

SEC Adopts New Short Position and Short Activity Reporting Requirements

by David Tang and Michael Schmieder

The Securities and Exchange Commission (the “SEC”) adopted a new short position and short activity disclosure requirement under Rule 13f-2 of the Securities Exchange Act of 1934 (the “Exchange Act”).^[1] Under Rule 13f-2, an institutional investment manager will be required to file a report on new Form SHO with the SEC within 14 calendar days after the end of each calendar month in which it meets or exceeds certain prescribed short position reporting thresholds. The SEC will then publish, on a delayed basis, certain aggregated short sale related information regarding each equity security reported by institutional investment managers on Form SHO. The compliance date for Rule 13f-2 and Form SHO is January 2, 2025.

This eUpdate provides a summary of the key elements of Rule 13f-2 and Form SHO.

Persons Covered

Rule 13f-2 defines “institutional investment manager” to have the same meaning as in Section 13(f)(6)(A) of the Exchange Act, which defines the term to include “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 term typically can include brokers and dealers, investment advisers, banks, insurance companies, pension funds and corporations.

Securities Covered

Rule 13f-2 covers “equity securities” as defined in Section 3(a)(11) of the Exchange Act and Rule 3a11-1 thereunder. The scope of securities includes both exchange-listed and OTC equity securities, including, among others, ETFs, certain derivatives, and options, warrants and other convertibles.

Reporting Thresholds

An institutional investment manager is required to file Form SHO for any month when the

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- David Tang
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following reporting thresholds are met:

1. With respect to equity securities of an SEC-reporting company, a monthly average gross short position^[2] at the close of regular trading hours:
 - a. in the equity security with a U.S. dollar value of \$10 million or more; or
 - b. as a percentage of shares outstanding in the equity security of 2.5% or more.
2. With respect to equity securities issued by a non-SEC reporting company, a gross short position in the equity security with a U.S. dollar value of \$500,000 or more at the close of regular trading hours on any settlement date during the calendar month.^[3]

Reported Information

For each reported equity security, an institutional investment manager will be required to report on Form SHO certain information, including the institutional investment manager's end-of-month gross short position in the equity security, and, for each individual settlement date during the calendar month, the institutional investment manager's "net" activity in the reported equity security, which includes activity in derivatives, such as options.

Dorsey Observations

Rule 13f-2 creates additional reporting burdens on investment advisers and other institutional investment managers to collect data and report short positions to the SEC on Form SHO. Institutional investment managers should assess their ability to respond to Rule 13f-2's new reporting requirements in a timely manner and implement new reporting processes as needed. Dorsey's regulatory compliance services are available to assist institutional investment managers with the requirements of Rule 13f-2 and Form SHO.

^[1] Short Position and Short Activity Reporting by Institutional Managers, SEC Release No. 34-98738 (Oct. 13, 2023) (the "Release") *available at* <https://www.sec.gov/files/rules/final/2023/34-98738.pdf>.

^[2] Gross short position is defined by Rule 13f-2 to mean the number of shares of the equity security that are held short as a result of short sales as defined in Rule 200(a) of Regulation SHO, without inclusion of any offsetting economic positions such as shares of the equity security or derivatives of such equity security.

^[3] Short positions created by using equity derivatives are not counted when calculating the reporting thresholds under Rule 13f-2. However, once an institutional investment manager meets or exceeds a reporting threshold for an underlying equity security, the institutional investment manager will be required to report certain short activity that takes into account activity in options, tendered conversions, secondary offering transactions, and other equity derivatives or activity that might affect the reported short positions on Form SHO. See the Release at page 29.

