

SEC Extends and Modifies Short-Sale Disclosure Regime: Adopts Rule 10a-3T and Temporary Form SH

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On October 15, 2008, the SEC adopted temporary Rule 10a-3T, requiring certain institutional investment managers to file on Temporary Form SH information concerning their shorting activity in section 13(f) securities.¹ With some modifications, Rule 10a-3T extends the reporting requirements established by the SEC's emergency orders of September and October 2008.² Most significantly, the new rule:

- Pushes back the weekly filing deadline from the Monday to the Friday following the week in which short sales are effected, thus giving investment managers more time to prepare their disclosure;
- Eliminates Form SH columns 5, 7 and 8, which had required disclosure of the daily value of securities sold short and the size and time of the largest intraday short position;
- Eliminates the "grandfathering" provision under which pre-September 22 short positions were not reflected on Form SH;
- Increases the "fair market value" threshold of the de minimis reporting exclusion from \$1 million to \$10 million; and
- Requires Forms SH to be filed with the SEC in XML format.

The SEC is maintaining its nonpublic treatment of Forms SH.

The new Form SH reporting regime is effective immediately, although filers may elect to take advantage of limited transition relief. Rule 10a-3T will remain in effect until August 1, 2009, unless the SEC decides to extend it. The October 15 adopting release

requests public comment on several aspects of Rule 10a-3T and the SEC's short sale reporting initiative in general.

Purpose

In the release adopting Rule 10a-3T, the SEC offers the same rationale for short sale reporting as it did in September and October:

"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. The reports [on Form SH] 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."

The adopting release notes that several foreign regulators, including the U.K. Financial Services Authority, also have adopted rules requiring disclosure of short sales and positions.

No Change in Who Has to File

Rule 10a-3T doesn't change who is required to file Form SH. The rule requires a Form SH from any institutional investment manager that: (i) as of the end of the most recent calendar quarter, was required to file a Form 13F for that quarter; and (ii) during a

Memorandum

October 17, 2008

"With some modifications, Rule 10a-3T extends the reporting requirements established by the SEC's emergency orders of September and October 2008."

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¹ Release No. 34-58785, "Disclosure of Short Sales and Short Positions by Institutional Investment Managers" (Oct. 15, 2008), available at www.sec.gov/rules/final/2008/34-58785.pdf.

² Release No. 34-58591 (Sept. 18, 2008); Release No. 34-58591A (Sept. 21, 2008); and Release No. 34-58724 (Oct. 2, 2008).

Sunday-to-Saturday calendar week has effected a non-de minimis short sale in a section 13(f) security other than options.³

Filing Deadline: More Breathing Room Each Week

Filers will now have a full work week, rather than a weekend plus a business day, to digest the prior week's trading activity and prepare their Forms SH.

To date, an investment manager has had to file Form SH on the Monday following each week in which the manager effected a reportable short sale. Under Rule 10a-3T, Form SH is due by 5:30 p.m. Eastern Time on the last business day (typically Friday) of the week following the calendar week in which a reportable short sale occurred. Accordingly, a manager that has reportable shorting activity for the period October 12-18 will file its Form SH on Friday, October 24, rather than on Monday, October 20.

Information Table: Something Kept, Something Gone, and Something Slightly New

The SEC has eliminated some types of data previously required in the Form SH information table, while calling for some new information. The new rules also revamp the information table's structure (including, in an unexplained Orwellian twist, replacing the term "column" with "data element").

What's Unchanged. New Form SH still requires

disclosure of:

- the name of the issuer whose section 13(f) securities the manager has shorted during the reporting week (formerly column 1, now data element 3);
- the CUSIP number of the security (formerly column 2, now data element 4);
- the start-of-day short position (formerly column 3, now data element 5);
- the number of securities sold short during the day (formerly column 4, now data element 6); and
- the end-of-day short position (formerly column 6, now data element 7).

What's Gone. Based on the SEC's recognition that "some of this information has been difficult for filers to obtain," new Form SH dispenses with disclosure of:

- the value of securities sold short during the day (formerly column 5);
- the largest intraday short position (formerly column 7); and
- the time of the largest intraday short position (formerly column 8).

What's New. New Form SH adds the trade date as data element 1 and the manager's CIK number as data element 2. Because the trade date has become part of the information table, Form SH will no longer feature a separate information table for each day of the reporting week. Instead, a single information table will now cover the entire week's shorting activity.

