

security on or before the settlement date.

(b) For purposes of this rule, the term *settlement date* shall mean the business day on which delivery of a security and payment of money is to be made through the facilities of a registered clearing agency in connection with the sale of a security.

By the Commission.

Dated: October 14, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 240 and 249

[Release No. 34-58785; File No. S7-31-08; October 15, 2008]

RIN 3235-AK23

#### Disclosure of Short Sales and Short Positions by Institutional Investment Managers

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Interim final temporary rule; Request for comments.

**SUMMARY:** The Commission is adopting an interim final temporary rule requiring certain institutional investment managers to file information on Form SH concerning their short sales and positions of section 13(f) securities, other than options. The new rule extends the reporting requirements established by our Emergency Orders dated September 18, 2008, September 21, 2008 and October 2, 2008, with some modifications. The extension will be effective until August 1, 2009. Consistent with the Orders, the rule requires an institutional investment manager that exercises investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value of at least \$100 million to file Form SH with the Commission following a calendar week in which it effected a short sale in a section 13(f) security, with some exceptions.

**DATES:** *Effective Date:* §§ 240.10a-3T, 249.326T and temporary Form SH are effective from October 18, 2008 until August 1, 2009.

*Compliance Dates:* An institutional investment manager that is required to file a Form SH report on October 24, 2008 or October 31, 2008, must comply with Rule 10a-3T, except that it:

- May exclude disclosure of short positions reflecting short sales before September 22, 2008 from the Form SH report filed on either or both of those dates. An institutional investment manager choosing to exclude these short sales effected before September 22 is not required to report short positions otherwise reportable if the short position in the section 13(f) security constitutes less than one-quarter of one percent of that class of the issuer's securities issued and outstanding as reported on the issuer's most recent annual or quarterly report, and any current report subsequent thereto, filed with the Commission pursuant to the Securities Exchange Act of 1934, unless the manager knows or has reason to believe that the information contained therein is inaccurate, and the fair market value of the short position in the section 13(f) security is less than \$1,000,000; and

- Does not have to file Form SH in XML format in accordance with the special filing instructions posted on the Commission's Web site. Instead, the institutional investment manager may file Form SH on EDGAR in the same manner as the form was filed pursuant to the Emergency Orders dated September 18, 2008, September 21, 2008 and October 2, 2008.

*Comment Date:* Comments on the interim final temporary rule should be received on or before December 16, 2008.

**ADDRESSES:** Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/final.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-31-08 on the subject line; or
- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

#### *Paper Comments*

- Send paper comments in triplicate to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number S7-31-08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site

(<http://www.sec.gov/rules/final.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

#### **FOR FURTHER INFORMATION CONTACT:**

Steven Hearne, at (202) 551-3430, in the Division of Corporation Finance, Marlon Paz, at (202) 551-5756, in the Division of Trading and Markets, or Stephan N. Packs, at (202) 551-6865, in the Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-3010.

**SUPPLEMENTARY INFORMATION:** The Commission is adopting temporary Rule 10a-3T and Temporary Form SH (Form SH) under the Securities Exchange Act of 1934<sup>1</sup> as an interim temporary final rule. We are soliciting comments on all aspects of the interim temporary final rule and Form SH. We will carefully consider the comments that we receive and intend to address them in a subsequent release.

#### **I. Background**

Recently, we have become concerned that there is a substantial threat of sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets. These concerns are evidenced by our recent publication of Emergency Orders under section 12(k) of the Exchange Act in July<sup>2</sup> and September of this year.<sup>3</sup> In these Orders, we noted our concerns about the possible unnecessary or artificial price movements that may be based on unfounded rumors and may be exacerbated by short selling.

Short selling involves a sale of a security that the seller does not own or a sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.<sup>4</sup> Short sales normally are settled by the

<sup>1</sup> 15 U.S.C. 78 *et seq.*

<sup>2</sup> Release No. 34-58166 (July 15, 2008) [73 FR 42379] (imposing borrowing and delivery requirements on short sales of the equity securities of certain financial institutions).

<sup>3</sup> Release Nos. 34-58592 (Sept. 18, 2008) [73 FR 55169] (temporarily prohibiting short selling in the publicly traded securities of certain financial institutions), 34-58591 (Sept. 18, 2008) [73 FR 55175] (requiring institutional investment managers to report short sales activities) and 34-58572 (Sept. 17, 2008) [73 FR 54875] (imposing enhanced delivery requirements on sales of all equity securities).

<sup>4</sup> 17 CFR 242.200(a).

delivery of a security borrowed by or on behalf of the seller. Regulation SHO, which became fully effective on January 3, 2005, sets forth the regulatory framework governing short sales.<sup>5</sup> Among other things, Regulation SHO imposes a close-out requirement to address failures to deliver stock on trade settlement date and to target potentially abusive short selling in certain equity securities.

As adopted, Regulation SHO included two major exceptions to the close-out requirement: The “grandfather” provision and the “options market maker” exception. Due to our concerns about the potentially negative market impact of large and persistent fails to deliver, and the fact that we continued to observe threshold securities with fail to deliver positions that are not being closed out under existing delivery and settlement requirements, effective on October 15, 2007, we adopted an amendment to Regulation SHO that eliminated the “grandfather” exception to Regulation SHO’s close-out requirement.<sup>6</sup> The options market maker provision excepted any fail to deliver position in a threshold security resulting from short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the underlying security became a threshold security. On September 17, 2008, we adopted and made immediately effective an amendment to Rule 203(b)(3) of Regulation SHO to eliminate the options market maker exception to the rule’s close-out requirement.<sup>7</sup>

On September 18, 2008, the Commission issued an Emergency Order pursuant to section 12(k)(2) of the Exchange Act<sup>8</sup> requiring institutional investment managers to report information concerning their short sales of section 13(f) securities on a weekly basis.<sup>9</sup> We amended the Order on September 21, 2008 to clarify certain technical issues and the public availability of the information provided by the institutional investment managers.<sup>10</sup> On October 2, 2008, we extended the Order’s effectiveness through October 17, 2008, and stated that the Forms SH filed under the Order

would remain nonpublic to the extent permitted by law.<sup>11</sup>

Under the terms of the Emergency Orders, institutional investment managers that exercise investment discretion with respect to accounts holding securities described in Rule 13f-1(c) under the Exchange Act<sup>12</sup> that have an aggregate fair market value of at least \$100,000,000, and effect short sales of those securities generally are required to file Form SH with the Commission on a weekly basis. The Form SH filing currently must be made on the first business day of each calendar week following a week in which the institutional investment manager has effected short sales with respect to any section 13(f) security that is not an option.<sup>13</sup> With respect to each applicable section 13(f) security, the Form SH filing must identify the issuer and CUSIP number of the relevant security and reflect the manager’s start of day short position, the number and value of securities sold short during the day, the end of day short position, the largest intraday short position, and the time of the largest intraday short position.

To make clear that continuous reporting of open short positions previously reported on Form SH was not required when no new short sales had been effected during the calendar week covered by the next Form SH filing due to be filed, the Emergency Orders stated that no Form SH filing is required when no short sales of a section 13(f) security have been effected since the previous filing of a Form SH.<sup>14</sup> Further, an institutional investment manager need not report certain information regarding short sales and positions that otherwise would be reportable on Form SH if:

- The short sale or position in the section 13(f) security constitutes less than one-quarter of one-percent of that class of the issuer’s section 13(f) securities issued and outstanding, as reported on the issuer’s most recent annual or quarterly report, and any subsequent current report, filed with the

Commission pursuant to the Exchange Act, unless the manager knows or has reason to believe that the information contained therein is inaccurate; and

- The fair value market of the short sale or position in the section 13(f) security is less than \$1,000,000.

## II. Purposes of the Interim Final Temporary Rule

As explained in the Emergency Orders requiring Form SH filings, and other emergency orders under section 12(k) of the Exchange Act,<sup>15</sup> we are concerned by sudden and excessive fluctuation of securities prices and disruptions in the fair and orderly functioning of the securities markets. We are concerned about possible unnecessary or artificial price movements that may be based on unfounded rumors and may be exacerbated by short selling.

We note that regulators in several foreign jurisdictions also have adopted rules requiring disclosure of short sales and net short positions. For example, the Netherlands Authority for the Financial Markets (AFM) requires daily disclosure to the AFM of net short positions greater than 0.25% of the capital of financial institutions listed on the Euronext Amsterdam stock exchange. The UK Financial Services Authority (FSA) requires daily disclosure to UK exchanges of net short positions greater than 0.25% of the ordinary stock of UK financial institutions listed in the United Kingdom.

