algorithmic traders, investment managers, or other trader types. Form SHO will address this limitation by providing data on the gross short sale positions and activity of investment managers with large short sale positions.

transaction data has been available at various times, including transaction data from the Regulation SHO Pilot, which has been discontinued by most exchanges in July 2007 when the uptick rule was removed. See Exchange Act Release No. 55970 (June 28, 2007), 72 FR 36348 (July 3, 2007), available at <https://www.sec.gov/rules/final/2007/34-55970.pdf>. The Pilot data comprised short selling records available from each of nine markets: American Stock Exchange, Archipelago Exchange, Boston Stock Exchange, Chicago Stock Exchange, NASD, Nasdaq Stock Market, New York Stock Exchange, National Stock Exchange, and the Philadelphia Stock Exchange. See SEC Division of Trading and Markets, Regulation SHO Pilot Data FAQ, available at <https://www.sec.gov/spotlight/shopilot.htm#pilotfaq>.

<sup>553</sup> See, e.g., TAQ Group Short Sale & Short Volume, New York Stock Exchange, available at <https://www.nyse.com/market-data/historical/taq-nyse-group-short-sales> (for short sale data relating to all NYSE owned exchanges). See Short Sale Volume and Transaction Reports from Nasdaq Trader, available at <https://nasdaqtrader.com/Trader.aspx?id=shortsale> (for short sale data for Nasdaq exchanges); see also Short Sale Daily Reports, Chicago Board Options Exchange (for Cboe exchanges), available at <https://datashop.cboe.com/us-equity-short-volume-and-trades>.

<sup>554</sup> Each TRF provides FINRA members with a mechanism for the public reporting of transactions effected otherwise than on an exchange. See FINRA, Market Transparency Trade Reporting Facility, available at <https://www.finra.org/Industry/Compliance/MarketTransparency/TRF/>.

Additionally, the data do not provide insight into activities that may reduce exposure, making the use of these data to estimate investor sentiment fraught with potential bias. Moreover, these data provide information only on short sales, whereas short positions could also change because investors can increase or decrease their positions in ways other than short selling the stock. For example, investors can increase their short positions by exercising put options and delivering borrowed shares or by delivering borrowed shares when they are assigned call options. Investors can reduce their short positions in an equity when they, for example, "buy to cover" their positions, purchase shares in a secondary offering,<sup>555</sup> convert bonds to stock, or redeem ETF shares containing the equity. As a result, the short selling volume and transactions data cannot easily explain changes in short interest, exposing a gap between these two types of existing data.

Aggregate short selling statistics and short selling transactions data have different lags with which they are available. Aggregate short selling volume statistics are usually made available by the SROs by the end of the following business day. For the transactions data, the lag can be much longer, and in some cases the data are released with a one-month lag—implying that some short selling transactions data are not available for two months.<sup>556</sup>

There is also a concern that these data may over-represent the total volume of short sales occurring in the market. This is because Regulation SHO provides specific criteria regarding what is a long sale.<sup>557</sup> If a market participant is unclear whether its trade will meet all the requirements at settlement to be marked a long sale, then it may choose to mark the trade as short to not run afoul of Regulation SHO requirements, even if the trade is likely an economic long sale.<sup>558</sup>

<sup>555</sup> See *supra* note 285.

<sup>556</sup> For example, a short sale transaction that takes place in late June could be released in a dataset in the month of August.

<sup>557</sup> See Rule 200(g) of Regulation SHO specifies when an order can be marked as long. See also Part IV.B; Regulation SHO Adopting Release. An economic long sale is a sale of an owned, not borrowed, security.

<sup>558</sup> See 2009 letter from Securities Industry and Financial Markets Association ("SIFMA") commenting on an alternative short sale price test, expressing concern that compliance with Regulation SHO short selling marking requirements "will result in a substantial over-marking of orders as 'short' in situations where firms are, in fact, 'long' the securities being sold." Letter from Securities Industry and Financial Markets Association ("SIFMA Letter"), available at <https://www.sec.gov/comments/s7-08-09/s70809-4654.pdf>.

## c. Securities Lending

Securities lending data provide information on stock loan volume, lending costs, and the percentage of available stock out on loan. In the equity market, a primary reason for end borrowers to engage in a securities loan is to facilitate a short sale,<sup>559</sup> leading to a close correlation between information about certain loan volumes and short interest. Therefore, some market participants use securities lending data as a measure of short sale positions.<sup>560</sup> Since the proposing release, the Commission has adopted Rule 10c-1a. Below, we describe the baseline securities lending data—commercial securities lending data as well as forthcoming Rule 10c-1a data.<sup>561</sup>

### i. Commercial Securities Lending Data

The securities lending industry appears to use commercial securities lending data widely,<sup>562</sup> though these data are generally available only by subscription.<sup>563</sup> The use of commercial

<sup>559</sup> One reason for this is that the "permitted purpose requirement" of the Board of Governors of the Federal Reserve System's Regulation T, which broadly governs the lending activities of broker-dealers, specifies that a broker dealer may generally borrow or lend U.S. securities from or to a (non-broker-dealer) customer solely "for the purpose of making delivery of the securities in the case of short sales, failure to receive securities required to be delivered, or other similar situations," unless an exemption applies. See 12 CFR 220.10(a).

<sup>560</sup> 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*, Alternative Investment Management Association (Feb. 2011), available at <https://www.managedfunds.org/industry-resources/industry-research/the-effects-of-short-selling-public-disclosure-of-individual-positions-on-equity-markets/>.

<sup>561</sup> While the adoption of Rule 10c-1a occurred before the adoption of Rule 13f-2, and Rule 10c-1a has certain intermediate compliance dates related to FINRA rulemaking that precede Rule 13f-2 compliance dates, we expect that the reporting and publication of Rule 13f-2 information will occur before the reporting and publication of Rule 10c-1a information. See *supra* Part VI and *infra* note 585. Rule 10c-1a is thus part of the baseline for Rule 13f-2, but significant aspects of Rule 10c-1a will be implemented later.

<sup>562</sup> Several commercial entities sell data on securities lending to clients. See, e.g., 2011 Letter from Data Explorers (hereafter "Data Explorers Letter") in response to the request for comment relating to the proposed study of the cost and benefits of short selling required by Dodd Frank Act section 417(a)(2) available at <https://www.sec.gov/comments/4-627/4627-152.pdf>. As some commenters have stated, stock lending facilitates short selling. See, e.g., *Speech by Chester Spatt, former Chief Economist of the SEC* (Apr. 20, 2007), available at <https://www.sec.gov/news/speech/2007/spch042007css.htm>. The information sold by vendors may include volume of loans, lending costs, and the percentage of available stock out on loan.

<sup>563</sup> See DERA 417(a)(2) Study at 22–23. See also Rule 10c-1a, Part IX.B.5.



security lending data as proxy for economic short interest has several limitations. These include the fact that commercial vendors of the securities lending data often impose access restrictions via give-to-get models. In addition, the data are not comprehensive and are based on voluntary contributions, which leads to self-selection bias. In this setting, the entities contributing data are mindful of whether other entities can access the data. As such, participation rates in data sharing reflects strategic considerations that may lower the extent of data shared by each entity, reducing the information content of the pool of data collected by each vendor.

The data for securities lending is potentially biased<sup>564</sup>—either containing information about the wholesale market or the customer market, but not both, making it difficult for a given market participant to obtain comprehensive security lending information from one source. Furthermore, even the cumulative data provided by vendors is still not be comprehensive, primarily because it is based on voluntary data contributions.<sup>565</sup> The reliance on voluntary data contributions increases the likelihood that data are missing in a non-random manner which can introduce biases into the data. To this end, the existing data accessible by an individual market participant may not accurately proxy short selling activity.

Existing commercial securities lending data only provide a noisy proxy of short sentiment. This is because current commercial securities lending data originates from either surveys of a subset of asset managers about their securities lending experience, or it comes from give-to-get arrangements where those involved in securities lending must give data to the data providers in order to be able access data from the data providers. Because the survey data are not comprehensive it

can only provide a noisy proxy of actual short sentiment. The give-to-get data also provides only a noisy proxy because it too relies on voluntary data submissions. It is also generally limited to information about loans from lending programs to broker dealers (“Wholesale Loans”), which are made largely to facilitate clearing and settlement on a net basis at a clearing broker, rather than by transaction or position.<sup>566</sup> Thus, Wholesale Loans are not traceable to individual short sellers. Further, the Commission understands that broker-dealers will usually source shares to meet their net clearing and settlement requirements from other sources, such as their own inventory or customer margin accounts, before engaging in Wholesale Loans. Thus, current commercial securities lending data serve only as an imperfect measure of short sentiment.

#### ii. Rule 10c–1a Data

On October 13, 2023, the Commission adopted Rule 10c–1a.<sup>567</sup> Rule 10c–1a requires that the data elements in paragraph (c) of Rule 10c–1a, except for the size of the loan, are required to be made publicly available by an RNSA not later than the morning of the business day immediately after the covered securities loan is effected. Rule 10c–1a requires that the size of the loan be made publicly available by an RNSA on the twentieth day immediately after the covered securities loan is effected. In addition, Rule 10c–1a requires covered persons to report to an RNSA the legal name of each party to the loan (lender, borrower, and intermediary) and that an RNSA keep such information confidential. Next-day summary volume information will indicate the magnitude but not the direction of the activity, such that loan decreases are added to, not subtracted from, loan increases. Therefore, these data will not allow a viewer to discern between increases in aggregate short positions and decreases of aggregate short positions.

Because loans to end-borrowers are usually made to facilitate short sales,<sup>568</sup> these loans relate very closely to those customers’ short positions. By aggregating the total amount of shares on loan in the “customer” category, market participants could likely estimate outstanding short interest with considerable accuracy, though with an

approximately one-month delay.<sup>569</sup> Additionally, since each loan likely relates to a unique market participant, the Rule 10c–1a data will provide an indication of the distribution of short sentiment—that is, whether short interest is concentrated on a few short sellers with large positions, or whether it is spread out over many short sellers.<sup>570</sup> Examining the change in the size of a loan from the reported data can also indicate when individual market participants increased or decreased their short positions, albeit with an approximate one-month delay.

Pursuant to Rule 10c–1a, persons will be required to identify the legal name of all the parties to a securities loan without any delay to the RNSA. Consequently, regulators can use the data to track the size of shares on loan, and thus approximate an individual entity’s short position with little delay, potentially even if that entity uses multiple broker-dealers to source shares. Because loan modifications, such as increases, decreases, or terminations of loans, must be reported, regulators can produce running estimates of changes in individual entity’s estimated short positions.

#### d. CAT Data

Regulators can also extract short sale information from CAT data, which provide order lifecycle information for stocks and options.<sup>571</sup> The data contain an order mark that is a part of the “material terms of the trade” that indicates whether an order is a short sale. This order mark allows regulators to identify traders who are short selling and to see the order entry and execution times of these short sales. However, CAT was not designed to track traders’

<sup>564</sup> For example, while the Commission believes that certain currently available securities lending data products may be biased due to missing observations, the extent of the biases cannot be quantified as the data that would be needed to assess the extent of the bias are missing.

<sup>565</sup> Voluntary data contributions are provided either through customer market surveys or using a give-to-get model. The Commission believes that both give-to-get and customer market survey data lack comprehensiveness, as it is unlikely that the full universe of lending programs and borrowers contribute all data to any given data vendor. The voluntary nature of submissions to both give-to-get and customer market survey data may mean that some data may be withheld. Market participants that choose not to disclose their data to the commercial data vendors likely make that choice because it is in their strategic interest not to disclose, resulting in nonrandom omissions. These omissions likely insert bias into the commercial databases.

<sup>566</sup> See Rule 10c–1a, Part IX.B.2 for a more detailed discussion.

<sup>567</sup> Rule 10c–1a will provide the Commission and market participants with access to comprehensive securities lending data market data. See Rule 10c–1a; see also *supra* note 561.

<sup>568</sup> See *infra* Part VIII.C.2.

<sup>569</sup> While most loans that facilitate short sales likely come from this category of ‘customer’ loans, not all will. Some large market participants do not use broker dealers as an intermediary when sourcing loans, rather they maintain relationships directly with lending programs to source shares when they wish to short sale. These transactions would show up in the data as loans to “Other” entities. Lastly, to the extent that a broker dealer borrows shares to facilitate their own short selling, the loan would show up in the data as a loan to a broker dealer. However, by summing up all ‘customer’ and ‘other’ loans, market participants could likely estimate aggregate short interest with considerable accuracy. However, only publicly released Form SHO data will isolate large gross short sale positions of Managers. The delay of 21 days is due to the settlement of the loan occurring in T+1 manner plus the publication of the data 20 days after settlement.

<sup>570</sup> The ability to identify changes in customer short positions is reduced to the extent that some short sellers, such as large institutions, have relationships with and are able to spread their borrowing across multiple prime brokers, which would make short interest appear less concentrated.

<sup>571</sup> It is important to note that only regulators have access to CAT data.

positions or changes in those positions, but rather collects information to analyze trading and order lifecycles. As such, using CAT data to estimate positions and changes in those positions can be challenging.

Theoretically, one could use the order execution information in CAT data to estimate trader positions and track how those positions change over time. However, such estimates could be inaccurate due to several circumstances. First, CAT data do not include information on the long or short positions held in each account at the time that an Industry Member initially begins reporting to CAT. Thus, CAT does not provide an appropriate starting point for building short positions using investor-specific transaction information. Second, some investors may establish or cover short positions via other means that are not CAT-reportable events, for example: secondary offering transactions; option assignments; option exercises; conversions; or ETF creations and redemptions. Thus, there are activities that affect positions that are not contained in CAT in any capacity.

While CAT is not designed to track positions, CAT data can be used in very limited and specific circumstances to offer rough position estimates. When focused on one or few accounts, estimating positions, though potentially inaccurate, can be manageable. However, using transaction information to track positions across a broad set of positions is inefficient. Even in situations in which the above limitations do not apply, the use of CAT data to estimate short positions and changes in those positions for all or a large set of accounts is inefficient and would require a considerable amount of processing power, which would take time and reduce the processing power available for other CAT queries. This hinders the Commission's estimation of short positions in a timely fashion.

Other than the inefficient means of estimating positions described above, CAT does not distinguish buy orders that establish a long position from those that cover, and therefore reduce, a short position. While Commission staff were able to identify some short covering activity during the volatile period in January 2021, due to the difficulties described above, the staff analyzing the volatility associated with meme stocks could not easily identify short covering activity using CAT data alone and was thus hindered in their reconstruction of key events.<sup>572</sup>

Finally, even though CAT data identify short selling by market makers, the data do not provide information as to whether a broker-dealer is claiming use of the exception for bona fide market making from Regulation SHO's locate requirement. Rather, the Commission has to make individual document requests to obtain such information currently. The adopted amendment will make this information readily available to regulators in a uniform electronic format and consolidate it with the other material terms of orders required to be reported to CAT.

There are 24 national securities exchanges and one national securities association (FINRA) that are CAT Plan Participants. There are also 3,501 broker-dealers who have reporting obligations to CAT as Industry Members.<sup>573</sup> These Industry Members often use third-party reporting agents such as service bureaus for CAT reporting.

#### e. Exchange Act Form SH

For a ten-month period in 2008 and 2009,<sup>574</sup> the Commission required certain Managers to file confidential weekly reports of their short positions in section 13(f) securities, other than options, on Exchange Act Form SH, through temporary Rule 10a-3T.<sup>575</sup> *De minimis* short positions of less than 0.25 percent of the class of shares with a fair market value of less than \$10 million were not required to be reported.<sup>576</sup> Additionally, only Managers that exercise investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value of at least \$100 million were required to report. The investment

2021), available at <https://www.sec.gov/files/staff-report-equity-options-market-structure-conditions-early-2021.pdf>.

<sup>573</sup> See *supra* Part VII.C.4.b for discussion of PRA costs for broker-dealers due to the CAT amendment. Not all 3,501 broker-dealers will bear the same costs due to the CAT amendment.

<sup>574</sup> See DERA 417(a)(2) Study at 18, *supra* Part II.A.3 at 6.

<sup>575</sup> With respect to each applicable section 13(f) security, the Form SH filing was required to identify the issuer and CUSIP number of the relevant security and reflect the manager's start of day short position, the number and value of securities sold short during the day, the end of day short position, the largest intraday short position, and the time of the largest intraday short position. The reporting requirement was implemented via a series of emergency orders followed by an interim final temporary rule, Rule 10a-3T. Exchange Act Release No. 58591 (Sept. 18, 2008), 73 FR 55175 (Sept. 24, 2008); Exchange Act Release No. 58591A (Sept. 21, 2008), 73 FR 58987 (Sept. 25, 2008); Exchange Act Release No. 58724 (Oct. 2, 2008), 73 FR 58987 (Oct. 8, 2008); Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008).

<sup>576</sup> See Exchange Act Release No. 58591 (Sept. 18, 2008), 73 FR 55175 (Sept. 24, 2008).

manager was required to report short positions to the Commission on Form SH on a nonpublic basis on the last business day of each calendar week immediately following any calendar week in which it effected short sales,<sup>577</sup> a more frequent disclosure interval than the quarterly public reporting of long positions required on Exchange Act Form 13F.<sup>578</sup>

In addition to the limited and temporary time period during which disclosure of short positions was required to be reported on Exchange Act Form SH, even at the regulatory level, the reporting requirements and data had several drawbacks and limitations. One drawback was that only Managers who exercised investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value of at least \$100 million were required to file Form SH, which excluded short-only funds and other large short sellers who did not file Form 13F. Additionally, the report was costly as Managers filing Form SH had a weekly reporting requirement. Additionally, data fields in Form SH including start of day short position, gross number of securities sold short during the day, and end of day short position were each subject to the *de minimis* reporting threshold, which resulted in unreported data points when only a subset of the fields exceeded the *de minimis* threshold. Furthermore, Form SH data were difficult to work with because they were not validated for errors such as duplicate entries, missing fields, or positions that were below the *de minimis* threshold and therefore did not need to be reported.<sup>579</sup>

#### 5. Competition

Many Managers operate in the investment management industry.<sup>580</sup> In broad terms, investment management is a highly competitive industry. Investment managers compete for investors and investor funds. Among the bases on which Managers compete are returns, fees and costs, trading strategies, risk management, and the ability to gather information. It is costly for investment managers to do market research to gain an informational advantage. Investment managers who own a security have an advantage over those who do not in that a security owner can trade more cheaply on

<sup>577</sup> See Exchange Act Release No. 58785, 73 FR 61678.

<sup>578</sup> *Id.*

<sup>579</sup> See Proposing Release, at 14963 for information on the methodology and caveats of using Form SH data.

<sup>580</sup> See *supra* Part VIII.B.1 for discussion of Institutional Investment Managers.

<sup>572</sup> See *Staff Report on Equity and Options Market Structure Conditions in Early 2021*, SEC (Oct. 14,

negative information by simply selling whereas investment managers not owning the same security must establish some form of short exposure, such as selling a security short, to capitalize on any negative information that they have uncovered. Academic research suggests that when the cost of short selling increases, a security owner's advantage in terms of being able to profitably trade on gathered information increases, leading investors not owning a security to engage in less fundamental research.<sup>581</sup> The Commission is cognizant of such research and has taken steps to help ensure that the impact of published data will be minimized by delaying publication by approximately one month and anonymizing and aggregating reporting Managers' short position data.

Investment managers, like other investors that could be subject to Rule 13f-2, also compete by using proprietary trading strategies. They typically seek to trade in ways that would not expose their strategies because, if their strategies became known to others, the strategies could lose value and such Managers could also suffer higher trading costs. More specifically, other traders could use copycat trading strategies to try to mimic the Managers' strategy, potentially competing away the profitability of the strategy or other traders could anticipate when the Manager might trade, which could result in higher trading costs for the Manager. Some Managers also compete for returns by engaging in securities lending whereby assets are lent to other investors, often short sellers, for a fee. These fees in aggregate can be substantial.<sup>582</sup>

The Commission estimates there are 3,501 broker-dealers. These broker-dealers also compete with each other for order flow. The broker-dealer industry is a competitive industry with reasonably low barriers to entry to many segments of the industry. Most trading activity is concentrated among a small number of large broker-dealers, with thousands of small broker-dealers competing for niche or regional

segments of the market. To limit costs and make business more viable, the small broker-dealers often contract with bigger broker-dealers to handle certain functions, such as clearing and execution, or to update technology. Larger broker-dealers often enjoy economies of scale over smaller broker-dealers and compete with each other to service the smaller broker-dealers who are both their competitors and customers.<sup>583</sup> Broker-dealers compete in multiple ways: reputation, convenience, and fees. Broker-dealers typically pass operating costs down to their customers in the form of fees.

### C. Economic Effects<sup>584</sup>

#### 1. Investor Protection and Market Manipulation

The adopted Rule 13f-2 and CAT amendment will enhance the Commission's ability to protect investors and investigate market manipulation by providing a clearer view into the short selling market and improving the Commission's reconstruction of significant market events. This in turn may lead to improved identification of manipulative short selling strategies which may also serve as a deterrent to would-be manipulators and thus may help prevent manipulation. It will also improve the Commission's observation of short sale activity that potentially poses a systemic risk. The Commission believes that the adoption of Rule 13f-2 and the CAT amendment will benefit investors by facilitating the Commission's observation of short selling and will thus help protect investors and help ensure the sufficiency of information related to short selling in the market.

The Commission believes that the Rule 13f-2, Form SHO, and the CAT Amendment will improve regulators' oversight of markets and enhance the Commission's and SROs' reconstruction of significant market events by providing a clearer view into the role that short selling plays in market events of interest. Specifically, the Commission could have used Form SHO data combined with other data to reconstruct market events and better understand the link between trading activity of large short seller and contemporaneous price

volatility during the recent volatility associated with meme stocks. For example, while short sellers as a whole were exiting their positions during the period of heightened volatility, large short sellers may have been engaging in trading behavior that was distinct from other short sellers.

The recent adoption of Rule 10c-1a will further enhance the usefulness of adopted Form SHO.<sup>585</sup> As another source of data covering the short selling market, the Commission may use Rule 10c-1a data combined with Form SHO data in an attempt to match securities lending with actual short positions taken. While the timing of the data being received may be asynchronous, Form SHO and Rule 10c-1a data sources will have a natural relationship with each other. This combination of data can be useful for market reconstructions, but also useful in detecting activities such as naked short selling or other potential violations.

Hypothetically, if Form SHO data had been available to the Commission at the time of the market events of January 2021, the Commission could have used these data to examine the short selling behavior of individual large short sellers. Additionally, because short positions often take some time to create, the Commission could have attempted to identify individual short sellers with large short positions in the various meme stocks in January 2021 based on the most recent reports; the Commission could then have used CAT data to better understand how these short sellers traded during the heightened volatility.<sup>586</sup> One commenter stated that the lack of transparency into short positions did not just hamper the SEC's understanding of these events as they unfolded but, “. . . may also be interfering with the SEC's and market

<sup>581</sup> This occurs because if an investor not owning the asset engages in fundamental research and discovers evidence that a stock may be overpriced, then it is costly for that investor to act on that information. This is not true for investors who own the asset as they can simply sell the shares that they own. See, e.g., Peter N. Dixon, *Why Do Short Selling Bans Increase Adverse Selection and Decrease Price Efficiency?*, 11 (1) The Rev. of Asset Pricing Studies 122–168 (2021).

<sup>582</sup> The securities lending market is large and complex. See Parts IX.B.1–IX.B.4 of Rule 10c-1a for a more detailed description of this market and players.

<sup>583</sup> See Rule 613 Adopting Release.

<sup>584</sup> In preparing this economic analysis, the Commission accounted for the various types of Managers that could be subject to the reporting requirements. In general, the Commission believes that the economic effects of the rule are more influenced by the Managers' investment strategy and motivation for short selling rather than by the type of Manager that is reporting. Any exceptions are noted in the analysis. See *supra* Part VIII.C.1.

<sup>585</sup> Rule 10c-1a, which was adopted prior to Rule 13f-2, includes multiple compliance dates, and certain disclosures required by Rule 13f-2 may be implemented before certain of Rule 10c-1a's compliance dates. Due to this uncertainty, the Commission describes the effects of Rule 13f-2 and the CAT amendment as coming into existence prior to those associated with Rule 10c-1a but acknowledges that there may be a period in which this is not true. The beneficial combined effects will not materialize until the disclosure requirements of both rules are implemented. See *infra* note 615.

<sup>586</sup> Some academics have critiqued the Commission Staff's GameStop report, the Report on Equity and Options Market Structure Conditions in Early 2021, available at <https://www.sec.gov/files/staff-report-equity-options-market-structure-conditions-early-2021.pdf>, and some of its methods, which were driven by data availability. See Joshua Mitts, Robert Battalio, Jonathan Brogaard, Matthew Cain, Lawrence Glosten, and Brent Kochuba, *A Report by the Ad Hoc Academic Committee on Equity and Options Market Structure Conditions in Early 2021* (working paper) (2022), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4030179](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4030179).

observers' ability to say with confidence what happened in retrospect."<sup>587</sup> The Commission agrees that more data, as is being generated by the adoption of this rule, would have aided the Commission in analysis of the events of January 2021.

As noted above in Part VIII.B, Form SHO data will provide the Commission with data that are additive rather than duplicative.<sup>588</sup> After implementation of Rule 13f-2, the activity data provided in Form SHO will allow the Commission to observe how large short sellers respond to the heightened volatility, albeit with a time lag, due to the filing deadline. Specifically, the Commission will be able to observe more precisely which days reporting short sellers most actively increase or decrease their short positions and correlate this activity to market conditions on those days.

Analysis of Form SHO data during periods of high volatility might help the Commission maintain fair and orderly markets by highlighting key economic channels and mechanisms through which short selling could both impact and be impacted by periods of volatility. This information can, in turn, allow the Commission to more specifically tailor responses to similar or related events in the future. While the data provided by the CAT amendment will be visible to the Commission relatively quickly, the Form SHO data will only be available following a lag of at least two weeks.<sup>589</sup> Thus, while Form SHO data will be useful in market reconstruction, it will have limitations in its timeliness.

The bona fide market making information from the CAT Amendment will facilitate regulatory analysis of the use of the bona fide market making exceptions to Regulation SHO.<sup>590</sup> In particular, this information will provide regulators investigating potential Regulation SHO violations with clearer

evidence regarding whether a market maker was relying on a bona fide market making exception. This might save a significant amount of time during an investigation. Having regular access to these data will provide the Commission with further insight into whether the exceptions for bona fide market making in Regulation SHO Rules 203 and 204 are being used appropriately, which may assist in assessing compliance with Regulation SHO.

The bona fide market making information might improve regulators' ability to interpret certain information in market reconstructions. Market reconstructions can sometimes benefit from regulators knowing when certain activity is either directional or market neutral because the motives and profitability of such trading types are different. The bona fide market making information will help regulators separate short selling that represents market makers' liquidity provision to facilitate investor demand from other short selling, including other market maker short selling. Since such short selling is more likely to be in response to customer demand, it is less likely to signify that the short seller anticipates a price decline, relative to cases in which the short seller is trading directionally.

