

FINANCIAL INFORMATION FORUM

August 9, 2024

By electronic mail

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Timothy M. Riley, Branch Chief

Re: File Number S7-08-22: Short Position and Short Activity Reporting by Institutional Investment Managers

Dear Mr. Riley,

Financial Information Forum (“FIF”)¹ is submitting this letter as a follow-up to the letter that FIF submitted to the Securities and Exchange Commission (the “Commission”) on June 24, 2024 (the “prior FIF letter”). The prior FIF letter and this letter relate to the implementation of Rule 13f-2 and the associated Form SHO adopted by the Commission on October 13, 2023.² Rule 13f-2 and Form SHO require “institutional investment managers” (as defined in the rule) to report to the Commission their end-of-month gross short positions in equity securities where the managers exceed specified gross short position thresholds.³ Rule 13f-2 and Form SHO also require institutional investment managers (referred to below as “managers”) to report daily changes in their gross short positions during any month where the manager has exceeded the specified gross short position threshold for the applicable security.⁴

FIF would like to thank you and your colleagues at the Commission for reviewing the questions and requests set forth in the prior FIF letter on a timely basis and for participating on a video conference call with FIF representatives and FIF members on July 15 to respond to these questions and requests. During the call, you and your colleagues were able to provide guidance on many of the items set forth in the prior FIF letter.

¹ FIF (www.fif.com) was formed in 1996 to provide a centralized source of information on the implementation issues that impact the securities industry across the order lifecycle. Our participants include broker-dealers, exchanges, back office service bureaus, and market data, regulatory reporting and other technology vendors in the securities industry. Through topic-oriented working groups, FIF participants focus on critical issues and productive solutions to technology developments, regulatory initiatives, and other industry changes.

² 17 CFR §240.13f-2; 17 CFR §249.332.

³ Ibid.

⁴ Ibid.

This follow-up letter is focused on the following points:

- In Section A, FIF members present specific scenarios along with the understanding of FIF members as to how these scenarios should be reported on Form SHO. FIF members request that Commission representatives provide confirmation that the understanding of FIF members as to how these scenarios should be reported is correct. FIF members further request that Commission representatives, if they do not agree with the proposed understanding of FIF members as to the reporting of a specific scenario, identify how the scenario should be reported.
- In Section B, FIF sets forth the understanding of FIF members as to the responses communicated by Commission representatives to the questions and requests set forth in the prior FIF comment letter.
- In Section C, FIF members set forth additional questions relating to the implementation of Rule 13f-2.
- In Section D, FIF members discuss the importance for the Commission to provide written guidance (for example, through FAQs) in response to the questions set forth in the prior FIF letter and this letter and in response to questions from other market participants.
- In Section E, FIF members discuss current implementation challenges and the need for additional time for managers to implement short position reporting. In Section E, FIF members also recommend various approaches for addressing (i) the current challenges for firms in computing the 2.5% threshold for Threshold A securities, and (ii) the fact that the approach for calculating the 2.5% threshold for Threshold A securities required by Form SHO would, in various scenarios, result in an inaccurate calculation of a manager's actual ownership percentage. These scenarios include reporting for securities after a stock split and reporting for exchange traded funds ("ETFs").

FIF members continue to discuss issues relating to the implementation of Rule 13f-2 and Form SHO reporting and could submit additional comments and questions at a future date. This letter is focused solely on implementation issues and questions and does not express any legal positions.

A. Reporting scenarios

FIF members request that Commission representatives provide confirmation on the proper reporting for the scenarios set forth in this section. The following assumptions and clarifications apply for all of the scenarios below:

- Manager 1 is an "institutional investment manager", as defined in Commission Rule 13f-2.
- All scenarios involve reporting for the month of March 2025.
- The last settlement date in February 2025 is Friday February 28; the first trading day in March 2025 is Monday March 3; the last settlement date in March 2025 is Monday March 31.
- The reporting below is only for March 2025; the end-of-month position for February 2025 is provided in the tables below because it is relevant for reporting for March 2025
- The reporting in the tables below is only for ABCD.

- ABCD is a Threshold B security during March 2025.
- The stock price of ABCD is \$50 at all times during March 2025.
- The numbers in the table below represent the number of shares of ABCD.
- An empty box means that the account has no position or transaction (as applicable) for the indicated date.
- All transactions settle on the first trading day after trade date.
- Manager 1 has investment discretion over the accounts listed in the tables below.
- The accounts listed in the tables below are the only accounts where Manager 1 has any position (either short or long) or transaction in ABCD during March 2025.
- Each scenario is distinct.

