

Recent SEC Developments on Confidential Treatment of Short Sale Disclosure Filings

Using its emergency authority, the Securities and Exchange Commission (SEC) extended the temporary requirement that institutional money managers report to the SEC short sales of certain publicly traded securities. The SEC's emergency order has been extended through October 17, 2008, but the SEC intends the order to continue beyond that date in the form of an interim final rule. Forms SH filed under the order, including those that were due on September 29, 2008, will be treated as having been filed confidentially. They should be marked **NON-PUBLIC** (in bold and capital letters at the top and bottom of each page of the entire form) and will remain non-public without the filer needing to submit a confidential treatment request.

However, these filings remain subject to Freedom of Information Act (FOIA) requests by the public and, therefore, one or more Forms SH could be made public unless the filer is able to establish that disclosure meets the standard for exemption under FOIA. This typically requires a showing of substantial commercial or competitive harm. The SEC may also require that a filer demonstrate that disclosure could result in increased market volatility, as they have done in the context of confidentiality requests for Form 13F information. We have confirmed with senior SEC staff that FOIA requests will be subject to the same procedures as any other information submitted confidentially to the SEC, which means there will be a notice and appeal process before the information is made public. Although we believe, based on our discussions with the SEC staff, that the burden of showing competitive harm may not be as stringent as for confidential treatment requests filed with Forms 13F, filers will be required to substantiate why disclosure of the information would be competitively harmful.

It is possible that FOIA requests have already been submitted for reports filed September 29, so managers wishing to substantiate competitive harm should begin the process of formulating arguments to preserve the confidentiality of the information filed with the SEC on Form SH, including why such disclosure would impede competition and cause increased volatility in the marketplace. If you would like to learn more about the issues raised by this update, please contact your usual Ropes & Gray adviser.

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