Proskauer

SEC Proposes Monthly Short Sale Reporting Requirements: Aggregated Information to be Public; New Order Marking Requirements Detailed

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The SEC recently proposed to require investment managers to report short sale information on a monthly basis if such activity exceeds certain thresholds (described below), and to require broker dealers to begin to mark "buy to cover" trades under Regulation SHO in addition to marking trading activity as "long," "short," and "short exempt." The definition of "investment manager" in the proposed rules would be the same as that applied for purposes of reporting on Form 13F.[1] The proposed rules would not impact hedging positions that do not meet the current definition of "short sales." These proposals follow other recent proposals by the SEC to expand beneficial ownership reporting under Section 13(d) of the Exchange Act by non-passive investors to include cash-settled derivatives and to require reporting of large security-based swap positions.

The SEC stated that the short sale reporting proposal seeks to balance its goal to enhance regulatory surveillance and market transparency of short selling activity in light of the trading activity involving GameStop equity and other perceived market disruptions with the hope that additional transparency will discourage rather than facilitate manipulative market practices or "copy-cat" trading.

Under the proposal, investment managers that have investment discretion over accounts that exceed certain thresholds on short sale activity would have to comply with proposed Rule 13f-2 and new Form SHO to report short sale activity on a monthly basis in a form submitted confidentially to the SEC. The thresholds that trigger a monthly filing are as follows:

- For any "equity security" of an issuer registered pursuant to Section 12 of the Exchange Act or for which the issuer is under a reporting obligation under section

15(d) of the Exchange Act, where the investment manager's short sale activity meets or exceeds either (1) a gross short position in the equity security with a U.S. dollar value of $10 million at the close of any settlement date or (2) a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5 percent or more; or

- For any "equity security" of any other issuer where the investment manager's gross short sale position meets or exceeds a gross short position with a US dollar value of $500,000 or more at the close of any settlement date.

"Equity security" includes securities convertible into equity securities but would not include short positions established through derivatives, and "gross short position" is calculated without regard to any offsetting long position.

The information reported would include whether the position is fully hedged, partially hedged, or unhedged, as well as daily activity as of each settlement date during the month. Reporting would be required within 14 days after month-end for any month in which a threshold had been exceeded. Significantly, while the filings made by investment managers would not be publicly available, the proposed rules would make aggregated information about short positions publicly available by the end of the month following the reported month. The proposed rules would make the following information publicly available:

- The issuer's name and other identifying information related to the issuer;
- The aggregated gross short position and corresponding dollar value across all reporting investment managers in the security at the close of the last settlement date of the relevant calendar month;
- The percentage of the reported aggregate gross short position that is reported as being fully hedged, partially hedged, or not hedged; and
- For each reported settlement date during the calendar month reporting period, the "net" activity aggregated across all reporting investment managers.

While information that is specific to any particular investment manager would not be publicly disclosed, it would be subject to a FOIA request.

The SEC further proposed to amend Regulation SHO to add Rule 205 to require broker dealers to mark trades as “buy to cover” a short position in addition to the current order marking requirements. The SEC also proposed amendments to the consolidated audit trail plan created pursuant to the requirements of Rule 613 of the Exchange Act to provide additional data on purchases to cover short sales as well as assertion of Regulation SHO’s bona fide market making exceptions.

We expect that many industry participants will be submitting comments to the SEC on these proposals, subject to a short comment period of 30 days following publication in the federal register or April 26. The SEC appears to be on a fast track, and new rules could be expected as soon as the end of the year.

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[1] As defined in Section 13(f)(6)(A) of the Exchange Act and for purposes of proposed rule 13f-2, “institutional investment manager” includes any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person. The SEC explains that the term “institutional investment manager” typically can include investment advisers, banks, insurance companies, broker-dealers, pension funds and corporations.

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