Additionally, the data provided by adopted Rule 13f-2 and the CAT amendment may improve the Commission's ability and effectiveness in detecting certain types of fraud. Form SHO data will provide the Commission flags that may signal potential fraud during an examination. Additionally, the enhanced CAT data will provide the Commission with regular access to improved information with which to examine potential instances of fraud without needing to ask broker-dealers for information.

Enhanced fraud detection by the Commission may also help deter fraud, resulting in improved price efficiency and market quality. Some market participants and academics have raised concerns that short selling may in some instances offer the potential for stock price manipulation, including "short and distort" campaigns.<sup>591</sup> In "short and

distort" strategies, which are illegal, the goal of manipulators is to first short a stock and then engage in a campaign to spread unverified bad news about the stock with the objective of panicking other investors into selling their stock in order to drive the price down.<sup>592</sup> If a "short and distort" campaign is suspected, then detecting this behavior using the position and activity data in Form SHO will be easier than using current data.

Short and distort campaigns are more likely to occur in stocks with lower market capitalizations with less public information.<sup>593</sup> Consequently, among these stocks, it may not take a very large short position in dollar terms to reach the daily average 2.5 percent of shares outstanding over the preceding calendar month threshold for smaller reporting issuers or the \$500,000 or more at the end of a settlement day threshold for non-reporting company issuers.<sup>594</sup> As a result, it is likely that an entity engaging in such a practice will be required to report Form SHO data.<sup>595</sup> Consequently,

Nixon, CEO and Chairman, International Bancshares Corporation, at 1 (July 18, 2011). All letters are available at <https://www.sec.gov/comments/4-627/4-627.shtml>.

<sup>592</sup> If successful, the scheme can drive down the price, allowing the manipulators to profit when they "buy to cover" their short position at the reduced price. Short sellers could also engage in price manipulations by systematically taking short positions in one firm while taking long positions in the competitor. See Bodie Zvi, Alex Kane, and Alan J. Marcus, *Investments and Portfolio Management*, McGraw Hill Education (2011). See also Rafael Matta, Sergio H. Rocha, and Paulo Vaz, *Predatory Stock Price Manipulation*, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3551282](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551282).

<sup>593</sup> One commenter stated that biotechnology companies, 90% of which have market capitalizations that would qualify as small-cap or micro-cap stocks, face a disproportionately high share of short positions. The commenter believes that biotechnology firms are disproportionately targeted by short sellers for multiple reasons. First, because biotechnology companies cannot disclose interim data until validated, the time gap between milestone announcements makes these stocks targets for "short-and-distort" campaigns. Second, the commenter stated that short sellers of biotechnology firms will challenge patent claims in order to drive their stock prices lower, which makes short positions on these stocks more valuable. The commenter supports the Commission's inclusion of the 2.5% threshold, which would be reached before the \$10 million daily average threshold for the majority of biotechnology firms. See Bio Letter at 5-8.

<sup>594</sup> Academic research has found that the average short interest in stocks targeted by activist short sellers is about 10%, while it is only 4% for non-targeted firms. Consistent with high information asymmetries, targeted firms also appear to have wider bid-ask spreads and higher disagreement among analysts. See W. Zhao, *Activist Short-Selling and Corporate Opacity* (Working Paper) (2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2852041](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852041).

<sup>595</sup> See, e.g., Y.T.F. Wong and W. Zhao, *Post-Apocalyptic: The Real Consequences of Activist*

Continued

<sup>587</sup> See Better Markets Letter at 7.

<sup>588</sup> See *supra* Part VIII.B for discussion.

<sup>589</sup> Form SHO is required to be reported 14 days after the end of the month. Thus, trades happening in the first two weeks of the month will not be reported for more than a month.

<sup>590</sup> Two Regulation SHO rules include exceptions for bona fide market making. Rule 203(b)(2)(iii) exempts market makers selling short in connection with bona fide market making activities from the requirement that a short seller must either borrow or have reasonable grounds to believe he can borrow a security in time for delivery prior to effecting a short sale. See 17 CFR 242.203(b)(2)(iii). Rule 204(a)(3) provides that a failure to deliver positions attributable to bona fide market making activities by registered market makers, options market makers, or other market makers obligated to quote in the over-the-counter markets, must be closed out by no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date (T+4), rather than the settlement day following the settlement date (T+1). See 17 CFR 242.204(a)(3).

<sup>591</sup> See, e.g., comment letters submitted with regards to Short Sale Reporting Study Required by Dodd-Frank Act section 417(a)(2): Naphtali M. Hamlet (May 6, 2011); Jan Sargent (May 6, 2011); Lee R. Donais, President and CEO, L.R. Donais Company (May 8, 2011); Joseph A. Scilla (May 9, 2011); Jane M. Reichold (May 17, 2011); John Gensen (May 18, 2011); Victor Y. Wong (May 20, 2011); Kevin Rentzsch (May 24, 2011); Lynn C. Jasper (May 27, 2011); Donald L. Eddy (May 28, 2011); Al S. (June 10, 2011); Jeffrey D. Morgan, President and CEO, National Investor Relations Institute, at 3 (June 21, 2011) ("NIRI"); Professor James J. Angel, at 2 (June 24, 2011); and Dennis

if “short and distort” type behavior is suspected, then the Commission will be more likely to identify Managers with large short positions and thus quickly focus their inquiries on entities that could potentially profit from manipulation. The Commission could then match estimated “buy to cover” trading on individual days to statements or other actions of the investor which may indicate that the investor was engaging in such behavior.<sup>596</sup> In addition, the Commission could use CAT data to further investigate the trading activity of the alleged manipulator. CAT data would be used to corroborate Form SHO reporting to CAT reported transactions. Using the identified manager’s data in CAT, the Commission could see all CAT reportable activity, but will not be able to see other activity such as options exercises or participation in secondary offerings from an issuer.

Enhanced oversight due to the adopted rule and amendment could also provide increased protection from other sources of harm caused by manipulative short sale activity. First, if firm manager decision-making is influenced by shifts in stock prices, as one theoretical study suggests,<sup>597</sup> then short sellers could seek to drive down stock prices when profitable projects are announced, which may cause firm managers to reassess these projects. Doing so may lead to worse managerial decision making and lower stock prices. Second, another theoretical study argues that due to high levels of leverage and interconnectedness in the finance industry, even small declines in stock prices due to manipulative short sellers could ripple through the financial system with large effects.<sup>598</sup> While

manipulation is difficult to verify, should it be suspected, such activity might be more easily identified with Form SHO positions and activity data. The positions data will allow the Commission to more quickly identify individuals with large short positions and then use the activity to identify what data to gather, including CAT data to investigate their trading behavior to look for signs of manipulation. Improved detection capacity may also deter manipulative behavior due to increased fear of detection, potentially leading to an overall decline in fraudulent activity.<sup>599</sup>

Publicly releasing aggregated information about large short positions may, in some instances, increase the risk of trading behavior that is harmful to short sellers, including orchestrated short squeezes. More specifically, to the extent that Managers are still holding their short positions when the data becomes public, the Commission believes that the information disclosed pursuant to Rule 13f–2 and the disclosures Form SHO requires also might, in some cases, potentially facilitate manipulative strategies targeting short sellers, such as short squeezes.

However, the Commission has sought to reduce this risk by releasing only aggregated and anonymized data. Several commenters agreed that only aggregated and anonymized data should be published by the Commission in order to reduce the likelihood of short squeezes and chilling short sale activity, the latter of which could harm stock price efficiency and market liquidity.<sup>600</sup> In contrast, however, multiple commenters stated that individual Manager’s positions should be publicly disclosed in order to uncover hidden short positions, which one commenter stated pose risks to investors and the markets.<sup>601</sup> The Commission has sought to balance the costs and benefits of Rule

13f–2 and Form SHO by collecting Manager-specific data, which should provide the Commission with improved detection of manipulative and potentially destabilizing activity, while publicly releasing only aggregated, anonymized data, which should reduce the likelihood of short squeezes and copycat behavior but still increase the transparency of large short sale activity.<sup>602</sup>

The Commission recognizes that the position size thresholds that underlie publicly released information may lead to the risk of Managers being identified by the public. The Commission estimates that 39 percent of stocks reported on Form SHO would only have one Manager above the reporting Threshold A.<sup>603</sup> By focusing on stocks in which market participants can ascertain that only one Manager exceeded the threshold,<sup>604</sup> combined with a Manager’s posts on social media or information discovered by a private investigator, market participants may be able to identify the Manager holding the short position.<sup>605</sup> As such, the limited

<sup>602</sup> One commenter stated it was confusing that the Commission believes that the public release of Form SHO may give opportunities to orchestrate short squeezes, but at the same time, also help detect short squeezes. See Two Sigma Letter, at 10–12. While publicly released Form SHO data may, in some cases, increase the opportunity to orchestrate short squeezes, the Commission has reduced this risk by only releasing, aggregated, anonymized data. Moreover, this risk is further reduced by the Commission’s ability to utilize disaggregated, Manager-identified short sale data in order to increase its detection of short squeezes and other manipulative behavior.

<sup>603</sup> Based on analysis of Form SH data. See Proposing Release, at 14963. Commenters questioned the use of Form SH data in this and other contexts. See *infra* Box 1: Use of Form SH Data for responses to comments on the use of these data.

<sup>604</sup> In some cases, identifying which equity securities reported to the public via Form SHO data had only one Manager reporting may not be difficult. For example, if the aggregated short positions reported in an equity security were less than \$20 million, it could be estimated that one Manager had a short position of at least \$10 million average over the month. However, this estimation could be incorrect if Managers’ end of month gross short position differs significantly from their average gross short position over the month. This estimation could be further honed by looking at daily data to see changes in daily short positions to better estimate the size of the position, and thus the number of Managers.

<sup>605</sup> For example, one issuer, upon learning that short sellers had taken a large short position in the issuer, reportedly sent a letter to all shareholders urging them to request physical custody of their shares from their broker-dealers in an apparent attempt to disrupt securities lending which supports short selling. This strategy appeared to work initially as the share price increased by nearly 50% in the subsequent three weeks. The issuer also hired private investigators to determine who was behind the short selling and filed suit against a well-known short seller. The issuer, however, entered bankruptcy less than a year later. The bankruptcy courts ruled that the issuer defrauded

*Short-Selling*, (Working Paper) (2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2941015](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941015). Several commenters agreed that the 2.5% threshold for Rule 13f–2 was important because it protects firms with lower market capitalizations. See, e.g., BIO Letter at 9.

<sup>596</sup> “Buy to cover” activity would be inferred from position changes reported on Form SHO. This method is only a proxy for “buy to cover” information. Specifically, the Commission would be assuming that changes in position came from “buy to cover” activity, though there are other mechanisms which could change a Manager’s net position that do not occur from “buy to cover” transactions. Further, Form SHO will not show intraday short sales and buying to cover if the amounts are equal, as the net position will not change.

<sup>597</sup> See I. Goldstein and A. Guembel, *Manipulation and the Allocational Role of Prices*, 75 (1) The Rev. of Econ. Studies 133–164 (2008).

<sup>598</sup> See Markus K. Brunnermeier and Martin Oehmke, *Predatory Short Selling*, 18 (6) Rev. of Fin. 2153–2195 (2014). Similarly, some have also stated that short sellers may have played a role in the stock market crash at the beginning of the Great Depression. See, e.g., Jonathan R. Macey, Mark Mitchell, and Jeffrey Netter, *Restrictions on Short*

*Sales: An Analysis of the Uptick Rule and its Role in View of the October 1987 Stock Market Crash*, 74 Cornell L. Rev. 799, 801–802 (1989) (collecting reports of such allegations).

<sup>599</sup> See letters from Christine Lambrechts (hereafter “Lambrechts Letter”), available at <https://www.sec.gov/comments/4-627/4627-14.htm>; see also International Association of Small Broker Dealers and Advisor, available at <https://www.sec.gov/comments/4-627/4627-109.pdf>. See NIRI Letter, available at <https://www.sec.gov/comments/4-627/4627-134.pdf>.

<sup>600</sup> For discussion of data aggregation, see *supra* Part II.C. See also MFA Letter, at 18; SIFMA Letter, at 22; AIMA Letter, at 5 comment letters of supporters.

<sup>601</sup> This commenter stated that reducing or eliminating the reporting thresholds to Form SHO would provide benefits. See Better Markets Letter, at 13. Several retail investor commenters also said that the reporting thresholds to Form SHO should be reduced or eliminated. See *supra* note 25.

number of reporters potentially risks shining a spotlight on the few Managers with large short positions.<sup>606</sup> However, due to the delay before publicly releasing the data, public Form SHO information will not be as up-to-date and thus may not as accurately reflect current short positions.<sup>607</sup> Thus, efforts to orchestrate a short squeeze based on the public Form SHO data could result in losses to the initiators of the short squeeze if the short positions they target no longer exist.<sup>608</sup> Based on analysis using Form SH data, the Commission expects that most, but not all, of the short positions leading to reporting on Form SHO will be closed by the time that the aggregated Form SHO data are released.<sup>609</sup> An additional factor that may help mitigate the risk of a short squeeze due to the public release of Form SHO data is the fact that non-public Form SHO data, in coordination with CAT data, will improve the SEC's ability to detect short squeeze activity, which may deter some market participants from seeking to orchestrate a short squeeze.

Having detailed confidential information about which Managers currently hold large positions might also

investors. See G. Weiss, *The Secret World of Short-Sellers*, Business Week, 62a (Aug. 5, 1996). See also Owen A. Lamont, *Go Down Fighting: Short Sellers vs. Firms*, 2 (1) The Rev. of Asset Pricing Studies 1–30 (2012).

<sup>606</sup> Though the count of Managers filing Form SHO in any particular equity security may sometimes be able to be estimated with some accuracy, the identities of Managers will not be disclosed by Form SHO data.

<sup>607</sup> Analysis of Form SH data found that short positions were held at or above the \$10 million or 2.5% thresholds only for an average of 9.85 days after the end of each month. See *Proposing Release*, at 14963 for information on the methodology and caveats of using Form SH data. Commenters questioned the use of Form SH data in this and other contexts. See *infra* Box 1: *Use of Form SH Data* for responses to comments on the use of these data.

<sup>608</sup> That is because the short position has already been closed and the organizers of the short squeeze are incorrectly assuming the Manager still has an open short position. Depending on the Manager's desired length of time of the short position, the public version of Form SHO data may still accurately portray the aggregated short position in a given equity security. However, those basing their decisions on public Form SHO data will not know whether the Managers underlying the aggregated short positions in Form SHO data have closed out their positions within the two weeks publication delay. Other data sources, combined with Form SHO data, can be used in an attempt to discover if the position is closed out, but those are also on a delayed basis.

<sup>609</sup> See *infra* note 622 for a discussion on the Commission's estimates on how long Managers hold short positions. See also *infra* note 629 for more information on short sellers that do hold their positions for longer periods of time. Commenters questioned the use of Form SH data in this and other contexts. See *infra* Box 1: *Use of Form SH Data* for responses to comments on the use of these data.

help the Commission observe potential systemic risk concerns regarding short selling. Large and concentrated short positions have the potential to increase systemic risk. As discussed previously, unlike long transactions, short selling places an investor at risk of losing significantly more than the investor's initial investment, should the value of the underlying asset increase significantly. Even temporary spikes in asset value can lead to significant losses—by triggering margin calls or even position liquidations if capital requirements cannot be met.<sup>610</sup> If the value of an underlying asset increases, a short seller may be required to post additional collateral to meet margin requirements. If the investor is unable to do so, then the investor's broker-dealer may liquidate the investor's position with existing collateral leading to steep losses for the short seller. Consequently, it may be more difficult for a short seller to ride out periods of turbulence than a long seller.

One commenter stated they were unaware of cases of short selling causing systemic harm.<sup>611</sup> However, the potential instability that the Commission wishes to detect includes spillovers from events in one asset, such as a particular equity security, to the market for another asset.

Manager level short position data of individuals with large short positions might allow the Commission to better observe these positions, study, and more appropriately respond to any market events that arise. For example, if the Commission had Form SHO data during the meme stock events of January 2021 then it would have had a clearer view as to which Managers held large short positions prior to the volatility event and thus which Managers could have been at greatest risk of suffering significant harm from a short squeeze. However, the ability of the Commission to respond to market events is likely impacted by the timeliness of the short sale data that it receives. One commenter stated that due to the delay in reporting of Form SHO, the data would not be useful to the Commission to respond to market events.<sup>612</sup> While

<sup>610</sup> Due to imperfect information and market frictions, a short seller who “does not have access to additional capital when security prices diverge . . . may be forced to prematurely unwind the position and incur a loss[.]” See, e.g., Mark Mitchell, Todd Pulvino, and Erik Stafford, *Limited Arbitrage in Equity Markets*, 57 J. of Fin. 551–584 (2002). See also, e.g., Andrei Shleifer and Robert W. Vishny, *The Limits of Arbitrage*, 52 J. of Fin. 35–55 (1997) and Denis Gromb and Dimitri Vayanos, *Limits of Arbitrage*, 2 Annu. Rev. Fin. Econ. 251–275 (2010) (citations therein).

<sup>611</sup> See SBAI Letter at 4.

<sup>612</sup> See SBAI Letter at 2.

the delay will not aid the Commission in responding in real-time to market events, it does aid the Commission in developing responses to events over a longer time horizon. Regulatory changes rarely happen in real time and involve careful analysis prior to implementation. The Commission has chosen a reporting regime which balances the benefits of more frequent and timely data with the costs incurred by Managers having to report more quickly, including higher explicit reporting costs as well as heightened risks of short squeezes and copycat trading.

All the effects, positive and negative, associated with the data collected by Rule 13f–2 discussed in this section will be limited by data accuracy. Upon filing, Form SHO will be checked for technical errors but not for the accuracy of the position and activity data in the Form. If Managers make mistakes in their calculations, such mistakes will reduce the utility of the data. However, the amendment process will require Managers to amend filings when they discover errors, thus promoting the accuracy of the information.

## 2. Effects on Stock Price Efficiency

The Commission believes that Rule 13f–2 and Form SHO may have uncertain effects on stock price efficiency.<sup>613</sup> The uncertain effects on price efficiency stems from increased transparency of short sales generally increasing efficiency, whereas increased transparency might also discourage potential short sellers from gathering information—which harms price efficiency. This section discusses both the concept of price efficiency and the positive and negative impacts that adopted Rule 13f–2 and the CAT amendment may have on price efficiency.

### a. Comparisons to Other Public Short Selling Data

The publicly released aggregated data from Form SHO will provide information to market participants about the aggregate activities of large short sellers—with a planned lag of approximately fourteen days from the end of the filing deadline, which is fourteen days after the last day of the month.<sup>614</sup> Existing short selling data, such as the FINRA short interest data, is timelier than the data that will be

<sup>613</sup> See *infra* Part VIII.D.1 for additional discussion of the effect of adopted Rule 13f–2 and the CAT amendment on efficiency.

<sup>614</sup> Thus, it will be a one-month delay after the last day of the month of data being reported. See *supra* Part II.B.3 for more information on the delay of public dissemination of Form SHO data.

filed pursuant to Rule 13f-2 and Form SHO. Forthcoming information from Rule 10c-1a data, which could be used to estimate short interest, is also expected to be timelier than Rule 13f-2 and Form SHO data.<sup>615</sup> Nevertheless, Rule 13f-2 and Form SHO data will provide information on short sale behavior that is not available from other short sale data sources. For example, while FINRA short interest data includes short interest for all short sales known to clearing broker-dealers, it does not provide the Commission or the public with daily information on short sellers' activities. In contrast, Form SHO data will provide daily information on gross short positions of Managers that exceed Reporting Thresholds.<sup>616</sup> Moreover, while Rule 10c-1a data will disseminate to the public anonymized transactions-by-transaction securities lending data by all market participants, it does not allow for an accounting of the timing of aggregate short sales conducted by Managers, nor does it reveal aggregate short positions of Managers with large short positions, as will the data from publicly available Form SHO.<sup>617</sup> Thus with the adoption of Rule 13f-2 and Form SHO, market participants, who will only see anonymized data, will have increased awareness into the activity of Managers with large short sale positions.<sup>618</sup> These benefits are afforded by the adoption of Rule 13f-2 and the required reporting of Form SHO.

There is overlap between the information about stock fundamentals contained in FINRA short interest data,

forthcoming Rule 10c-1a data, and the data that will be aggregated from Form SHO filings. However, the information in Form SHO filings provides data on Managers, including their aggregated daily net changes in positions.<sup>619</sup> Thus, Form SHO will increase the information available to investors about past bearish sentiment in the market on a specific time frame. For example, Form SHO data could be combined with FINRA short interest data to calculate the proportion of short interest comprised of Managers with substantial positions. Furthermore, the accompanying activity information of Form SHO will provide market participants with an enhanced view of short interest and securities lending as well as increased insight on how the short sale activity measured by these data series change over time. Further, the use of the last day of the month as the reference month for the Form SHO reports will allow for a direct comparison of the Form SHO data to the FINRA short interest data. For example, market participants might search for correlations between significant increases or decreases in short positions found in Form SHO data with corporate events or announcements to gather a more precise view of how the market views corporate actions or events and which events contributed to the FINRA final short interest tally at the end of the month. While Rule 10c-1a data could also be used with FINRA short interest data for such analysis, Form SHO data will more clearly reveal how Managers with large gross short positions view these actions or events. Thus, market participants and regulators will be able to use Form SHO data along with FINRA short interest data to assess the degree to which short interest is concentrated among Managers with large positions. It will also allow regulators to better assess which securities face the greatest risk of short squeezes and other manipulative strategies.

Form SHO data could also be combined with forthcoming Rule 10c-1a data in order to assess the degree to which securities lending is widely dispersed among market participants or concentrated among Managers who filed Form SHO.

<sup>619</sup> This is in contrast to other data sources, which only provide data on securities such as the short interest in a particular security (*i.e.*, FINRA short interest) or the volume of securities lent (*i.e.*, Rule 10c-1a data).

## b. Potential Improvements to Price Efficiency

Rule 13f-2 and Form SHO may also improve price efficiency if they mitigate fraud as discussed in Part VIII.C.1. Fraud is inherently non-efficient trading and harms price efficiency because a fraudster's motive is to create a deviation of a firm's value from fundamentals and to profit from this deviation. Thus, to the extent that fraudulent trading, such as short and distort campaigns, are limited by regulator's access to the data provided by Form SHO, Rule 13f-2 will result in improved price efficiency.

More generally, the impact of Form SHO on price efficiency will be commensurate with the degree to which aggregated Form SHO data are newer or more timely than other publicly available short selling information and useful for valuing stocks. Price efficiency (also known as market efficiency) refers to how accurately prices reflect available information relevant to the value of the asset.<sup>620</sup> This information may allow market participants to more effectively make trading decisions and manage risk—increasing price efficiency. For example, if aggregate Manager short positions provide better info on bearish sentiment, then prices could react to updated Form SHO information on bearish sentiment.<sup>621</sup> Although the majority of Managers' short positions may be closed by the time the aggregated data from Form SHO will be made public due to the lag in reporting and public dissemination, a portion of the short positions may still be open.<sup>622</sup> Information on the aggregate size and activity of positions that remain open could be combined with FINRA short interest and forthcoming Rule 10c-1a data to estimate the proportion of short positions held by large short sellers. If this proportion is not yet reflected in prices, prices will adjust upon publication.

<sup>620</sup> See, *e.g.*, Eugene Fama, *Efficient Capital Markets II*, 46(5) J. Fin. 1575–1617 (1991).

<sup>621</sup> See, *e.g.*, A. Senchack and L. Starks, *Short-Sale Restrictions and Market Reaction to Short-Interest Announcements*, 28 J. of Fin. and Quantitative Analysis 177–194 (1993).

<sup>622</sup> The Commission estimates that the median number of days that the short position is held above the threshold after the end of the month is 0, while the average number of days that a short position is held above the threshold is 9.68. This suggests that the majority of positions will be closed while some are held longer than the delay in reporting.

<sup>615</sup> We expect that the reporting and publication of Rule 13f-2 information will occur before the reporting and publication of Rule 10c-1 information. See *supra* note 531. Reporting and disclosure under Rule 13f-2 will provide more information over current short selling data until reporting and disclosure under Rule 10c-1a are fully implemented. This could temporarily magnify the benefits and costs of many of the effects discussed in this section and elsewhere in the Economic Analysis.

<sup>616</sup> The Commission will anonymize these data before they are publicly disseminated.

<sup>617</sup> For example, a Manager could accumulate a large short position in a particular security using securities loans from multiple prime brokers. Each of these loans will be reported as a distinct Rule 10c-1a securities loan, and observers may not be able to ascertain whether they are part of a single Manager's short position. As a result, a large securities loan in Rule 10c-1a data may not represent a single large position reportable under Rule 13f-2.

<sup>618</sup> The Commission will have enhanced data regarding Managers and trading activity of stocks in which thresholds are triggered. See *supra* Part VIII.C.1 for discussion.



Even if many positions are closed by the time the information is disseminated, Tables 1 and 2 will still promote price efficiency if the prices do not yet reflect the historical short position and activity information. Table 2, for example, will provide information on the variability of large short positions in a security and how large short positions changed around corporate events. Such information will improve the precision of signals from Table 1 information and corporate events.

#### c. Potential Harms to Price Efficiency

Rule 13f-2 may harm price efficiency by increasing the cost of short selling.<sup>623</sup> Academic studies, both theoretical and empirical, have shown that when short selling becomes more costly, stock prices are less reflective of fundamental information both because costly short selling makes trading on information more difficult, and because costly short selling dissuades investors from collecting information in the first place.<sup>624</sup> Short sellers fill the role of incorporating negative information by making short sales that reflect the short sellers' beliefs about the true value of the company.<sup>625</sup>

<sup>623</sup> Adopted Rule 13f-2 will have direct impacts on establishing large short positions which may trigger reporting obligations. Additionally, there may be lesser effects which dissuade market participants from short selling in fear of triggering reporting of Form SHO.

<sup>624</sup> See *supra* note 597. See Edward Miller, *Risk, Uncertainty, and Divergence of Opinion*, 32 J. of Fin. (1977). See Robert F. Stambaugh, Jianfeng Yu, and Yu Yuan, *The Short of It: Investor Sentiment and Anomalies*, 104 J. of Fin. Econ. 288–302 (2012).

