



ALERTS

SEC Adopts New Short Position Reporting Rules For Institutional Investment Managers

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Highlights

The SEC has adopted new Rule 13f-2 requiring institutional investment managers to report monthly short position data for equity securities

Managers will report confidentially on new Form SHO, following which the SEC will publish aggregated monthly short position data

The new reporting requirements are challenging, but will be subject to a 12-month delayed compliance date

The U.S. Securities and Exchange Commission (SEC) [adopted](#) new Rule 13f-2 under the Securities Exchange Act of 1934 (the Exchange Act) on Oct. 13, 2023. Rule 13f-2 will require institutional investment managers that meet certain prescribed disclosure thresholds to file monthly confidential reports with the SEC concerning their short position and short activity levels in equity securities on an issuer-by-issuer basis.

Managers will file this information on newly adopted Form SHO. The SEC plans to aggregate and publicly disseminate, on a modestly delayed basis, certain of the monthly data derived from managers' filings. SEC

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Chair Gary Gensler stated that Rule 13f-2 and the Form SHO reporting system “will promote greater transparency about short selling both to regulators and the public.”

As part of the same adopting release but not directly relevant to investment managers, the SEC also introduced an amendment to the national market system plan governing the consolidated audit trail, known as the CAT NMS Plan. This amendment will require broker-dealers to indicate whether a sale order is a short sale in connection with which the broker-dealer is claiming the market maker’s exemption from the normal “locate” requirement applicable to short sales.

Rule 13f-2 will become effective 60 days after the adopting release is published in the Federal Register. The compliance date will be 12 months after the effective date.

Background

Congress added Section 13(f)(2) to the Exchange Act in 2011 as part of its Dodd-Frank legislation. The statutory language directs the SEC to prescribe rules providing for public disclosure, on at least a monthly basis, of the aggregate amount of short sales in particular issuers’ equity securities.

The SEC has now implemented this statutory mandate by [adopting final Rule 13f-2 and Form SHO](#). The adoption of the final provisions reflects the SEC’s receipt of public comments on the initial rule [proposal](#) issued in early 2022.

Scope of Rule 13f-2 and Associated Form SHO Reporting Obligation

New Rule 13f-2 is in some sense the short-side analog to the traditional long-focused Form 13F reporting system that operates pursuant to Rule 13f-1, albeit with significant differences in scope and practical impact.

Investment Managers Subject to the New Reporting Requirement

Rule 13f-2, and thus the potential requirement to file a monthly Form SHO, applies to any “institutional investment manager.” The term has the same definition under Rule 13f-2 as in the Form 13F context. That is, an institutional investment manager is either (i) an entity that invests in or buys and sells securities for its own account or (ii) an entity or a natural person that exercises investment discretion with respect to the account of any other entity or natural person.⁽¹⁾ A private fund manager typically is an institutional investment manager due to the second prong of that definition. A manager need not be a registered investment adviser to have institutional investment manager status.

Scope of Securities Covered

Rule 13f-2 and the Form SHO reporting regime apply to “equity securities,” as defined in Section 3(a)(11) of the Exchange Act and Rule 3a11-1 thereunder.⁽²⁾ That definition encompasses not only common

stock, but also certain derivatives, options, warrants, and convertible securities, as well as ETFs.(3) Equity securities do not include instruments designed to provide their holders only with synthetic exposure to a reference equity security.

Unlike in the Form 13F context, the SEC will not be preparing a periodic official list of securities subject to reporting on Form SHO.

The Concept of “Gross Short Position”

The potential obligation of an institutional investment manager (a Manager) to report on Form SHO for a particular calendar month hinges on the size of the Manager’s “gross short position” in the equity securities of any given issuer during that month.

Rule 13f-2 defines a gross short position as the number of shares of the equity security in question that are held short as a result of “short sales,” as defined in Regulation SHO.(4) In calculating its gross short position in a particular equity security, the Manager would not include any offsetting economic positions, such as shares of the equity security that are held long, or synthetic long exposure achieved through the holding of derivative instruments referencing the equity security.(5)

Gross Short Position Thresholds that Trigger Reporting on Form SHO

Rule 13f-2 provides that a Manager is subject to reporting on Form SHO if the Manager (and all accounts over which the Manager or any person under their control has investment discretion) meets either of two gross short position thresholds in the equity securities of one or more issuers for a particular month. The reporting thresholds differ depending on whether the issuer of the equity securities in question is subject to periodic SEC reporting (a Reporting Issuer) or not (a Non-Reporting Issuer).(6)

When a Manager has a gross short position in the equity securities of a Reporting Issuer, “Threshold A” sets forth the relevant tests for determining whether reporting on Form SHO is required. If a Manager has a gross short position in the equity securities of a Non-Reporting Issuer, “Threshold B” is the relevant test.

