



April 28, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

VIA ELECTRONIC MAIL
rule-comments@sec.gov

Subject: Short Position and Short Activity Reporting by Institutional Investment Managers, File No. S7-08-22

Dear Ms. Countryman:

The National Investor Relations Institute (“NIRI”)¹ appreciates the opportunity to provide comments regarding the rule proposal by the Securities and Exchange Commission (“SEC” or “Commission”) to improve market transparency through monthly reporting and public disclosure of short sale information.²

For more than a decade, NIRI has advocated for improved short position disclosure by institutional investment managers, including the adoption by the SEC of new rules to make short sale information publicly available on at least a monthly basis, as required by Section 929X of the Dodd-Frank Act.³ Specific NIRI comment letters and petitions for rulemaking submitted to the SEC include the following:

- In 2011, NIRI submitted a comment letter on the SEC’s Short Sale Reporting Study.⁴ NIRI urged the SEC to require the same level of disclosure from all institutional investors maintaining short equity positions as is required of the same investors that

¹ Founded in 1969, the National Investor Relations Institute (“NIRI”) is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. The largest professional investor relations association in the world, NIRI’s more than 2,800 members represent over 1,350 publicly held companies with more than \$7 trillion in stock market capitalization.

² Short Position and Short Activity Reporting by Institutional Investment Managers, 87 Fed. Reg. 14,950 (Mar. 16, 2022) (hereinafter “Proposed Rule”).

³ See Public Law 111-203, Section 929X, 124 Stat. 1376, 1870 (July 21, 2010).

⁴ Letter from Jeffrey D. Morgan, President & CEO, National Investor Relations Institute, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission (June 21, 2011), *available at* <https://www.sec.gov/comments/4-627/4627-134.pdf>.

maintain long equity positions. In NIRI's view, short sale reporting should be publicly available in the same manner as long position reporting.

- In 2015, NIRI joined with the NYSE Group in submitting a rulemaking petition requesting that the SEC require 13(f) institutions to publicly report their short positions.⁵ This petition was followed a few months later by a similar request by Nasdaq, Inc., urging the SEC to require disclosure of short positions in parity with required disclosure of long positions.⁶
- In 2018, the NIRI Capital Area Chapter and the NIRI Dallas-Fort Worth Chapter submitted comment letters in support of these 2015 rulemaking petitions.⁷
- In 2020, NIRI submitted a comment letter in support of a "short and distort" rulemaking petition filed by a group of securities law professors.⁸ This petition urged the SEC to: (1) impose a duty to update promptly a voluntary short position disclosure which no longer reflects current holdings or trading intention; and (2) clarify that rapidly closing a short position after publishing (or commissioning) a report, without having specifically disclosed an intent to do so, can constitute fraudulent scalping in violation of Rule 10b-5.

NIRI appreciates and supports the comprehensive approach the SEC has taken in developing its Proposed Rule on short position disclosure and offers the following specific comments:

1. **NIRI Supports the SEC's Proposed Short Position Reporting Regime.** One element of the Commission's Proposed Rule would require 13(f) investment managers holding a large gross short position of an individual equity security registered under the Exchange Act to file a Form SHO report with the SEC within 14 calendar days after the end of a calendar month.

⁵ NYSE Group and National Investor Relations Institute, Petition for Rulemaking Pursuant to Sections 10 and 13(f) of the Securities Exchange Act of 1934 (Oct. 7, 2015) (File No. 4-689), *available at* <https://www.sec.gov/rules/petitions/2015/petn4-689.pdf>.

⁶ Nasdaq, Inc., Petition for Rulemaking to Require Disclosure of Short Positions in Parity with Required Disclosure of Long Positions (Dec. 7, 2015) (File No. 4-691), *available at* <https://www.sec.gov/rules/petitions/2015/petn4-691.pdf>.