<sup>625</sup> Several commenters made statements and cited research on how short selling improves price efficiency. See, e.g., NASDAQ Letter at 1, AIMA Letter at 5, which state that short selling promotes efficient price formation, enhances liquidity, and facilitates risk management. Furthermore, one comment letter, “. . . urge(d) the Commission to consider the widely-cited academic law and finance literature as part of its analysis of the Proposed Short Reporting Rules,” and cited multiple studies that provide evidence that short selling contributes to price efficiency. See also “Law and Finance Professors letter” at 2. Cited studies include Jonathan M. Karpoff and Xiaoxia Lou, *Short Sellers and Financial Misconduct*, 65 J. of Fin. 1879–1913 (2010) and Ekkehart Boehmer, Charles Jones, and Xiaoyan Zhang, *Which Shorts Are Informed?* 63 J. of Fin. 491–527 (2008), and Lauren Cohen, Karl Diether, and Christopher Malloy, *Supply and Demand Shifts in the Shorting Market*, 62 J. of Fin. 62, 2061–2096 (2007). Other cited studies find evidence that constraints on short selling reduce market efficiency, including Joseph E. Engelberg, Adam V. Reed, and Matthew C. Ringgenberg, *Short Selling Risk*, 73 J. of Fin. 755–786 (2018), Ekkehart Boehmer, Charles Jones, and Xiaoyan Zhang, 2013, *Shackling the Short Sellers: The 2008 Shorting Ban*, Review of Financial Studies 26, 1363–1400, Pedro Saffi and Kari Sigurdsson, *Price Efficiency and Short Selling*, Review of Financial Studies 24, 821–852 (2011). One cited paper favors reduced regulation of short selling in order to avoid undermining the market quality improvements provided by short selling. See Peter Molk and Frank

#### i. Costs That Impact Price Efficiency

Rule 13f-2 increases the costs of short selling in at least four ways: (1) Compliance costs, (2) potentially revealing short sellers' information that may have been acquired through fundamental research, (3) potentially revealing short sellers' trading strategies, and (4) increasing the threat of retaliation against Managers by other market participants.

##### (a) Compliance Cost Effects

The compliance costs associated with reporting large short positions will result in an increase in the cost of short selling.<sup>626</sup> As many Managers have underlying investors, these costs will likely be passed on to end consumers in the form of lower returns due to limiting the strategies that Managers could profitably employ and reducing the profitability of strategies still employed. On net, an increase in the cost of short selling will reduce short selling, harming price efficiency.<sup>627</sup>

##### (b) Potentially Revealing Information of Short Sellers

Publicly releasing aggregated Form SHO data has the potential to reveal some of the information that short sellers may have acquired through fundamental research.<sup>628</sup> Revealing this information to the market may cause prices to adjust to the information that the short seller uncovered before the short seller is able to acquire their full desired position—decreasing the profits to acquiring this information and providing less incentive to produce fundamental research. Thus, the publication of Form SHO data represents an additional cost to short selling in the form of potentially lower

Partnoy, *The Long-Term Effects of Negative Activism*, Univ. of Illinois L. Rev., 1–70 (2022). Another cited paper favors less regulation of short selling that enhances price efficiency but increased regulation of short selling that is aimed at disabling the fundamental value of targeted firms. See Barbara Bliss, Peter Molk, and Frank Partnoy, *Negative Activism*, 97 Wash. Univ. L. Rev. 1333–1395 (2020)). The comment letter's suggestion to delay public release of Form SHO data for one year and receive additional input on which Form SHO thresholds to apply stem from a concern that Rule 13f-2 could undermine the market quality benefits of short selling, of which the above cited studies find evidence. However, the Commission is also cognizant of the of the benefits provided by short selling, as noted in *supra* Part VIII.B.2. Furthermore, the Commission discusses in detail below the potential costs to price efficiency stemming from Rule 13f-2 and Form SHO. See *infra* Part VIII.C.2.c.ii.

<sup>626</sup> See *infra* Part VIII.D.2 for a discussion of how these direct costs may affect investors in funds that employ short selling.

<sup>627</sup> See *supra* note 624 and accompanying text.

<sup>628</sup> Several commenters agreed. See, e.g., SBAI Letter at 2–3, Two Sigma Letter at 1–2, SIFMA Letter at 2.

profitability for trading on negative information. Relative to the proposed rule, the Commission has modified the final rule's requirements for publication of Form SHO data (from the proposed rule) to decrease the risks of revealing this information by requiring much less granular information in Table 2 of Form SHO. In addition, adopted Rule 13f-2 will mitigate revealing information by delaying publication at least 14 days from the last day of a month and only publishing aggregated data.

To avoid price impacts, a short seller seeking to build a sizeable position in a firm generally does so by building up small positions over time until the desired position is accumulated.<sup>629</sup> Because short positions can take a long time to accumulate, even with a lag, the information motivating the trades being reported may not be stale. While aggregation limits the precision with which markets can estimate an individual short seller's motivation, it does not eliminate it.<sup>630</sup> Additionally, the threshold may protect short sellers with smaller short positions from having the information in their trades revealed. In contrast, Rule 13f-2 may highlight large positions, potentially increasing the likelihood that some of the information contained in the trades of large short sellers will be acted on by other market participants before the short seller could acquire their optimal position. Thus, the Commission expects that publication of aggregated Form

<sup>629</sup> See Albert S. Kyle, *Continuous Auctions and Insider Trading*, Econometrica: J. of the Econometric Society 1315–1335 (1985). See Kirilenko, Andrei, Albert S. Kyle, Mehrdad Samadi, and Tugkan Tuzun, *The Flash Crash: High-Frequency Trading in an Electronic Market*, 72 (3) The J. of Fin. 967–998 (2017) (for a discussion of this type of trading); Amir E. Khandani and Andrew W. Lo., *What Happened to the Quants in August 2007? Evidence from Factors and Transactions Data*, 14 (1) J. of Fin. Markets, 1–46 (2011) (for a discussion of what happens when investors build large positions without properly smoothing their trading). Well-known short seller Gabe Plotkin testified that his firm had built and maintained a short position in GameStop for over 5 years prior to the significant volatility experienced in January 2021. See *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide* (Hearing), U.S. House of Representatives Committee Repository (“Game Stopped Hearing”), <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=111207>; See also Juliet Chung and Melvin Capital Says It Was Short GameStop Since 2014, Wall Street Journal (Feb 17, 2021). In the Form SH data, 17.9% of positions were held above the proposed Threshold A for at least a month. Commenters questioned the use of Form SH data in this and other contexts. See *infra* Box 1: *Use of Form SH Data* for responses to comments on the use of these data.

<sup>630</sup> See *supra* Part VIII.C.1 for a discussion of how market participants may attempt to uncover individual identities.

SHO data will still represent a cost to short selling.<sup>631</sup>

Relatedly, Managers who wish to build large short positions may choose to execute their transactions at a pace that is faster than what they would have done otherwise to attempt to profit from their research before information is disclosed and copycat investors are able to trade based on the reported data. Executing transactions at a faster speed than would be optimal imposes increased transaction costs on Managers than they would have incurred otherwise.<sup>632</sup> Additionally, trading faster than is optimal may harm price efficiency by leading prices to over-react to the aggressive trading.<sup>633</sup>

#### (c) Potentially Revealing Trading Strategies of Short Sellers

If Form SHO data provides information about the specific trading strategies or identities of certain short sellers, those short sellers could be harmed by actions such as others profiting from predicting their trading or copycat trading.<sup>634</sup> This harm could result in less short selling, reducing the price efficiency benefits of short selling.

While Rule 13f-2 was designed to minimize the possibility of identifying Managers or their proprietary information, there are conditions that may arise that would be conducive to revealing proprietary trading strategies. For example, in cases where market participants may be able to discern that there is only one Form SHO filer,<sup>635</sup> then market participants might attempt to use the activity data to extract information about the specific trading strategies that short sellers use to implement their trades. Market participants might then try to identify similar patterns in the real time market

trading and quote data and alter their trading strategies to attempt to profit from any predictability in the short seller's trading strategy. This behavior would further limit the benefit to short selling as it may allow other market participants to game the short seller's trading behavior—increasing the cost of implementing short selling trading strategies. The Commission received several comment letters that addressed the risk of copycat trading due to public disclosure of Form SHO data.<sup>636</sup> While the Commission acknowledges this risk, it believes that the design of the published activity data will significantly limit this risk. In particular, the netting of short selling activity across short sellers will mask much of the trading behavior of individual short sellers while still providing information about changes in bearish sentiment in the market. By netting trading activity in the aggregations across Form SHO filers, market participants viewing the publicly reported Form SHO data will still get a view of changes in bearish sentiment while keeping Manager specific trading strategies hidden.

#### (d) Retaliation Against Short Sellers

The public disclosure requirements might also increase short selling costs by exposing Managers to the risk of retaliation by other market participants, but the risk may be low.<sup>637</sup> An issuer's directors or shareholders may have the incentive to retaliate if they believe short sellers are inappropriately reducing the value of the stock.<sup>638</sup>

Although aggregating the data before releasing it to the public on a delay will provide some protection to Managers

from having their identities uncovered, in certain cases motivated market participants may still be able to identify individual investors. For instance, in the case that the aggregated short position reported to the public is just above the threshold, market participants might reasonably assume that only one Manager has a short position large enough to report, which may facilitate identifying who that manager is. The Commission believes that even if the probability of identifying individual short sellers is low, the threat of this additional exposure to retaliation may disincentivize short selling.

In the event that Managers can be identified from Form SHO disclosures, issuers might take retaliatory action against individual short sellers through lawsuits and by forwarding information to regulators in attempts to precipitate regulatory investigations, through claims in the media, or by applying pressure on the shorting firm through business relationships that may exist outside of trading.<sup>639</sup> One commenter provided further examples of retaliatory behavior that short sellers may face the threat of, including short squeezes, nuisance lawsuits, intimidation, and physical violence.<sup>640</sup> There is also evidence that when short sellers' positions become public, market participants strive to orchestrate short squeezes and are successful a significant fraction of the time.<sup>641</sup> Short sellers often face lawsuits when they take their information public or their identities otherwise become known—regardless of whether the information the short sellers brought forth was legitimate.<sup>642</sup> Some issuers have even been known to hire private investigators in an attempt to uncover the identities of individuals short selling their stock.<sup>643</sup> Some short sellers have also expressed that they have experienced threats to their personal safety after their short positions were revealed.<sup>644</sup>

<sup>631</sup> Consistent with this expectation, research on similar regulations in Europe has documented a similar effect there. See *Market Impact of Short Sale Position Disclosures*, Copenhagen Economics: Office of Global Research and Markets at the MFA, available at <https://www.copenhageneconomics.com/publications/publication/market-impact-of-short-sale-position-disclosures>.

<sup>632</sup> See Kyle (1985) at *supra* note 630.

<sup>633</sup> See e.g., Albert S. Kyle and Anna A. Obizhaeva, *Large Bets and Stock Market Crashes* (Mar. 22, 2019), available at <https://ssrn.com/abstract=2023776> or <https://dx.doi.org/10.2139/ssrn.2023776>.

<sup>634</sup> If the identity of the short seller is exposed, then this may also incentivize retaliation against them. See *infra* Part VIII.C.2.i.(d).

<sup>635</sup> This could partially be achieved through the use of Rule 10c-1a data, depending on the timing of the securities loan, among other factors. However, such risk is mitigated by the fact that securities lending transaction sizes in Rule 10c-1a data are not publicly disseminated for 20 business days and counterparties identities are not publicly disseminated.

<sup>636</sup> See, e.g., SBAI letter at 2, Two Sigma letter at 1, David Kwon letter at 3. Furthermore, supporting commenters' views, there is empirical evidence that copycat trading in response to media reports may harm price efficiency. See Jiang, George and Strong, Cuyler, *Unusual Option Activity: Is it Smart to Follow "Smart Money"?* (Aug. 29, 2022), available at <https://ssrn.com/abstract=3618427>.

<sup>637</sup> See 2011 MFA Letter; Owen A. Lamont, *Go Down Fighting: Short Sellers vs. Firms*, 2(1) The Rev. of Asset Pricing Studies 1–30 (2012); Lorian Stice-Lawrence, Yu Ting Wong, Yu Ting Forester Wong, and Wuyang Zhao, *Short Squeezes After Short-Selling Attacks* (Nov. 2021), available at <https://ssrn.com/abstract=3849581> or <https://dx.doi.org/10.2139/ssrn.3849581>.

<sup>638</sup> The motivation behind such retaliation may be strengthened by the belief that the short seller's aim is to profit from reducing the value of the stock rather than uncovering mismanagement or other negative information about the firm to shareholders. See generally Barbara Bliss, B., Peter Molk, and Frank Partnoy (2020), *Negative Activism*, Wash. U. Law Review 97:1333–1395 (2020), which distinguishes between “informational negative activism,” which serves to uncover, “. . . the truth about companies whose shares the activists believe are overvalued,” and “operational negative activism,” which, “. . . involves dismantling or disabling sources of value at companies.”

<sup>639</sup> See 2011 letter from Security Traders Association of New York on the Short Sale Reporting Study Required by Dodd-Frank Act section 417(a)(2), available at <https://www.sec.gov/comments/4-627/4627-155.pdf>.

<sup>640</sup> See MFA Letter at 9.

<sup>641</sup> See *infra* note 645.

<sup>642</sup> See Owen A. Lamont, *Go Down Fighting: Short Sellers vs. Firms*, 2 (1) The Rev. of Asset Pricing Studies 1–30 (2012).

<sup>643</sup> *Id.*

<sup>644</sup> See *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide: Hearing Before the H. Comm. on Fin. Serv.*, 117th Cong. (2021) (statement of Gabriel Plotkin, Founder and CEO, Melvin Capital Management), available at <https://www.congress.gov/117/meeting/house/111207/witnesses/HHRG-117-BA00-Wstate-PlotkinG-20210218.pdf> (stating that after company's short positions were made known, Reddit users made

In addition, publicly disclosing that Managers, in aggregate, have amassed large aggregate short positions may expose the Managers to increased risk of being the target of predatory strategies such as short squeezes. The risk of short squeeze increases if market participants are able to identify the individuals with large short positions, as discussed in Part VIII.C.1.<sup>645</sup> In this case, they may be able to better estimate the capital constraints of the short seller to identify the likelihood of a squeeze being successful.

#### ii. Impact of the Costs

Because reporting information on Form SHO increases the costs of short selling, the adopted rules could have several negative effects on price efficiency. In particular, negative price efficiency effects could derive from a reduction in fundamental research,<sup>646</sup> strategic trading to avoid exceeding the thresholds, and reduced liquidity in options markets. Reduced short selling could also take place from the effect of negative price efficiency. Rule 13f-2 and Form SHO have been designed to reduce the likelihood of these risks occurring to the extent possible while still providing market participants and regulators with enhanced transparency of short sale behavior. To the extent that fundamental research decreases, price efficiency might be harmed as prices will not necessarily reflect all available relevant information, only that portion that had been discovered by investors continuing to perform fundamental research.

It is possible that short sellers may strategically select average short position just below the threshold in order to avoid reporting. The size of a short position is often related to the expected magnitude of the short seller's negative information, with revelations of larger negative information being associated with larger short positions.<sup>647</sup> Consequently, to the extent that Managers may choose to select otherwise sub-optimal short positions to avoid reaching the reporting threshold, Rule 13f-2 and Form SHO might result in a sub-optimal allocation of capital and may harm price efficiency. To this end, some have argued that stock prices can be viewed as a weighted average of investor sentiment. If short sellers limit

posts and others sent personal text messages that were laced with anti-Semitic slurs and threats of physical harm to him and others).

<sup>645</sup> As noted in Part VIII.C.1, the Commission will also be better able to detect short squeezes.

<sup>646</sup> Several commenters also stated there could be a possible reduction in fundamental research. *See, e.g.,* MFA Letter at 10.

<sup>647</sup> *See, e.g., supra* note 629.

their positions to avoid disclosure requirements, then stock prices may skew towards being overvalued.<sup>648</sup>

Additionally, Rule 13f-2 might dissuade options market makers from holding large short positions and providing liquidity in options markets and, thus, might harm price efficiency in equity markets. Research has found that options play an important informational role in stock price discovery, therefore reductions in liquidity in the options market can reduce the price efficiency in the equity market.<sup>649</sup>

#### d. Limitations on Price Efficiency Effects

As with the discussion in Part VIII.C.1, many of the economic effects articulated in this section relating to the reporting of Form SHO might be limited to the extent that the data reported in Form SHO contains factual errors. The EDGAR system will check the data for technical errors but not the accuracy of the data entry by filers. Thus, the data reported in Form SHO might contain errors. To the extent that these errors exist and meaningfully affect the usability of the data, the value of the data and the economic benefits and costs associated with collecting the data would be limited. Additionally, the benefits and costs are lessened by the delay in the publication of the data. Furthermore, the data will only be available for those securities with Managers who have short positions over

<sup>648</sup> *See, e.g., supra* note 625. In contrast, some argue that short selling itself increases the value of assets as it provides demand for securities lending and allows owners to collect securities lending fees. From this perspective, restricting short selling may decrease stock prices by restricting the demand for securities loans. *See* Darrell Duffie, Nicolae Garleanu, and Lasse Heje Pedersen, *Securities Lending, Shorting, and Pricing*, 66 (2-3) J. of Fin. Econ. 307-339 (2002). Consistent with statements in the Proposing Release, the Commission continues to believe that this effect is the not predominate effect of short selling on asset prices, because the average fee earned from securities lending is usually very small relative to the average long term stock returns. Thus, it appears that other economic effects tend to dominate the relationship between short selling and stock prices and that on net short selling restrictions lead to stock overvaluation. Proposing Release at 14996 n. 281. *See also* letters from OTC Markets, Provable Markets, SIFMA, and Chester Spatt responding to FINRA's regulatory notice 21-19 (arguing that short selling is vital to price efficiency), available at <https://www.finra.org/rules-guidance/notices/21-19#>. In contrast, others have argued markets adjust to short selling constraints as to not overvalue stocks. *See* Douglas Diamond and Robert E. Verrecchia, Constraints on Short-Selling and Asset Price Adjustment to Private Information, 18 J. of Fin. Econ. 277-311 (1987).

<sup>649</sup> *See infra* Part VIII.C.3. *See also* David Easley, Maureen O'Hara, and Pulle Subrahmanya Srinivas, *Option Volume and Stock Prices: Evidence on Where Informed Traders Trade*, 52 J. of Fin. 431-465 (1998).

the threshold, which may not be representative of all short positions, and the number of reporting Managers may change from month to month.

#### 3. Effect on Market Liquidity

The effect of the adopted Rule 13f-2 and CAT amendment on liquidity is uncertain. Part VIII.C.2.c discusses the possibility that Rule 13f-2 and Form SHO may harm price efficiency by dissuading investors from pursuing fundamental research. Alternatively, Rule 13f-2 and Form SHO may help price efficiency by increasing transparency with respect to the actions of large short sellers. To the extent that the adopted rule and amendment improve price efficiency, this might also indirectly improve liquidity because market makers would be subject to less mispricing risk. Mispricing risk leads to lower liquidity because market makers must be compensated in the form of wider bid ask spreads for the potential that there is information relevant to the firm that has not yet been discovered and may affect prices. Thus, to the extent that the Rule 13f-2 enhances price efficiency, it may also enhance liquidity by mitigating mispricing risk. Conversely, if the Rule harms price efficiency, it may also harm liquidity.

Equity market makers generally do not carry large gross short positions overnight. However, adopted Rule 13f-2 and Form SHO may make market makers more concerned that a particularly volatile trading day may cross the Reporting Thresholds requiring the filing of Form SHO. One commenter described the concern for unintentionally crossing the threshold while market making.<sup>650</sup> While the Commission believes the adopted Reporting Thresholds will generally be very difficult for market makers to trigger,<sup>651</sup> market makers could still choose to reduce market making activities during periods of volatility due to concerns over having to report Form SHO. To the extent market makers believe high volatility may necessitate a large short position, the adopted rule may reduce market liquidity.

<sup>650</sup> *See* HSBC Letter at 15.

<sup>651</sup> Market makers typically use short selling to maintain two sided quotes in the absence of inventory and other high frequency traders. While market makers trade in large volumes, they tend to end trading sessions fairly flat on inventory in larger stocks. Therefore, while it is possible that market makers may end a single trading day holding a gross short position of \$10 million, it is highly unlikely that this will occur frequently enough for them to end the month with an average daily position of \$10 million.

Additionally, in the event that an options market maker might have short equity position close to the Reporting Thresholds, Rule 13f-2 might dissuade these option market makers from increasing their short position, which may harm their willingness to provide liquidity in options markets.

Alternatively, Rule 13f-2 might not cause option market makers that exceed the Reporting Thresholds to reduce their positions in order to avoid filing Form SHO, in which case the additional associated spending on filing Form SHO (and other compliance costs) might result in wider spreads if the compliance costs are large enough.

#### 4. Effect on Corporate Decision Making

The Commission believes that Rule 13f-2 and Form SHO might have mixed effects on corporate decision making.

On one hand, research suggests that corporate managers learn from market reactions to announcements.<sup>652</sup>

Consequently, Rule 13f-2 and Form SHO may provide corporate managers with additional feedback on their decisions, albeit with a delay. Projects often take some time to design and implement after announcement, and consequently, even with the lag in the reporting time of Form SHO data, a corporate manager might review the data around significant announcements to better understand how some Managers viewed a particular project or announcement. For example, if large short positions were built shortly after a corporate project announcement, then this may help signal to a corporate manager that the market viewed that project announcement negatively, and this information could enhance the corporate manager's decision-making on the project.

In another aspect, short sellers, and particularly large short sellers with the resources to perform fundamental research, serve as valuable external monitors of management. If a corporate manager knows that short sellers are monitoring their actions and financial statements and are willing to expose wrongdoing, then they are less likely to engage in fraud or do other things that may hurt the value of the company. Historically, short sellers have, at times, through doing research, uncovered fraudulent behavior.<sup>653</sup> Academic

research has also shown that even the threat of short selling serves to discipline managers.<sup>654</sup> As discussed in Parts VI.C.1 and VI.C.2, Rule 13f-2 may discourage Managers from performing fundamental research. If less fundamental research is performed by short sellers,<sup>655</sup> then their role as monitors of the firm diminishes. Less monitoring might lead to higher incidences of fraud as managers feel that the likelihood of being caught declines.<sup>656</sup> Thus, to the extent that Rule 13f-2 and Form SHO discourage fundamental research it may lead to both an increase in the total amount of corporate fraud in the economy as well as decrease the fraction of fraudulent actors that are discovered by investors.

#### 5. Effect on the Securities Lending Market

As discussed in Parts VIII.C.1 and VIII.C.2, the adopted rule and related Form SHO will increase the cost of short selling, particularly large short positions—potentially leading to less overall short selling. As discussed in Part VIII.C.2, short sellers must borrow shares for their short position. When short sellers borrow shares, they pay a borrowing fee to the owner of the share. These fees can represent a significant source of revenue for pension funds, mutual funds, and others who engage in securities lending.<sup>657</sup> Consequently, to the extent that the adoptions discourage short selling, they may also lower overall portfolio returns, including for institutional investors that engage in securities lending.<sup>658</sup>

Low and Suzanne McGee, *Enron Short Seller Detected Red Flags in Regulatory Filings*, The Wall Street J. (Nov. 5, 2001) (discussing an Enron short seller that detected red flags reviewing, among other things, the company's SEC filings) (retrieved from Factiva database). Cf. Nessim Mezrahi et al., *More Securities Class Actions May Rely on Short-Seller Data*, Law360 (Jan. 10, 2022, 7:07 p.m.) available at <https://www.law360.com/articles/1453499/more-securities-class-actions-may-rely-on-short-seller-data> (authors' "analysis of 131 Rule 10b-5 securities class actions indicates that plaintiffs continue to rely on short-seller research to substantiate fraud-on-the-market claims").

<sup>654</sup> See, e.g., Massimo Massa, Bohui Zhang and Hong Zhang, *The Invisible Hand of Short Selling: Does Short Selling Discipline Earnings Management?* 28 (6) The Rev. of Fin. Studies 1701-1736 (2015).

<sup>655</sup> See *supra* Part VIII.C.2 for a discussion of the potential for the final rule to reduce the incentives for short sellers to conduct fundamental research.

<sup>656</sup> See, e.g., Paul Povel, Rajdeep Singh, and Andrew Winton, *Booms, Busts, and Fraud*, 20 (4) The Rev. of Fin. Studies 1219-1254 (2007) (linking variations in monitoring intensity to the incidence rate of financial fraud.).

<sup>657</sup> See *supra* note 563.

<sup>658</sup> Commenters on the Short Sale Reporting Study Required by Dodd-Frank Act section 417(a)(2) argue that increased public short selling disclosure may result in reduced short selling, thereby lowering revenues to institutions that

#### 6. Compliance Costs

The Commission believes that there will be direct costs associated with adopted Rule 13f-2, Form SHO, and the CAT amendment. These costs include Managers reporting position and activity data, broker-dealers updating CAT reporting processes, and the Commission processing and releasing the Manager reports through EDGAR. Rule 13f-2, related Form SHO, and the amendment to CAT in aggregate, will result in an estimated maximum of \$119,975,800 in initial costs and \$72,026,064 in annual costs.<sup>659</sup>

The Commission received several comments from industry groups concerned about the cost of implementing Rule 13f-2, Form SHO, and the CAT amendment. One commenter stated that Managers currently do not have systems in place to comply with Rule 13f-2, Form SHO, and the CAT amendment. Multiple commenters stated that there would be high costs associated with tracking positions for the purpose of seeing if they had crossed the Reporting Thresholds.<sup>660</sup> Another commenter stated that the Commission's estimated costs in the proposing release, in general, were "materially understated".<sup>661</sup> However, the Commission has attempted to use the applicable resources available to it to estimate the costs of implementing adopted Rule 13f-2, Form SHO, and the CAT amendment. The Commission did not receive any information from commenters that might otherwise have been used to refine or adjust its estimates of the implementation costs of adopted Rule 13f-2, Form SHO, and the CAT amendment. Thus, the Commission believes its estimates to be reasonable given the information it has

maintain long positions in equities for extended periods (such as pension funds). See, e.g., 2011 Letter from Alternative Investment Management Association, available at <https://www.sec.gov/comments/4-627/4627-138.pdf>.

<sup>659</sup> See *supra* Table 1, Table 2, and Table 3 in Part VII. These costs assume 1,000 Managers would file Form SHO annually and 35 Managers would file amendments each month. The initial costs are calculated by adding the Form SHO Initial Technology Projects cost, the CAT: Central Repository—Short Sale Data cost, CAT: Reporting of Bona Fide Market Making Exception—Insourcers cost, and the CAT: Reporting of Bona Fide Market Making Exception—Outsourcers cost. (\$118,950,000 + \$113,800 + \$870,000 + \$42,000 = \$119,975,800). The annual costs are calculated by adding the Form SHO Filings cost, the Use of Structured XML-Based Data Language cost, the Amended Form SHO Filings cost, and the amending Use of Structured XML-Based Data Language cost. (\$60,326,400 + \$9,264,000 + \$2,111,424 + \$324,240 = \$72,026,064). See also *infra* Part VIII.C.6.a and Part VIII.C.6.c for further explanations of these costs.

<sup>660</sup> See *infra* note 679.

<sup>661</sup> See MFA Letter, at 19.

<sup>652</sup> See, e.g., James B. Kau, James S. Linck, and Paul H. Rubin, *Do Managers Listen to the Market?*, 14 (4) J. of Corporate Fin. 347-362 (2008).

<sup>653</sup> See, e.g., A. Dyck, A. Morse, and L. Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65(6) The J. of Fin. 2213-2253 (2010) (using a large sample of fraud cases between 1996 and 2004, the authors find that short sellers uncovered the fraud in nearly 15% of cases.). See also Cassell Bryan-

available. Furthermore, the Commission has adjusted estimates in response to policy choices that differ from the Proposing Release, some of which will lower compliance costs, including the exclusion of the “buy to cover” proposals (proposed Rule 205 and the related CAT amendment) and a change to one of the reporting thresholds that will likely result in fewer Managers having to report Form SHO. As discussed in Part II.B, these policy changes, to the extent possible, address or are in response to statements from commenters regarding costs stemming from the Proposing Release.

