

Market Pushes Back on SEC Short Sale Reporting Rule

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On October 13, the SEC adopted a new Securities Exchange Act rule that will require “institutional investment managers,” such as insurance companies, banks, brokers and dealers, investment advisers, and pension funds, that meet specified reporting thresholds to report, on a monthly basis, certain short position and activity data for equity securities. The SEC intends to aggregate the resulting data by security on an anonymized basis and publicly disseminate the aggregated data on a delayed basis. New Rule 13f-2 has a compliance date of January 2, 2025, giving managers roughly a year to update their compliance policies and procedures. The term “institutional investment manager” is defined broadly 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.” As such, the term applies to managers irrespective of the amount of securities they manage. In contrast, only managers that exercise investment discretion over \$100 million or more in section 13(f) securities must file Form 13F. Accordingly, many money managers that are unaccustomed to filing securities position reports are being dragged from the bleachers and suited up for the SEC’s reporting act. Affected managers must file a report on Form SHO with the SEC within 14 calendar days after the end of each calendar month with respect to short positions in each equity security over which the manager has investment discretion where the manager has (a) with regard to positions in SEC-reporting company securities, an average gross short position for the month of at least \$10 million or 2.5% of shares outstanding and (b) with regard to positions in non-reporting company securities, a gross short position of at least \$500,000 on any settlement date during the month. The new rule has attracted the ire of several private fund trade associations that have petitioned the Fifth Circuit to overturn the rulemaking, along with a “closely related” rulemaking that was adopted by the SEC on the same day as Rule 13f-2 relating to securities lending transactions. The petition alleges that both rules impose extensive new requirements for the reporting and public disclosure of information pertaining to short sales of securities, yet adopt fundamentally contradictory approaches to the new disclosure requirements in violation of the Administrative Procedure Act. This is but the latest of several recent industry challenges to the current SEC’s aggressive rulemaking agenda.

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