⁷ Letter from David Dixon, President, and David L. Dragics, Advocacy Ambassador, NIRI Capital Area Chapter, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission (Aug. 30, 2018), *available at* <https://www.sec.gov/comments/4-689/4689-4290063-173188.pdf>; and Letter from Glen Orr, President, NIRI DFW Chapter, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission (Sept. 11, 2018), *available at* <https://www.sec.gov/comments/4-689/4689-4333531-173256.pdf>.

⁸ Letter from Gary LaBranche, President & CEO, National Investor Relations Institute, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (May 22, 2020), *available at* <https://www.sec.gov/comments/4-758/4758-7227732-217014.pdf>. *See also* 12 Corporate Law Professors, Petition for Rulemaking on Short and Distort (Feb. 12, 2020) (File No. 4-758), *available at* <https://www.sec.gov/rules/petitions/2020/petn4-758.pdf>.

Form SHO reporting would be required for any short position meeting one of two different quantitative thresholds: (a) any gross short position with a U.S. dollar value of \$10 million or more; or (b) a monthly average gross short position as a percentage of shares outstanding in an equity security of 2.5% or more.⁹

Under the SEC's Proposed Rule, short position reporting under new Rule 13f-2 would be deemed subject to a confidential treatment request under Rule 24b-2.¹⁰ This approach would protect the identities of the reporting investment managers and avoid public disclosures of their individual short transactions. Short sellers have raised concerns about such disclosures, as public reporting could reveal proprietary trading strategies and, in some instances, cause other market participants to orchestrate a "short squeeze" targeting certain investment managers.¹¹ The SEC also notes that certain market participants, including issuers, could use the information to take retaliatory steps against specific short sellers.¹²

While, NIRI supports the monthly reporting regime outlined by the SEC in its Proposed Rule, it remains an advocate for more transparency in the marketplace through additional disclosure of individual short positions, as discussed below.

2. NIRI Supports the SEC's Alternative Approach to Public Reporting of Short Position Information. The SEC proposes to publicly disclose, through its EDGAR platform, aggregated short position information for each equity security reported in monthly Form SHO filings.¹³ The SEC intends to provide this aggregated information within one month after the end of each reporting calendar month.¹⁴

The SEC argues that this new reporting regime will supplement the aggregated short sale information provided today through FINRA and the stock exchanges. Currently, FINRA and most stock exchanges collect and publish daily aggregate short sale volume data.¹⁵ Additionally, on a one month delayed basis, certain entities also publish information regarding short sale transactions for each security, although without identification of broker-dealers or short sellers.¹⁶

While NIRI acknowledges that the SEC's proposed short position reporting regime does improve the disclosure requirements for short positions by providing supplemental information to the marketplace, the investor relations community has long sought to receive manager-level transaction and identity information for large short positions. For this reason, NIRI supports the

⁹ *Proposed Rule* at 14,955.

¹⁰ *Proposed Rule* at 14,957. Rule 24b-2 is codified at 17 C.F.R. § 240.24b-2.

¹¹ *Proposed Rule* at 14,995.

¹² *Id.* In its explanation of the Proposed Rule, the SEC offers very little evidence that retaliatory actions by issuers would be a widespread problem, documenting its statements with only one comment letter and an academic study.

¹³ *Proposed Rule* at 14,961.

¹⁴ *Id.*

¹⁵ *Proposed Rule* at 14,953.

¹⁶ *Id.*

SEC's alternative approach to publishing Rule 13f-2 reports, as described in Part IV of the Proposed Rule, to provide for additional short sale transparency. Under this alternative, the SEC would publish the information reported by individual investment managers on Form SHO and not aggregate it with information reported by other investment managers holding large short positions.¹⁷ The information reported on Form SHO would be published as it is reported to the Commission, but the SEC would remove from public disclosure any identifying information regarding each of the reporting managers.¹⁸

NIRI agrees with the Commission that this alternative approach balances the need for additional short sale transparency with the concerns about potential retaliation or negative actions by market participants against identified short sellers.¹⁹ If adopted, this alternative approach would significantly improve market transparency of short sale positions, especially when compared to the SEC's other proposal to simply aggregate short sale information reported on Form SHO.²⁰ This alternative would also bring short position information faster to the marketplace, as the Form SHO disclosure would occur shortly after each Form is filed, in contrast to publication of aggregated information within one month after the end of each reporting calendar month.