#### a. Form SHO Compliance Costs

The Commission believes that Managers will incur an initial technology-related burden to update their current systems to capture the

required information and automate and facilitate the completion and filing of Form SHO.<sup>662</sup> While Managers likely have other existing reporting obligations that are similar to Form SHO filing obligations, Managers will need to update their systems to ensure timely and accurate filing of the specific information required under Form SHO.<sup>663</sup> The estimated aggregate cost of Form SHO initial technology projects across all Managers ranges from \$29,975,400 to \$118,950,000. The Commission estimates that between 252<sup>664</sup> and 1,000 Managers will be required to file Form SHO. The lower estimate is based on the number of Form SH filers above Threshold A. The actual number of reporting Managers will likely be higher than our low estimate, because Managers that exercise

investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value of less than \$100 million were not required to file Form SH.<sup>665</sup> However, the actual number of reporting Managers will likely be lower than the Commission’s high estimate, since this estimate is also based on an initial analysis of Form SH filings, which were filed weekly and therefore more likely to trigger reporting thresholds, as compared to adopted Form SHO, which will involve monthly assessment and therefore require a longer-held large short position to trigger a reporting threshold.<sup>666</sup> The Commission discusses the use of Form SH Data, including commenter concerns about the use of the data in this and other contexts, in Box 1: Use of Form SH Data.

#### Box 1: Use of Form SH Data:

The Commission’s estimation of the minimum number of Managers likely to report Form SHO draws on an analysis of data collected under Form SH, the only existing data source of individual Manager-level short sale positions. In addition to estimating the minimum number of reporting Managers, the Economic Analysis also uses Form SH data for comparisons of alternative thresholds and to estimate the share and number of potential reported securities with only one reporting Manager, the potential share of gross short sale dollar volume covered by reporting Managers, and statistics on potential holding periods after hitting a threshold.

The Commission received several comment letters questioning the applicability of Form SH data to the current time period.<sup>a</sup> One commenter stated that the period surrounding the filing of Form SH was an abnormal period for financial markets, and also stated that many prominent short sellers have left the industry.<sup>b</sup> While there are various limitations to be considered when using Form SH data,<sup>c</sup> Form SH data are the most relevant and applicable source of data available for the purposes of estimating the costs of the design and analysis of Rule 13f–2. There are no other data sources, public or regulatory, which specifically track Managers’ short position activities in the U.S. While the Commission agrees that having more current data would be useful for the purposes of Rule 13f–2’s design and analysis, no commenters provided such data, and the Commission believes Form SH data are sufficiently informative to analyze the predicted impact of the amendments.<sup>d</sup>

Further, in response to these comments, the Commission analyzed FINRA short interest data over the period of 2008 to present with the goal of seeing if short interest was comparable between the current period and the period surrounding Form SH filings.<sup>e</sup> Specifically, we compared the trend of average short interest to the trend of the number of equities counted from each FINRA short interest files covered 2009 to 2023. The analysis revealed that the average short interest per equity symbol has increased over time by approximately 46 percent, while the number of symbols has increased at a much slower rate of 17 percent. Thus, we observe that the average short interest per equity symbol has increased from 2009 to present. However, the Commission cannot assess whether the size of Manager positions has changed over time.<sup>f</sup> Without this piece of knowledge, it is indeterminate whether the average amount of short interest generated by a manager has changed over time. If there are currently more Managers relative to 2008, it is possible that the average short position per manager is smaller than during the period Form SH was used. Conversely, if there are fewer Managers, it is likely the average short position per manager has increased relative to 2008.

<sup>a</sup> See, e.g., Law and Finance Professors Letter, at 3; AIMA Letter at 11–12; Two Sigma Letter at 5–6.

<sup>b</sup> See Law and Finance Professors Letter, at 3.

<sup>c</sup> See *supra* Part VIII.B.4.e and note 670 for a discussion of limitations in the use of Form SH data. See also Part VII.B.1 for a discussion of other ways Form SH data differ from Form SHO data.

<sup>d</sup> See *supra* Part II.A.3 for additional discussion of comments regarding the Reporting Thresholds and note 177 for further discussion of the time period of the data.

<sup>e</sup> FINRA Short Interest data are available at <https://www.finra.org/finra-data/browse-catalog/equity-short-interest/data>. See also Part VIII.B.4 a for further information about FINRA Short Interest Data.

<sup>f</sup> See *supra* Part VII.B.1 for a discussion of estimates of the number of affected Managers using Form SH, which most closely mirrors the criteria of Rule 13f–2 and Form SHO and how the number may have changed over time.

The Commission estimates that the annual cost to Managers for filing Form SHO ranges from \$15,202,252 to \$60,326,400.<sup>667</sup> The Commission estimates that Managers will

collectively spend an additional \$2,334,528 to \$9,264,000 per year to structure Form SHO directly in Form SHO-specific XML.<sup>668</sup> The Commission estimates that the Managers that will file

amended Form SHOs will collectively spend \$542,938 to \$2,111,424 per year to file amended Form SHOs.<sup>669</sup> Further,

<sup>662</sup> See *supra* Part VII.4.

<sup>663</sup> See *infra* Part VIII.C.6.c.

<sup>664</sup> In the Proposing Release, the Commission estimated 346 Managers would be required (on the low end of the estimate). The Commission changed the parameters for this estimate to match the scenario of a \$10 million daily average over the month or 2.5% daily average over the month of

shares outstanding thresholds that are being adopted as Threshold A.

<sup>665</sup> See Proposing Release, at Table I. See also Proposing Release, at 14963 for more information on the methodology and caveats of using Form SH data.

<sup>666</sup> See *Disclosure of Short Sales and Short Positions by Institutional Investment Managers*, 73 FR 61679. Form SH filers filed weekly reports. As

a result, each reporting manager would file fewer reports under Rule 13f–2, because Form SHO would be filed monthly. See also 73 FR 61686 (estimating 1,000 weekly Form SH filings by reporting Managers).

<sup>667</sup> See *supra* PRA Table 2 and note 450. The lower estimate was calculated using 252 Managers. 20 hours per filing × 252 filings by Managers each month × 12 months × \$251.36 = \$15,202,252. The

the Commission estimates that Managers filing amended Form SHO will collectively spend an additional \$83,376 to \$324,240 per year to structure Form SHO directly in Form SHO-specific XML.<sup>670</sup> The Commission thus estimates that the aggregate cost of structuring and filing Form SHO across all Managers ranges from \$18,163,094 to \$72,026,064.<sup>671</sup> Costs might be underestimated to the extent that wages are higher than those used in the estimation. The initial costs are likely higher than the lower bound estimates as Managers who may not file Form SHO on a monthly basis will likely still incur the initial costs. Furthermore, because Manager short positions are fluid, some Managers will not be required to file a report every month when they do not cross the reporting threshold. As a result of this fluidity, ongoing costs could be lower than our estimates. Moreover, to the extent that the number of reportable short positions varies across Managers, the costs to track and report those positions will also vary by Manager. Initial costs might also be higher for some Managers who do not currently have systems built to report to EDGAR.<sup>672</sup> By contrast, because we expect Managers will have a financial incentive to automate the reporting process by leveraging Form SHO-specific XML reporting, the aggregate costs associated with Form

Commission estimates that 252 Managers would have been required to file Form SH had Form SH been subject to the same \$10 million and 2.5% threshold.

<sup>668</sup> See *infra* Part VIII.C.6.c and *infra* note 686. The lower estimate was calculated as follows: 2 hours per filing  $\times$  \$386 per hour for a programmer  $\times$  252 filings by Managers each month  $\times$  12 months = \$2,334,528.

<sup>669</sup> See *supra* PRA Table 1 and accompanying text discussing amended Form SHO estimates. We maintain the assumption of 3.5% of Managers amending monthly in all of our estimated costs for amending Form SHO. Using the lower estimate of 252 Managers, this would result in 9 Managers filing amendments monthly. 20 hours per filing  $\times$  9 filings by Managers each month  $\times$  12 months  $\times$  \$251.36 per hour = \$542,938.

<sup>670</sup> Using the lower estimate of 9 Managers filing amendments monthly would result in \$83,376 to structure amended Form SHO filings in Form SHO-specific XML. 2 hours per filing  $\times$  9 filings by Managers each month  $\times$  12 months  $\times$  \$386 per hour = \$83,376.

<sup>671</sup> See *supra* PRA Table 2. These costs are calculated by adding the costs for Form SHO Filings, Use of Structured XML-Based Data Language, Amended Form SHO Filings, and the amending Use of Structured XML-Based Data Language together. For the lower estimate, we calculate using 252 Managers filing each month annually and 9 Managers filing amendments monthly. (\$15,202,252 + \$2,334,528 + \$542,938 + \$83,376 = \$18,163,094).

<sup>672</sup> Most Managers will be familiar with EDGAR filing requirements through other reporting obligations, such as Form 13F. See *supra* notes 193 and 452. See also *infra* Part VIII.C.6.c.

SHO-specific reporting may be meaningfully lower going forward.<sup>673</sup>

For some Managers, there may be additional considerations, which may increase costs. For example, rules for filing Form SHO require Managers to prevent duplicative reporting.<sup>674</sup> The burden to ensure that duplicative reporting doesn't occur will vary by Manager and will depend on whether two or more Managers exercise investment discretion over the same reportable securities position. Also, Managers managing multiple accounts with short positions requiring aggregation may have additional costs associated with the aggregation when modifying systems to track the Reporting Thresholds and report positions on Form SHO.

The Commission believes the need to amend Form SHO may vary by familiarity with filing Form SHO. These costs may be more common for Managers who do not hold short positions often and are likely to decrease with time as Managers become more experienced with filing Form SHO. As part of updating systems to comply with the reporting requirements of Rule 13f-2, Managers must calculate the market value of their position using the official closing price as of the close of regular trading hours for the trade settlement date in question at the end of the month, which may not be the fair market value at the time in which the trade occurred.<sup>675</sup> However, the Commission believes that in most cases this will be a small burden on Managers as the data needed for the calculation will be publicly available and that Managers may already track the end of day fair market value of short positions. Even in cases that the reportable equity security is not traded on an exchange, the Commission believes that Managers may be able to calculate the value of their short positions by using publicly available closing prices from the OTC Reporting Facility. In circumstances where closing prices of non-reporting company issuers are not available, the Commission believes the tracking such information will still not impose a large burden as a Manager can use the price at which they last purchased or sold any share of that security, which will be readily available to the Manager.

<sup>673</sup> See *supra* note 451 and *infra* note 711.

<sup>674</sup> See Form SHO, General Instructions at *Rules to Prevent Duplicative Reporting*.

<sup>675</sup> See Form SHO, General Instructions at *INSTRUCTIONS FOR CALCULATING REPORTING THRESHOLD*. See also PRA Table 2 in Part VII for an estimate of these burden hour.

## b. Costs of Tracking Threshold Status

There will be costs associated with tracking short positions in relation to the threshold.<sup>676</sup> Particularly, after the last day of each calendar month, Managers must calculate their average short positions over the month to be aware if their average daily gross short position exceeds \$10 million<sup>677</sup> or 2.5 percent of shares outstanding; or in the case of equity securities of non-reporting company issuers, if Managers meet or exceed a gross short position of \$500,000 at the close of regular trading hours on any settlement date. However, the Commission believes that the Reporting Thresholds will generally limit the burden on Managers, in aggregate, as fewer Managers will be required to report than if the Commission did not adopt an amended reporting threshold. For example, the Commission believes that certain types of Managers that carry short positions will not meet a Reporting Threshold.<sup>678</sup> Additionally, certain types of Managers may be less likely to meet the threshold, resulting in lower overall costs for these Managers.<sup>679</sup> Using Form SH data, the Commission estimates that an average of 442 Managers were required to file Form SH each month under the threshold in place during temporary Rule 10a-3T. However, only 252 eligible Managers would have been required to file had Threshold A of adopted Form SHO been in place instead of the threshold in temporary Rule 10a-3T.<sup>680</sup>

<sup>676</sup> As stated in the proposing release, based on the number of registered investment companies reporting short positions and the number of hedge funds engaged in a strategy including short selling, we continue to anticipate that only a small fraction of Managers is likely to have monitoring responsibilities pursuant to the rule and, given the Reporting Thresholds and the modification of Threshold A, an even smaller fraction is likely to have reporting obligations. Proposing Release at 14998 n. 298.

<sup>677</sup> Under Proposed Form SHO, the threshold was triggered if a gross short position exceeded \$10 million on a single day. Adopted Form SHO requires a daily average gross short position of \$10 million over the month.

<sup>678</sup> See *supra* Part VIII.B.1 for a discussion on why certain types of Managers are more likely to have reporting requirements. For example, market makers and algorithmic technical traders are not likely to meet the thresholds because they generally close their positions by the end of the day.

<sup>679</sup> However, Managers that trigger a threshold(s) but do not currently report to EDGAR may face additional compliance costs associated with Rule 13f-2.

<sup>680</sup> The lower number of estimated reporting Managers in Form SHO compared to Form SH is due to the fact that the Reporting Thresholds are higher for Form SHO than Form SH in Threshold A (average daily gross position of \$10 million vs. a single day threshold of \$10 million, and 2.5% of shares outstanding vs. 0.25% of shares outstanding). This estimate differs from the Proposing Release due to modification of the part of the threshold from \$10 million daily to \$10

The Commission received several comment letters that described what they believed were the high cost of monitoring with respect to the thresholds to file Form SHO under Rule 13f-2.<sup>681</sup> One commenter stated that the cost of daily monitoring would be high, although no specific estimated cost is provided.<sup>682</sup> While the costs would likely be higher if firms choose to monitor daily, Rule 13f-2 does not require daily monitoring, either for reporting or non-reporting stocks.

For Managers engaged in shorting selling, the rule necessitates that Managers calculate their average daily gross short position in equity securities for which they have conducted short sales during that calendar month in order to know if they are required to file Form SHO within 14 days of the end of that month.<sup>683</sup> Managers may choose to do this calculation on a rolling basis, or to do the calculation after the month has ended. While some Managers may choose to incur the higher costs of daily tracking and calculation for purposes of compliance with Rule 13f-2, the final rule's reporting threshold is not based on a Manager's gross short position on a single trading date, reducing the need for daily tracking.

The Commission understands that the cost of tracking short positions might be higher for certain types of equity securities. For example, tracking the short position in an ETF as a percent of shares outstanding will be more difficult as the number of shares outstanding changes frequently. Additionally, Managers who hold short positions in non-reporting company issuers may have difficulty calculating the value of their position, however Managers may use the last price at which the Manager traded even though the price may be stale.<sup>684</sup>

million average daily over the month. Commenters questioned the use of Form SH data in this and other contexts. See *supra* Box 1: *Use of Form SH Data* for responses to comments on the use of these data.

<sup>681</sup> See, e.g., MFA Letter, at 13; AIMA Letter, at 12–14; ICI Letter, at 5; Ropes & Gray Letter, at 2 and 5–7; SBAI Letter, at 4; SIFMA Letter, at 4, 7–8, and 13–19; T. Rowe Price Letter, at 3–4; Two Sigma Letter, at 6–7 and 10.

<sup>682</sup> See ICI Letter, at 11.

<sup>683</sup> As discussed in *supra* Part II.A.3, Managers with gross short sale positions that exceed a daily average during the previous month of \$10 million or a daily average of 2.5% of a reporting firm's shares outstanding will have to file Form SHO. With regard to short sale positions of non-reporting firms, Managers will have to file Form SHO if their short sale position exceeded \$500,000 on any single day during the previous month.

<sup>684</sup> See *supra* Part II.A.3.b for discussion of comments received related to tracking non-reporting company short positions.

#### c. Cost of Reporting Form SHO to EDGAR

Requiring Form SHO to be filed on EDGAR in Form SHO-specific XML will not impose significant incremental costs on Managers. The Commission expects most Managers who will be required to file Form SHO will likely have experience filing EDGAR forms that use similar EDGAR Form-specific XML data languages, such as Form 13F. In that regard, the process for filing Form SHO, as well as the XML-based data language used for Form SHO, will be similar to the filing process and data language used for Form 13F.<sup>685</sup> We expect that Managers with such experience that choose to file Form SHO directly in Form SHO-specific XML will incur some compliance costs associated with doing so.<sup>686</sup>

In addition, Managers will be given the alternate option of filing Form SHO using a fillable web form that will render into Form SHO-specific XML in EDGAR, rather than filing directly in Form SHO-specific XML using the technical specifications published on the Commission's website. We expect Managers who do not have experience filing Form 13F or other EDGAR Form-specific XML filings will likely choose this option. In that regard, Managers are only required to file Form 13F if they exercise investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value on the last trading day of

<sup>685</sup> See EDGAR Filer Manual (Volume II) version 67 (September 2023), at 9–1 (“EDGAR Filer Manual Volume II”) (describing process for submitting Form-specific XML filings directly to EDGAR); see also Form 13F XML Technical Specification, available at <https://www.sec.gov/edgar/filer-information/current-edgar-technical-specifications>.

<sup>686</sup> See *supra* PRA Table 2 (estimating the ongoing burden for the Form SHO-specific XML requirement at two hours per Manager per filing and two hours per amended filing). These estimates conservatively assume that Managers will structure their filings in Form SHO-specific XML, incurring \$772 (2 hours × \$386 per hour for a programmer = \$772) per filing or amended filing, rather than use a fillable form. Assuming 1,000 Managers filing 12 Form SHO filings per year would equal 12,000 filings per year, resulting in 24,000 total annual industry burden hours (12 filings × 1,000 Managers × 2 hours = 24,000) and \$9,264,000 in industry costs for filings per year (24,000 hours × \$386 per hour = \$9,264,000) attributable to the Form SHO-specific XML requirement. In addition, based on an estimate of 420 amended filings per year, the total industry cost for the Form SHO-specific XML would be \$324,240 for amended filings (420 amended filings × 2 hours per amended filing × \$386 per hour = \$324,240). As such, the total annual industry cost attributable to the Form SHO-specific XML requirement (including amended filings) is \$9,588,240 (\$9,264,000 for filings + \$324,240 for amended filings = \$9,588,240). Using a lower estimate of 252 Managers would result in \$2,417,904 in total annual industry costs to structure initial and amended filings in Form SHO-specific XML. See *supra* note 517.

any month of any calendar year of at least \$100 million.<sup>687</sup> Of Managers that do not have experience filing Form 13F, only a subset are subject to other EDGAR Form-specific XML filing requirements.<sup>688</sup> For any Managers that choose to file Form SHO using a fillable web form, whether or not they have prior experience with filing forms in EDGAR Form-specific XML, the Form SHO-specific XML requirement (*i.e.*, the requirement to place the collected information in a fillable web form provided by EDGAR, rather than in an HTML or ASCII document to be filed on EDGAR as is required for most other EDGAR forms) will not impose any additional compliance costs.<sup>689</sup>

#### d. Costs Associated With Reporting Bona Fide Market Making Locate Exception to CAT

The 25 Plan Participants will face costs associated with the CAT amendment, as they will be required to engage the Plan Processor to modify the Central Repository to accept and process new short sale data elements on order receipt and origination reports. Additionally, the Commission estimates an external cost of \$4,522 per participant or \$113,800 total to compensate the Plan Processor for staff time required to make the initial necessary programming and systems changes.<sup>690</sup> However, these initial costs might be higher if the Commission underestimated the time and wages necessary for programming and systems changes for the plan processor to accept and process new data elements. Furthermore, the Commission believes that CAT amendment will not impose additional ongoing cost to Participants beyond those costs already accounted for in existing Paperwork Reduction Act

<sup>687</sup> See 17 CFR 240.13f-1(a).

<sup>688</sup> For example, registered brokers or dealers that are subject to the reporting requirements set forth in 17 CFR 240.17h-2T must file Form 17-H either electronically or in paper. Those that choose to file electronically must file Form 17-H partially in EDGAR Form-specific XML. Insurance companies may offer variable contracts that are registered under the Investment Company Act of 1940, and would thus be required to file annual reports on Form N-CEN in EDGAR Form-specific XML as well as, in some cases, monthly portfolio information on Form N-PORT in EDGAR Form-specific XML. Corporations may make exempt offerings and be required to file Form 1-A, Form C, or Form D in EDGAR Form-specific XML either in part or in full, depending on the nature of the offering.

<sup>689</sup> See 17 CFR 232.101(a)(1)(iv); 17 CFR 232.301; EDGAR Filer Manual Volume II at 5–1 (requiring EDGAR filers generally to use ASCII or HTML for their filed documents, subject to certain exceptions).

<sup>690</sup> See *supra* note 475.



estimates that apply for Rule 613 and the CAT NMS Plan approval order.<sup>691</sup>

The Commission believes that the CAT amendment involving the bona fide market making exception from the locate requirement will impose a one-time cost to Industry Members.<sup>692</sup> These costs will involve creating an additional field in the order origination report. Some broker-dealers will incur ongoing costs related to the recording of the use of the BFMM locate exception.<sup>693</sup> To the extent that broker-dealers are not already recording the use of the exception, broker-dealers may have costs to inputting the use of the exception into their current systems.<sup>694</sup>

The Commission recognizes that costs will vary broadly across Industry Members, particularly depending on whether the Industry Member outsources the provision of an order handling system and regulatory data reporting to a service provider. In the CAT NMS Plan Approval Order,<sup>695</sup> the Commission identified 126 Industry Members that do not outsource these activities. For these Industry Members, implementation is likely to require changes both to their order handling systems as well as their regulatory data reporting systems that produce their CAT reporting data. Additionally, 58 insourcing Industry Members will incur an aggregate initial cost of \$870,000 or \$15,000 individually to update systems to facilitate reporting the new bona fide market making exception elements to CAT.<sup>696</sup> However, this cost might be lower if the Commission is overestimating the number of insourcing industry members, in particular, the additional cost might drive some insourcing industry members to begin to outsource. The Commission believes that ongoing costs associated with reporting the newly required information to CAT will already be covered by ongoing cost estimates included in its cost estimates for the CAT NMS Plan. The Commission further believes that similar implementation and ongoing costs will

be borne by each of the service providers that provide order handling systems and regulatory data reporting services to Industry Members that outsource these systems.

For Industry Members that outsource, the Commission believes that implementation costs will be far lower because the service bureaus that provide them with order handling systems and regulatory data reporting services will adapt those systems on their customers' behalf.<sup>697</sup> Additionally, 42 outsourcing industry members will incur an aggregate one-time cost of \$42,000 or \$1,000 individually to update systems to facilitate reporting the new bona fide market making exception elements to CAT.<sup>698</sup> However, these costs might be higher if some current insourcing industry members begin to outsource as a result of the increased costs, which will lead to an overall reduced cost for the rule as outsourcing is less costly than insourcing. The Commission believes that the costs of service bureaus adapting those systems will be passed to their Industry Member customers.

#### e. Comparison to Rule 10a–3T Costs

The Commission is cognizant of the burdens Managers experienced of filing Form SH in compliance with temporary Rule 10a–3T and has designed Rule 13f–2 and Form SHO to attempt to reduce those burdens. First, commenters on the temporary Rule 10a–3T stated that the 0.25 percent threshold was too low.<sup>699</sup> The two-pronged threshold in Rule 13f–2 is higher than the threshold in Rule 10a–3T, reducing the number of Managers likely to have a reporting obligation. For example, the Commission estimates that only 28 percent of positions reported under Rule 10a–3T will be required to report given the higher threshold in Rule 13f–2 and Form SHO, while still collecting 78 percent of the dollar value.<sup>700</sup>

<sup>697</sup> One commenter stated that support from third-party data service providers could make Form SHO reporting less burdensome. See S3 Letter, at 5.

<sup>698</sup> See *supra* Part VII.C.4.

<sup>699</sup> See Temporary Rule 10a–3T Comment letters (including Seward & Kissel LLP Letter), available at <https://www.sec.gov/comments/s7-31-08/s73108-43.pdf>; MFA Letter, available at <https://www.sec.gov/comments/s7-31-08/s73108-41.pdf>; IAA Letter, available at <https://www.sec.gov/comments/s7-31-08/s73108-38.pdf>; ICI Letter, available at <https://www.sec.gov/comments/s7-31-08/s73108-47.pdf>; SIFMA Letter, available at <https://www.sec.gov/comments/s7-31-08/s73108-52.pdf>. See also *supra* Part III.D.2. (for more information on Threshold A using Form SH data).

<sup>700</sup> See Proposing Release at Economic Analysis Table I: Various Threshold Levels for Monthly Average Positions and Monthly Maximum Dollar Value. However, the Commission recognizes that temporary Rule 10a–3T was in effect in 2008–2009 and the market may be different, particularly the average short position may be larger. Only

Additionally the threshold might be less burdensome to assess than the one in Rule 10a–3T because it requires the Manager to assess whether it is above the threshold on a monthly basis rather than on each individual day.<sup>701</sup> Second, many commenters believed that weekly reporting was overly burdensome.<sup>702</sup> The short selling information required by Rule 13f–2 and Form SHO will be reported less frequently (monthly rather than weekly) and will involve reporting end of month positions rather than daily positions. Third, Managers will have more time to compile and file the Form SHO reports than they had to compile Form SH.

Notwithstanding these cost-reducing differences, the Commission does recognize that other differences might offset some or all of these cost reductions. In particular, Rule 13f–2 and Form SHO will require that the information on activity include daily records if the Manager exceeds a position threshold that month rather than include daily records if the Manager exceeds an activity threshold that week.<sup>703</sup> Also, unlike the Form SH required under Rule 10a–3T, the Form SHO that will be required by Rule 13f–2 will feature an XML schema that will incorporate technical validations of certain data fields on the Form, and will flag technical errors and require the filer to correct the technical errors before successful submission on EDGAR. However, because the field validations implemented by Rule 13f–2 and Form SHO will be limited to technical errors (e.g., letters instead of numbers in a field requiring only numbers) that will be straightforward to resolve, such resubmission costs will not be

Managers that exercise investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value of at least \$100 million were required to file Form SH. Additionally, the data lacked data validation according to the needs of the end user when filed, making the data hard to work with.

<sup>701</sup> This example assumes the equity is from a reporting company. Thresholds for non-reporting companies are triggered following a single day in which the short sale position exceeds \$500,000. See *supra* Part II.A.3.

<sup>702</sup> See *supra* note 697 for the comment letters in note, as well Coalition of Private Investment Companies letter, available at <https://www.sec.gov/comments/s7-31-08/s73108-46.pdf>.

<sup>703</sup> Rule 10a–3T required institutional investment managers to report beginning and end of day short position, number of securities sold short each day if the particular data item exceeded the threshold. See P 3 final Rule 10a–3T, 73 FR 61678 (Oct. 17, 2008), available at <https://www.sec.gov/rules/final/2008/34-58785fr.pdf>. However, in analysis of Form SH data intraday short selling volume could not be examined for Form SH because the data field for “Number of Securities Sold Short” was populated in only 7% of observations after filters were applied. See Proposing Release note 80 at 14963 for more information on short volume in Form SH data.

<sup>691</sup> See *supra* Part VII.C.4 for more information on costs for CAT Plan Participants.