The Commission believes that requiring the filing of the information on Form SH will provide useful information to the staff to analyze the effects of our rulemakings relating to short sales and in evaluating whether our current rules are working as intended, particularly in times of financial stress in our markets. The reports will supply the Commission with important information about the size and changes in short sales of particular issuers by particular investors. That information will be available to the Commission to consider when questions about the propriety of certain short selling occur.

Because of these concerns, we are extending the requirements to file the Forms SH until August 1, 2009 with the following modifications to the reporting requirements:

- Beginning on October 18, 2008, the Form SH weekly filing deadline will be the last business day of the calendar

<sup>11</sup> Release No. 34-58724 (Oct. 2, 2008) [73 FR 58987-01]. Release 34-58724, together with Release 34-58591 and 34-58591A are collectively referred to as the Emergency Orders.

<sup>12</sup> 17 CFR 240.13f-1(c).

<sup>13</sup> Our discussion here and elsewhere in the release regarding the need to disclose short sales and short positions assumes that the reporting exception, which is described in Section II.A.3, does not apply.

<sup>14</sup> Similarly, under the Emergency Orders no Form SH filing is required when all short sales of section 13(f) securities that have been effected since the last day of the prior reporting period for which a Form SH was due qualify for the reporting exception.

<sup>15</sup> See also Release Nos. 34-58166 (July 15, 2008) [73 FR 42837] and 34-58572 (Sept. 17, 2008) [73 FR 58698].

<sup>5</sup> 17 CFR 242.200(a).

<sup>6</sup> See Release No. 34-56212 (Aug. 7, 2007) [72 FR 45544].

<sup>7</sup> See Release No. 34-58572 (Sept. 17, 2008).

<sup>8</sup> 15 U.S.C. 78(k)(2).

<sup>9</sup> Release No. 34-58591.

<sup>10</sup> Release No. 34-58591A (Sept. 21, 2008) [73 FR 58987].

week following a calendar week in which short sales are effected instead of the first business day as required by the Emergency Orders. This change will provide filers with additional time to gather and verify the necessary information and file the forms.

- Form SH filers will no longer be required to disclose the value of the securities sold short (currently column 5 of Form SH), the largest intraday short position (currently column 7 of Form SH) and the time of day of the largest intraday short positions (currently column 8 of Form SH). We understand that some of this information has been difficult for filers to obtain.

- Form SH filers will be required to report all short positions, including short positions effected prior to September 22, 2008, when reporting data elements 5, 6 and 7, Short Position (Start of Day), Number of Securities Sold Short (Day) and Short Position (End of Day). We believe this additional data will assist with our goals of tracking short sale activity.

- The threshold for reporting short sales or positions will be raised from a fair market value of \$1 million to a fair market value of \$10 million. We have raised this threshold due to the new requirement to disclose pre-September 22, 2008 short sales and positions.<sup>16</sup>

- Filers will be required to submit an XML tagged data file to the Commission providing the requested data. This new requirement will facilitate the review of the filed data by the Commission staff.

### III. Interim Final Temporary Exchange Act Rule 10a-3T and Form SH

We are adopting interim final temporary Exchange Act Rule 10a-3T (Rule 10a-3T) to require institutional investment managers to continue filing Form SH in a form that is substantially similar to that required by the Emergency Orders. Adoption of the interim final temporary rule, which will be effective immediately and will continue in effect until August 1, 2009, will facilitate our review of our regulation of short sales. We have included several requests for comment in this release. We will consider public comments on Rule 10a-3T and Form SH in determining whether we should revise the interim final temporary rule or Form SH in any respect, as well as whether we should promulgate a longer-term or permanent short sale reporting requirement upon expiration of Rule 10a-3T and Form SH on August 1, 2009.

<sup>16</sup> Under the Emergency Orders, institutional investment managers did not have to disclose short sales effected, and positions held, prior to September 22, 2008.

We intend to address any comments received in a subsequent release.

#### A. Description of Rule 10a-3T

Exchange Act Rule 10a-3T requires certain institutional investment managers that exercise investment discretion<sup>17</sup> with respect to accounts holding section 13(f) securities<sup>18</sup> to file a nonpublic Form SH on a weekly basis if they have effected short sales with respect to a section 13(f) security during the reporting period preceding the due date of the filing.

##### 1. Institutional Investment Managers Required To Report Short Sales

Rule 10a-3T requires institutional investment managers to keep track of certain short sale transactions and file Form SH to report them. The rule requires the filing of Form SH by those institutional investment managers that: (1) As of the end of the most recent calendar quarter, filed, or were required to file, a Form 13F for the calendar quarter; and (2) during a Sunday to Saturday calendar week effected a short sale in a section 13(f) security other than options.<sup>19</sup> The manager is required to file a Form SH report with the Commission on the last business day of the ensuing calendar week. By limiting the Form SH reporting requirement to institutional investment managers that are required to file Form 13F, we subject only those institutional investment managers that exercise investment discretion with respect to accounts holding section 13(f) securities that have an aggregate fair market value on the last trading day of any month of the previous calendar year of at least \$100 million to the Form SH reporting requirement.<sup>20</sup>

We are applying the rule only to Form 13F filers because they exercise discretion over large accounts that have

<sup>17</sup> For purposes of this rule, the term "investment discretion" has the same meaning as in Rule 13f-1(b) under the Exchange Act. [17 CFR 240.13f-1(b)].

<sup>18</sup> The term "section 13(f) securities" is defined in Rule 13f-1(c) under the Exchange Act [17 CFR 240.13f-1(c)] to include securities of a class described in Section 13(d)(1) of the Exchange Act [15 U.S.C. 78m(d)(1)] that are admitted to trading on a national securities exchange or quoted on the automated quotation system of a registered securities association. In determining what classes of securities are section 13(f) securities, an institutional investment manager may rely on the Official List of Section 13(f) Securities published by the Commission available at <http://www.sec.gov/divisions/investment/13flists.htm>.

<sup>19</sup> As adopted, the rule differs from the requirement of the Order which applied to institutional investment managers that were required to file Form 13F for the quarter ended June 30, 2008. Because the temporary rule will be in effect until August 1, 2009, the temporary rule refers instead to the previous calendar quarter.

<sup>20</sup> See 17 CFR 240.13f-1(a)(1).

significant potential to affect the markets. In addition, these filers already are subject to Exchange Act reporting and in most instances, the Emergency Orders, and therefore are familiar with using the Commission's EDGAR system to submit filings. In addition, the Form SH reporting requirement applies only to section 13(f) securities, which include equity securities of a class described in section 13(d)(1) of the Exchange Act that are admitted to trading on a national securities exchange or quoted on the automated quotation system of a registered securities association, because this is a useful and tested term that is well-suited to capture the information we are seeking.

#### Request for Comment

- Rule 10a-3T limits reporting of short sales and short positions to institutional investment managers that are required to file Form 13F. Should we continue to require Form SH reporting by these institutional investment managers? Should we require only a subset of these institutional investment managers to file Form SH reports? If so, how should we limit the type of institutional investment manager that we require to file Form SH? Should we instead require a different set of persons to file Form SH? Are there categories of persons that conduct a significant amount of short sales but who are not required to submit Form SH because they are not institutional investment managers required to file Form 13F? If so, which categories of short sellers should be subject to Form SH reporting? Would it be appropriate to require anyone who conducts short sales or has short positions in excess of specified thresholds, such as those in Rule 10a-3T(b)(2)(ii), to report?

- Are there other, better ways to collect information about short sales than by requiring Form SH?

- Should we require short sellers to keep current detailed books and records of their short sale activities and their short positions, of the sort required under Rule 17a-3(a)(6) under the Exchange Act?<sup>21</sup> If so, should we require short sellers to retain the name of the broker, the number of shares, the price, the issuer name, the time and date of entry of the order, the time and date of execution of the order, the type of order (limit or market), the locate source or exception to locate claimed, the contact at the locate, the time and date when the locate was received, the amount of shares located, the time and

<sup>21</sup> 17 CFR 240.17a-3(a)(6).

date of the borrow, the number of shares borrowed, the source from which they were borrowed, and where the borrowed shares are located? Should we require other information be maintained?

- In the alternative, or in addition, should we require all short sellers to publicly provide a notice filing when their short sale activity or positions cross a specific threshold that would be deemed significant? If so, what information should the notice filing contain? If a notice filing is required, should it be filed with us on a nonpublic basis? Would there be any concerns about publicly filing such a notice? Would such a notice filing provide useful information to investors? Would requiring all short sellers to keep detailed records of their short sale activities and filing when necessary a notice filing relating to those activities raise any other concerns, such as concerns about the potential costs? In the alternative, should we instead require short sellers to produce books and records upon request from the Commission?