3. NIRI Urges the SEC to Provide Confidential Disclosure of Large Short Positions to Individual Public Companies. NIRI acknowledges the concerns by investment managers that disclosure of identifying manager information could result in market participants targeting individual short sellers, either by orchestrating a short squeeze or by taking other retaliatory actions. However, enhanced disclosure of large short positions and identifying manager information would improve the ability of public companies to analyze and understand market movements in their securities and be in a position to more effectively engage in direct communications with short sellers. Companies are not able to engage with these investors unless the short sellers choose to surface publicly, and issuers should be able to obtain basic information about whether an investor has a large short position in their securities.²¹

In order to balance the interests of public companies and investment managers, NIRI proposes that the SEC consider sharing short position and identifying manager information from

¹⁷ See *Proposed Rule* at 14,967.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ In its Economic Analysis of this Proposed Rule, the Commission concedes that aggregated short position information at the security level prevents market participants from: (1) understanding the underlying short selling activity; (2) evaluating whether short sentiment is broadly or narrowly held; or (3) determining whether existing short interest is for a hedging purpose or based on short sentiment. See *Proposed Rule* at 14,988.

²¹ One of the most important duties of a corporate investor relations (IR) officer is to respond to requests from institutional investors and analysts for calls or meetings with C-suite executives and members of the company's Board of Directors. At most companies, the volume of requests far exceeds the scarce executive (or director) time available for such engagement, so IR officers have to decide which investors and analysts should have priority. A key consideration in allocating executive (or director) time is knowing whether an investor has a net long or short position, the size of that position, and whether the investor is increasing or decreasing that position.

Form SHO on a confidential basis with each public company whenever a large short position is reported on Form SHO.²² If adopted, this information sharing proposal would improve issuer-investor engagement and begin to harmonize the SEC's short position disclosure regime with European disclosure requirements, where a net short position of 0.5% or more of the share capital of a company is publicly disclosed, along with the identity of the short seller.²³

In order to ensure that this information remains confidential, the SEC should insert a provision in its Final Rule to require that any short position or identity information, once shared, be protected by a company using the same means it uses to protect its own confidential information and in a manner that avoids disclosure to any third party. An example of this type of confidentiality provision could read as follows:

Each issuer shall maintain any information provided by the Commission in confidence, pursuant to Rule 13f-2, to the same extent and using the same means it uses to protect its own confidential information, but no less than a reasonable standard of care, and shall not use this information with any third party, or disclose this information to any third party, except as required under the rules of the Commission or as otherwise required by applicable law.

This refinement to the Proposed Rule, if adopted, would improve short sale transparency in a manner that does not increase the marketplace risk to an investment manager of a short squeeze or other retaliatory action targeted at a specific short position.

* * *

NIRI is very appreciative of the SEC's efforts provide greater transparency through monthly reporting and public disclosure of short sale information. Thank you for the opportunity to present the Institute's views on this rulemaking and please feel free to contact us if further discussion would be helpful.

Sincerely,



Matthew D. Bruschi
Interim President and CEO
National Investor Relations Institute

²² These confidential disclosures could be made to all companies where large short positions are reported on Form SHO, or the disclosures could be made only to those companies that request such confidential information.

²³ See *Proposed Rule* at 15,005.

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cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
The Honorable Allison Herren Lee
The Honorable Carolyn A. Crenshaw
Renee Jones, Director, Division of Corporation Finance
Haoxiang Zhu, Director, Division of Trading and Markets