<sup>692</sup> *Id.*

<sup>693</sup> The Commission believes these costs will be comparable to those estimated in the Proposing Release in connection to the burden of marking an order. The Commission estimates that recording (marking) this information will take between 0.42 and 0.5 seconds per trade, with an annual time burden per Manager equal to 592–7,104 hours. See Table 3 from Proposing Release at 14975, available at <https://www.sec.gov/files/rules/proposed/2022/34-94313.pdf>.

<sup>694</sup> See *supra* Part IV.B for description of Industry Members' use of BFMM.

<sup>695</sup> See CAT NMS Plan Approval Order, 81 FR 84860.

<sup>696</sup> See *supra* Part VII.C.4.

significant. Finally, the rule might impose costs on Managers who were not required to report Form SH because Rule 10a-3T and Form SH did not apply to Managers that exercise investment discretion with respect to accounts holding section 13(f) securities with an aggregate fair market value of less than \$100 million.

#### f. Other Compliance Costs

One commenter stated that the Commission should consider that “the sheer number and complexity of the Proposals, when considered in their totality, if adopted, would impose staggering aggregate costs, as well as unprecedented operational and other practical challenges.”<sup>704</sup> But, consistent with its long-standing practice, the Commission’s economic analysis in each adopting release considers the incremental benefits and costs for the specific rule—that is the benefits and costs stemming from that rule compared to the baseline. In doing so, the Commission acknowledges that in some cases resource limitations can lead to higher compliance costs when the compliance period of the rule being considered overlaps with the compliance period of other rules. In determining compliance periods, the Commission considers the benefits of the rules as well as the costs of delayed compliance periods and potential overlapping compliance periods.

In this regard, some commenters mentioned the proposals which culminated in the recent adoptions of Rule 10c-1a, Beneficial Ownership Reporting, Private Fund Advisers, Settlement Cycle Adopting Release, and May 2023 SEC Form PF Amending Release.<sup>705</sup> The Commission acknowledges that there are compliance dates for certain requirements of these rules that overlap in time with the final rule, which may impose costs on resource constrained entities affected by multiple rules.<sup>706</sup>

However, we do not think these increased costs from overlapping compliance periods will be significant for several reasons. First, the number of Managers who will also be subject to

one or more of these recently adopted rules could be limited; we estimate that 252 to 1000 Managers may be required under the final rules to report on new Form SHO, and of those, depending on their activities, only a portion may also be required to comply with one or more of the recently adopted rules raised by commenters (and even fewer may need to comply with more than one of those other rules).<sup>707</sup> In addition, commenters’ concerns about the costs of overlapping compliance periods were raised in response to the proposal and as discussed above, we have taken steps to reduce costs of the final rule.<sup>708</sup> Finally, although the compliance periods for these rules overlap in part, the compliance dates adopted by the Commission are generally spread out over more than a two-year period from 2023 to 2026.<sup>709</sup>

#### 7. Effect of Certain Electronic Filing and Dissemination Requirements

Rule 13f-2 and Form SHO will require the short position and activity disclosures to be filed on the Commission’s EDGAR system using a structured, machine-readable data language. In particular, the rule and Form will require Form SHO to be filed on EDGAR in a custom XML-based data language specific to that Form (“custom XML,” here “Form SHO-specific XML”). The XML schema for Form SHO-specific XML will incorporate validations of certain data fields on the Form to help ensure consistent formatting and completeness.<sup>710</sup> While

<sup>707</sup> For example, broker-dealers who need to report on Form SHO under Rule 13f-2 will also need to comply with Settlement Cycle Adopting Release but may not need to comply with the requirements of any of the other recently adopted rules.

<sup>708</sup> The final rule mitigates costs relative to the proposal in three ways. First, the reporting threshold for the U.S. dollar value-based prong for reporting company issuer securities is being adopted as a monthly average, rather than the daily end-of-day calculation that was proposed. See *supra* Part II.A.3.b. Second, Form SHO is being adopted without the proposed requirement to report hedging classifications in Information Table 1, and includes a streamlined Information Table 2, which reduces the form’s complexity and the granularity of the information reported. See *supra* Parts II.A.4.d.iii, II.A.4.d.iv. Third, proposed Rule 205 and related CAT reporting requirements are not adopted. See *supra* Part III.B.

<sup>709</sup> For example, compliance periods for the May 2023 SEC Form PF Amending Release and the Settlement Cycle conclude by mid-2024 while reporting under the final rule will be required by the end of 2024 at the earliest. Similarly, certain compliance deadlines for Rule 10c-1a extend into early 2026. See *supra* notes 500–504.

<sup>710</sup> See *supra* Part II.A.4.b. Field validations are restrictions placed on each data element which would not allow a filer to file a form if there are certain technical errors in critical fields. If a Form SHO were to include, for example, letters instead of numbers in a field requiring only numbers, it

the field validations will act as an automated form completeness check when a Manager files a Form SHO, the field validations will not be designed to verify the accuracy of the information filed in Form SHO filings. EDGAR will subsequently aggregate the reported information at the equity security level and release the aggregated data to the public on EDGAR. These requirements will incrementally augment the various effects of the short position and activity disclosures discussed herein by enhancing the accessibility, usability, and quality of the Form SHO disclosures (for use by the Commission) and the aggregate security-level disclosures (for use by the public). By requiring a structured machine-readable data language and a centralized filing location (EDGAR) for the disclosures on Form SHO, the Commission will be able to access and download large volumes of Form SHO disclosures in an efficient manner. To the extent that the efficiencies derived from the centralized filing of the Form SHO disclosures facilitate more rapid Commission response to potential market manipulation, investors could indirectly benefit from the fact that such practices are detected, and possibly addressed, earlier than might otherwise be the case.

One commenter agreed with the Commission’s proposal to require Managers to provide Form SHO in EDGAR in a Form SHO-specific XML.<sup>711</sup> Another commenter stated that “XML is a widely used language and therefore implementation and maintenance would keep costs low and efficiency high.”<sup>712</sup>

Similarly, the provision of the aggregated security-level information at a centralized, publicly accessible location in a structured, machine-readable data language, will enable investors and other public data users to download the aggregated information

would be flagged as a technical error, at which point the filer would either be unable to file the Form (if completed using the fillable web form provided by EDGAR) or the filing would be rejected (if directly filed in EDGAR in Form SHO-specific XML). To complete the filing, the filer would need to correct the error and re-file.

<sup>711</sup> See Comment Letter from Aaron Franz, available at <https://www.sec.gov/comments/s7-18-21/s71821-20120685-272855.pdf> (“This form and forum are ideal for reporting purposes. Further, since the Form SHO is proposed to be published in XML format it should be easy for Managers to automate the process of filling and filing the Form SHO.”).

<sup>712</sup> “[XML] would also allow for easy parsing and review of the data. The costs shouldn’t vary very much between managers as the SHO form should be uniform for all managers, which means they will all use similar implementations to conform to its usage.” Anonymous Comment Letter (Apr. 4, 2022), available at <https://www.sec.gov/comments/s7-08-22/s70822-20122297-278355.htm>.

<sup>704</sup> NAPFM Letter 3.

<sup>705</sup> See *supra* note 499. As stated above, commenters also specifically suggested the Commission consider potential overlapping compliance costs between the final rule and certain proposing releases. See *supra* note 505. These proposals have not been adopted and thus have not been considered as part of the baseline here. To the extent those proposals are adopted in the future, the baseline in those subsequent rulemakings will reflect the regulatory landscape that is current at that time.

<sup>706</sup> See *supra* notes 500–504 (summarizing compliance dates).

directly, and the data might then be analyzed using various tools and applications. Placing the security-level information someplace other than a centralized location in a structured, machine-readable language would mean that data users seeking to analyze the information using tools and applications would need to search for, extract, and structure the security-level short position and activity information or pay a third-party vendor to do so.

Requiring the short position and activity disclosures to be filed in Form SHO-specific XML will facilitate more thorough review and analysis of the reported short sale disclosures by the Commission, which will increase the efficiency and effectiveness with which the Commission could identify manipulative short selling strategies—which may also serve as a deterrent to would be manipulators and thus may help prevent manipulation.

The requirement for short sale disclosures to be filed on EDGAR in Form SHO-specific XML will result in additional incremental compliance costs on filing Managers. These direct compliance costs are detailed in a subsequent section.<sup>713</sup> Moreover, to the extent these incremental compliance costs further chill the incidence of short-selling, the EDGAR and Form SHO-specific XML requirements will increase the likelihood of the indirect costs that are discussed elsewhere in Parts VII.C.2, VII.C.3, VII.C.4, and VII.C.6.

Some commenters expressed concerns with regard to the risks of cyber criminals accessing non-public Form SHO data.<sup>714</sup> Although the SEC is not exempt from cyberattacks, the Commission is pursuing several actions to protect SEC data and strengthen the EDGAR system as described above. The Commission recently deployed security and modernization enhancements focusing on technology upgrades to the EDGAR system.<sup>715</sup> The Commission recognizes that the Rule collects sensitive information and that, while the likelihood of a data breach is low, the costs of a data breach could be substantial. These costs include but are not limited to the following: trading losses that could occur due to the revelation of private trading strategies or economic positions which may enable identifying and trading

opportunistic around such strategies, such as facilitating a short squeeze; business disruptions that could occur if the data breach results in temporary system down time; data breach response costs as market participants must devote resources to determining how to respond to the data breach; and reputational harm to individual Managers and the broker-dealers that employ them. While the potential costs of a breach, to the extent that one occurs, could be severe, RNSAs, ATSs, and SROs, are currently subject to existing requirements designed to improve the resiliency and oversight of securities market technology infrastructure, such as Regulation Systems Compliance and Integrity (“Regulation SCI”) (17 CFR 242.1000 through 242.1007). Adherence to such regulations can reduce the probability of a data breach and mitigate the costs associated with a breach, should it occur.

As stated previously, one commenter stated that the LEI and the FIGI of issuers is “not commonly provided” in other holding reports and would therefore cause Managers to incur additional costs.<sup>716</sup> While LEIs are widely used in the global financial markets (for example, the Commission currently requires funds to identify themselves with LEIs in portfolio holding reports on Form N-PORT),<sup>717</sup> we agree that there are costs associated with obtaining and maintaining LEIs. Currently, U.S. entities may obtain an LEI for a one-time fee of \$60 and an annual renewal fee of \$40.<sup>718</sup>

FIGIs also are widely used in the financial markets, and the Commission recently added FIGI as an optional securities identifier on Form 13F.<sup>719</sup>

<sup>716</sup> MFA Letter, at 9.

<sup>717</sup> Item A.1.d and Item A.2.c of Form N-PORT. See also Item B.1.d of Form N-CEN (requiring funds to disclose their LEIs on annual reports); 17 CFR 242.903(a) (requiring security-based swap participants to report LEIs to swap data repositories). Additionally, other U.S. and foreign regulators require firms to identify themselves with LEIs. For example, Commodity Futures Trading Commission (CFTC) regulations require counterparties to swaps, including interest-rate swaps, to report their LEIs. See 17 CFR 45.6 (CFTC LEI requirement for parties to swap transactions).

<sup>718</sup> A U.S. entity can currently obtain and renew an LEI from one of eleven LEI operating units. See *Get an LEI: Find LEI Issuing Organizations*, Glob. Legal Entity Identifier Found., available at <https://www/gleif.org/en/about-lei/get-an-lei-find-lei-issuing-organizations> (2003). One LEI operating unit currently discloses an initial fee of \$60 and a renewal fee of \$40. See *Frequently Asked Questions, Fees, Payments & Taxes*, Bloomberg LEI, available at <https://lei.bloomberg.com/docs/faq#what-fees-are-involved> (2023).

<sup>719</sup> Special Instruction 11.b.iii of Form 13F. Based on Commission staff analysis of Form 13F filings in EDGAR, at least 500 unique filers have included FIGIs on their Form 13F filings since the

Further, FIGIs, which are automatically assigned and are retrievable and redistributable without licensing restrictions and at no cost,<sup>720</sup> are not expected to result in compliance costs for reporting persons. Lastly, firms can use identifier mapping tables, and thus likely would not need new technology systems to accept LEIs and FIGIs.<sup>721</sup> However, the Commission recognizes that Managers who do not currently use those identifiers and who do not already have identifier mapping capabilities in their data systems would incur one-time costs to build such functionality.

## 8. Potential Increased Use of Derivatives

The Commission recognizes the risk that the benefits of Form SHO data could be diminished to the extent that Managers avail themselves of economically similar arrangements. For example, Managers might consider trading derivatives in place of engaging in short selling, particularly for stocks with liquid options.<sup>722</sup> Benefits might similarly be diminished if a robust single-stock futures market develops over time.<sup>723</sup> Indeed, Rule 13f-2 and its accompanying Form SHO might be a catalyst for growth in derivatives markets if short sellers were to look for avenues to take the economic equivalent of short positions that did not require similar disclosures.

The Reporting Thresholds in Rule 13f-2 are based on a Manager’s gross short position in the equity security itself, and do not consider derivative

amendments to Form 13F became effective on January 3, 2023. As of the second quarter of 2022, 1 billion FIGIs had been assigned to financial instruments. *Financial Instrument Global Identifier Newsletter Q2 2022*, OpenFIGI (June 30, 2022), available at <https://www.openfigi.com/about/news/2022/6/30/financial-instrument-global-identifier-newsletter-q-2-2022>.

<sup>720</sup> Allocation Rules for the Fin. Instrument Glob. Identifier (FIGI) Standard (Object Mgmt. Grp. & Am. Nat’l Comm. X9, amended 2022) section 1.2.1, available at <https://www.openfigi.com/assets/local/figi-allocation-rules.pdf> (“FIGI Allocation Rules”); *Symbolology*, OpenFIGI, available at <https://www.openfigi.com/about/symbolology>. FIGI is an open-source, non-proprietary data standard for the identification of financial instruments across asset classes. FIGI Allocation Rules sections 1.1.1, 1.2.1, 1.4.1. The Share Class level FIGI is assigned to equities and funds, and enables users to link multiple FIGIs for the same instrument to obtain an aggregated view for that instrument across all countries globally. *Id.* section 1.4.3.

<sup>721</sup> FIGI allows users to link various identifiers for the same security to each other, which includes mapping the FIGI of a security to its corresponding CUSIP number. See *Financial Instrument Global Identifier*, OMG Standards Dev. Org. (2023), available at <https://www.omg.org/figi/>.

<sup>722</sup> See *supra* note 527, R. Battalio, and P. Schultz (2011), Grundy, Lim, and Verwijmeren (2012). One commenter agreed that this is a likely outcome. See *Better Markets Letter* at 9–10.

<sup>723</sup> See *supra* note 527, Jiang, Shimizu, and Strong (2019).

<sup>713</sup> See *supra* Part VIII.C.6.

<sup>714</sup> See MFA Letter, at 8 and Two Sigma Letter, at 5.

<sup>715</sup> See Annual Report on SEC website Modernization Pursuant to Section 3(d) of the 21st Century Integrated Digital Experience Act (Dec. 2022), available at <https://www.sec.gov/files/21st-century-idea-act-report-2022-12.pdf>.

positions. Consequently, a Manager seeking to build a large short position without incurring a reporting obligation might hold a short position just below a Reporting Threshold and use derivatives to take positions that effectively rise above that threshold.<sup>724</sup> One commenter stated that this may be viewed as regulatory arbitrage.<sup>725</sup>

Using derivatives to establish an economically equivalent short position that does not include a reporting obligation may be costly. Options tend to be more expensive than equity transactions, particularly for less liquid securities. Additionally, some equities do not have listed options. Consequently, the Managers' desire to avoid the costs associated with reporting Form SHO information articulated in Parts VIII.C.1 and VII.C.2 is balanced against the increased cost of using derivatives such as options to execute a short position. Thus, for some stocks, *i.e.*, those with illiquid or non-existent options, the likelihood that Managers will seek to employ alternative arrangements through options may be minimal. However, academic research has shown that investors have used options as an alternative means to obtain short-like economic exposure when short selling is restricted, thus there is a significant risk that there will be some attempt to employ alternative arrangements using derivatives, particularly in stocks with liquid options markets.<sup>726</sup>

#### *D. Efficiency, Competition and Capital Formation*

##### 1. Efficiency

Markets function best and are most efficient when all relevant information regarding a security is known and is incorporated into prices.<sup>727</sup> This includes negative information. When negative information is not tradable, stocks tend to be overpriced, leading to an inefficient allocation of capital across the economy.<sup>728</sup> More efficient prices lead to better economic outcomes for the macro economy as capital flows into high value projects and out of low value projects. Short sellers have incentive to uncover negative information and to trade in order to profit from that

information.<sup>729</sup> As discussed in Part VIII.D.2, more transparency in short selling will improve the amount of information that investors have to value a stock—increasing price efficiency. However, it might also disincentivize fundamental research which may harm price efficiency by limiting the amount of total information has been discovered, and thus, limiting the amount of information incorporated into stock prices. Overall, the impact of the adopted rule and CAT amendment on price efficiency is uncertain.<sup>730</sup>

Additionally, the CAT amendment will improve the efficiency of the Commission's oversight and enforcement of regulations relating to the bona fide market making exception by providing more efficient access to data on how individual market makers are using the exception. Currently, the Commission must request information about the use of the market maker exception from specific broker-dealers.<sup>731</sup>

##### 2. Competition

Investors compete with one another to gather information that they use to enact trading strategies. Academic research indicates that when short selling is costly, investors owning the asset have an advantage in gathering information due to the reduced cost of acting on whatever information that they gather.<sup>732</sup> The final rule may increase this advantage since it will increase the cost of short selling for Managers above the Reporting Thresholds, as discussed in Parts VIII.C.1 and VIII.C.2. Relatedly, fund performance is a key determinate of drawing investor flows. The Commission believes that Rule 13f-2 and Form SHO might harm competition for fund flows between Managers who do and do not use short selling strategies. For instance, Managers that are skilled at uncovering negative information may face additional costs when transacting on this information, potentially leading to lower returns.

The Commission believes that the CAT amendment will not alter significantly the competitive landscape for broker-dealer services. Because small

broker-dealers are likely to use a service bureau to report their CAT data,<sup>733</sup> the Commission believes that implementation costs will be borne by service bureaus and are likely to be recovered across many service bureau-client broker-dealers. Individual small broker-dealers may face expenses in configuring service bureau software packages, but these expenses are likely to be one-time and modest because the bulk of implementation activities will have been performed by the service bureau.<sup>734</sup> Because larger broker-dealers that self-report CAT Data enjoy economies of scale, they should be able to absorb the costs associated with compliance more easily, and they may choose to contract with a service bureau if implementation is unusually burdensome due to the operation of multiple legacy order-handling systems.

In addition, as stated above, some commenters requested the Commission consider interactions between the economic effects of the proposed rule and other recent Commission rules, as well as practical realities such as implementation timelines.<sup>735</sup> As discussed above, the Commission acknowledges that overlapping compliance periods may in some cases increase costs.<sup>736</sup> This may be particularly true for smaller entities with more limited compliance resources.<sup>737</sup> This effect can negatively impact some competitors because these entities may be less able to absorb or pass on these additional costs, making it more difficult for them to remain in business or compete. However, the final rule mitigates overall costs relative to the proposal,<sup>738</sup> and we do not believe these increased compliance costs will be significant for most Managers.<sup>739</sup> We therefore do not expect the risk of negative competitive effects from increased compliance costs due to simultaneous compliance periods to be significant.

##### 3. Capital Formation

One of the primary roles of the securities markets is to allocate capital

<sup>733</sup> See Rule 613 Adopting Release for the Commission discussion of CAT costs to broker-dealers.

<sup>734</sup> See *supra* Part VIII.C.6 for a discussion of compliance costs.

<sup>735</sup> See *supra* Part VIII.C.6.

<sup>736</sup> See *id.*

<sup>737</sup> But see *supra* Part VII.B.2 and *infra* Part IX (the Commission anticipates that the type of Manager that will trigger a reporting threshold likely already has sophisticated information technology and the ability to automate reporting; and that the reporting thresholds will not apply to a significant number of small Managers).

<sup>738</sup> See *supra* note 706 and accompanying text.

<sup>739</sup> See *supra* Part VIII.C.6.f.

<sup>724</sup> While combining short positions with derivatives may allow a Manager not to trigger the Reporting Thresholds, using options may trigger a report to FINRA's LOPR. See *supra* note 78.

<sup>725</sup> See Law and Finance Professors Letter, at 3.

<sup>726</sup> See *supra* note 527.

<sup>727</sup> See Eugene F. Fama, Efficient Capital Markets a Review of Theory and Empirical Work, *The Fama Portfolio* 76–121 (2021).

<sup>728</sup> See *supra* note 624.

<sup>729</sup> See *supra* Part VIII.C.2 for discussion of short selling motivation.

<sup>730</sup> See *supra* Part VIII.C.2 for discussion of price efficiency effects.

<sup>731</sup> See *supra* Part VIII.B.3 for a further discussion of the inefficiencies of existing data with regards to oversight and enforcement of rules relating to bona fide market making. In examinations and enforcement matters, the Commission has used broker-dealer trade blotters in combination with other regulatory data to consider whether conditions were met for the use of BFMM locate exemptions.

<sup>732</sup> See Dixon (2022), *supra* note 581.

(money) across the economy. If investors believe that a company is undervalued then, all else being equal, they will buy that stock; if many investors buy the stock, the price for that stock will increase—lowering the cost of equity financing and making funding projects easier for the firm. On the other hand, if investors believe that a company is overvalued then, all else being equal, they will sell or short sell the stock to invest in other more profitable ventures. If enough investors sell or short the stock, then the stock price will decline. A lower stock price implies more expensive equity financing and thus a higher weighted average cost of capital. When stocks are overpriced, they are inherently allocated too much capital, which deprives more productive ventures from receiving optimal capital and hinders economic progress. Consequently, short sellers contribute to capital formation by enhancing price efficiency which helps to ensure an optimal allocation of capital across firms. Thus, to the extent that the adopted rule and CAT amendment discourage short selling, as discussed in Parts VIII.C.1 and VIII.C.2, it may lead to the overpricing of some stocks and the underpricing of others.<sup>740</sup> This mispricing distorts optimal capital formation as it implies that some firms may have a cost of capital that is relatively too high or too low with respect to that firm's fundamentals and risk profile.

Additionally, academic research suggests that managers learn from stock price changes, using them as a way to tap into the 'wisdom of crowds' phenomena to improve decisions.<sup>741</sup> For instance, if a firm announces a capital investment or other project, and the stock price moves up or down, then managers may use this information as a signal about the market's perception of the value of that project. Thus, stock price reactions may be an input into manager decisions in terms of when and how to invest capital. To the extent that the rule discourages short selling, it may make it more difficult for managers to extract signals from stock prices about the value of capital investments—particularly low value projects as the rule may attenuate the market's ability to respond to negative information.

The costs associated with Managers monitoring their short positions for compliance with reporting Form SHO along with the negative economic effects detailed in Parts VIII.C.1, VIII.C.2, and

VIII.C.7 may harm capital formation, specifically capital formation using convertible debt, if it increases the cost of short selling. Investors may be less inclined to purchase convertible debt if the cost of hedging that purchase by short selling the security becomes more expensive—through both the direct and indirect costs associated with Form SHO.<sup>742</sup> Thus, to the extent that the costs associated with Form SHO increase the cost of short selling they may also increase the cost of hedging convertible debt and may make that form of financing more expensive. This effectively increases the weighted cost of capital for firms that use convertible debt and may hinder their ability to fund operations, including new investments.

In contrast, adopted Rule 13f-2, Form SHO, and the CAT amendment may have a positive influence on capital formation if they disincentivize short selling that takes place in connection with securities fraud. For example, in one type of fraud, investors holding convertible debt would engage in a manipulation including short sales of a stock in an attempt to drive down the price artificially in order to convert their debt to equity and cover their short positions at a lower price. To the extent that the rule facilitates better oversight and prosecution of this sort of fraud, it may facilitate capital formation by lowering the risk that convertible debt holders will engage in this sort of fraud. More generally, to the extent that enhanced oversight of short sale activity deters manipulative activity such as short squeezes and associated price bubbles stemming from short squeezes, price efficiency may be enhanced, which in turn, could further promote capital formation.

Rule 13f-2 may also affect capital formation through investor confidence. Some commenters on FINRA's short interest proposal suggested that short selling, and in particular a lack of short selling disclosure, leads some investors to have less confidence in financial markets.<sup>743</sup> One commenter, however, stated that, "Rule 13f-2 will not promote greater risk management among market participants, and hence, not bolster confidence in the markets by providing greater transparency," because investors already use aggregate

short interest data from FINRA, the exchanges, and data vendors for risk management purposes.<sup>744</sup> As discussed throughout this release, the Commission, however, believes that the data from Form SHO and the amendment to CAT will provide information that is additive to these and other data sources and will therefore improve short selling transparency and strengthen investor confidence, which might increase investment activity and, in turn, promote capital formation.

#### *E. Reasonable Alternatives*

##### *1. Alternative Approaches*

###### *a. Releasing Aggregated CAT Data*

As an alternative to collecting, aggregating, and publishing Form SHO, the Commission considered amending the CAT NMS Plan to collect additional information so that the Commission or the Plan Processor could aggregate and publish CAT Data. This alternative would effectively eliminate the thresholds for reporting.<sup>745</sup>

CAT data currently contains a short sale mark and, as part of the implementation of the Customer Account Information System (CAIS), will also provide the identities of those transacting. Consequently, the Commission or the Plan Processor could aggregate information on the number of short sales that Managers engage in from CAT, assuming that the Commission or the Plan Processor could determine that a transaction is by or on behalf of a Manager, and disseminate aggregated information to the public at monthly intervals—or more frequently. The Commission or Plan Processor could publish daily statistics on the number of short sales engaged in by Managers each day in the prior month as reported in CAT. Additionally, the reports could include information on options transactions that lead to short exposure, such as purchasing a put option, or writing a call option.<sup>746</sup> Furthermore, a longer time series (for example, a rolling year) to estimate a Manager's position could be aggregated using CAT data. These could be aggregated to create a market-wide short position estimate. However, this estimate would be inaccurate because the alternative does not consider collecting in CAT information on changes in positions that come from activity other than secondary market transactions, such as secondary offering purchases, conversions, creations and redemptions, and option

<sup>742</sup> See, e.g., Stephen J. Brown, Bruce D. Grundy, Craig M. Lewis and Patrick Verwijmeren, *Convertibles and Hedge Funds as Distributors of Equity Exposure*, 25 (10) Rev. Fin. Stud 3077–3112 (Oct. 2012).

<sup>743</sup> See letters from NASDAQ, OTC Markets, and CFA Institute in response to FINRA's short interest proposal) available at <https://www.finra.org/rules-guidance/notices/21-19#comments>.

<sup>744</sup> See SBAI Letter, at 3.

<sup>745</sup> See Proposing Release, at 15003.

<sup>746</sup> In this alternative, however, CAT would not contain the information on option expirations or assignments.

<sup>740</sup> See *supra* note 624, Miller (1977).

