

March 10, 2022

## SEC Proposes New Reporting Regime for Short Sales

On February 25, 2022, the Securities and Exchange Commission (the “SEC”) proposed Rule 13f-2<sup>1</sup> and Form SHO under the Securities Exchange Act of 1934 (the “Exchange Act”), which would require investors to file monthly reports disclosing certain short selling activity. Form SHO would be confidentially filed with the SEC and would include detailed information about certain trading activities. The SEC would aggregate the reported information by security and publicly disclose only that aggregated information (without identifying any investors) monthly. The key elements of the SEC’s proposal are summarized below.

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- Entities trading for their own account and all persons with investment discretion over accounts of others would need to report if they hold short sale positions exceeding the thresholds.
  - The SEC’s proposal would require all “institutional investment managers” to file reports with respect to a security if the short sale position in that security exceeds certain thresholds. The definition of “institutional investment manager” extends beyond investment advisers, and has been interpreted broadly to capture “an entity that either invests in, or buys and sells, securities for its own account ... [such as] corporations and pension funds that manage their own investment portfolios [and] a natural person or an entity that exercises investment discretion over the account of any other natural person or entity.”<sup>2</sup>
- The proposal addresses short sales of “equity securities” issued by both public and private companies.
  - “Equity securities” is broadly defined and includes, in addition to common and preferred stock, securities convertible, exercisable or exchangeable for an equity security.<sup>3</sup>
  - Short sales of both Exchange Act-registered classes of equity securities and other equity securities (e.g., equity securities of privately held companies) would be subject to reporting.<sup>4</sup>
- Whether or not an investor is required to file Form SHO would be determined each month on a security-by-security basis. The relevant thresholds are:
  - For equity securities of issuers that are SEC-reporting companies,<sup>5</sup> either:
    - a gross short position with a U.S. dollar value of \$10 million or more at the close of any settlement date during the calendar month; or
    - a monthly average gross short position (determined by looking to the gross short position as of the close of each settlement date during the calendar month) equal to 2.5% or more of the shares outstanding.
  - For equity securities of other issuers, a gross short position with a U.S. dollar value of \$500,000 or more at the close of any settlement date during the calendar month.
  - There are two important exclusions with respect to calculation of those thresholds:
    - Short positions established through derivatives would not be counted towards those thresholds; and
    - Investors that take short positions in ETFs would not need to include securities held by the ETF in its portfolio when calculating if the threshold has been met.

- Investors would be required to file reports with the SEC 14 calendar days after the end of each month.
  - Form SHO would be filed confidentially with the SEC.
  - Reports would include detailed information about short positions in securities for which the investor has exceeded the relevant threshold, including, among other things, the size of the gross short position at the end of the month, whether or not the position is hedged, information regarding short sales and acquisitions of the relevant security for each settlement date during the calendar month and information regarding whether the acquisition or sale was related to the exercise of a derivative.
  - The SEC plans to report aggregated data regarding short sales within one month following the end of the reporting calendar month. The aggregated information would be reported for each security and include the gross short position at the end of the month and the percentage of that position that is hedged. The SEC would also report daily net activity (calculated by netting purchase and sale activity reported on Form SHO) for each settlement date during the calendar month.
- In connection with proposing Rule 13f-2 and Form SHO, the SEC also proposed amending Regulation SHO and Regulation NMS to require broker-dealers to mark trades as “buy to cover” if effected for the account of a person that has a gross short position in the relevant security.

Comments on the Proposing Release will be due on the later of April 26, 2022 and 30 days after the proposal is published in the Federal Register. In connection with the Proposing Release, the SEC re-opened the comment period for its recent proposal on reporting of securities loans.<sup>6</sup> Comments on that proposal are due on April 1, 2022.<sup>7</sup>

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If you would like to follow up regarding any of the matters covered by this Alert, please contact your usual Ropes & Gray attorney.

1. SEC Release 34-94313, available at <https://www.sec.gov/rules/proposed/2022/34-94313.pdf> (the “Proposing Release.”).
2. Securities and Exchange Commission Staff, Frequently Asked Questions About Form 13F, at Question 3, available at <https://www.sec.gov/divisions/investment/13ffaq.htm> (last accessed March 8, 2022). See also Proposing Release at n.15.
3. See Proposed Rule 13f-2(b)(2); Exchange Act Rule 3a11-1.
4. See Proposed Rule 13f-2(a).
5. Defined as companies with a class of equity securities registered under Section 12 of the Exchange Act or required to file reports under Section 15(d) of the Exchange Act.
6. SEC Release 34-93595 (Nov. 18, 2021), available at <https://www.sec.gov/rules/proposed/2021/34-93613.pdf>.
7. SEC Release 34-94315 (Feb. 25, 2022), available at <https://www.sec.gov/rules/proposed/2022/34-94315.pdf>.