

January 21, 2025

By Electronic Transmission

David H. Saltiel, Acting Director
Division of Trading and Markets
United States Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: Relief from the Securities Exchange Act of 1934 for Institutional Investment Managers for Failure to File Form SHO Reports as Required by Rule 13f-2

Dear Mr. Saltiel:

The Investment Company Institute¹ (ICI) is writing to request that the staff of the Division of Trading and Markets (“Staff”) confirm that it will not recommend that the Securities and Exchange Commission (SEC or “Commission”) take enforcement action under the Securities Exchange Act of 1934 (“Exchange Act”) against institutional investment managers for failure to file Form SHO reports as required by Rule 13f-2² under the Exchange Act until the Staff has provided additional interpretive guidance on compliance with the rule. The need for this no-action relief is urgent because of the impending February 14, 2025, deadline to file the first Form SHO reports.³

ICI considers the requested relief important to address the potential that the information required to be reported on Form SHO, without further guidance, will negatively impact the quality and accuracy of the data reported to the Commission, which will ultimately be aggregated and made available to the public. Below we provide background on Rule 13f-2, describe challenges with

¹ The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing the asset management industry in service of individual investors. ICI’s members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$39.0 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 120 million investors. Members manage an additional \$9.6 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

² *Short Position and Short Activity Reporting by Institutional Investment Managers*, Release No. 34-98738 (Oct. 13, 2023), 88 Fed. Reg. 75100 (Nov. 1, 2023) available at <https://www.federalregister.gov/documents/2023/11/01/2023-23050/short-position-and-short-activity-reporting-by-institutional-investment-managers> (“Adopting Release”).

³ The compliance date for Rule 13f-2 was January 2, 2025, and pursuant to Rule 13f-2(a), institutional investment managers are required to file reports on Form SHO with the Commission within 14 calendar days after the end of each calendar month.

the requirements to comply with the rule, outline ICI's requested no-action relief, and explain the rationale behind the requested relief.

Background on Rule 13f-2

Rule 13f-2 requires institutional investment managers to report to the Commission on their end-of-month gross short positions in equity securities where the manager exceeds specified short position thresholds (Table 1 of Form SHO), as well as daily changes in gross short positions during any month where the manager has exceeded the specified gross short position threshold for the applicable security (Table 2 of Form SHO). The Commission adopted a compliance date of January 2, 2025, and will begin publishing aggregated short sale data three months after the compliance date.⁴

Compliance Challenges with Rule 13f-2

ICI and other industry associations previously expressed concern about the ability for institutional investment managers to meet the January 2, 2025, compliance date.⁵ Chief among these continuing concerns is the short time frame to develop and implement system changes to capture the relevant data, including the delay in the Commission issuing a final Form SHO technical specification for managers to test file their Form SHO reports.⁶ In addition to the limited time to test systems and filings, the Commission has not issued any formal guidance or Frequently Asked Questions (FAQs) leading to inconsistent interpretations regarding the scope

⁴ Aggregate data will be reported on a one-month delay after the initial data set is published (*e.g.*, for data reported on Form SHO for the month of March, the Commission will publish aggregated information derived from such data no later than the last day of April.)

⁵ See Letter from SIFMA, SIFMA AMG, ICI, IRI, FIA PTG, and IAA to Vanessa Countryman, Secretary, SEC, *File Number 27-08-22: Short Position and Short Activity Reporting by Institutional Investment Managers* (Nov. 25, 2024) ("Industry Associations Letter").

⁶ The final Form SHO XML specifications were released on December 16, 2024, a mere 10 business days (including EDGAR holidays) prior to the initial compliance date of January 2, 2025. Additionally, ICI member firms have stated that they are not able to test Form SHO filings until after February 1, 2025.

of equity securities included in Rule 13f-2,⁷ as well as how to report changes in gross short positions as a result of the exercise of certain derivatives.⁸

Requested No-Action Relief

As indicated above, ICI seeks assurance that the Staff will not recommend that the Commission take enforcement action under the Exchange Act against an institutional investment manager for failure to file Form SHO reports as required by Rule 13f-2 under the Exchange Act until no earlier than **six months** after the Staff has provided additional interpretative guidance on compliance with the rule.

Rationale for the Requested Relief

Given the Commission's lack of engagement with institutional investment managers to provide necessary reporting and interpretive guidance, institutional investment managers and other market participants have been left to make their own judgments on how to comply, and how to design their systems to comply, with Rule 13f-2 and the Form SHO reporting requirements. ICI is very concerned that this will result in inconsistent data sets being reported to the Commission, including the subsequent aggregate data derived from such Form SHO reports that the Commission is required to make publicly available. The requested relief will give the Commission the opportunity to issue needed guidance so that institutional investment managers can provide uniform data to the Commission, as well as give institutional investment managers and other market participants adequate time to redesign or recalibrate their short position and short activity monitoring and reporting systems to reflect the Commission's guidance.

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In light of the foregoing, we seek confirmation that the Staff of the Division of Trading and Markets will not recommend enforcement action to the Commission in the circumstances set forth above.

⁷ While Section 13(f)(4) of the Exchange Act requires the Commission to make available a public list of Section 13(f) securities that can be relied upon by Form 13F filers, under Rule 13f-2 institutional investment managers need to individually assess whether the securities over which they exercise investment discretion qualify as "equity securities" as defined under Section 3(a)(11) of the Exchange Act and Rule 3a11-1 thereunder, which is not limited to securities issued by US issuers or traded on US markets. While the Commission stated in the Adopting Release that it intends for Rule 13f-2 to require disclosure of "short selling by managers of securities of US and non-US issuers . . . regardless of where those sales occur" (Adopting Release at 75109), it took a different approach in the pending litigation arguing that Rule 13f-2 "does not apply to short sale transactions in foreign equity securities effected outside the United States" (*National Association of Private Fund Managers, et al. v. SEC*, No. 23-60626 (5th Cir. Mar. 5, 2024), Brief of Respondent at p. 53).

⁸ For example, the Industry Associations Letter highlights the challenge of reporting convertible bonds given that Form SHO does not allow for the reporting of a short position in units other than "number of shares."

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We would be happy to discuss our request in more detail and provide more information. If you have any questions, or if we can be of assistance in any way, please contact us at paul.cellupica@ici.org or kthomasson@ici.org.

Sincerely,

/s/ Paul Cellupica
General Counsel

/s/ Kimberly Thomasson
Assistant General Counsel

cc: The Honorable Mark T. Uyeda, Acting Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner

Carol McGee, Associate Director
Josephine J. Tao, Assistant Director

Division of Trading and Markets