<sup>741</sup> See I. Goldstein and A. Guembel, *Manipulation and the Allocational Role of Prices*, 75 (1) The Rev. of Econ. Studies 133–164 (2008).

exercises and assignments. This inaccuracy could also result in the market-wide short position estimate being less accurate than current short interest data.<sup>747</sup>

The alternative would result in lower benefits than those from Rule 13f-2 and the disclosures Form SHO requires. The data published under this alternative would have significant overlap with the data that would be published under Rule 13f-2 and Form SHO. However, again assuming that the Commission or the Plan Processor could determine that a transaction is by or on behalf of a Manager, the data in this alternative could be more comprehensive in terms of the breadth of Managers whose short selling information could be aggregated and published,<sup>748</sup> because the Commission could publish aggregated data on short selling transactions from all Managers instead of just those that meet the threshold. However, the published data would be less accurate in terms of estimating positions and changes in positions as they would not include certain activity, such as options assignments, that are not collected in CAT but that may affect a short position. As a result of these differences, this alternative would result in less clarity about bearish sentiment among Managers. Thus, in terms of price efficiency, this approach would not have many of the same benefits as adopted Rule 13f-2 and Form SHO.

The alternative would also reduce the benefits of comparing the published data to short interest because the alternative would focus on transaction dates rather than settlement dates and the alternative would not be restricted to large positions.<sup>749</sup> Short interest measures short positions as of two settlement dates per month. A comparison of the data in the alternative to the short interest data would require either publishing the position data as of the transaction dates that correspond to the short interest settlement dates or users would have to use the activity data to offset the dates themselves. Further, the inclusion of more than just Managers with large short positions means that the information conveyed by the alternative relative to short interest data would be less additive than the

data provided that will be provided by adopted Rule 13f-2 and Form SHO.

This alternative would mitigate some of the concerns associated with Managers being exposed to increased risk of short squeezes or other retaliation as discussed in Parts VIII.C.1 and VIII.C.2. This reduced risk stems from the fact that it would be more difficult to determine whether the short selling activity reported was due to many Managers short selling small amounts, or just a few Managers short selling large amounts. It would also be more difficult to identify individual short sellers based on the data. A lower risk of retaliation or short squeezes may also mitigate some of the negative effects of Rule 13f-2 and Form SHO with regard to less overall short selling or fundamental research that are described in Part VIII.C.2, depending on the delay in publication under the alternative.

Additionally, this approach would have lower compliance costs for Managers than the current proposal, as it would not require Managers to file Proposed Form SHO. One commenter agreed that releasing CAT data with short sale information would be less costly for Managers than Proposed Form SHO.<sup>750</sup> While it would result in the same costs for Industry Member reporting as those associated with the CAT amendment, it would increase costs associated with the Plan Processor improving processing power for the aggregation of CAT data if such computations could not be performed with existing resources (without reducing other functionality). Any costs incurred by the Plan Processor would be passed along to Plan Participants and Industry Members.

There are several drawbacks to this alternative relative to the existing proposal. First, it would take some time before CAT data could be used to develop an estimate of the size of short positions. Thus, the data would not immediately provide the Commission or market participants with information about the size of individual large short positions. Consequently, to the extent that knowing the total size of short positions held by Managers with large positions conveys fundamental information to the market, then this fundamental information would not be immediately available if the Commission were to adopt a version of this alternative. Additionally, the data provided by this alternative would exclude transactions outside of the purview of CAT that may affect short positions. Thus, the data provided

under this alternative would always be estimates of total short positions, which could be inaccurate for some Managers. Another drawback to this alternative is that releasing CAT data to the public could increase security risks. CAT contains highly sensitive information and creating a process that would release portions of the data, even if aggregated, could present risks.

A larger expansion of CAT could achieve at least the same data value as in Rule 13f-2 and Form SHO.<sup>751</sup> For example, CAT could expand to require the reporting of all the information that will be collected in adopted Form SHO. Specifically, the Commission could expand CAT to include data on account positions, including short selling positions associated with those positions. In addition, CAT could be expanded to capture information on changes in those positions. Under this approach, regulators would have access to the same data as if Managers filed Form SHO but for all short sellers, not only the subset of Managers reporting on Form SHO. This approach would also result in additional information available to regulators not collected in Form SHO that could improve investor protections. In addition, this alternative would reduce costs for Managers who are not Industry Members because they would not be required to report new information. However, costs would increase for Industry Members, who would have to report a significant amount of new information on CAT report types that do not exist today and for Participants who would have to work out technical specifications and implement changes for new types of CAT reports. Further, more Industry Members would report this information to CAT than Managers who, under the final rule, would be required to report information on Form SHO. It would be a major undertaking for both the Plan Processor and industry participants to build out and adapt systems to collect, process, and publish this information. This implementation would likely be very complex and take a significant amount of time to compile. Overall, the cost of this alternative is likely to exceed the costs of adopted Rule 13f-2 and Form SHO.

Further, if the Commission were to expand CAT to collect additional information beyond what would be captured by the amendment to CAT, such as position information, then these additional expansions would impose significant direct costs to CAT-reporting firms.

<sup>747</sup> FINRA's process of gathering and validating short interest data takes approximately two weeks. See *supra* note 561.

<sup>748</sup> This assumes the Managers that could be identified in CAT could include all those that would be responsible for reporting under Proposed Rule 13f-2 and Proposed Form SHO.

<sup>749</sup> Adopted Rule 13f-2 requires reporting based on the settlement date, which is normally two business days after the transaction day.

<sup>750</sup> See SBAI Letter, at 2.

<sup>751</sup> See Proposing Release, at 15004.

#### a. FINRA Reporting

As discussed in Part VIII.C.4.i, FINRA already collects and, together with the listing exchanges, disseminates aggregate short interest that it collects from member broker-dealers.

Consequently, the Commission could codify FINRA's existing process to ensure that it continues in perpetuity.<sup>752</sup> This alternative would have no additional costs to market participants but would substitute a Commission mandate for the publication of the short interest data. Several commenters expressed support for the use of FINRA to satisfy DFA requirements in lieu of Rule 13f-2 and Form SHO.<sup>753</sup> The commenters' support is motivated by familiarity with current FINRA short reporting requirements and costs that would not be incurred to comply with Rule 13f-2 and Form SHO.

Similarly, the Commission 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.<sup>754</sup> To accomplish this, reporting broker-dealers would separately include in their reports to FINRA the short positions that originate from Managers. FINRA would then compile both total short interest, as it currently does, as well as a Manager specific short interest. Because broker-dealers already have experience reporting short interest data to FINRA and would thus not need to build out new systems to report the data, this alternative might have been less expensive than the existing proposal as it would have only required a modification of an existing process. Since this alternative would not have provided the Commission with the positions of any identified Managers or any Manager-specific activity data, the benefits and risks associated with these data articulated throughout Part VIII.D would decline. In addition, it would not have distinguished Managers with large positions from other Managers. Therefore, neither market participants nor regulators would know what share of short interest was concentrated among Managers with large positions. As discussed above in Part VIII.C.1, Managers often accumulate large short sale positions based on fundamental market research or other factors that differ from investors with smaller positions, the latter of which are more likely shorting for hedging or smaller-scale speculative purposes. Therefore,

this alternative would have provided less transparency into the short sale market relative to the Rule 13f-2 and Form SHO because it would not have revealed the degree to which short interest was concentrated among Managers with large positions.

The Commission also expects that data on Manager short interest in addition to total short interest would have likely not provided much incremental value over the existing short interest data due to the likely significant overlap of the short positions of Managers and total short interest, and the absence of activity information to better understand changes in short interest.<sup>755</sup> Thus, while the alternative that requires FINRA to produce separate short interest data for Managers would have reduced costs to market participants relative to the existing proposal, it also might not have provided the market or regulators a significant incremental benefit relative to existing short selling data.

#### b. Broker-Dealer Reporting to EDGAR on Behalf of Managers

The Commission could adopt a modified rule that allows broker-dealers to file Form SHO reports with the Commission on behalf of Managers.<sup>756</sup> This alternative might reduce costs as it could concentrate reporting with broker-dealers that have significant experience collecting and providing such information—increasing operational efficiency. On the other hand, Managers may use multiple prime brokers and thus the reporting prime broker may not have easy access to information about all such Manager's positions and activity in a security. Consequently, the reporting prime broker may not know whether the sum of the manager's positions exceeds either of the thresholds and thus whether reporting is necessary. Thus, the reporting broker would need to gather additional information from the Manager about activity associated with other prime broker(s).<sup>757</sup> In the absence of such information gathering, the reporting broker may mistakenly not report Form SHO for a Manager whose position with

that particular reporting broker is under the threshold, but over the threshold when positions across brokers are combined. Requiring additional data collection of a Manager's short positions by the reporting broker might increase complexity and costs as Managers and broker-dealers would need to develop systems by which a Manager provides information to its reporting broker about its activity with other prime brokers. Alternatively, the Commission could permit broker-dealers to report on behalf of Managers only if the broker-dealer could report full information. Thus, Managers using multiple prime brokers would have the option of providing comprehensive information to their reporting prime broker, or they could report Proposed Form SHO data themselves.

#### c. Harmonization With European Disclosure Requirements

The Commission could also craft Rule 13f-2 and Form SHO to be consistent with European disclosure requirements.<sup>758</sup> In 2012, the European Parliament and the Council of the European Union adopted regulations on short selling (the "SSR") that standardized the reporting threshold for all EU member states.<sup>759</sup> Under the SSR, a natural or legal person holding a short position is required to report to the relevant regulator when its short position ("net short position"), computed by taking into account relevant derivative positions such as options, if any, reaches the initial threshold of 0.2 percent of the issued share capital of the company, and in 0.1 percent up and down increments thereafter.<sup>760</sup> The threshold for reporting to a regulator recently was lowered to 0.1 percent.<sup>761</sup> If the net short position reaches 0.5 percent of the share capital of the company, then the relevant market regulator reports the net short position to the public with the identity of the short seller revealed.

<sup>752</sup> See Proposing Release, at 15005.

<sup>759</sup> See European Parliament and Council Regulation 236/2012, 2012 O.J. (L 86) 1, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:en:PDF>. The SSR was adopted on Mar. 14, 2012 and its provisions had applicability dates of Mar. 25 and Nov. 1, 2012.

<sup>760</sup> *Id.* at Article 5(2).

<sup>761</sup> The threshold was temporarily lowered in Mar. 2020 in response to the COVID-19 pandemic. See ESMA Decision of 16 Mar. 2020, ESMA 70-155-9546, available at [https://www.esma.europa.eu/sites/default/files/library/esma70-155-9546\\_esma\\_decision\\_-\\_article\\_28\\_ssr\\_reporting\\_threshold.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-155-9546_esma_decision_-_article_28_ssr_reporting_threshold.pdf). In September 2021, the change was adopted on a permanent basis. See European Union, Commission Delegated Regulation 2022/27, art. 1, 2022 O.J. (L 6) 9, available at <https://eur-lex.europa.eu/legal-content/EN/TEXT/HTML/?uri=CELEX:32022R0027>.

<sup>752</sup> See Proposing Release, at 15004.

<sup>753</sup> See, e.g., AIMA Letter, at 8; ICI Letter, at 51; Ropes & Gray Letter, at 4; Two Sigma Letter, at 9.

<sup>754</sup> See Proposing Release, at 15004.

<sup>755</sup> Analysis of Form SH data indicates that these data, which would be a subset of the data collected in this alternative, amounted to a high percentage of short interest. Commenters questioned the use of Form SH data in this and other contexts. See *supra* Box 1: Use of Form SH Data for responses to comments on the use of these data.

<sup>756</sup> See Proposing Release, at 15004.

<sup>757</sup> The latter could result in the additional complication of double reporting or prime brokers having to coordinate on who reports a position. Likely, the least costly solution could involve Managers being responsible for informing their prime brokers of their threshold status.



New filings are required to be made whenever the net short position increases or decreases by 0.1 percent of the share capital of the company. In the EU, trading entities must submit their data to the relevant regulator by 3:30 p.m. on the following trading day.<sup>762</sup> Trading entities accomplish public disclosure via a central website operated or supervised by the relevant competent authority.<sup>763</sup>

Consequently, the Commission could structure the rule to require Manager short selling reports that are consistent with the European regulations in terms of the thresholds for reporting, the computation of the threshold, the items reported, the timing for when short sale information is made public, and the timing for when new reports have to be issued. This alternative would provide directional information about short positions because only net short positions are required to be reported; would likely impose lower compliance costs to Managers;<sup>764</sup> would likely raise the risk of abusive practices towards short sellers; would likely increase Managers' ability to evade the threshold; and would lower the detail of the data the Commission receives relative to the data from adopted Form SHO.

One advantage of this alternative would be likely lower compliance costs for Managers that engage in short selling in both the EU and US.<sup>765</sup> By only needing one set of compliance systems in place to satisfy both rules, Managers might enjoy lower costs to comply in both systems. Additionally, Managers might face lower costs to track and report net short positions. Moreover, in connection with Regulation SHO compliance, some Managers already track net positions on an aggregation unit basis.<sup>766</sup> Thus, the computation of net positions for such Managers might be less costly than that of gross short positions as required by Rule 13f-2. However, for other Managers who are not currently aggregating positions on a net basis, costs of tracking may be higher under this alternative than under Rule 13f-2.

This alternative also could have some negative consequences. The EU data are timelier than data available under adopted Rule 13f-2, since the forms are

posted publicly immediately after receipt by the regulator, which potentially facilitates greater price discovery. However, this comes at the cost of increasing the possibility of revealing short sellers' proprietary information and its associated risks, including short squeezes and copycat trading. Additionally, the EU structure, whereby individual short sellers' names are made public, might raise the risk of retaliation towards short individual sellers, as well as the ability for market participants to engage in copycat strategies that decrease the profitability of gathering information. As a result of these costs to short sellers, investors may not be able to gather as much fundamental information as under the final rule.<sup>767</sup> One commenter,<sup>768</sup> however, stated that a recent study has found that the EU's regulation finds no evidence that the disclosure requirements have resulted in increased coordination or have resulted in short sellers being targeted for short squeezes.<sup>769</sup>

Another potential consequence of this alternative would be adjusting position sizes to evade the Reporting Threshold. Multiple studies found evidence that short sales in the EU are clustered below the threshold, suggesting that investors are trying to conceal their positions to protect their underlying investment strategies.<sup>770</sup> Thus, short sellers may adjust their positions to either increase their long exposure or reduce their short exposure, leading to loss of price efficiency. The Commission believes that since there are benefits to short sale activity, including increased price efficiency, then there would likely be increased costs to disclosing manager identities, since this would reduce short sale activity.

By reporting net short positions, rather than gross short position, the Commission and the public would not

receive information about large, but hedged, short positions. For instance, the alternative would allow<sup>771</sup> a comparison of total short interest with reported large hedged short positions, which might provide additional information to the market about the activities of large, though perhaps non-information based, traders. While hedged short positions are less likely to be manipulative in nature, or to pose systemic risk, large short positions are still potential sources of systemic risk. One commenter stated that using thresholds based on net short positions would allow market makers that carry large gross short positions for market making purposes rather than directional trading strategies to avoid having to submit Form SHO and incur its associated costs. According to the commenter, since net positions of market makers tend to be close to zero, including market maker gross positions in the public release of Rule 13f-2 data could be misleading to market participants (assuming that those market participants did not understand what data Rule 13f-2 will and will not provide).<sup>772</sup> The Commission believes, however, that market makers will rarely if ever be required to report their short positions because the dollar-value threshold of Rule 13f-2 was increased from the proposal's \$10 million on a single trading day to a \$10 million daily average over the course of a month. It is the Commission's understanding that markets makers are highly unlikely to hold a gross short position averaging \$10 million over the course of trading month.

A reporting requirement for only net short positions would reduce the value of Rule 13f-2 data for use in reconstructing market events. For instance, during the recent meme stock phenomenon, for certain stocks it became difficult to hedge options transactions using the underlying security due to the significant price changes in the spot market. Consequently, positions that were previously judged to have been hedged, and thus low risk, may no longer have been hedged. In addition, large short positions with hedges that have been significantly weakened or broken due to unforeseen extreme market events, may have become systemically important. In such cases, it would be useful for the Commission to have information on large short positions, regardless of perceived net short position, in order to

<sup>767</sup> For analyses of how the SSR lead to increased copycat trading, lower price efficiency, and increased volatility, see Stephan Jank, Christoph Roling, and Esad Smajlbegovic, *Flying Under the Radar: The Effects of Short-Sale Disclosure Rules on Investor Behavior and Stock Prices*, 139 (1) J. of Fin. Econ. 209–233 (2021); Charles M. Jones, Adam V. Reed, and William Waller, *Revealing Shorts an Examination of Large Short Position Disclosures*, 29 (12) The Rev. of Fin. Studies 3278–3320 (2016).

<sup>768</sup> See Better Markets Letter, at 13.

<sup>769</sup> See Charles M. Jones, Adam V. Reed, and William Waller, *Revealing Shorts an Examination of Large Short. Position Disclosures*, 29 Rev. of Fin. Studies 3278, 3282 (2016).

<sup>770</sup> See Stephan Jank, Christoph Roling, and Esad Smajlbegovic, *Flying Under the Radar: The Effects of Short-Sale Disclosure Rules on Investor Behavior and Stock Prices*, 139 (1) J. of Fin. Econ. 209–233 (2021); Mazzacurati, Julien, *The Public Disclosure of Net Short Positions*, European Securities and Markets Authority (ESMA), Trends, Risks, Vulnerabilities (TRV) Report No. 1, 2018.

<sup>771</sup> This comparison, however, would be different than that of comparing Form SHO data to short interest data.

<sup>772</sup> See HSBC Letter 2, at 3.

<sup>762</sup> *Id.* at Article 9(2).

<sup>763</sup> *Id.* at Article 9(4).

<sup>764</sup> For Managers operating in both the EU and the US, these costs may be lower.

<sup>765</sup> Due to uncertainties regarding the EU short selling data regarding the identities of short sellers and the ability to map those IDs to US Managers, the Commission cannot identify the number of US Managers that currently comply with EU regulations.

<sup>766</sup> See *supra* note 263.

aid in the reconstruction of market events. This is a loss of value compared to adopted Rule 13f-2 and Form SHO, which are triggered by large gross short positions.

Further, the EU regulations provide activity data if positions change by 0.1 percent or more. Thus, market participants could only learn about measured positions changes, rather than position changes of all sizes. As an example, there may be times where the public may be interested in seeing the reaction to a corporate announcement, but this may be limited if Managers do not adjust short positions above the 0.1 percent threshold to trigger reporting.

## 2. Data Modifications

### a. Release Proposed Form SHO Data in Alternative Formats

The Commission could release the information included in Form SHO in a different manner. This alternative could take one of several forms.<sup>773</sup> For example, the Commission could release each Form SHO report to the public exactly as it is filed, identifying the Managers. The Commission could also release the Forms as filed, but with the identities of the filers removed. The Commission could also release the aggregated data as in the current proposal, but it could publish the data in different ways in the aggregated Form SHO report, such as publishing the number of entities underlying the aggregated data or publishing increases in short positions separate from decreases.

In the first alternative, the Commission could release Form SHO as filed, allowing all market participants to see the identities of short sellers—similar to the EU regulation discussed above. This would increase the information that market participants have to evaluate sentiment on particular equities in the market. In particular, for some market participants, this information would also allow market participants to better manage risk by allowing them to manage their exposure to Managers with large short positions. There are also potential costs to this alternative. One potential result from this alternative is that if a short seller is viewed as sophisticated and informed, then releasing identifying information would likely spur copy-cat trading strategies. This outcome has been documented with respect to the EU regulation and suggests that revealing the identities of the short sellers may diminish the value of becoming informed.<sup>774</sup> In addition, the detailed

information on daily short activity could reveal not just market sentiment, but trading strategies of individual Managers. Additionally, releasing the names of large short sellers would further increase the likelihood that the short seller would be the victim of a short squeeze or other retaliatory actions as described in Part VIII.C.1.

Similarly, the Commission could publicly release individual Form SHO filings with identification information removed from the released data. This alternative would provide market participants a clearer view into the activities of large short sellers, potentially improving their ability to learn from the actions of large short sellers relative to the current proposal. For instance, the data would allow market participants to know whether short sentiment was broadly held—as would be indicated by many filings—or concentrated—as would be indicated by few filings. This information could potentially improve the market assessment of bearish sentiment relative to Rule 13f-2, improving price efficiency.

However, the indirect costs of this alternative would be greater than for Rule 13f-2 and Form SHO. Releasing all the information from Proposed Form SHO could reveal trading strategies that would be costly even if the identities of the short sellers remained anonymous. For example, releasing this information, even without naming the short sellers, might increase the risk of copycat trading which reduces the profits of acquiring information. It might also provide information about how vulnerable short sellers may be to a short squeeze as it could give a signal about whether a short seller has a large and potentially vulnerable short position. In this case, the negative effects of the rule on the value of collecting information and of short selling in general would be greater than under the final rule, leading to less price efficiency and potentially more volatility. Additionally, even though the data could be released anonymously, it is not clear that in all cases the identities of the individual short sellers would remain anonymous.<sup>775</sup> If market

<sup>773</sup> Issuers have been known to hire private investigators to try and uncover the identities of short sellers when they learn that their stock is being targeted by short sellers. See *supra* note 622. Additionally, researchers have used algorithms to unmask the identities of individuals from masked data released to the public by the SEC. See Huaizhi Chen, Lauren Cohen, Umit Gurun, Dong Lou, and Christopher Malloy, *IQ from IP: Simplifying Search in Portfolio Choice*, 138 (1) J. of Fin. Econ. 118–137 (2020). While the Commission could design this alternative to avoid the specific vulnerabilities exploited by Chen et al (2020) it is possible that

participants were able to uncover the identities of individual short sellers, then the risk of retaliation or short squeezes would increase relative to Rule 13f-2 and Form SHO.

Alternatively, the Commission could release the data as specified in the current proposal but also include the number of entities whose Form SHO reports were collected. This information would provide the market with additional detail about whether short sentiment was broadly held by multiple Managers, or narrowly held by just one or a few. This information could be useful as market participants assess bearish sentiment in the market and adjust their actions accordingly. However, adding this information might also increase the risk of short squeezes or other retaliatory actions in the case where there are very few reporters of Form SHO. In the Form SH data collected under temporary Rule 10a-3T, 32 percent of stocks had only one Manager reporting a position per month.<sup>776</sup> Such a situation could signal to market participants that one, or a few, short sellers have large short positions that could potentially be vulnerable to a short squeeze.

Similarly, the Commission could collect Form SHO data but publicly release the daily aggregate increases separately from the daily aggregate decreases in short positions as opposed to daily net changes to short positions as adopted in Form SHO. This approach would provide the public more detailed information and understanding on what drives changes to short positions. However, separating daily aggregate increase from decreases in short positions could increase the risk of revealing trading strategies, which could disincentivize short selling and harm market quality.

### b. Collect Data on Derivatives Positions

Investors can use derivatives to take an economically short position in a security. For example, an investor with a bearish view of a stock can purchase a put option in that stock. Consequently, for a more complete view of the total economic short position that a Manager has taken, the Commission could require Managers who report adopted Form SHO to also disclose their derivatives positions on underlying equity securities such as options and

motivated researchers and market participants could find some other unforeseen way to link the public data to individual short sellers.

<sup>776</sup> See Proposing Release, at 14963 for more information on methodologies and caveats for using Form SH data. See also *supra* Box 1: Use of Form SH Data for responses to comments on the use of these data.

<sup>773</sup> See Proposing Release, at 15005.

<sup>774</sup> See *supra* Part VIII.F.1.iv.

total-return swaps as an alternative to Form SHO as adopted, which does not directly collect information on derivatives.<sup>777</sup> This alternative refers only to options and other derivative securities for which their transactions do not fit the definition of a short sale under Rule 200(a) of Reg SHO.

Requiring this data would provide a more complete view of the economic short position that a Manager engaging in a large short sale has taken.<sup>778</sup> Consequently, the information would aid market participants in gauging bearish sentiment in a security relative to Rule 13f-2 and Form SHO, as adopted. This information may also help the Commission to better evaluate potentially risky short positions and respond more quickly in the case of a market event. The Commission could also better reconstruct market events, such as the recent meme stock events in January 2021, with options positions data.

Requiring options data to be reported on Form SHO would increase the compliance costs to Managers of reporting on Proposed Form SHO. One commenter stated that the inclusion of derivatives, warrants, convertible debt, and ETFs would be costly.<sup>779</sup> Adopted Rule 13f-2 will compel Managers to track their gross short positions in individual equities in a month. Tracking of ETFs for the purposes of adopted Rule 13f-2 is the same as tracking any equity security with the exception of tracking shares outstanding, which might be marginally more costly. Additionally, securities that may be used to change a gross short position, such as options or convertible debt, are unaffected by Rule 13f-2 unless they are used in a manner that changes gross short position in an equity security.<sup>780</sup> The alternative discussed here would require explicit tracking and reporting of such securities.

While Managers generally track their options exposure carefully, it is frequently different trading desks that execute options trades and equity transactions. Thus, it is possible that Managers use separate systems to track their options and equity positions. For these Managers, collecting options and equity transactions to report the data required for Proposed Form SHO would require building a process to pull data from two separate systems—increasing

the cost of complying with the rule. Requiring derivative position information might also be duplicative of other derivatives reporting requirements.

### 3. Threshold Modifications

As an alternative to the adopted Form SHO Thresholds, the Commission could require reporting Form SHO at either higher or lower thresholds—or no threshold.<sup>781</sup> Commenters to the Proposal Release expressed a range of opinions on the thresholds, some of whom supported increasing the thresholds and others decreasing the thresholds relative to Proposed Form SHO.<sup>782</sup> When selecting thresholds, the fundamental economic tradeoff is the value of the data versus the cost of collecting the data. Alternative thresholds that are lower than Threshold A or Threshold B specified in Rule 13f-2 or an alternative that would not contain a threshold would produce more data as more entities would be required to report.

Commission analysis of Form SH data collected under temporary Rule 10a-3T indicates that the gross short position thresholds in adopted Form SHO for Threshold A, equal to daily averages of \$10 million or 2.5 percent of shares outstanding, would have collected more than three-quarters (78.5 percent) of the dollar value of short positions.<sup>783</sup> Therefore, an alternative that lowers the threshold might lead to only a minor increase in coverage relative to the adopted thresholds in Form SHO. Nevertheless, the Commission recognizes that even a relatively small increase in coverage could increase benefits. For example, such an alternative would provide market participants with a clearer view of Manager bearish sentiment compared to adopted rule and form, as more Managers would be required to report the data, making the data more comprehensive.