As a result of the above, the Form SH information table now reads as follows:

INFORMATION TABLE

Element 1	Element 2	Element 3	Element 4	Element 5	Element 6	Element 7
Date	CIK of Manager	Name of Issuer	CUSIP	Short Position (Start of Day)	Number of Securities Sold Short (Day)	Short Position (End of Day)

³ The emergency orders were phrased to apply only to institutional investment managers that were required to file Form 13F for the quarter ended June 30, 2008. Because new Rule 10a-3T will be in effect until August 1, 2009, it refers to managers that were required to file Form 13F for the previous calendar quarter.

Pre-September 22 Positions No Longer Grandfathered

Apart from the modifications to the Form SH information table, the most significant change wrought by Rule 10a-3T is the treatment of short positions established before September 22.

The September and October emergency orders provided that pre-existing short positions were deemed to be zero as of 12:01 a.m. on September 22 (the first day of the first reporting week of the Form SH regime). Consequently, pre-existing short positions (and purchases to close them out) were not reflected in any disclosure of start-of-day, end-of-day or intraday short positions.⁴

Rule 10a-3T does away with the grandfathering of pre-September 22 positions. Now, filers must reflect all short positions, including pre-September 22 positions, when reporting data element 5 (Short Position (Start of Day)), data element 6 (Number of Securities Sold Short (Day)) and data element 7 (Short Position (End of Day)). The SEC has concluded that “this additional data about the pre-September 22 positions will improve our efforts to analyze short sale activity.”

A manager may choose to delay its implementation of the “no-grandfathering” aspect of Rule 10a-3T. See “Transition Matters” below.

Relaxed De Minimis Exclusion

In connection with eliminating the pre-September 22 grandfathering provision, Rule 10a-3T revises the filing exclusion for de minimis short sales and positions. Under the September and October emergency orders, filers were allowed to omit disclosure if the short sale or short position constituted less than 0.25% of the class of securities outstanding and had a fair market value of less than

\$1 million. Rule 10a-3T retains the percentage-of-class prong of the de minimis exclusion, but raises the FMV threshold to \$10 million.

A manager that chooses to delay implementing the “no-grandfathering” aspect of Rule 10a-3T may not take advantage of the heightened FMV threshold. See “Transition Matters” below.

Filings in XML Format

To date, managers have been able to file Form SH in HTML or ASCII. Going forward, filings must be made in XML, which entails the submission of tagged data for the information table on Form SH. XML filing instructions will be posted on the SEC's website.

Transition Matters

The adopting release permits filers briefly to delay compliance with two aspects of Rule 10a-3T. A manager that is required to file a Form SH on October 24, 2008 or October 31, 2008 may, for either or both of those reports:

- Exclude disclosure of short positions reflecting short sales before September 22, 2008. However, if a manager chooses to exclude pre-September 22 positions, the relevant FMV for reporting short sales or positions is \$1 million, rather than the new \$10 million threshold under Rule 10a-3T.
- File via EDGAR in the same manner as permitted with prior Form SH (i.e., HTML or ASCII), rather than in XML format.

Form SH is Still Nonpublic

The SEC is maintaining its commitment to nonpublic treatment of Forms SH, primarily out of concern that publicly available Form SH data could spawn “additional, imitative short selling.” Rule 10a-3T states that all Forms SH filed with the SEC will be

⁴ The SEC initially adopted this “grandfathering” provision to address concerns about the public disclosure of investment managers’ pre-existing short positions. The SEC views those concerns as no longer relevant, given the SEC’s subsequent decision to allow Form SH to be filed on a nonpublic basis.

nonpublic “to the extent permitted by law.”⁵ The adopting release instructs filers not to submit confidential treatment requests to the SEC. Filers must continue to label their Forms SH “nonpublic,” as required by the instructions to the form.

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If you have any questions regarding the matters discussed in this memorandum, please call your usual contact at Richards Kibbe & Orbe LLP or one of the persons listed below.

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⁵ The Freedom of Information Act (“FOIA”) provides at least two exemptions under which the SEC has authority to withhold from public disclosure the information that filers submit on Form SH. FOIA Exemption 4 provides a public disclosure 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.”