## 2. Short Sales and Short Positions Required To Be Reported

Rule 10a-3T requires an institutional investment manager to report short sales and short positions, as defined in Rule 200 of Regulation SHO. Rule 200 defines a short sale to mean any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.<sup>22</sup> For purposes of Rule 10a-3T, a short position is the aggregate gross short sales of an issuer's section 13(f) securities (excluding options), less purchases to close out a short sale in the same issuer. The Form SH short position is not net of long position in the issuer. If a person that has loaned a security to another person sells the security and a *bona fide* recall is initiated within two business days after trade date, the person that has loaned the security is deemed to own the security for purposes of Rule 200(g)(1) and Rule 200(b) of Regulation SHO, and such sale will not be treated as a short sale.<sup>23</sup> Rule 10a-3T is intended to broadly require institutional investment managers to account for their short sales.

<sup>22</sup> 17 CFR 242.200.

<sup>23</sup> For staff guidance regarding how sales of loaned but recalled securities should be treated for purposes of the Emergency Orders, see the Division of Trading and Market Guidance Regarding Sale of Loaned but Recalled Securities available at <http://www.sec.gov/divisions/marketreg/loanedsecuritiesfaq.htm>.

Options and short sales of options on section 13(f) securities are not required to be reported on Form SH. However, certain transactions that involve options are required to be reported.<sup>24</sup> For example, if an institutional investment manager exercises a put and is net short pursuant to Rule 200(c) of Regulation SHO, the resulting transaction is a short sale and must be reflected on Form SH. Similarly, if the institutional investment manager effects a short sale as a result of assignment to it as a call writer, upon exercise, the resulting transaction is a short sale and must be reflected on Form SH.

### Request for Comment

- Rule 10a-3T is limited to reporting on short sales and short positions of section 13(f) securities, other than options. Should we continue to require disclosure about short sales of these section 13(f) securities? Should we limit the securities that institutional investment managers are required to report on to a subset of these securities, such as equity securities of financial institutions? Would it be more appropriate for the Form SH reporting requirement to cover all publicly traded equity securities regardless of whether they are listed on a national securities exchange or quoted on the automated quotation system of a registered securities association? Should we require reporting on Form SH for transactions relating to any equity security of a company reporting under the Exchange Act?

- Rule 10a-3T requires reporting of the start of day short position, the gross number of securities sold short during the day and the end of day short position. Does requiring reporting of this information have the effect of reducing manipulative behavior and other improper conduct by short sellers? Do these categories of information provide the most useful data for analyzing short selling activities and combating market manipulation? If not, are there other benefits that Form SH information will provide? Are there other categories of information that we should require that would be useful to our objectives, such as transaction audit trails or the portion of the number of securities sold short in foreign markets?

- Do the definitions of the terms short sale and short position that we use in Rule 10a-3T adequately capture the types of transactions on which the Commission should focus? Should we use definitions for the terms short sale

<sup>24</sup> Short sales resulting from the exercise of option contracts are reportable as of the date of the exercise.

or short position in Rule 10a-3T that are different from the Regulation SHO definitions? If so, how should we define these terms?

- How can we best address the risk that managers may try to evade reporting by conducting short sales through synthetic instruments or through third parties that are not required to report on Form SH? Should we require disclosure of these transactions as well? Should we amend the rule to require filers to report any synthetic arrangements that function as short sales and provide Form SH information for those positions and identify the parties to those transactions? How would we define or describe these transactions? Should we require any short seller that is entering the short to hedge a synthetic position entered into with another party to identify the other party in Form SH?

- Should we revise Rule 10a-3T to require disclosure of options and short sales of options? Should Rule 10a-3T require disclosure of other financial instruments such as single stock futures?

- Rule 10a-3T requires information to be reported to the Commission. Should the rule require this information to be provided to the self-regulatory organizations? If so, which self-regulatory organizations should receive this information? Should we work with the exchanges and self-regulatory organizations to capture this information? Would these organizations be well equipped to monitor the data that we are requesting?

- Should we consider harmonizing our short sale reporting and regulation with foreign regulators? Would it be appropriate to require similar short sale reporting to that implemented by the FSA in the United Kingdom?<sup>25</sup> What aspects would be more or less appropriate?

## 3. Exceptions to the Filing and Reporting Requirements

Rule 10a-3T does not require an institutional investment manager to file a Form SH to report short sales and positions if:<sup>26</sup>

- The institutional investment manager has not effected any short sales of section 13(f) securities during the reporting period covered by the Form SH due to be filed; or

<sup>25</sup> See information on the short selling instruments issued in September 2008 at the Financial Services Authority Web site at <http://www.fsa.gov.uk/pages/Library/Policy/Handbook/short-selling.shtml>.

<sup>26</sup> Unlike the requirements under the Emergency Orders, the rules we adopt today require short sales or positions effected prior to September 22, 2008, to be reported.

• On each calendar day during the calendar week, the start of day short position, the gross number of securities sold short during the day and the end of day short position constitute less than one-quarter of one percent of that class of the issuer's section 13(f) securities issued and outstanding as reported on the issuer's most recent annual, quarterly or current report filed with the Commission pursuant to section 13 of the Exchange Act, unless the manager knows or has reason to believe the information contained therein is inaccurate and the fair market value of the start of day short position, the gross number of securities sold short during the day and the end of day short position is less than \$10,000,000.<sup>27</sup>

Once a determination is made that a Form SH filing is required, Rule 10a-3T permits an institutional investment manager to disclose in the appropriate data element its reliance on this exception with respect to information otherwise required to be reported. The institutional investment manager may disclose "N/A" in the appropriate data element to report the number of securities sold short or corresponding information regarding the short position in that class where the data element falls below the reporting threshold. The exception limits the substantive disclosure required on Form SH to significant short sales and positions that have the potential to materially affect the price of the underlying securities. This limitation is designed to strike a balance between the burden of compiling and providing the information to the Commission and the need for information about short sales to be available to the Commission.

We are clarifying in accordance with staff guidance provided in conjunction with the Emergency Orders that institutional investment managers may act as conduits for customer orders by handling such orders on a "riskless principal"<sup>28</sup> basis in the following scenarios, which may result in the broker-dealer effecting a short sale: (i) A broker-dealer receives an order to sell a section 13(f) security from a customer who is net long on the securities being sold, and the broker-dealer then seeks to

execute that order, either in whole or in part, by selling the section 13(f) security as riskless principal, and the broker-dealer has an overall net short position in such section 13(f) security; or (ii) a broker-dealer receives an order to buy a section 13(f) security from a customer, and the broker-dealer then seeks to execute that order, either in whole or in part, by purchasing the section 13(f) security as riskless principal, and then selling the section 13(f) security to the customer, and the broker-dealer has an overall net "short" position in such section 13(f) security. In both scenarios, the short sales need not be reported by the broker-dealer on Form SH.

We are eliminating the "grandfather" provision that was included in the Form SH filing conditions set forth in the Emergency Orders. The Emergency Orders did not require disclosure of existing or outstanding short positions in section 13(f) securities held before the September 22, 2008 effective date of the initial order. This grandfather provision was established primarily to address concerns about the public disclosure of institutional investment managers' pre-existing short positions before we indicated that Form SH filings would be made on a nonpublic basis. One of the commenters on the Emergency Orders noted that a consequence of the grandfather provision is that some Form SH filers will have to keep two sets of books until all of the pre-September 22 positions are cleared out.<sup>29</sup>

Under Rule 10a-3T, Form SH filers will be required to report all short positions, including short positions effected prior to September 22, 2008, when reporting data elements 5, 6 and 7, Short Position (Start of Day), Number of Securities Sold Short (Day) and Short Position (End of Day) on Form SH. We believe that the additional data about the pre-September 22 positions will improve our efforts to analyze short sale activity.

In connection with elimination of the grandfather provision, we are revising the exception to the Form SH filing requirements. Under the Emergency Orders, Form SH filers are not required to report short sales or short positions otherwise reportable if: The short sale or short position in the section 13(f) security constitutes less than one-quarter of one percent of that class of the issuer's section 13(f) securities issued and outstanding, as reported on the issuer's most recent Exchange Act report; and the fair market value of the

short sale or short position in the section 13(f) security is less than \$1 million. We are raising the threshold for filing and reporting short sales or short positions in a class of section 13(f) securities other than options from a fair market value of \$1 million to a fair market value of \$10 million primarily due to the new requirement for institutional investment managers to report information about their pre-September 22 short positions. In addition, we note that the threshold is intended to ensure that small percentage positions that comprise large monetary positions are reported, and we believe that \$10 million more suitably addresses this concern.