A lower threshold would also enhance Commission oversight of short selling and allow the Commission to more easily reconstruct significant market events involving short selling—again because the data would be more comprehensive. One commenter stated that reducing or eliminating the

reporting thresholds to Form SHO would provide additional benefits, since unknown, hidden short positions pose risks to investors and the markets. Reducing or eliminating reporting thresholds would reveal the identity of all holders of short sale positions, thereby reducing these risks.<sup>784</sup>

However, a lower or no threshold would increase the cost of reporting Form SHO data in terms of compliance costs associated with Managers compiling and filing the required data thorough EDGAR and in the indirect costs associated with revealing short sellers' information. Evidence of this increase in aggregate reporting costs can be seen through an analysis of Form SH data. For example, if the reporting thresholds of adopted Form SHO were reduced from average daily gross position of 10 million or 2.5 percent of shares outstanding to \$5 million or 1 percent of shares outstanding, the number of reporting Managers would rise from 252 to 314. Furthermore, the increase in the share of gross short sale dollar volume covered by reporting Managers would rise from 78.5 percent to 88.6 percent. In addition, Managers would likely be required to file reports for more securities, which would further increase compliance costs. Indirect costs include increased risk of copycat short selling strategies, which can lead to herding and increased volatility, and short sellers engaging in strategic behavior to build short positions just underneath the threshold, which would lead to lower price efficiency.<sup>785</sup>

In some cases, a lower threshold would decrease the indirect costs associated with adopted rule because it would be harder to identify individual short positions from aggregate reporting if there are many entities reporting.<sup>786</sup> This effect may not be universally true, however. In particular, at thresholds just below Threshold A, the number of securities in which only one entity reported Form SH increases.<sup>787</sup> This result implies that there are a number of securities for which only one short seller held a short position at a level lower than the current cutoff. In these

<sup>784</sup> See Better Markets Letter, at 12.

<sup>785</sup> See *supra* Part VIII.F.1.iv for discussion of this behavior in Europe.

<sup>786</sup> See *supra* Part VIII.C.1 and Part VIII.E.1 with accompanying text for more information on risks of identifying individual short sellers.

<sup>787</sup> According to Form SH data, 39% of securities would have only one Manager reporting at or above the threshold of \$10 million average daily and 2.5% average daily of shares outstanding. If the percent threshold was reduced to 1% average daily of shares outstanding along with the \$10 million average daily threshold the number of securities with only one Manager reporting would increase to 41%.

<sup>777</sup> See Proposing Release, at 15006.

<sup>778</sup> One commenter argued including derivatives for Rule 13f-2 would give a more complete picture of Managers' positions. See NASDAQ Letter, at 3.

<sup>779</sup> See MFA Letter, at 12.

<sup>780</sup> Such as a Manager exercising a call option to buy equity, and thus decreasing the Manager's gross short position, if any.

<sup>781</sup> See Proposing Release, at 15007.

<sup>782</sup> Furthermore, in response to a solicitation of comments on Temporary Rule 10a-3T, commenters suggested thresholds generally ranging from 1% to 5%. See Proposing Release, at 14963 n.79 for links to specific comment letters.

<sup>783</sup> Commenters questioned the use of Form SH data in this and other contexts. See *supra* Box 1: Use of Form SH Data for responses to comments on the use of these data.

cases, lowering the threshold might increase the risk of identifying individual short sellers.

In contrast, alternatives that would raise the reporting threshold would lower many of the costs associated with providing Form SHO data, since fewer entities would be required to report. It would also limit somewhat the value of the data—again as the reported data would reflect a smaller portion of overall short positions. One means of increasing the threshold would be to require that both thresholds in Threshold A (*i.e.*, both daily averages of \$10 million and 2.5 percent of shares outstanding) be reached before a Manager is required to file, instead of either threshold. Another alternative would be to increase one or both of thresholds in Threshold A but continue to require only one of them be reached before a Manager is required to file Form SHO. This decline in aggregate reporting costs can be seen with an analysis of Form SH data, which show that increasing the Form SHO daily average thresholds from 2.5 percent and \$10 million to 5 percent and \$25 million would reduce the number of reporting Managers from 252 to 165. In addition, it would reduce the percentage of short sale dollar volume covered by reporting Managers from 78.5 percent to 58.4 percent.

Higher thresholds, however, might also come with increased risk of identification and retaliation towards short sellers because at some point the likelihood that more than one investor holds a very large short position diminishes. For example, according to analysis of Form SH data, if the Form SHO thresholds rose from an average daily position of \$10 million or 2.5 percent of share outstanding to \$25 million or 5 percent of shares outstanding, the share of reported securities with only one Manager would rise from 39.3 percent to 48.4 percent.<sup>788</sup>

Another alternative would be to raise the percent threshold from 2.5 percent to 5 percent, as suggested by one commenter,<sup>789</sup> without altering the \$10 million threshold. Commission analysis of Form SH data indicates that this would only reduce the number of reporting Managers from 252 to 247. However, further analysis reveals that there could be a substantial loss of transparency into stocks with less than a \$400 million market capitalization. Since stocks with market caps

exceeding \$400 million will always trigger the \$10 million threshold before the 2.5 percent trigger (2.5 percent of \$400 million = \$10 million), raising the 2.5 percent to 5 percent will not impact the number of large positions reported in stocks with market caps exceeding \$400 million. However, stocks with market caps under \$400 million will always trigger the 2.5 percent threshold before the \$10 million threshold. Thus, raising the 2.5 percent threshold to 5 percent without altering the \$10 million threshold would result in fewer smaller stock positions being reported. Furthermore, analysis of Form SH data indicates that for stocks that are specifically sensitive to the 2.5 percent threshold (*i.e.*, stocks in which all reportable short sale positions are under \$10 million and therefore only trigger the 2.5 percent threshold), raising the threshold to 5 percent would reduce the number of reportable stocks from 131 to 30, a decline of about 77 percent. Thus, Form SH data analysis indicates that while raising the threshold from 2.5 percent to 5 percent might only result in a small reduction in the number of reporting Managers, it could nevertheless lead to a significant loss of transparency in small stocks (stocks with market capitalizations under \$400 million).

For securities subject to Threshold B, the economic impact of either raising or lowering the dollar threshold would be similar. Raising the threshold would lower compliance costs but also the quality of the data, while lowering the threshold would do the opposite. For example, if the Commission raised Threshold B from \$500,000 to \$10 million, then under the assumption of one manager short selling each Threshold B security, the total number of short positions captured for Threshold B securities would decrease from 23.72 percent to 8.76 percent.<sup>790</sup> Similarly, under the same assumptions, lowering the threshold to \$50,000 would increase the number of short positions captured to 48.08 percent.

As another alternative to the proposed Threshold A, the Commission could establish a threshold based on one rather than both of the thresholds in Rule 13f-2, *i.e.*, either the average daily dollar short position or the percent of shares outstanding.<sup>791</sup> The advantage of this alternative is that it might reduce compliance costs by simplifying reporting requirements. One commenter

stated that the two-prong threshold for reporting companies was, “overly and unnecessarily complex.”<sup>792</sup> In addition, the commenter said that using a percentage-based threshold was more costly to Managers, in part because it can be burdensome to obtain data on shares outstanding, which serves as the denominator in the calculation of the percentage-based threshold.<sup>793</sup> Another commenter, however, stated that, relative to percentage-based threshold, “compliance with a dollar value threshold typically requires significant manual processes and more difficult system buildouts.”<sup>794</sup> The Commission acknowledges that a dollar-value threshold might be somewhat less complicated for some Managers, but nevertheless believes that data tracking the number of shares outstanding are generally readily available, and that it is straightforward to calculate an average daily gross short position as a percentage of outstanding shares.

The Commission also acknowledges that using a single threshold for Threshold A would lower compliance costs, primarily because fewer entities would be required to report. However, choosing which of the two thresholds to drop would impact which positions are more likely to trigger the remaining threshold. For example, an alternative that retained only the \$10 million daily average threshold would decrease the likelihood of small cap positions being reported, since these firms reach the 2.5 percent threshold before the \$10 million threshold.<sup>795</sup> Smaller market capitalization stocks tend to be easier to manipulate and less stable. Thus, an alternative that excludes the 2.5 percent threshold would result in less visibility into the actions of short sellers among smaller market capitalization stocks and may undermine the ability of Rule 13f-2 to reduce manipulative behavior among these stocks, as articulated in Part VIII.C.1.

Commission analysis of Form SH data suggest that an alternative that includes only the 2.5 percent threshold would result in a substantial reduction in the number of reporting Managers relative to the two-prong threshold in adopted Rule 13f-2. More specifically, switching from the adopted Form SHO thresholds of \$10 million daily average or 2.5 percent of shares outstanding to a single prong threshold of 2.5 percent would cause the number of reporting Managers

<sup>792</sup> See MFA Letter, at 13

<sup>793</sup> See Proposing Release, at 15008.

<sup>794</sup> See ICI Letter, at 9.

<sup>795</sup> Short positions in stocks with market capitalizations below \$400 million will trigger the 2.5% threshold before they trigger the \$10 million threshold.

<sup>788</sup> See Proposing Release, at 14963 for more information on methodologies and caveats for using Form SH data.

<sup>789</sup> See *supra* note 120 and associated discussion.

<sup>790</sup> See Proposing Release, at Table II (analysis within table).

<sup>791</sup> See Proposing Release, at 15008 for discussion of this alternative with the \$10 million threshold as proposed, not as adopted.

under Form SH to fall from 252 to 115. Furthermore, it would drastically reduce the share of covered short sale volume of reporting Managers from 78.5 percent to 16 percent. One commenter stated that excluding the dollar-based threshold and solely using a threshold of 5 percent or more, “. . . would allow the Commission to achieve its objectives without imposing unnecessary complexity on advisers and other reporting Managers.”<sup>796</sup> Form SH data, however, indicate that this would reduce the number of reporting Managers from 252 to 55 and the share of covered short sale volume from 78.5 percent to 9 percent.

More generally, the alternative of requiring a threshold based only on short positions as a percent of shares outstanding would largely eliminate reporting in larger securities. Note that for stocks with market capitalization above \$400 million, short sellers reach the \$10 million threshold before the 2.5 percent threshold. Furthermore, for large cap stocks, generally defined as having a market capitalization exceeding \$10 billion, short position would have to be more than \$250 million in order to trigger the 2.5 percent threshold. Consequently, an alternative in which the Commission required reporting based only on the percent of shares outstanding would result in fewer Form SHO reports for stocks with larger market capitalizations. Less visibility into the actions of short sellers in larger market capitalization stocks would provide less information about bearish sentiment in the economy. This is because larger market capitalization stocks, which are more well-established than small cap stocks, are more likely to be shorted due to general pessimism about the macroeconomy and less likely to be targeted as part of manipulative strategy in comparison to small cap stocks.<sup>797</sup>

As another alternative, the Commission could structure the Reporting Thresholds to include the nominal economic value of short derivative positions. Specifically, reporting on Form SHO would be required if a Manager's total short position in the stock and in derivatives such as options and security-based swaps exceeded the relevant Reporting

Thresholds.<sup>798</sup> This alternative would decrease the likelihood that Managers seek to avoid the Reporting Thresholds by transacting in derivatives and thus, may increase the benefits of the data from Form SHO.<sup>799</sup> Making it more difficult to circumvent the reporting requirements using derivatives might also decrease strategic, and sub-optimal, trading around the Reporting Thresholds which leads to lower price efficiency.<sup>800</sup> However, increasing the amount of information that was disclosed on publicly released Form SHO may increase copycat activity that leads to herding and increased volatility. Conversely, incorporating derivatives in Form SHO reports may dilute the information filed by Managers relative to the case where only equity gross short positions are included, thereby reducing the amount of herding. This alternative could also result in situations in which Managers would have a reporting obligation despite having large long positions in the equity over the entire month, which would increase costs for the Managers and would provide less relevant information. Additionally, including derivatives in the Reporting Threshold computations would increase the complexity of the rule and the cost of implementing the rule. For instance, Managers may need to pull information from multiple systems to determine the total value of their short position for reporting. Pulling information from multiple systems can be costly. Additionally, while valuing short positions in most equities is fairly straightforward, this is not true for derivatives. There are often multiple methodologies used by different market participants to value derivative contracts such as options. Thus, an alternative including a threshold for a Manager's short exposure in derivatives would be significantly more complicated than Adopted Rule 13f-2 and Form SHO.

An additional alternative could also involve requiring reporting thresholds to be based on activity and not just positions.<sup>801</sup> This alternative would increase the amount of information available to the Commission regarding the activities of entities engaging in a high volume of short selling. This alternative might provide additional insight into Managers that sell short but

do not hold short positions. Specifically, entities with high volumes of short selling are likely to be market makers who use short selling to maintain two sided quotes in the absence of inventory and other high frequency traders. These entities trade in large volumes but tend to end trading sessions fairly flat on inventory in larger stocks. Consequently, requiring reporting based on activity might not significantly improve the market's ability to assess of bearish sentiment. However, one area where reporting based on activity may be beneficial would be in identifying short selling attacks that are relatively short lived. For example, an investor with a convertible bond may seek to distort the stock price right around the exercise date of their bond as such contracts stipulate that the holder of the convertible bond receives more shares if the stock price is lower. In this case, an attempted manipulator may seek to aggressively short sell right around a convertible bond exercise date. Activity that is concentrated enough in time might not trigger a reporting threshold based on average position over the prior month under the final rule. While this activity information may be helpful in flagging unusual short selling activity, the Commission could conceivably build reports based on existing CAT data<sup>802</sup> that would be more effective at detecting such behavior and Rule 13f-2 would identify these activities if the market participant exceeds the Reporting Thresholds.

As an alternative, the Commission could measure the thresholds as of the last settlement day of the month rather than using the \$10 million average daily prong or 2.5 percent average daily prong for Threshold A and the \$500,000 threshold over any single day for Threshold B.<sup>803</sup> This alternative would have the advantage of simplifying compliance with Rule 13f-2 and Form SHO and thus may reduce compliance costs. Form SH data analysis indicates that using last settlement day of the month instead of average daily thresholds for Threshold A would only result in a marginal increase in the number of reporting Managers, from 252 to 256. However, the Commission is concerned that this alternative might also invite more strategic trading around the end of the month than adopted Form SHO, which is structured to prevent trading around the threshold. For

<sup>796</sup> See ICI Letter at 9.

<sup>797</sup> See, e.g., Carole Comerton-Forde & Tălis J. Putniņš, *Stock Price Manipulation: Prevalence and Determinants*, 18:1 Rev. of Fin. 23–66 (2014), available at <https://doi.org/10.1093/rf/rfs040> (for evidence on small and less liquid stocks higher exposure to manipulative behavior by investors). See also discussion in *supra* Part VIII.C.1.

<sup>798</sup> See Proposing Release, at 15008 (discussing this alternative with the \$10 million threshold as proposed, not as adopted).

<sup>799</sup> See *supra* Part VIII.C.8.

<sup>800</sup> See *supra* Part VIII.C.1 for further discussion on strategic trading around the threshold and how the rule is designed to reduce it.

<sup>801</sup> See Proposing Release, at 15009.

<sup>802</sup> In particular, because such an analysis would not involve estimating a position for the Manager, the limitations of CAT are less important.

<sup>803</sup> See Proposing Release, at 15009 (discussing this alternative with the \$10 million threshold as proposed, not as adopted).

instance, Managers with short positions near the threshold may temporarily reduce their positions to below a Reporting Threshold on exactly the days that short positions are measured for compliance with the threshold to avoid reporting. This inefficient trading may reduce price efficiency right around the reporting days as trading to avoid holding a position that would trigger reporting is not trading based on economic considerations but rather trading based on regulatory considerations and thus is inefficient and may harm price efficiency on these days.

Instead of Threshold B, the Commission could require the same two prong, \$10 million or 2.5 percent daily average gross position reporting threshold for short positions in equity securities of non-reporting company issuers, as well as for equity securities of reporting company issuers.<sup>804</sup> This approach might be less complex as all short positions would be subject to the same reporting threshold. Further, it would retain a threshold that relates to the size of the short position and to the size of the issuance to ensure capturing positions that are relatively large whereas the Threshold B imposes a flat threshold that could result in some relatively large positions, in terms of daily average gross position of percentage of shares outstanding, not being filed on Form SHO.

However, this alternative would increase the burden for Managers as information for non-reporting company issuers can be hard to find, making threshold calculations difficult. In particular, information on the number of shares outstanding can be difficult to obtain for non-reporting company issuers and when it is available it is often stale and inaccurate. This could lead to problems with the calculations for the 2.5 percent threshold. One commenter stated that a single percentage-based threshold level applied to both reporting and non-reporting company issuers, “. . . would mitigate unnecessary operational and cost burdens on managers, including complexities from monitoring and reporting with up to three separate thresholds.”<sup>805</sup> However, this alternative would require Managers to know the number of shares outstanding in non-reporting companies for each trading day for their short positions, and would therefore effectively impose new recordkeeping costs on Managers. Further, there are multiple sources from which Managers can obtain shares

outstanding for securities of non-reporting company issuers. At times these sources may report different numbers for total shares outstanding. Consequently, Managers could also feel the need to track the sources used to identify shares outstanding each day and would incur costs to determine which sources to trust for compliance. One concern is that Managers would try to game different data sources in order to avoid having to report Form SHO.

The Commission could enhance record keeping requirements associated with this alternative by requiring Managers to record and report on Form SHO the source of data used to calculate shares outstanding.<sup>806</sup> This could improve the quality of the information reported in Form SHO for securities of issuers who do not report with the Commission by improving the quality of the data that Managers use when calculating their positions. It might also help mitigate concerns that Managers may try to game different data sources to avoid complying with the regulation. For securities of reporting issuers, accurate shares outstanding information is readily available, thus concerns about gaming data sources or using low quality information is not as relevant. However enhanced record keeping requirements would increase the costs to Managers. While the Commission believes that most Managers have ready access to this information, requiring that Managers record and report the information would require Managers to further build out systems, in conjunction with the systems already required to report Form SHO, to also capture the source of information used.

#### 4. Other Alternatives

##### a. Alternative Reporting Frequency or Additional Reporting Delay

As alternatives, the Commission could require reporting at different frequencies than the monthly reporting mandated by the rule. Specifically, the Commission could require gross short position assessment and reporting (assuming at least one of the thresholds had been crossed) at frequencies that are shorter than a month.<sup>807</sup> For example, the Commission could require reporting daily, weekly,<sup>808</sup> biweekly, or whenever

there is a significant change in short position (as is currently the standard in the European Union), but at least monthly. These alternatives could require reporting if the average short position surpasses the threshold for the month prior to the reporting period or if average positions surpass the threshold for the prior period (e.g., one week, or two weeks). This could result in an increase in the number of Managers that report, since it is likely that some Managers hold short positions that cross a Form SHO threshold for the alternative time frequencies (e.g., one week) but not for the entire month. These Managers may be required to report with more frequent disclosures relative to Adopted Form SHO.

The fundamental tradeoff with such thresholds compares the simplicity of the rule with the potential to game the threshold by strategic trading. Such alternative frequencies face the fundamental tradeoff of increased cost and increased transparency of the data. Put simply, increasing the reporting frequency increases the number of reports and thus increases the cost associated with reporting by a similar factor.

Increased reporting frequency could also result in collecting more information than the current proposal. The difference between the information collected in the current proposal and this alternative would mainly come from the frequency and timeliness of the reports. The improved timeliness could increase the risk of copycat strategies and short squeezes, but also improve price efficiency. One commenter stated that a study of the EU's short sale disclosure policy, which requires, “immediate public disclosure of large short positions,” finds no evidence of increased manipulation or short squeezes.<sup>809</sup> However, multiple studies have found evidence that the EU's policy has result in short sellers seeking to avoid disclosure by accumulating positions slightly under the threshold, which could result in a loss price efficiency.<sup>810</sup> Furthermore, one commenter stated that increasing the disclosure delay to 45 days would help prevent copycat trading and short squeezes.<sup>811</sup> The Commission

<sup>806</sup> See Proposing Release, at 15009.

<sup>807</sup> See Proposing Release, at 15009. In this alternative, the thresholds would conform to the reporting period, such that the 2.5% and \$10 million daily average thresholds would be calculated over the alternative shortened time period.

<sup>808</sup> Many commenters on temporary Rule 10a-3T stated that weekly reporting was overly burdensome. See, e.g., Seward Kissel LLP, available at [https://www.sec.gov/comments/s7-31-08/s73108-](https://www.sec.gov/comments/s7-31-08/s73108-43.pdf)

43.pdf; Investment Adviser Association, available at <https://www.sec.gov/comments/s7-31-08/s73108-38.pdf>; and Securities Industry and Financial Markets Association, available at <https://www.sec.gov/comments/s7-31-08/s73108-52.pdf>.

<sup>809</sup> See Better Markets Letter, at 13 and Charles M. Jones, Adam V. Reed, and William Waller, *Revealing Shorts an Examination of Large Short. Position Disclosures*, 29 Rev. of Fin. Studies 3278, 3282 (2016).

<sup>810</sup> See *supra* note 770.

<sup>811</sup> See MFA Letter at 4.

<sup>804</sup> See *Id.*

<sup>805</sup> See ICI Letter, at 9.

recognizes that there are benefits and costs to more timely disclosure, and believes that the two week delay incorporated in adopted Form SHO effectively balances these costs and benefits.

The Commission could also consider different reporting windows for Managers who meet the threshold short positions to report on Form SHO.<sup>812</sup> The current proposal requires Managers to report on Form SHO within 14 calendar days of the end of each month. Shorter time horizons may increase the cost of reporting as Managers would have less time to gather and file the data on Form SHO and may need to build costlier procedures to ensure compliance with the reporting requirement.<sup>813</sup> A mitigating factor would be that most of this reporting is likely to be done electronically, consequently it may not take the full 14 calendar days for Managers to gather and file the required data to the Commission.

Additionally, the Commission could adopt different horizons for releasing the aggregated data after the reporting deadline.<sup>814</sup> The fundamental tradeoff in terms of the delay between reporting and when the Commission releases the aggregated data is that a shorter delay increases the relevance of the data, in terms of the bearish sentiment it contains, which may improve managerial decision making, as well as providing more timely information about bearish sentiment in the market.<sup>815</sup> At the same time a shorter delay increases the likelihood of copycat behavior, which decreases the incentive that short sellers have to gather information potentially leading to lower price efficiency and greater volatility.<sup>816</sup> The converse is true for

longer delays. Additionally, a shorter delay provides less time for the Commission to aggregate the data and run checks on the aggregated data to ensure the Commission's aggregation is error-free, and also provides less time for amendments to be filed, both of which could harm the quality of the data.

#### b. Report Form SHO in Inline XBRL

The adopted rule would require Form SHO to be filed in Form SHO-specific XML, a structured, machine-readable data language. As an alternative, the Commission might require Form SHO to be filed in Inline eXtensible Business Reporting Language ("Inline XBRL"), a separate data language that is designed for business reporting information and is both machine-readable and human-readable.<sup>817</sup> Compared to the adopted Form SHO, the Inline XBRL alternative for Form SHO would provide more sophisticated validation, presentation, and reference features for filers and data users. However, given the fixed and constrained nature of the disclosures to be reported on Form SHO (e.g., the information would be as of a single reporting date rather than multiple reporting dates, and Managers would not be able to customize the content or presentation of their reported data), the benefits of these additional features would be muted. Compared to the adopted Form SHO, this alternative would impose greater initial implementation costs (e.g., licensing Inline XBRL filing preparation software) upon reporting persons that have no prior experience structuring data in Inline XBRL.<sup>818</sup> By contrast, because many Managers that would be Form SHO filers would likely have experience structuring filings in a similar EDGAR Form-specific XML data language, such as in the context of filing Form 13F, the Form SHO-specific XML requirement will likely impose lower implementation compliance costs on Form SHO filers than an Inline XBRL requirement would impose.

### IX. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")<sup>819</sup> requires Federal agencies, in

and their proprietary trading strategies, is warranted.

<sup>817</sup> See Proposing Release, at 15010.

<sup>818</sup> See Inline XBRL Filing of Tagged Data, Securities Act Release No. 10514 (June 28, 2018), 83 FR 40846 at 40862, available at <https://www.sec.gov/rules/final/2018/33-10514.pdf> (discussing costs associated with Inline XBRL filing of operating company financial statements and investment company risk/return summaries, including software licensing costs).

<sup>819</sup> 5 U.S.C. 601 *et seq.*

promulgating rules, to consider the impact of those rules on small businesses. Section 603(a) of the Administrative Procedure Act, as amended by the RFA, generally requires the Commission to undertake a final regulatory flexibility analysis of rules it is adopting, to determine the impact of such rulemaking on "small businesses" unless the Commission certifies that the rule would not have a significant economic impact on a substantial number of "small entities."<sup>820</sup>

*Certification for Rule 13f-2 and Form SHO.* Although section 601(b) of the RFA defines the term "small business," the statute permits agencies to formulate their own definitions. The explanation of the term "small entities" and the definition of the term "small business" in 17 CFR 240.0-10<sup>821</sup> of the Exchange Act do not explicitly reference Managers. Rule 0-10 does provide, however, that the Commission may "otherwise define" small entities for purposes of a particular rulemaking proceeding. For purposes of Rule 13f-2 and related Form SHO, therefore, the Commission has determined that the definition of the term "small business" found in 17 CFR 275.0-7(a)<sup>822</sup> under the Investment Advisers Act of 1940<sup>823</sup> is more appropriate to the functions of institutional managers such as the Managers with reporting obligations under Rule 13f-2. The definition will help ensure that all persons or entities that might be Managers subject to reporting requirements under Rule 13f-2 will be included within a category addressed by the Rule 0-7(a) definition.

Therefore, for purposes of this rule and the RFA, a Manager is a small entity if it: (i) has assets under management having a total value of less than \$25 million; (ii) did not have total assets of \$5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of \$25 million or more, or any person (other than a natural person) that had total assets of \$5 million or more on the last day of its most recent fiscal year.<sup>824</sup> The Commission did not

<sup>820</sup> In response to the Commission's request for comment, commenters provided general predictions without empirical data to support their assessments that Proposed Rule 13f-2, Proposed Form SHO, and the Proposed CAT Amendments would have a significant economic impact on a substantial number of "small entities." See *supra* note 324 and accompanying text.

<sup>821</sup> Rule 0-10.

<sup>822</sup> Rule 0-7(a).

<sup>823</sup> 15 U.S.C. 80b-1 *et seq.*

<sup>824</sup> Rule 0-7(a), *supra* note 822. See generally, *Reporting Threshold for Institutional Investment*

<sup>812</sup> See Proposing Release, at 15010.

<sup>813</sup> See Seward & Kissel LLP Letter (discussing Temporary Rule 10a-3T) at 5, available at <https://www.sec.gov/comments/s7-31-08/s73108-43.pdf>.

<sup>814</sup> See Proposing Release, at 15010.

<sup>815</sup> One commenter stated that the "... proposed data framework will not provide timely insight for the SEC to act given that it is monthly data with 14 days delay after month end." See SBAI Letter, at 2. The Commission recognizes that removing the 14-day delay would increase its ability to monitor and respond more rapidly to market events stemming from short sale activity. However, as discussed elsewhere in this release, the delay is in part necessary to review and validate the data, and may also serve to reduce the likelihood of short squeeze and copycat behavior.

<sup>816</sup> One commenter stated that the public dissemination of Rule 13f-2 data should be increased from 14 days to 45 days in order to provide additional protection against exposure of trading strategies, which could be used as part of a replication strategy or to facilitate a short squeeze. See MFA Letter, at 4. More generally, the commenter believes that since the amendments would provide only "limited marginal benefits," reducing the cost of compliance, including the risk of exposing the identities of investment managers



receive any comments on the certification as it related to entities impacted by Rule 13f-2.