- Threshold A – Short Position in Reporting Issuer. Under Threshold A, a Manager is subject to reporting on Form SHO in respect of a given calendar month if the Manager has, with respect to the equity security of any Reporting Issuer:
 - A monthly average gross short position at the close of regular trading hours in the security with a value of \$10 million or more;(8) or
 - A monthly average gross short position at the close of regular trading hours(7) equal to 2.5 percent or more of the outstanding shares of the equity security.(9)

The two-pronged approach of Threshold A therefore measures the size of a Manager’s gross short position in a Reporting Issuer relative to both dollar value and shares outstanding. This approach ensures that a

relatively substantial short position in either a large-cap or a small-cap Reporting Issuer would trigger a reporting obligation.

- **Threshold B – Short Position in Non-Reporting Issuer.** Under Threshold B, a Manager is subject to reporting on Form SHO in respect of a given calendar month if the Manager has, with respect to the equity security of any Non-Reporting Issuer, a gross short position in the security of \$500,000 or more at the close of regular trading hours on any settlement date during the calendar month.(10)

Note that while Threshold A relates to dollar- or percentage-based gross short positions calculated on a monthly basis, Threshold B is met if the Manager exceeds its dollar-based standard on any settlement date during the calendar month.

Form SHO

If a Manager determines that it has met a Threshold A or Threshold B degree of gross short exposure in an equity security in a given calendar month, the Manager must file a Form SHO for that month with respect to that equity security. Since a Manager may exceed a relevant threshold with respect to the equity securities of multiple issuers in a particular month, it is possible that a Manager's Form SHO will refer to short positions in several different issuers.

Filing Deadline

The Manager must file its Form SHO with the SEC via EDGAR within 14 calendar days after the end of the calendar month with respect to which the reporting obligation is triggered.(11) The filing will be made in an XML language specific to Form SHO.

Content of Form SHO

Form SHO consists of a cover page and two information tables. The cover page sets forth basic information, such as the Manager's name and other identifying information, and the calendar month to which the Form SHO relates.

Information Table 1 provides a month-end snapshot of a Manager's gross short position in each reported equity security. Information Table 2 effectively provides a moving picture of the daily trading activity during the course of the month that affected the size of each reported gross short position.

- **Information Table 1 – “Manager's Monthly Gross Short Position.”** Information Table 1 discloses with regard to each reported equity security: (a) the last day of the calendar month on which the Manager settled a trade in that security; (b) the number of shares representing the Manager's gross short position in the security at the close of regular trading hours on that last settlement date; and (c) the U.S. dollar value of that number of shares, calculated by reference to the security's price at the close of regular trading hours on that last settlement date.(12)

- Information Table 2 – “Daily Activity Affecting Manager’s Gross Short Position During the Reporting Period.” With regard to each reported equity security, Information Table 2 requires disclosure of: (a) each date during the calendar month on which the Manager settled a trade in that security; and (b) for each such settlement date, the “net change in short position” (represented as a number of shares) reflecting how the gross short position in the security was being closed out or increased on that date as a result of acquisitions or sales of the security.(13)

Arriving at the Information Table 2 “net change in short position” for a particular security on each settlement date during the month may require a Manager to engage in a very detailed cataloguing of daily trading activity. Nonetheless, the SEC believes that the intra-month activity data elicited by Information Table 2 will provide the SEC with valuable “context and transparency into how and when” short positions are created, increased, reduced, or closed out.

Amendments to Form SHO

If a Manager determines that it has filed a Form SHO containing errors affecting the accuracy of the reported short sale data, the Manager must file an amended and restated Form SHO within 10 calendar days of discovering the error.(14)

Monthly Publication of Aggregate Data by SEC

The SEC plans to publish anonymous, aggregated information regarding each equity security reported by Managers on Form SHO for a given calendar month. The information published by the SEC will correspond to the content of Information Tables 1 and 2. The SEC expects to publish this aggregated Form SHO information within one month following the end of the reporting calendar month.

Confidential Treatment

Form SHO will be a non-public filing. All information reported by a Manager in a Form SHO is deemed subject to a confidential treatment request. The adopting release states that Manager confidentiality also will be protected by the SEC’s delayed publication of aggregated Form SHO data.

Compliance Timing

Rule 13f-2 will become effective 60 days after its publication in the Federal Register. The compliance date for Rule 13f-2, and hence for reporting on Form SHO if required, will be 12 months after that effective date. The SEC plans to begin reporting aggregated Form SHO data three months after the compliance date.

Differing Views of SEC Commissioners

In a now not uncommon occurrence, the SEC adopted the new short position reporting rules by a 3-2 vote along party lines. Commissioners

expressed divergent views concerning the final scope of the new reporting regime and its associated benefits and costs.

Chair Gensler supported the new rules as fulfilling a long-standing Congressional mandate and “enhanc[ing] the transparency of short selling of equity securities.” Commissioner Jaime Lizárraga expressed a similar view, stating that the new reporting requirements “will increase transparency, enhance market oversight, and reduce systemic risk from large, short-selling positions.”

In dissent, Commissioner Hester Peirce echoed the concerns of many Managers, opining that the new rule “does not adequately consider all the costs associated with its implementation” and may risk inadvertent public dissemination of Managers’ “highly sensitive” information. Commissioner Peirce, along with Commissioner Mark Uyeda, also expressed concern as to whether the scope of Rule 13f-2 as adopted exceeds what Congress had contemplated.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Scott Budlong at 646-746-2036 or sbudlong@btlaw.com.