An institutional investment manager that is required to file a Form SH report on October 24, 2008 or October 31, 2008 may exclude disclosure of short positions reflecting short sales effected before September 22, 2008 from the Form SH report filed on either or both of those dates. However, if the manager excludes such disclosure, the relevant fair market threshold for reporting short sales or positions is the \$1 million threshold.

#### Request for Comment

• Is the exception in Rule 10a-3T to Form SH reporting of short sales that fall below the specified thresholds appropriate? If so, are the thresholds set at appropriate levels, or should they be higher or lower? What threshold would be appropriate? Should we use 5% as in Regulation 13D<sup>30</sup> or is a smaller threshold, such as 2.5%, more appropriate? If you suggest a different type of exception to Form SH reporting, please describe the exception that you think is appropriate.

• Is the reporting exception in Rule 10a-3T for "riskless principal" transaction appropriate? If not, why not and what would be the best way to address "riskless principal" transactions in the rule?

• Should we continue to use a significance test that couples a percentage of shares outstanding threshold with a fair market value threshold? Should the percentage and market value thresholds be combined or should they be separate standards? If separate, what level should each be set at? Would \$1 million or \$10 million be appropriate? Would 1%, 2.5% or 5% be appropriate? Should we instead adopt a threshold that is tied to the number of shares sold short or some other standard?

• As adopted, a manager is required to report its short sales and short

<sup>27</sup> For purposes of determining whether the \$10,000,000 threshold is met, the manager should multiply the number of shares the manager sold short that day by the market price as of the time of the close of trading at the NYSE on that day.

<sup>28</sup> A "riskless principal" transaction is generally described as trades in which, after receiving an order to buy (or sell) from a customer, the broker-dealer purchases (or sells) the security from (or to) another person in a contemporaneous offsetting transaction. See Exchange Act Rule 10b-10(a)(2)(ii)(A) [17 CFR 240.10b-10(a)(2)(ii)(A)]; Release No. 34-33743 (Mar. 9, 1994) at n.11.

<sup>29</sup> See letter from the Securities Industry and Financial Markets Association dated October 9, 2008 available in file No. S7-24-08.

<sup>30</sup> 17 CFR 240.13d-1 *et seq.*

positions. However, managers often take short positions in order to hedge the risk on long positions in which they invest and not for speculative purposes. Should we develop an exemption that would permit managers to avoid reporting of hedging short positions or in the alternative require additional information that explains the purposes of various short positions? If so, how would we best develop the exemption or the request for additional information and how would we define hedging transactions? Would such an exemption be useful? Would it subsume the purpose of the rule?

#### 4. Transition and Expiration Dates of Rule 10a-3T

As noted above, the Commission remains concerned by sudden and excessive fluctuation of securities prices and disruptions in the fair and orderly functioning of the securities markets. We are adopting this temporary rule to continue the reporting obligations established in our Emergency Orders as modified. For the reasons those Orders were adopted and for the reasons explained in this release, no gap between the reporting obligations of the Emergency Orders and the obligations established by this rule should exist. In addition, we received a variety of comments from the public about the Emergency Orders, which were valuable in developing this interim temporary final rule. As a result, this rule is immediately effective.

In order to assist with the transition, institutional investment managers that are required to file a Form SH report on October 24, 2008 or October 31, 2008, must comply with Rule 10a-3T, except that they may exclude disclosure of short positions reflecting short sales before September 22, 2008 from the Form SH report filed on either or both of those dates. An institutional investment manager may choose to exclude these short sales effected before September 22 if the short position in the section 13(f) security constitutes less than one-quarter of one percent of that class of the issuer's securities issued and outstanding as reported on the issuer's most recent annual or quarterly report, and any current report subsequent thereto, filed with the Commission pursuant to the Exchange Act, unless the manager knows or has reason to believe that the information contained therein is inaccurate, and the fair market value of the short position in the section 13(f) security, as of September 22, 2008, was less than \$1,000,000. In addition, institutional investment managers do not have to file Form SH in XML format in accordance

with the special filing instructions posted on the Commission's Web site for their Form SH reports on October 24, 2008 or October 31, 2008. Instead, the institutional investment manager may file Form SH on EDGAR in the same manner as the form was filed pursuant to the Emergency Orders dated September 18, 2008, September 21, 2008 and October 2, 2008.

Subsequently, beginning with the calendar week ending November 1, 2008, institutional investment managers are required to report as specified in Rule 10a-3T and the filer instructions as to the assembly of the EDGAR submission provided on the Commission's Web site at <http://www.sec.gov/info/edgar/ednews/formshsubmission.htm> or in a future update of the EDGAR Filer Manual. Rule 10a-3T will expire and cease to be effective on August 1, 2009 unless we act to continue or revise the rule and extend the effective date.

#### Request for Comment

- How long should institutional investment managers be required to file Form SH reports with the Commission? Is the period extending until August 1, 2009 that we are adopting appropriate? Should we require Form SH reporting beyond August 1, 2009?

#### B. Form SH

##### 1. Timing and Nonpublic Nature of Form SH

Rule 10a-3T requires institutional investment managers to report certain short sales to the Commission on Form SH. Under Rule 10a-3T, institutional investment managers must file Form SH on the last business day of each calendar week following a week in which the institutional investment manager has effected certain short sales with respect to any section 13(f) security that is not an option.<sup>31</sup>

This is a change from the Form SH filing deadline set forth in the Emergency Orders which required Form SH to be filed on the first business day of each calendar week immediately following a week in which the institutional investment manager effected certain short sales. This change will provide filers with additional time to gather, verify and file the data, decreasing the burden on the filers without affecting the efficacy of the information to the staff.

As we explained in our October 2008 Order, we are concerned that publicly

<sup>31</sup> The Form SH is required to be filed electronically on the Commission's EDGAR system on or before 5:30 p.m. Eastern Time on the last business day of the calendar week.

available Form SH data could give rise to additional, imitative short selling. Accordingly Rule 10a-3T states that all Forms SH filed with the Commission will be nonpublic to the extent permitted by law. The Freedom of Information Act provides at least two exemptions under which the Commission has authority to withhold the information.<sup>32</sup> A Form SH filer should not submit a confidential treatment request to the Commission. A Form SH filer must label its Form SH as non-public, as required by the instructions to the form.

#### Request for Comment

- Form SH requires detailed reports regarding institutional investment managers' significant short positions in section 13(f) securities. Are there better ways for the Commission to gather short selling information and address our concerns than by using Form SH? Are the detailed reports required on Form SH appropriate? Is there any information that should be required in, or deleted from, the requirements of the Form?

- When requiring reporting of short positions, should we generally only require reporting of new positions, or should we require reporting of all short positions? Does requiring reporting of all short positions create significant additional burdens on filers? If so, what burdens and how can they best be addressed?

- Form SH requires filers to report the short position at the start of the day, the aggregate number of securities sold short on that day, and the short position at the end of the day. Is this information sufficient to provide an adequate understanding of the filer's short sale activity during the day? Should we require filers to report their net long and short positions in addition to the information already required? Is it sufficient to simply track the net short positions and not to report the start and end of day positions and the aggregate activity?

- As adopted, Form SH no longer requires reporting of the daily value of securities sold short, the largest intraday short position and the time of day of that short position. We understand that some institutional investment managers have had significant difficulty

<sup>32</sup> The Freedom of Information Act ("FOIA") Exemption 4 provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." FOIA Exemption 8 provides an exemption for matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."

identifying the largest intraday short position and the time of day of that short position. This information may be helpful in identifying manipulative short selling. How difficult is it for filers to track and report this information? Should we require filers to report this information? Is there an alternative way to track this kind of information and better identify when manipulative short selling may be taking place?

- Rule 10a-3T provides that the information required by Form SH shall remain nonpublic to the extent permitted by law. Institutional investment managers have expressed concern about making this information public. Should the information required by Form SH be publicly reported? Would concerns about public reporting be alleviated if there was a delay in filing the information, such as a delay of 10 days, or 45 days after the end of a quarter in which the transaction occurred, similar to the 45-day deadline for Form 13F filings? Would concerns be alleviated if the information was reported by the institutional investment manager on a nonpublic basis, but made public after a delay on an issuer basis?

- If the Form SH remains nonpublic, what is the best way to require filers to report the Form SH information to the Commission? Is EDGAR the best vehicle for reporting Form SH information to the Commission? If not, what vehicle would be superior and why?

- We are permitting institutional investment managers to provide the information required by Form SH on the last business day following a calendar week in which the institutional investment manager effected a short sale. Are there concerns with permitting institutional investment managers with extra time to provide the information to the Commission? Is the extra time sufficient time to address concerns about the need for more time to be able to provide the information in a timely fashion? Should we change the weekly reporting period so it is not based on a calendar week?