Under Rule 13f-2, Managers are not required to report on Form SHO unless they meet or exceed a specified Reporting Threshold. Managers with a gross short interest position in an equity security of a reporting company issuer will be subject to a two-pronged reporting threshold structure: a monthly average gross short position in the equity security with a U.S. dollar value of \$10 million or more; or a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5 percent or more (Threshold A). Managers with a gross short interest position in an equity security of a non-reporting company issuer will be subject to a single-pronged reporting threshold structure: a gross short position in the equity security with a U.S. dollar value of \$500,000 or more at the close of regular trading hours on any settlement date during the calendar month (Threshold B). While the parameters of the Reporting Thresholds under Rule 13f-2 relate to the number and dollar value of shares of short positions, rather than assets under management, the Commission nevertheless anticipates that application of the Reporting Thresholds will result in Rule 13f-2 not applying to a significant number of “small businesses” as defined under Rule 0-7(a).

With respect to the first prong of Threshold A, a monthly average gross short position in the equity security with a U.S. dollar value of \$10 million or more for reporting company issuer securities represents forty percent of the assets of an entity that qualifies as a “small entity” under Rule 0-7(a). The Commission believes it is also unlikely that a significant number of small entities would place 40 percent of their respective assets under management in a short position in a single security. Further, many types of Managers that could be small entities, including bank trustees, endowments, and foundations, are subject to fiduciary standards that prohibit them from investing in large, concentrated short positions. Such restrictions deter small entities (with less than \$25M of assets under management) from investing over \$10M (greater than 40 percent) of their assets in a single short position, and therefore

prevent them from triggering the first prong of Threshold A.<sup>825</sup>

With respect to the second prong of Threshold A, smaller Managers (those with under \$25M in assets under management) would likely try to leverage their assets through a combination of traditional short sales and derivatives and similar transactions that create economic short exposure to a security. Such entities therefore, would likely engage in strategies that do not lend themselves to a clear determination that the second prong of Threshold A under Rule 13f-2 has been met.<sup>826</sup> Further, the Commission estimates, based on an analysis of US common stocks,<sup>827</sup> that Managers that qualify as small entities under Rule 0-7(a) would not meet the 2.5 percent monthly average reporting threshold for securities representing over ninety-eight percent (98 percent) of the overall market value.<sup>828</sup>

When it comes to meeting the dollar value limits of Threshold B and the first prong of Threshold A, it is important to note that for the subset of Managers that engage in the most short selling activity—hedge funds<sup>829</sup>—less than twenty-five percent have less than \$50M in assets under management.<sup>830</sup> Indeed, research shows that most hedge funds have assets under management above the amount that would qualify them as small entities under Rule 0-7(a), *i.e.*, above \$25M.<sup>831</sup> Further, the

<sup>825</sup> See Molk and Partnoy, *supra* note 510, describing impediments that have kept different types of institutional investment managers from engaging in short selling.

<sup>826</sup> *Id.* at 839 (positing that “institutions incorporate short selling into their strategies, not necessarily by taking net-short positions, but instead by combining leveraged long equity index positions with smaller actively managed short portfolios.”).

<sup>827</sup> A small entity, with less than \$25M in assets under management, is not able to hold a short position of at least 2.5% in a company with a market capitalization above \$1B. Such companies represent over 98.5% of the overall market cap of US equities. See also Stock Market Size Categories (2021), available at <https://stockmarketmba.com/sizescategories.php> (calculating approximately three percent (3%) of the US stock market consists of common stocks of companies with less than \$2B in market capitalization (*i.e.*, small-cap and micro-cap stocks) and stating that micro-cap companies are generally too small for even most large institutional investment managers to invest in).

<sup>828</sup> An analysis by Commission of the daily dataset of the Center for Research in Security Prices (“CRSP”) showed that for the month of Oct. 2021, on average, the number of companies with less than \$1B in market capitalization (2,293) constituted 1.51% of the overall market capitalization.

<sup>829</sup> See Molk and Partnoy, *supra* note 510, at 846.

<sup>830</sup> See David Goldin, *Elephant in the room? Size and hedge fund performance*, Aurum (June 28, 2019), available at <https://www.aurum.com/insight/elephant-in-the-room-size-and-hedge-fund-performance/>.

<sup>831</sup> See Daniel Barth et al., *The Hedge Fund Industry is Bigger (and Has Performed Better) Than*

Commission certified in the Proposing Release that Proposed Rule 13f-2 would not have a significant economic impact on a substantial number of small entities, as defined under Rule 0-10, for purposes of the RFA. The Commission requested written comments regarding this certification and did not receive any. Additionally, and as described above, the adopted dollar-value based prong of Threshold A for reporting company issuer securities is based on a monthly average rather than a daily calculation, likely capturing fewer Managers than would have been required to report under the proposed daily dollar-value prong of Threshold A, so it is even less likely that small entities will be required to report on Form SHO as adopted.

For these reasons, the Commission certifies that Rule 13f-2 will not have a significant economic impact on a substantial number of small entities, as defined under Rule 0-10, for purposes of the RFA.

*Certification for the Amendment to CAT.* The amendment to the CAT NMS Plan will impose requirements on the CAT NMS Plan Participants (the national securities exchanges registered with the Commission under section 6 of the Exchange Act and FINRA), and broker-dealers that effect short sales utilizing the bona fide market making exception pursuant to Rule 203(b)(2)(iii) of Regulation SHO and report use of the exception to CAT.

With respect to the national securities exchanges, the Commission’s definition of a small entity is an exchange that has been exempt from the reporting requirements of Rule 601 of Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization.<sup>832</sup> None of the national securities exchanges registered under section 6 of the Exchange Act that will be subject to the amendments are “small entities” for purposes of the RFA. In addition, FINRA is not a “small entity.”<sup>833</sup> Based on Commission knowledge and experience with broker-dealers that identify as market makers, the Commission does not believe that any broker-dealer that effects short sales utilizing the bona fide market making

*You Think (Office of Fin. Research, Working Paper No. 20-01, Feb. 25, 2020, Revised Mar. 8, 2021).*

<sup>832</sup> See 17 CFR 240.0-10(e) (stating that a broker-dealer is a small entity if it has total net capitalization (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a-5(d), and it is not affiliated with any person (other than a natural person) that is not a small business or small organization).

<sup>833</sup> See 13 CFR 121.201.

*Managers*, Exchange Act Release No. 89290 (July 10, 2020), 85 FR 46016, 46031 n.90 (July 31, 2020) (stating that “[r]ecognizing the growth in assets under management at investment advisers since Rule 0-7(a) was adopted, the Commission plans to revisit the definition of a small entity in Rule 0-7(a).”).

exception pursuant to Rule 203(b)(2)(iii) of Regulation SHO and reports to the CAT will qualify as a small entity pursuant to Exchange Act Rule 0–10(c), because they either exceed \$500,000 in total capital or are affiliated with a person that is not a small entity as defined in Rule 0–10. Given the above estimates it is possible, but unlikely, that in the future a small entity may come within scope of the Amendment to CAT, because such firms are likely to exceed \$500,000 in total capital or be affiliated with a person that is not a small entity.

For the foregoing reasons, the Commission certifies that the Amendment to CAT will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

#### X. Other Matters

Pursuant to the Congressional Review Act,<sup>834</sup> the Office of Information and Regulatory Affairs has designated these rules as a “major rule,” as defined by 5 U.S.C. 804(2).

If any of the provisions of these final rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

#### Statutory Authority

The Commission is adopting the rule and form contained in this document under the authority set forth in the Exchange Act [15 U.S.C. 78a *et seq.*], particularly sections 3, 10(b), 12, 13(f), 15, (d), 23(a), 35A, 36 thereof [15 U.S.C. 78c, 78j(b), 78l, 78m(f), 78o(d), 78w(a), 78ll, and 78mm], and Public Law 111–203, 929X, 124 Stat. 1376 (2010). The Commission is amending the CAT NMS Plan pursuant to the Exchange Act, particularly Sections 2, 3, 5, 6, 11A, 15, 15A, 17(a) and (b), 19, and 23(a) thereof [15 U.S.C. 78b, 78c, 78e, 78f, 78k–1, 78o, 78o–3, 78q(a) and (b), 78s, and 78w(a)], and Rules 608(a)(2) and (b)(2) thereunder.

#### List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

#### Text of Amendments

In accordance with the foregoing, the Commission is amending title 17, chapter II of the Code of the Federal Regulations as follows.

### PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 is amended by removing the sectional authority for § 240.13f–2(T) to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78j–4, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

\* \* \* \* \*

■ 2. Add § 240.13f–2 to read as follows:

#### § 240.13f–2 Reporting by institutional investment managers regarding gross short position and activity information.

(a) An institutional investment manager shall file a report on Form SHO (referenced in 17 CFR 249.332), in accordance with the form’s instructions, with the Commission within 14 calendar days after the end of each calendar month with regard to:

(1) Each equity security that is of a class of securities that is registered pursuant to section 12 of the Exchange Act or for which the issuer of that class of securities is required to file reports pursuant to section 15(d) of the Exchange Act over which the institutional investment manager and all accounts over which the institutional investment manager (or any person under the institutional investment manager’s control) has investment discretion with respect to either:

(i) A monthly average gross short position at the close of regular trading hours in the equity security with a U.S. dollar value of \$10 million or more; or

(ii) A monthly average gross short position at the close of regular trading hours as a percentage of shares outstanding in the equity security of 2.5 percent or more; and

(2) Each equity security that is of a class of securities that is not registered pursuant to section 12 of the Exchange Act or for which the issuer of that class of securities is not required to file reports pursuant to section 15(d) of the Exchange Act over which the institutional investment manager and all accounts over which the institutional investment manager (or any person under the institutional investment manager’s control) has investment discretion with respect to a gross short position in the equity security with a

U.S. dollar value of \$500,000 or more at the close of regular trading hours on any settlement date during the calendar month.

(3) Form SHO and any amendments thereto must be filed with the Commission via the Commission’s Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”), in accordance with 17 CFR part 232 (Regulation S–T). The Commission will publish, on an aggregated basis, certain information regarding each equity security reported by institutional investment managers on Form SHO and filed with the Commission via EDGAR.

(b) For the purposes of this section:

(1) The term *institutional investment manager* has the same meaning as in section 13(f)(6)(A) of the Exchange Act.

(2) The term *equity security* has the same meaning as in section 3(a)(11) of the Exchange Act and § 240.3a11–1 (Rule 3a11–1).

(3) The term *investment discretion* has the same meaning as in § 240.13f–1(b) (Rule 13f–1(b)).

(4) The term *gross short position* means the number of shares of the equity security that are held short as a result of short sales as defined in 17 CFR 242.200(a) (Rule 200(a) of Regulation SHO), without inclusion of any offsetting economic positions such as shares of the equity security or derivatives of such equity security.

(5) The term *regular trading hours* has the same meaning as in 17 CFR 242.600(b)(77) (Rule 600(b)(77)).

### PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The general authority citation for part 249 continues to read as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; 12 U.S.C. 5461 *et seq.*; 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3) Pub. L. 112–106, 126 Stat. 309 (2012), Sec. 107 Pub. L. 112–106, 126 Stat. 313 (2012), Sec. 72001 Pub. L. 114–94, 129 Stat. 1312 (2015), and secs. 2 and 3 Pub. L. 116–222, 134 Stat. 1063 (2020), unless otherwise noted.

\* \* \* \* \*

■ 4. Add § 249.332 to read as follows:

#### § 249.332 Form SHO, report of institutional investment managers pursuant to section 13(f)(2) of the Securities Exchange Act of 1934.

This form shall be used by institutional investment managers that are required to furnish reports pursuant to section 13(f)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(f)(2)) and 17 CFR 240.13f–2 (Rule 13f–2).

■ 5. Add Form SHO referenced in § 249.332.

<sup>834</sup> 5 U.S.C. 801 *et seq.*

**Note:** Form SHO is attached as Appendix A to this document. Form SHO will not appear in the Code of Federal Regulations.

By the Commission.

Dated: October 13, 2023.

**J. Matthew DeLesDernier,**  
Deputy Secretary.

**Note:** The following appendix will not appear in the Code of Federal Regulations.

## Appendix A—Form SHO

OMB Number: XXXX–XXXX

### FORM SHO

#### Information Required of Institutional Investment Managers Pursuant to Section 13(f)(2) of the Securities Exchange Act of 1934 and Rules Thereunder

##### General Instructions

*Rule as to Use of Form SHO.* Institutional investment managers (“Managers”) must use Form SHO for reports to the Commission required by Rule 13f–2 [17 CFR 240.13f–2] promulgated under section 13(f)(2) of the Securities Exchange Act of 1934 [15 U.S.C. 78m(f)(2)] (“Exchange Act”). A Manager shall file a report on Form SHO in accordance with these instructions with the Commission within 14 calendar days after the end of each calendar month with regard to: (1) each equity security that is of a class of securities that is registered pursuant to section 12 of the Exchange Act or for which the issuer of that class of securities is required to file reports pursuant to section 15(d) of the Exchange Act over which the Manager and all accounts over which the Manager (or any person under the Manager’s control) has investment discretion with respect to either (A) a monthly average gross short position at the close of regular trading hours in the equity security with a value of \$10 million or more, or (B) a monthly average gross short position at the close of regular trading hours as a percentage of shares outstanding in the equity security of 2.5 percent or more; and (2) each equity security that is of a class of securities that is not registered pursuant to section 12 of the Exchange Act or for which the issuer is not required to file reports pursuant to section 15(d) of the Exchange Act over which the Manager and all accounts over which the Manager (or any person under the Manager’s control) has investment discretion with respect to a gross short position in the equity security with a U.S. dollar value of \$500,000 or more at the close of regular trading hours on any settlement date during the calendar month. For purposes of Rule 13f–2 and Form SHO, “regular trading hours” shall have the meaning ascribed in Rule 600(b)(77) under the Exchange Act [17 CFR 242.600(b)(77)].

A Manager that determines that it has filed a Form SHO with errors that affect the accuracy of the short sale data reported must file an amended and restated Form SHO within ten (10) calendar days of discovering the error.

*Rules to Prevent Duplicative Reporting.* If two or more Managers, each of which is required by Rule 13f–2 to file Form SHO for

the reporting period, exercise investment discretion with respect to the same securities, only one such Manager must report the information in its report on Form SHO. If a Manager has information that is required to be reported on Form SHO and such information is reported by another Manager (or Managers), such Manager must identify the Manager(s) reporting on its behalf in the manner described in Special Instruction 5.

*Filing of Form SHO.* A reporting Manager must file Form SHO with the Commission via the Commission’s Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”), in accordance with Regulation S–T. The Commission plans to publish certain data from the filings on an aggregated basis.

All information included in a Form SHO report is deemed subject to a confidential treatment request under 17 CFR 200.83. The Commission plans to publish only aggregated data derived from information provided in Form SHO reports.

Technical filing errors may cause delays in the filing of Form SHO. Technical support for making Form SHO reports is available through EDGAR Filer Support.

##### Instructions for Calculating Reporting Threshold

A Manager shall file a report on Form SHO:

- with regard to each equity security that is of a class of securities that is registered pursuant to section 12 of the Exchange Act or for which the issuer is required to file reports pursuant to section 15(d) of the Exchange Act (a “reporting company issuer”) in either of the following circumstances: (1) the Manager and all accounts over which the Manager or any person under the Manager’s control has investment discretion that are a monthly average gross short position at the close of regular trading hours in the equity security with a U.S. dollar value of \$10 million or more, or (2) the Manager and all accounts over which the Manager or any person under the Manager’s control has investment discretion that are a monthly average gross short position at the close of regular trading hours as a percentage of shares outstanding in the equity security of 2.5 percent or more (“Threshold A”).

- with regard to each equity security that is of a class of securities of an issuer that is not a reporting company issuer as described above (a “non-reporting company issuer”), when the Manager and all accounts over which the Manager or any person under the Manager’s control has investment discretion that are a gross short position in the equity security with a U.S. dollar value of \$500,000 or more at the close of regular trading hours on any settlement date during the calendar month (“Threshold B”).

With respect to each equity security to which the circumstances described in Threshold A or Threshold B applies, the Manager shall report the information, as described in the “Special Instructions” below, aggregated across accounts over which the Manager, or any person under the Manager’s control, has investment discretion.

To determine whether the dollar value threshold described in (1) of Threshold A above is met, a Manager shall determine its gross short position at the close of regular

trading hours in the equity security (as defined in Rule 13f–2) on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the settlement date (“end of day dollar value”). The Manager shall then add all end of day dollar values during the calendar month and divide that sum by the number of settlement dates in the month to arrive at a “monthly average” for each equity security the Manager traded during that calendar month reporting period.

To determine whether the dollar value threshold described in Threshold B above is met, a Manager shall determine its gross short position at the close of regular trading hours in the equity security (as defined in Rule 13f–2) on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the settlement date. If such closing price is not available, a Manager shall use the price at which it last purchased or sold any share of that security.

To determine whether the percentage threshold described in (2) of Threshold A above is met, the Manager shall (a) determine its gross short position at the close of regular trading hours in the equity security (as defined in Rule 13f–2) on each settlement date during the calendar month, and divide that figure by the number of shares outstanding in such security at the close of regular trading hours on the settlement date, and (b) add up the daily percentages during the calendar month as determined in (a) and divide that sum by the number of settlement dates in the month to arrive at a “monthly average” for each equity security the Manager traded during that calendar month reporting period. 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 Commission.

##### Special Instructions

1. This form consists of two parts: the Cover Page, and the Information Tables.

Cover Page

2. The period end date used in the report (and in the EDGAR submission header) is the last settlement day of the calendar month. The date shall name the month, and express the day and year in Arabic numerals, with the year being a four-digit numeral (e.g., 2023).

3. Amendments to Form SHO must restate the Form SHO in its entirety. If the Manager is filing the Form SHO report as an amendment, then the Manager must check the “Amendment and Restatement” box on the Cover Page; and enter the amendment number. Each Amendment and Restatement must include a complete Cover Page and Information Tables. Amendments must be filed sequentially.

a. In the space designated on the Cover of Page of each Amendment and Restatement, a Manager shall (1) provide a written description of the revision being made; (2) explain the reason for the revision; and (3) indicate whether data from any additional Form SHO reporting period(s) (up to the past

12 calendar months) is/are affected by the Amendment and Restatement.

b. If (3) applies, a Manager shall complete and file a separate Amendment and Restatement for each previous calendar month so affected (up to the past 12 months) and provide a description of the revision being made and explain the reason for the revision.

4. Present the Cover Page information in the format and order provided in the form, including the non-lapsed Legal Entity Identifier ("LEI"), if any, of the Manager filing the Form SHO report. The Cover Page shall include only the required information. Do not include any portions of the Information Tables on the Cover Page.

5. Designate the Report Type for the Form SHO by checking the appropriate box in the Report Type section of the Cover Page, and include, where applicable, the Name and non-lapsed LEI (if available) of each of the Other Managers Reporting for this Manager on the Cover Page, and the Information Tables, as follows:

a. If all of the information that a Manager is required by Rule 13f-2 to report on Form SHO is reported by another Manager (or Managers), check the box for Report Type "FORM SHO NOTICE," include on the Cover Page the Name and non-lapsed LEI (if available) of each of the Other Managers Reporting for this Manager, and omit the Information Tables.

b. If all of the information that a Manager is required by Rule 13f-2 to report on Form SHO is reported in this report, check the box for Report Type "FORM SHO ENTRIES REPORT," omit the "Name and Non-Lapsed LEI (if available) of each of the Other Managers Reporting for this Manager" section of the Cover Page, and include the Information Tables.

c. If only a part of the information that a Manager is required by Rule 13f-2 to report on Form SHO is reported in this report, check the box for Report Type "FORM SHO COMBINATION REPORT," include on the Cover Page the name and non-lapsed LEI (if available) of each of the Other Managers Reporting for this Manager, and include the Information Tables.

#### Information Tables

6. Do not include any additional information in the Information Tables. Do not include any portions of the Information Tables on the Cover Page.

7. In reporting information required on Information Tables 1 and 2, Managers must account for a gross short position in an ETF, and activity that results in the acquisition or sale of shares of the ETF resulting from call options exercises or assignments; put options exercises or assignments; tendered conversions; secondary offering transactions; or other activity, as discussed further below. In determining its gross short position in an equity security, however, a Manager is not required to consider short positions that the ETF holds in individual underlying equity securities that are part of the ETF basket.

#### 8. Instructions for Information Table 1—Manager's Gross Short Position:

a. *Column 1. Settlement Date.* Enter in Column 1 the last day of the calendar month

of the reporting period on which a trade settles ("settlement date").

b. *Column 2. Issuer Name.* Enter in Column 2 the name of the issuer of the security for which information is being reported. Reasonable abbreviations are permitted.

c. *Column 3. Issuer LEI.* If the issuer has an LEI, enter the issuer's LEI in Column 3.

d. *Column 4. Title of Class.* Enter in Column 4 the title of the class of the security for which information is being reported. Reasonable abbreviations are permitted.

e. *Column 5. CUSIP Number.* Enter in Column 5 the nine (9) digit CUSIP number of the security for which information is being reported, if applicable.

f. *Column 6. FIGI.* Enter in Column 6 the twelve (12) character, alphanumeric Financial Instrument Global Identifier ("FIGI") of the security for which information is being reported, if a FIGI has been assigned.

g. *Column 7. End of Month Gross Short Position (Number of Shares).* Enter in Column 7 the number of shares that represent the Manager's gross short position in the security for which information is being reported at the close of regular trading hours on the last settlement date of the calendar month of the reporting period. The term "gross short position" means the number of shares of the security for which information is being reported that are held short, without inclusion of any offsetting economic positions—including shares of the reportable equity security or derivatives of such security.

h. *Column 8. End of Month Gross Short Position (rounded to nearest USD).* Enter in Column 8 the U.S. dollar value of the shares reported in Column 7, rounded to the nearest dollar. A Manager shall report the corresponding dollar value of the reported gross short position by multiplying the number of shares of the security for which information is being reported by the closing price at the close of regular trading hours on the last settlement date of the calendar month. In circumstances where such closing price is not available, the Manager shall use the price at which it last purchased or sold any share of that security.

#### 9. Instructions for Information Table 2—Daily Activity Affecting Manager's Gross Short Position During the Reporting Period:

a. *Column 1. Settlement Date.* Enter in Column 1 each date during the reporting period on which a trade settles (settlement date). The Manager shall report information for each settlement date during the calendar month reporting period as described in these instructions.

b. *Column 2. Issuer Name.* Enter in Column 2 the name of the issuer of the equity security for which information is being reported. Reasonable abbreviations are permitted.

c. *Column 3. Issuer LEI.* If the issuer has an LEI, enter the issuer's LEI in Column 3.

d. *Column 4. Title of Class.* Enter in Column 4 the title of the class of the security for which information is being reported. Reasonable abbreviations are permitted.

e. *Column 5. CUSIP Number.* Enter in Column 5 the nine (9) digit CUSIP number

of the security for which information is being reported, if applicable.

f. *Column 6. FIGI.* Enter in Column 6 the twelve (12) character, alphanumeric FIGI of the security for which information is being reported, if a FIGI has been assigned.

g. *Column 7. Net Change in Short Position (Number of Shares).* For the settlement date set forth in Column 1, enter the net change in short position (represented as a number of shares) 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, by taking into account:

(1) Short sales of the security that settled on that date.

(2) Shares of the security that were purchased to cover, in whole or in part, an existing short position and settled on that date.

(3) Shares of the security that were acquired in a call option exercise that reduces or closes a short position on that security and settled on that date.

(4) Shares of the security that were sold in a put option exercise that creates or increases a short position on that security and settled on that date.

(5) Shares of the security that were sold in a call option assignment that creates or increases a short position on that security and settled on that date.

(6) Shares of the security that were acquired in a put option assignment that reduces or closes a short position on that security and settled on that date.

(7) Shares of the security for which information is being reported that were acquired as a result of the tendered conversions that reduces or closes a short position on that security and settled on that date.

(8) Shares of the security that were obtained through a secondary offering transaction that reduces or closes a short position on that security and settled on that date. Such secondary offering purchases must be reported whether they occurred outside or within the restricted period of Rule 105 of Regulation M, 17 CFR 242.105, which prohibits purchasing offering shares within the restricted period after selling short.

(9) Shares of the security that resulted from other activity not previously reported on this form that creates or increases a short position on that security and settled on that date, or that reduces or closes a short position on that security and settled on that date.

(10) Activity other than (1) through (9) above that creates or increases, or reduces or closes, a short position on that security, including, but not limited to, shares resulting from ETF creation or redemption activity.

#### Paperwork Reduction Act Information

Persons who are to respond to the collection of information contained in this form are not required to respond to the collection of information unless the form displays a currently valid Office of Management and Budget ("OMB") control number.

OMB Number: XXXX-XXXX  
**United States**  
**Securities and Exchange Commission**  
Washington, DC 20549  
**FORM SHO**  
Form SHO Cover Page  
Report for the Period Ended: [Month/Day/Year]  
Check here if Amendment and Restatement [ ]; Amendment Number:  
Description of the Amendment and Restatement, Reason for the Amendment and Restatement, and Which Additional Form SHO Reporting Period(s) (up to the past 12 calendar months), if any, is/are affected by the Amendment and Restatement:

Institutional Investment Manager ("Manager") Filing Report:  
Name: \_\_\_\_\_  
Mailing Address: \_\_\_\_\_  
Business Telephone Number: \_\_\_\_\_  
Business Email: \_\_\_\_\_  
Non-Lapsed Legal Entity Identifier ("LEI"): \_\_\_\_\_  
Contact Employee: \_\_\_\_\_  
Name and Title: \_\_\_\_\_  
Business Telephone Number: \_\_\_\_\_  
Business Email: \_\_\_\_\_  
Date Filed: \_\_\_\_\_  
The Manager filing this report hereby represents that all information contained herein is true, correct and complete, and that it is understood that all required items, statements, schedules, lists, and tables, are considered integral parts of this form.  
Report Type (Check only one):

[ ] FORM SHO ENTRIES REPORT. (Check here if all entries of this reporting Manager are reported in this report.)  
[ ] FORM SHO NOTICE. (Check here if no entries reported are in this report, and all entries are reported by other reporting Manager(s).)  
[ ] FORM SHO COMBINATION REPORT. (Check here if a portion of the entries for this reporting Manager is reported in this report and a portion is reported by other reporting Manager(s).)  
Name and Non-Lapsed LEI of each of the Other Manager(s) Reporting for this Manager: [If there are no entries in this list, omit this section.]  
Name: \_\_\_\_\_  
Non-Lapsed LEI: \_\_\_\_\_  
[Repeat as necessary.]

INFORMATION TABLE 1—MANAGER’S MONTHLY GROSS SHORT POSITION

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Settlement Date (Month End).	Issuer Name.	Issuer LEI	Title of Class.	CUSIP Number.	FIGI .....	End of Month Gross Short Position (Number of Shares).	End of Month Gross Short Position (rounded to nearest USD).

(Repeat as Necessary)

INFORMATION TABLE 2—DAILY ACTIVITY AFFECTING MANAGER’S GROSS SHORT POSITION DURING THE REPORTING PERIOD

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
Settlement Date	Issuer Name .....	Issuer LEI .....	Title of Class ....	CUSIP Number	FIGI .....	Net Change in Short Position (Number of Shares).

(Repeat as Necessary)

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