



Regulatory Alert

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Short Sales: SEC proposed disclosures

The SEC's proposed rules and amendments under the Exchange Act, Regulation SHO and the CAT NMS Plan will require certain broker-dealers and institutional investment managers to provide detailed information regarding short sale-related information on a monthly basis. SEC anticipates the new requirements will provide greater visibility into market activity and identify potential issues related to market conduct. Notably, the proposals follow recent news reports that the Department of Justice is conducting investigations into short sellers, and, in particular, trading practices known as "spoofing" and "scalping."

The SEC [released](#) proposed new rules under the Securities Exchange Act of 1934, in an effort to provide greater transparency of short sale-related data to investors and the public.

Proposed Rule 13f-2 and Form SHO

The SEC proposed new Rule 13f-2 and corresponding new Form SHO which pertain to institutional investment managers (Managers - see definition below). Under Rule 13f-2, Managers would be required to file Form SHO with the SEC via the EDGAR system within 14 days after the end of each calendar month for each equity security and account for which the Manager, or any person under the Manager's control, has investment discretion that collectively meets or exceeds the following quantitative reporting thresholds:

- **Threshold A:** regarding any registered equity security, i) a gross short position in the equity security with a US 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 monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5 percent
- **Threshold B:** regarding any equity security of a "non-reporting company issuer," a gross short position in the equity security with a US dollar value of \$500,000

or more at the close of regular trading hours on any settlement date during the calendar month.

Managers would include "institutional investment managers," which would be defined to include "any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person. As such, the term 'institutional investment manager' typically can include investment advisers, banks, insurance companies, broker-dealers, pension funds and corporations."

Form SHO would require Managers to report:

- The name of the eligible security
- End of month gross short position information
- Daily trading activity that affects a manager's reported gross short position for each settlement date during the calendar month reporting period.

Based on the information obtained via Form SHO, the Commission will aggregate the data by security in order to protect the privacy of reporting Managers, and publicly release the data to investors by the end of the month following the reporting calendar month. The SEC states



that it does not intend to verify the accuracy of the data reported by Managers but may consider doing so in the future. Data to be provided to the public would include:

- The issuer’s name and other identifying information
- The aggregated gross short position across all reporting managers in the reported security at the close of the last settlement date of the calendar month of the reporting period, as well as the corresponding dollar value of this reported gross short position
- The percentage of the reported aggregate gross short position that is reported as being fully hedged, partially hedged, or not hedged
- For each reported settlement date during the calendar month reporting period, the “net” activity in the reported security, as aggregated across all reporting Managers.

Proposed Rule 205

In addition to proposed Rule 13f-2, the SEC proposed a new provision under Regulation SHO, Rule 205, that would implement new “buy to cover” order marking requirements for broker-dealers. Specifically, broker dealers would be required to mark purchase orders as “buy to cover” at the time of the order entry if the purchaser is either the broker-dealer or another person and “has a gross short position in such security in the specific account for which the purchase is being made at such broker-dealer”. The requirement to mark a purchase order as “buy to cover” would apply regardless of the size of the purchase order or whether it is offset by a long position.

SEC states this proposed rule is designed to provide regulators with information regarding the life cycle of short sales, noting the SEC does not currently have regular access to “buy to cover” order marking information. As such, SEC says the reporting would “fill an information gap for market participants and

regulators,” supplementing the short sale data that is currently publicly available from FINRA and stock exchanges.

Proposed CAT Amendments

In connection with the proposed new rules pertaining to short sale activities, the SEC also [proposed](#) amendments to the National Market System Plan Governing the Consolidated Audit Trail (CAT NMS Plan). To supplement the short sale data required by the Rules 13f-2 and 205 proposals, the proposed CAT amendments would require CAT reporting industry members to report:

- The original receipt or origination of a “buy to cover” equity security order
- Only “one-sided” CAT unless certain exceptions prescribed by the rule apply
- Where the use of the bona fide market making exception under Regulation SHO is being asserted
- The material terms of an order to CAT for “numerous other events in an order’s lifecycle” including:
 - Routing of an order
 - Receipt of an order that has been routed
 - Order modifications and cancellations
 - Executions of orders, in whole or in part.

Comments requested

Comments on the proposals will remain open until 30 days following publication of the proposing release in the Federal Register or April 26, 2022 (60 days following publication of the proposing release on the SEC’s website), whichever period is longer. In addition, the SEC has reopened the comment period for its [proposed Rule 10c-1](#), Reporting of Securities Loans. Comments on this proposal may be submitted through April 1, 2022.

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