- Institutional investment managers are required to file Form SH for any week during which they make a reportable short sale. Is it appropriate to require the filing of Form SH on a weekly basis? Should we require the filing to be made more frequently, such as daily? Should we require the filing less frequently, such as bi-weekly, monthly or quarterly, to reduce the filing burden? Would we be able to capture short selling information as effectively if Form SH reports were required to be filed less frequently?

## 2. Form SH

Under the Emergency Orders, Form SH may be filed in ASCII or HTML. We are adopting rules that require that short sale and position information to be filed in XML tagged data format and additional identification within the data file. By requiring reporting in XML, the Commission staff will be able to more easily analyze the data that we receive. Based on our experience with reporting under the Emergency Orders, we are reducing the data that institutional investment managers are required to report to the Commission by removing the requirement that managers report the value of securities sold short during the day, the largest intraday short position and the time of day of the largest intraday short position.

We understand that some filers have found it difficult to obtain and burdensome to track and report the largest intraday short position disclosure, and the time thereof. We are no longer requiring disclosure of the value of securities sold short during the day as our staff has the ability to perform this calculation without the disclosure from the institutional investment manager.

There are three Form SH report types: Form SH Entries Report, Form SH Notice and Form SH Combination Report. An Entries Report is filed if all of the information that an institutional investment manager is required to report is included in the Form SH filing; a Notice is filed if all of the information that a manager is required to include in the XML tagged data file is reported by another Manager; a Combination Report is filed if a portion of the manager's entries are filed in the manager's report and a portion are reported by another manager. When filing a Form SH Notice or Combination Report, the manager is required to disclose the other managers that are reporting for the manager.

Rule 10a-3T requires filers to format the Form SH data differently than under the Emergency Orders, but will similarly include:

- Disclosure of the time period of the report;
- An indication of whether the report is an amendment;
- The name and address of the institutional investment manager;
- A representation by the signer;
- A signature block for the person signing the form;
- An indication of the report type;
- A list of any other managers reporting for the manager filing the report;
- The total number of transactions reported;

- A list of other managers for whom the Form SH is filed; and
- The number of other included managers.<sup>33</sup>

In addition, the Form SH will include, where applicable, an XML tagged data file that provides much of the information that was previously required by the Emergency Orders to be included in the Information Table. The XML tagged data file will provide the information regarding short sales, including:

- The date;
- The Central Index Key (CIK) of the filer;
- The name of the issuer;
- The CUSIP of the issuer;
- The short position at the start of the day;
- The number of securities sold short on that day; and
- The short position at the end of the day.

The XML data elements provide the bulk of the required disclosure in Form SH and are limited to the information requested in the instructions to the form. Data elements 1 through 4 provide the date, identify the manager by CIK, and the name and CUSIP of the issuer. Data Elements 5 and 7 require the manager to report the number of securities that represent the manager's short position in the issuer as of the start and end of each calendar day during the reporting period. Data element 6 requires the manager to report the gross, not net, number of securities in the issuer that the manager sold short for each calendar day during the reporting period.

When determining the disclosure required in the XML tagged data file, an institutional investment manager may apply the exclusion in Rule 10a-3T(b)(2)(ii) on a day-by-day and data element-by-data element basis. For example, if a filer has triggered a filing obligation for a given calendar week, has start and end of day short positions on a particular day that do not qualify for the reporting exception, but does not effect any short sales on that day, the filer would disclose the appropriate numbers under elements 5 and 7 and enter zero under element 6. Using the same facts, if the filer did engage in short sales during that particular day but those sales in the aggregate met the reporting exception, the filer may enter

<sup>33</sup> Additional information the manager wishes to report may be included on the Form SH provided that the information does not, either by its nature, quantity, or manner of presentation, impede the understanding or presentation of the required information. Only information requested by the Form SH and its instructions is permitted in the XML tagged data file.

“N/A” under element six. “N/A” can be used any time a filer has a filing obligation and is omitting information under the reporting exception.

To the extent still relevant, institutional investment managers may look to the staff guidance provided pursuant to the Emergency Orders regarding reporting short sales and positions on Form SH such as the Guidance Regarding the Commission’s Emergency Order Concerning Disclosure of Short Selling provided by the staff of the Divisions of Corporation Finance, Investment Management, and Trading and Markets available at <http://www.sec.gov/divisions/marketreg/shortsaledisclosurefaq.htm>.

#### Request for Comment

- Is the XML tagged data file format more easily generated than an ASCII document in columned or delimited format? Would XBRL tagged data be a preferred solution? Are there any other technology issues resulting from the use of XML tagged data format? Do filers have the ability to submit the XML tagged data by November 7, 2008?

- Should delimited ASCII text data be considered for transaction data? If the data is to be provided to the public, which data file format would be preferred? If the data is to be provided to the public, is there an advantage to using XML because a style sheet can be used to present XML data elements in a readable format?

#### IV. Other Matters

The Administrative Procedure Act generally requires an agency to publish notice of a proposed rulemaking in the **Federal Register**.<sup>34</sup> This requirement does not apply, however, if the agency “for good cause finds \* \* \* that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.”<sup>35</sup> Further, the Administrative Procedure Act also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.<sup>36</sup> This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.<sup>37</sup> The Commission, for good cause, finds that notice and solicitation of comment before Rule 10a–3T and Form SH is impracticable, unnecessary, or contrary to the public interest.

For the reasons we discussed throughout this release, we believe that we have good cause to act immediately

to adopt this rule and form on a temporary interim final basis. As discussed throughout this release, we are concerned by recent sudden and excessive fluctuation of securities prices and disruptions in the fair and orderly functioning of the securities markets and believe that the nonpublic submission of Form SH may provide the Commission with useful information to combat market manipulation that threatens investors and our capital markets. Adopting the rules as interim temporary rules also will minimize any disruption in reporting by institutional investment managers of their short sale activities. Avoiding such disruption should obviate the need for those managers to stop and restart their reporting apparatus and should allow us uninterrupted access to the information in the reports during a time of significant market upheaval.

Rule 10a–3T takes effect on October 18, 2008. For the reasons discussed above, we have acted on a temporary interim final basis. We emphasize that we are requesting comments on the temporary rule and will carefully consider any comments that we receive. We intend to respond to the comments in a subsequent release. Moreover, this is a temporary rule that will expire on August 1, 2009. Setting a termination date for the rule will necessitate further Commission action no later than the end of that period if the Commission determines to continue the same, or similar, requirements contained in the temporary rule. The Commission finds that there is good cause to have Rule 10a–3T and Form SH effective as temporary interim rules on October 18, 2008 and that notice and public procedure in advance of effectiveness of the rules are impracticable, unnecessary and contrary to the public interest.<sup>38</sup>

#### V. Paperwork Reduction Act

##### A. Background

Temporary Exchange Act Rule 10a–3 relates to a “collection of information” requirement within the meaning of the Paperwork Reduction Act of 1995 (PRA).<sup>39</sup> The title for the information collection is “Form SH” (OMB Control No. 3235–0646). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of

information unless it displays a current valid control number.

The Office of Management and Budget (“OMB”) approved Form SH on September 19, 2008 in connection with the Commission’s issuance of the Emergency Order to require institutional investment managers to file Form SH with the Commission.<sup>40</sup> We submitted revised burden estimates to OMB for review and approval in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13. Separately, we submitted the revised burden estimates to OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. OMB has approved the revised Form SH burden estimates related to our adoption of Rule 10a–3T on an emergency basis.

##### B. Summary of Rule 10a–3T and Form SH Burden Estimates

Rule 10a–3T will require certain institutional investment managers that exercise investment discretion with respect to accounts holding section 13(f) securities that have an aggregate fair market value of at least \$100,000,000 to file Form SH on a weekly basis during the period covered by this interim rule. The Form SH filing must be made on the last business day of each calendar week following a week in which the institutional investment manager has effected any short sale with respect to any section 13(f) security that is not an option. Form SH is filed on a nonpublic basis and compliance is mandatory.

With respect to each applicable section 13(f) security, the Form SH filing must reflect the number of securities sold short during the day, as well as the start of day short position and end of day short position, for that security on each calendar day of the prior week in which the institutional investment manager engaged in trading activity with respect to short sales. No Form SH filing is required when no short sales of a section 13(f) security have been effected during the reporting period to be covered by the Form SH filing or where all short sales and short positions are below the following thresholds on each day of the calendar week to be covered by the report:

- The short sales and short positions in the section 13(f) security constitute less than one-quarter of one-percent of that class of the issuer’s section 13(f) securities issued and outstanding as reported on the issuer’s most recent annual or quarterly report, and any current report subsequent thereto, filed with the Commission pursuant to the Exchange Act, unless the manager knows or has reason to believe that the

<sup>38</sup> This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rules to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are “impractical, unnecessary or contrary to the public interest,” a rule “shall take effect at such time as the federal agency promulgating the rule determines.”).