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(1) Rule 13f-2(b)(1), cross-referencing to the definition of “institutional investment manager” set forth in Section 13(f)(6)(A) of the Exchange Act.

(2) Rule 13f-2(b)(2).

(3) The adopting release notes that this scope is consistent with the equity securities covered by Regulation SHO, the SEC’s package of rules governing short sales.

(4) Rule 13f-2(b)(4). The term “short sale” is defined in Rule 200(a) of Regulation SHO to mean either (i) a sale of a security which the seller does not own, or (ii) a sale of a security which is consummated by the delivery of a security borrowed by, or for the account of, the seller. For purposes of the first type of short sale, Rule 200(b) describes various circumstances in which a seller is deemed to “own” a security. Rule 200(c) adds the caveat that a person is deemed to own a security only to the extent of the person’s net long position.

(5) Rule 13f-2(b)(4).

(6) A Reporting Issuer is an issuer that is subject to periodic SEC reporting either because it has a class of securities registered under Section 12 of the Exchange Act (in which case periodic reporting is obligatory under Section 13 of the Exchange Act), or because it has filed a registration statement that became effective under the Securities Act of

1933 (in which case periodic reporting is obligatory under Section 15(d) of the Exchange Act). A Non-Reporting Issuer is any other issuer.

(7) The term “regular trading hours” generally means 9:30 a.m. to 4 p.m. Eastern Time. Rule 13f-2(b)(5), cross-referencing Rule 600(b)(77) under the Exchange Act.

(8) Rule 13f-2(a)(1)(i). To determine whether it meets this first, dollar-value-based prong of Threshold A, a Manager: (a) determines its gross short position in the relevant security at the close of regular trading hours on each settlement date during the calendar month; (b) multiplies that figure by the closing price at the close of regular trading hours on the settlement date (the “end-of-day dollar value”); (c) adds up all end-of-day dollar values during the month; and (d) divides that sum by the number of settlement dates in the month. The Manager thus arrives at a dollar-based “monthly average” gross short position for the security. If that dollar figure is \$10 million or greater, the Manager has a Form SHO reporting obligation in respect of the security under the first prong of Threshold A. See Form SHO, Instructions for Calculating Reporting Threshold.

(9) Rule 13f-2(a)(1)(ii). To determine whether it meets this second, percentage-of-shares-outstanding prong of Threshold A, a Manager: (a) determines its gross short position in the relevant security at the close of regular trading hours on each settlement date during the calendar month; (b) divides that figure by the number of shares of the security outstanding at the close of regular trading hours on the settlement date; (c) adds up the resultant daily percentages during the month; and (d) divides that sum by the number of settlement dates in the month. The Manager thus arrives at a percentage-based “monthly average” gross short position for the security. If that percentage figure is 2.5% or greater, the Manager has a Form SHO reporting obligation in respect of the security under the second prong of Threshold A. The number of shares of an equity security outstanding shall be determined by reference to the issuer’s most recent annual or quarterly report, and any subsequent update thereto, filed with the SEC. *Id.*

(10) Rule 13f-2(a)(2). To determine whether it meets the dollar-value-based Threshold B, a Manager: (a) determines its gross short position in the relevant security at the close of regular trading hours on each settlement date during the calendar month; and (b) multiplies that figure by the closing price at the close of regular trading hours on the settlement date (if such a closing price is not available, the Manager instead uses the price at which it last purchased or sold a share of the security). If the resultant figure is \$500,000 or more on any settlement date during the month, the Manager has a Form SHO reporting obligation in respect of the security under Threshold B. *Id.*

(11) Rule 13f-2(a). Form SHO has rules to avoid duplicative reporting by affiliated Managers, essentially modeled on those contained in Form 13F. See Form SHO, General Instructions.

(12) See Form SHO, Special Instruction 8.

(13) The Manager calculates the “net change in short position” in a given security for each reported settlement date by taking into account: (i) short sales that settled on that date; (ii) shares that were purchased to cover, in whole or in part, an existing short position and settled on that date; (iii)

shares that were acquired in a call option exercise that reduced or closed a short position in the security and settled on that date; (iv) shares that were sold in a put option exercise that created or increased a short position in the security and settled on that date; (v) shares that were sold in a call option assignment that created or increased a short position in the security and settled on that date; (vi) shares that were acquired in a put option assignment that reduced or closed a short position in the security and settled on that date; (vii) shares that were acquired as a result of “tendered conversions” that reduced or closed a short position in the security and settled on that date; (viii) shares that were obtained through a secondary offering transaction that reduced or closed a short position in the security and settled on that date; (ix) shares that resulted from other activity not previously reported on the Form SHO that created or increased a short position in the security and settled on that date, or that reduced or closed a short position in the security and settled on that date; and (x) activity other than that described in clauses (i)-(ix) that created or increased, or reduced or closed, a short position in the security, including but not limited to shares resulting from ETF creation or redemption activity. See Form SHO, Special Instruction 9.

(14) Form SHO, General Instructions.