<sup>39</sup> 44 U.S.C. 3501 *et seq.*

<sup>40</sup> Release No. 34–58591.

<sup>34</sup> See 5 U.S.C. 553(b).

<sup>35</sup> *Id.*

<sup>36</sup> See 5 U.S.C. 553(d).

<sup>37</sup> *Id.*

information contained therein is inaccurate; and

- The fair value market of the short sale and short position in the section 13(f) security is less than \$10,000,000.

When we originally requested approval of Form SH in connection with the Emergency Orders, we estimated that the same number of respondents that file Form 13F also would file Form SH, and that each Form SH filing would impose an estimated five burden hours on each respondent. Some Form SH filers indicated that the five hour burden estimate is too low, so we are increasing it to 20 hours as explained below. We also now have actual data from the Form SH filings that we received on September 29, 2008, October 6, 2008 and October 14, 2008 upon which to base our revised burden estimates. We estimate that we will receive approximately 1,000 Form SH filings from institutional investment managers each week during the nine-month period during which Rule 10a-3T will be in effect.

Pursuant to Rule 10-3T, Form SH contains three fewer data elements than did the version of Form SH required by the Emergency Orders. Therefore, we estimate that 1,000 institutional investment managers will file 36 Form SH reports annually at an estimated 20 hours per filing for a total annual reporting burden of 720,000 hours.<sup>41</sup> The 20 hour per filing estimate is based on data received from a small sample of actual filers and a random sample of filings conducted by our Office of Economic Analysis. Staff in the Office of Economic Analysis sampled 100 of the Form SH filings that we received on October 6, 2008. The average number of pages filed was 8.2 and the median number of pages filed was 6, while the maximum number of pages included in a sample filing was 228 and the minimum was 1 page.

Based on limited data from a small sample of actual filers, we estimate that the legal costs of filing Form SH for investment managers that retain an outside law firm to be approximately \$1,000 per filing for 36 filings for a total of \$36,000.<sup>42</sup> We further estimate the filing agent costs to be \$1,500 per week for managers that retain an outside agent to assist them in filing Form SH on EDGAR for a total of \$54,000 (\$1,500 × 36), and a combined cost total of

\$90,000,000 (\$90,000 per filer × 1000 filers).

We understand that many institutional investment managers incurred a much higher reporting burden than five hours per filing in connection with the Form SH reports that they filed to comply with the Emergency Orders. A substantial portion of the initial reporting burden, as discussed in more detail in the Cost-Benefit Analysis, was attributable to the compressed timeframe in which the managers had to comply with the newly created form and the need for new programs to combine data from two different types of automated information systems to satisfy the Form SH disclosure requirements. The revised 20 hour estimate and cost estimate reflects an estimated average reporting burden associated with Form SH for each of the 36 filings that some institutional investment managers must make during the nine month period covered by Rule 10a-3T.

#### C. Solicitation of Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comments to: (1) Evaluate whether Form SH is necessary for the proper performance of the functions of the agency, including whether it will have practical utility; (2) evaluate the accuracy of our estimate of the burden imposed by Form SH; (3) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090, with reference to File No. S7-31-08. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-31-08, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE., Washington, DC 20549.

## VI. Cost-Benefit Analysis

### A. Background

As stated in the Emergency Orders, we are concerned about the potential for sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets. In particular, we are concerned that some persons may manipulate the stock of issuers that have become temporarily weakened by current market conditions. Possible unnecessary or artificial downward price movements may be based on unfounded rumors and may be exacerbated by short selling. Such price declines can give rise to questions about the underlying financial condition of an issuer, which in turn can create a crisis of confidence that is not warranted by the issuer's true financial condition. This undue crisis of confidence can threaten an issuer's viability as a going concern, even when the underlying fundamentals of the firm do not suggest cause.

For example, financial institutions with demand deposit liabilities might experience unwarranted depositor withdrawals that, without replacement, could lead to a funding shortfall for the financial institution's long term assets, such as residential mortgages and commercial loans. Liquidation of these assets to meet depositor redemption could force sales at unfavorable prices that erode capital and increase the risk of insolvency and institutional failure.

Non-financial institutions can face similar risks from an undue crisis in confidence. Manufacturers that rely on credit with suppliers or financial institutions for production inputs might see this credit offered at less favorable terms, or even worse, become unavailable, placing undue burden on their working capital and cash reserves. An undue crisis in confidence also could lead customers to choose alternative products or producers if customers fear that future commitments, such as warranties or service agreements, might not be honored.

We therefore believe that it is necessary to continue requiring institutional investment managers subject to the Form 13F filing requirements to report information concerning their short sales of Rule 13(f) securities on Form SH after the expiration of the Emergency Order dated October 2, 2008 on October 17, 2008. New Exchange Act Rule 10a-3T requires an institutional investment manager that exercises investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value of at least

<sup>41</sup> This estimate conservatively assumes that each Form SH filer will make a Form SH filing each week during the period covered by Rule 10a-3T.

<sup>42</sup> The \$1,000 per filing estimate is based on two-and-a-half hours of outside law firm time at a rate of \$400 per hour.

\$100 million to file Form SH with the Commission each calendar week immediately following a calendar week in which the manager effects a short sale of section 13(f) securities, other than options, exceeding stated thresholds. Rule 10a-3T and Form SH are temporary requirements that will expire on August 1, 2009.

### B. Benefits

The securities markets have undergone significant stress in recent months. An expected benefit of Rule 10a-3T and Form SH is to help restore investor confidence in the markets. The disclosure may help to combat manipulative behavior by making it easier for us to analyze short selling activity. To the extent that the rule does reduce manipulative behavior while still permitting legitimate trading activity should help to alleviate any undue crisis of investor confidence and may strengthen the market's ability to correctly incorporate accurate information into securities prices.

Among other things, the Form SH disclosure will enable staff in our Office of Economic Analysis and Office of Compliance, Inspections and Examinations to analyze short selling patterns and use the data along with other information to study the impact of short selling on the market in times of financial crisis. For example, the Form SH disclosure can help Commission staff evaluate the effectiveness of some of our other emergency initiatives relating to short selling, such as our new temporary Rule 204T requiring short sellers and their broker-dealers to deliver securities by the settlement date (three days after the sale transaction date, or T+3).

In response to feedback on the Emergency Orders, we have further tailored the information collected. We believe that this will limit the expense of complying with the disclosure, while still providing us with the information that we need.

### C. Costs

Rule 10a-3T will impose costs on institutional investment managers subject to the Form SH filing requirement. We estimate that approximately 1,000 Form SH reports will be filed with the Commission each week during the period through August 1, 2009, and that each filing will impose an estimated reporting burden of 20 hours on the filer at an estimated internal cost of \$3,500 per filing,<sup>43</sup> plus

an estimated \$90,000 per filing in legal and filing costs for managers that retain the services of an outside law firm and EDGAR filing agent.<sup>44</sup>

In addition to the costs associated with the reporting burden, we understand that many institutional investment managers spent a substantial number of hours creating a reporting mechanism to capture the data required by Form SH when they first became subject to the reporting requirement under the Emergency Orders. The managers typically maintain an automated system to generate information about their short positions, and a different automated system to generate information about their trading activity. Due to the fact that Form SH requires information about the manager's short positions, as well as the number of securities sold short during the day, they had to create new programs to generate the necessary data.

The temporary rule will also be associated with implementation costs. By requiring filings in XML, filers will need to reprogram systems to be prepared to file in XML by November 7. In addition, changing the form to report fewer data items will also involve reprogramming costs. We believe that these extra costs are justified because the changes help to limit the costs and improve the ability of the Commission to use the information in the filings.

We recognize that the Form SH reporting requirement imposed by Rule 10a-3T may result in increased short selling costs for participants that may impact legitimate short selling activities. We sought to limit the potential costs associated with Form SH filing under Rule 10a-3T by:

- Imposing the Form SH filing obligation only on institutional investment managers that exercise discretion over accounts holding section 13(f) securities having an aggregate fair market value of at least \$100 million—these managers have experience with SEC filing and tend to be larger and better able to bear the cost;

- Requiring reporting only about section 13(f) securities, but not including options or equity securities of all public companies—the section 13(f) category of securities is a well-defined, pre-existing category of securities that institutional investment managers use in connection with their Form 13F filing obligations;

- Not requiring Form SH to be filed following a week in which the

institutional investment manager did not effect any short sale of a section 13(f) security, even if the manager closes a short position during that week;

- Allowing aggregation of reporting on Form SH across multiple institutional investment managers;

- Establishing thresholds below which short sales need not be reported on Form SH; and

- Establishing a last business day of each calendar week reporting deadline, which should help to reduce weekend labor and systems time.

We request comments on this Cost-Benefit Analysis and any of the costs and benefits associated with Rule 10a-3T and Form SH. We solicit quantitative data to assist with our assessment of the costs and benefits of the rule and form.

- Have we accurately estimated the costs?

- Are additional costs involved in complying with the rule? What are the types, and amounts, of the costs?

- Can the rule be modified to mitigate costs?

- Do the benefits justify the costs?

- Will the Form SH reporting requirements influence the day-to-day decisions made by institutional investment managers in any substantive way? For example, will managers choose in some cases to avoid short selling, or to short through alternative vehicles such as OTC derivatives to avoid reporting?

- Given that Rule 10a-3T requires reporting of short sales and short positions, but does not require Form SH filers to report whether the short sales are being used to hedge other positions, does the Form SH information provide an accurate picture of the short selling activities of institutional investment managers and their clients? Is there an alternative reporting requirement that would more accurately reflect managers' true activities?

- Rule 10a-3T requires a single form that aggregates short positions across multiple systems and across portfolios managed for multiple customers. Does the aggregation process pose any special difficulties or impose additional costs beyond those that would be incurred if filers could submit separate reports for separate units or systems?

- How costly will it be for Form SH filers to develop the code needed to file Form SH in XML format? Are there less costly alternatives that will present the Form SH data in a machine readable format?

<sup>43</sup> Consistent with recent rulemaking estimates, we used a \$175 per hour rate to estimate the cost of work performed internally at the company.

<sup>44</sup> We do not expect that all Form SH filers will retain the services of an outside law firm or filing agent to assist them, but we conservatively assume that they will for purposes of these cost estimates.

## VII. Consideration of Burden of Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act<sup>45</sup> requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act<sup>46</sup> and section 2(c) of the Investment Company Act of 1940<sup>47</sup> require us, when engaging in rulemaking to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We believe that Rule 10a-3T will not have an adverse impact on competition among the institutional investment managers required to file Form SH and other parties effecting short sales because the Commission will keep Form SH information nonpublic to the extent permitted by law. We have received comments indicating that the information required by Form SH is highly proprietary and could be used to try and reverse engineer an institutional investment manager's trading strategy.<sup>48</sup> In addition, there is a concern that public disclosure could inaccurately suggest that the managers effecting short sales have a negative view of some issuers' prospects given that short sales may be a part of some managers' routine hedging strategies.<sup>49</sup>

Further, the rule imposes similar costs on institutional investment managers of similar size, given that only larger institutional investment managers subject to the Form 13F filing requirement are subject to the Form SH filing requirement. Therefore, it does not create any competitive disadvantages among these managers. Rule 10a-3T could, however, create an advantage for smaller institutional investment managers that are not subject to the Form SH filing requirement as compared to the larger filers. We believe any burden on competition imposed by the rule is necessary or appropriate in furtherance of the purposes of the Exchange Act

because the rule will assist us in addressing concerns that short selling may be used to manipulate the stock of issuers.

To the extent Rule 10a-3T achieves its objective of combating market manipulation, the rule should promote efficiency and capital formation by increasing investor confidence and strengthening the market's ability to correctly incorporate accurate information into securities prices. We request comment on these matters in connection with the rule.

## VIII. Regulatory Flexibility Certification

Section 3(a) of the Regulatory Flexibility Act requires the Commission to undertake a Regulatory Flexibility Analysis of the effect of its rules on small entities unless the Commission certifies that the rules do not have a significant economic impact on a substantial number of small entities.<sup>50</sup> Pursuant to Section 605(b) of the Regulatory Flexibility Act, the Commission hereby certifies that Exchange Act Rule 10a-3T and Form SH do not have a significant impact on a substantial number of small entities.<sup>51</sup> A "small entity" is defined under Rule 0-7 of the Investment Advisers Act of 1940 for purposes of the Regulatory Flexibility Act as an investment adviser that:

- Has assets under management and reported in its annual updating amendment to Form ADV of less than \$25 million;
- Did not have total assets of \$5 million or more on the last day of its most recent fiscal year; and
- Does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of \$25 million or more, or any person (other than a natural person) that had total assets of \$5 million or more on the last day of the most recent fiscal year.

Rule 10a-3T requires only an institutional investment manager that exercises investment discretion over investment accounts holding section 13(f) securities having an aggregate fair market value of at least \$100 million on the last trading day of a month that is relevant to the period covered by the rule to file Form SH with the Commission. Therefore, we do not

<sup>50</sup> 5 U.S.C. 603(a).

<sup>51</sup> Although the requirements of the Regulatory Flexibility Act do not apply to rules adopted under the Administrative Procedure Act's "good cause" exception, *see* 5 U.S.C. 601(2) (defining "rule" and notice requirements under the Administrative Procedure Act), we have nevertheless provided this certification.

expect the rule to affect a significant number of small entities under the definition of "small entity" set forth above. Not all of the institutional investment managers that may be required to file Form SH are registered as investment advisers under the Investment Advisers Act. Despite the fact that the Rule 0-7 definition of a small entity is designed for purposes of the Investment Advisers Act, it also provides a useful basis for determining whether unregistered investment advisers are small entities.

We solicit comment on the certification. Commenters are asked to describe the nature of any impact on small entities and provide any empirical data.

## IX. Statutory Basis and Text of Amendments

We are adopting amendments to rules pursuant to sections 3(b), 10 and 23(a) of the Exchange Act, as amended.

### List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

■ In accordance with the foregoing, the Securities and Exchange Commission is amending Title 17, chapter II of the Code of Federal Regulations as follows:

### PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

■ 2. Section 240.10a-3T is added to read as follows:

#### § 240.10a-3T Temporary Rule for reporting short sales by institutional investment managers.

(a)(1) For purposes of this section, the terms "investment discretion" and "section 13(f) securities" shall have the meanings set forth in § 240.13f-1(b) and § 240.13f-1(c), respectively.

(2) For purposes of this section, the term "short sale" shall have the meaning set forth in § 242.200(a) of this chapter, and, for purposes of Form SH a "short position" is the aggregate gross short sales of an issuer's section 13(f) securities (excluding options), less purchases to close out a short sale in the

<sup>45</sup> 15 U.S.C. 78w(a)(2).

<sup>46</sup> 15 U.S.C. 78c(f).

<sup>47</sup> 15 U.S.C. 80a-2(c).

<sup>48</sup> See, for example, letter from WilmerHale dated October 10, 2008 available in file No. S7-24-08.

<sup>49</sup> *Id.*

same issuer. The Form SH short position is not net of long position in the issuer. If a person that has loaned a security to another person sells the security and a *bona fide* recall is initiated within two business days after trade date, the person that has loaned the security is deemed to own the security for purposes of Rule 200(g)(1) and Rule 200(b) of Regulation SHO, and such sale will not be treated as a short sale.

(b)(1) Every institutional investment manager that exercises investment discretion with respect to accounts holding section 13(f) securities that has filed, or was required to file, a Form 13F (§ 249.325 of this chapter) for the calendar quarter, as required under Section 13(f) of the Act (15 U.S.C. 78m(f)) and § 240.13f-1(a) thereunder, shall file a report on Form SH (§ 249.326T of this chapter) with the Commission on the last business day of each calendar week immediately following a calendar week in which the institutional investment manager has effected a reportable short sale with respect to a section 13(f) security that is not an option.

(2) An institutional investment manager is not required to file Form SH to report short sales or short positions of section 13(f) securities on Form SH where:

(i) No short sales of a section 13(f) security have been effected during the reporting period to be covered by the Form SH filing; or

(ii) On each calendar day during the calendar week, the start of day short position, the gross number of securities sold short during the day and the end of day short position each constitute less than one-quarter of one percent of that class of the issuer's section 13(f) securities issued and outstanding as reported on the issuer's most recent annual, quarterly or current report filed with the Commission pursuant to section 13 of the Exchange Act, unless the manager knows or has reason to believe the information contained therein is inaccurate, and the fair market value of the start of day short position, the gross number of securities sold short during the day and the end of day short position each are less than \$10,000,000.

(3) Once a determination is made that a Form SH filing is required, an institutional investment manager is not required to report short sales or short positions of section 13(f) securities on Form SH where:

(i) On any calendar day of the calendar week, the start of day short position, the gross number of securities sold short during the day, or the end of day short position in the section 13(f)

security constitutes less than one-quarter of one percent of that class of the issuer's section 13(f) securities issued and outstanding as reported on the issuer's most recent annual, quarterly or current report filed with the Commission pursuant to section 13 of the Exchange Act, unless the manager knows or has reason to believe the information contained therein is inaccurate, and the fair market value of the start of day short position, the gross number of securities sold short during the day, or the end of day short position is less than \$10,000,000. The institutional investment manager must designate in the appropriate data element its reliance on this exception with respect to information otherwise required to be reported; or

(ii) A broker-dealer seeks to execute a customer order, either in whole or in part, through a riskless principal transaction, and a short sale results from a sale order of a customer who is net long the section 13(f) security, or a purchase order of a section 13(f) security.

(4) The Form SH shall be nonpublic to the extent permitted by law.

(c) A report on Form SH shall identify the date of the transaction, the institutional investment manager by EDGAR Central Index Key, the issuer name and CUSIP for the relevant securities and reflect the start of day short position, the gross number of securities sold short during the day, and the end of day short position, on each day of the calendar week in which short sale trading activity occurred.

(d) This section will expire on August 1, 2009.

#### **PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934**

■ 3. The authority citation for Part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

■ 4. Add § 249.326T and Temporary Form SH to read as follows:

#### **§ 249.326T Form SH, weekly report of short sales and positions.**

(a) This form shall be used by institutional investment managers to file weekly reports pursuant to § 240.10a-3T of this chapter. A weekly report on this form pursuant to § 240.10a-3T of this chapter shall be filed on the last business day of each calendar week immediately following a calendar week in which the institutional investment manager effected a short sale and shall

be nonpublic to the extent permitted by law.

(b) The temporary section will expire on August 1, 2009.

**Note:** The text of Form SH does not, and this amendment will not, appear in the Code of Federal Regulations.

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#### **OMB APPROVAL**

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OMB Number: 3235-0646

Expires: April 30, 2009

Estimated average burden hours per response: 20.0

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#### **UNITED STATES SECURITIES AND EXCHANGE COMMISSION**

##### **Form SH**

##### **Weekly Report of Short Sales and Short Positions**

##### **General Instructions**

1. *Rule as to Use of Temporary Form SH ("Form SH").* Institutional investment managers ("Managers") that exercise investment discretion with respect to accounts holding section 13(f) securities, as defined in rule 13f-1(c) under the Securities Exchange Act of 1934 [15 U.S.C. 78m(f)] ("Exchange Act"), who have filed or were required to file a Form 13F for the previous calendar quarter, must file a nonpublic report on Form SH with the Commission to report certain information about short sales and short positions. The nonpublic Form SH filing must be made on the last business day of each calendar week immediately following a Form SH reporting period (*i.e.*, the preceding Sunday-Saturday calendar week) in which the Manager entered into any new short positions with respect to any section 13(f) securities except for any short positions for options ("SH Short Positions"). The nonpublic Form SH will report SH Short Positions for the Sunday-Saturday calendar week that precedes the date on which the Form SH is due to be filed.

2. *Rules to Prevent Duplicative Reporting.* If two or more Managers that are required to file a report on Form SH for the reporting period exercise investment discretion with respect to the same securities, only one such Manager must include information in its reports on Form SH. A Manager whose information is reported on Form SH by another Manager (or Managers), must identify the Manager(s) reporting on its behalf.

3. *Filing of Form SH.* A Form SH report that is filed by a Manager with the Commission shall be nonpublic to the extent permitted by law. A Manager must label its Form SH as non-public by adding the phrase NONPUBLIC (in bold and capital letters) at the top and bottom of each page of the form with the exception of the XML tagged data file containing transaction data. A Manager must file a Form SH report with the Commission on the last business day of each calendar week immediately following the preceding calendar week period (Sunday—Saturday) in which the Manager has entered into any new SH Short Position(s) in accordance with Rule 232.13 of Regulation S-T [17 CFR 232.13]. The Form SH must be

filed electronically using the Commission's EDGAR system.

4. Official List of Section 13(f) Securities. The Official List of Section 13(f) Securities published by the Commission (the "13F List") lists the securities the holdings of which a Manager is to report on Form 13F. See rule 13f-1(c) [17 CFR 240.13f-1(c)]. Form SH filers may rely on the current 13F List in determining whether they need to report on Form SH information about any particular equity security, excluding short positions for options that are on the 13F List. The 13F List is available on the SEC's Web site, at http://www.sec.gov/divisions/investment/13flists.htm. Paper copies are available at a reasonable fee from the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE., Washington, DC 20549-1520.

Paperwork Reduction Act Information

The Office of Management and Budget has approved this collection of information pursuant to 44 U.S.C. 3507 and 5 CFR 1320.13. The OMB control number for this collection of information is 3235-0646. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. We estimate that providing the requested information will take, on average, approximately 20 hours. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

Filings with the form types set forth in this instruction will be filed on a nonpublic basis.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC 20549

TEMPORARY FORM SH

WEEKLY REPORT OF SHORT SALES AND SHORT POSITIONS

Report for the Period Ended: [Month, Day, Year]

Check here if Amendment [ ]; Amendment Number: \_\_\_\_\_

This Amendment (Check only one):

- [ ] is a restatement.
[ ] adds new entries.

Institutional Investment Manager Filing this Report:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Form 13F File Number: 28- \_\_\_\_\_

Central Index Key (CIK) Number: \_\_\_\_\_

The institutional investment manager filing this report and the person by whom it is signed hereby represent that the person signing the report is authorized to submit it, that all information contained herein is true, correct and complete, and that it is understood that all required items, statements, schedules, lists, and tables, are considered integral parts of this form.

Person Signing this Report on Behalf of Reporting Manager:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Phone: \_\_\_\_\_

Signature, Place, and Date of Signing

[Signature]

[City, State]

[Date]

Report Type (Check only one):

[ ] FORM SH ENTRIES REPORT. (Check here if all entries of this reporting manager are reported in this report.)

[ ] FORM SH NOTICE. (Check here if no entries reported are in this report, and all entries are reported by other reporting manager(s).)

[ ] FORM SH COMBINATION REPORT. (Check here if a portion of the entries for this reporting manager is reported in this report and a portion is reported by other reporting manager(s).)

List of Other Managers Reporting for this Manager:

Provide a list of the name(s), Form 13F file number(s) and CIK numbers of all institutional investment managers who are reporting for this manager.

[If there are no entries in this list, state "NONE".]

Number of Other Included Managers: \_\_\_\_\_

Total Number of Transactions Reported: \_\_\_\_\_

List of Other Included Managers:

Provide a numbered list of the name(s), Form 13F file number(s) and CIK numbers of all institutional investment managers with respect to which this Form SH report is filed, other than the manager filing this report.

[If there are no entries in this list, state "NONE".]

INFORMATION TABLE

Table with 7 columns: Element 1, Element 2, Element 3, Element 4, Element 5, Element 6, Element 7. Rows include Date, CIK of Manager, Name of Issuer, CUSIP, Short Position (Start of Day), Number of Securities Sold Short (Day), and Short Position (End of Day).

\* \* \* \* \*

By the Commission.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8-24895 Filed 10-16-08; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 241 and 242

[Release No. 34-58775; File No. S7-19-07]

RIN 3235-AJ57

Amendments to Regulation SHO

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to Regulation SHO under the Securities Exchange Act of 1934 ("Exchange Act"). The amendments are intended to further reduce the number of persistent fails to deliver in certain equity securities by eliminating the options market maker exception to the close-out requirement of Regulation SHO. As a result of the amendments, fails to deliver in threshold securities that result from hedging activities by options market makers will no longer be excepted from Regulation SHO's close-out requirement. The Commission is also providing guidance regarding bona fide market making activities for purposes of the market maker exception to Regulation SHO's locate requirement.

DATES: Effective Date: October 17, 2008.

FOR FURTHER INFORMATION CONTACT:

James A. Brigagliano, Associate Director, Josephine J. Tao, Assistant Director, Victoria L. Crane, Branch Chief, Joan M. Collopy, Special Counsel, Christina M. Adams and Matthew Sparkes, Staff Attorneys, Office of Trading Practices and Processing, Division of Trading and Markets, at (202) 551-5720, at the Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-6628.

SUPPLEMENTARY INFORMATION: The Commission is amending Rule 203 of Regulation SHO [17 CFR 242.203] under the Exchange Act.

I. Introduction

To further Regulation SHO's goal of reducing fails to deliver in equity