Scenario 1: Account 1 has long position; sale by Account 2

Account	End-of-day Position on February 28, 2025	Transaction on Monday March 10, 2025	Table 1, Column 7: End of Month Gross Short Position (Number of Shares) (for March 2025)	Table 2, Column 7 (for Settlement Date of March 11, 2025): Net Change in Short Position (Number of Shares)
Account 1	Long 50,000 ABCD			
Account 2		Sell 20,000 ABCD		
Reporting for March 2025			20,000	-20,000

Notes for Scenario 1:

- Manager 1 marks the March 10 sale as long based on Commission Rule 200(g).
- FIF members assume for all scenarios that a manager should only report for a settlement date if there is a change in the manager’s gross short position for that settlement date (as opposed to including a settlement date if there is no change in the manager’s gross short position and reporting a value of 0 for that settlement date). For additional detail, please see the discussion in Section C below.
- FIF members understand that this scenario corresponds to Section 9.g.9 of the Form SHO Special Instructions.⁵

⁵ 17 CFR §249.332.

Scenario 2: Transactions for account that do not impact gross short position

Account	End-of-day Position on February 28, 2025	Transaction on Monday March 10, 2025	Transaction on Wednesday March 12, 2025	Table 1, Column 7: End of Month Gross Short Position (Number of Shares) (for March 2025)	Table 2, Column 7 (for Settlement Dates of March 11 and 13, 2025): Net Change in Short Position (Number of Shares)
Account 1	Long 20,000 ABCD	Buy 40,000 ABCD	Sell 30,000 ABCD		
Account 2	Short 50,000 ABCD				
Reporting for March 2025				50,000	

Notes for Scenario 2:

- FIF members understand that, for Scenario 2, a manager would not have any information to report for Table 2 for March 2025. FIF members request confirmation on this point.

Scenario 3: Transactions for different accounts with same settlement date

Account	End-of-day Position on February 28, 2025	Transaction on Monday March 10, 2025	Table 1, Column 7: End of Month Gross Short Position (Number of Shares) (for March 2025)	Table 2, Column 7 (for Settlement Date of March 11, 2025): Net Change in Short Position (Number of Shares)
Account 1	Long 50,000 ABCD	Sell 70,000 ABCD		
Account 2		Sell 20,000 ABCD		
Reporting for March 2025			40,000	-40,000

Notes for Scenario 3:

- FIF members understand that this scenario corresponds to Sections 9.g.1 and 9.g.9 of the Form SHO Special Instructions.⁶

⁶ Ibid.

Scenario 4: Account 1 has long position; call option assignment for Account 2

Account	End-of-day Position on February 28, 2025	Call Option Assignment on Monday March 10, 2025	Table 1, Column 7: End of Month Gross Short Position (Number of Shares) (for March 2025)	Table 2, Column 7 (for Settlement Date of March 11, 2025): Net Change in Short Position (Number of Shares)
Account 1	Long 50,000 ABCD			
Account 2		20,000 ABCD		
Reporting for March 2025			20,000	-20,000

Notes for Scenario 4:

- Prior to March 10, 2025, Manager 1 writes a call option for 20,000 shares of ABCD for Account 2.
- On March 10, 2025, the option is assigned to Account 2.
- On March 11, 2025, Manager 1 borrows 20,000 shares of ABCD to make delivery on the option assignment.
- The loan remains outstanding through March 2025.
- FIF members understand that this scenario corresponds to Section 9.g.5 of the Form SHO Special Instructions.⁷

Scenario 5: Stock split

Account	End-of-day Position on February 28, 2025	2 for 1 Stock Split on Tuesday March 11, 2025	End-of-day Position on March 11, 2025	Table 1, Column 7: End of Month Gross Short Position (Number of Shares) (for March 2025)	Table 2, Column 7 (for Settlement Date of March 11, 2025): Net Change in Short Position (Number of Shares)
Account 1	Long 50,000 ABCD		Long 100,000 ABCD		
Account 2	Short 20,000 ABCD		Short 40,000 ABCD		
Reporting for March 2025				40,000	-20,000

Notes for Scenario 5:

⁷ Ibid.

- FIF members understand that this scenario corresponds to Section 9.g.10 of the Form SHO Special Instructions.⁸

Scenario 6: Account transfer

Account	End-of-day Position on February 28, 2025	Account transfer on Monday March 11, 2025	Table 1, Column 7: End of Month Gross Short Position (Number of Shares) (for March 2025)	Table 2, Column 7 (for Settlement Date of March 11, 2025): Net Change in Short Position (Number of Shares)
Account 1	Long 50,000 ABCD	Transfer of 10,000 ABCD to Account 2		
Account 2	Short 30,000 ABCD	Transfer of 10,000 ABCD from Account 1		
Reporting for March 2025			20,000	10,000

Notes for Scenario 6:

- On March 11, 2025, Manager 1 transfers 10,000 shares of ABCD from Account 1 to Account 2.
- FIF members understand that this scenario corresponds to Section 9.g.10 of the Form SHO Special Instructions.⁹

B. Request for confirmation re: Commission responses to questions and requests from prior FIF letter

This section sets forth the understanding of FIF members as to the guidance provided by Commission representatives during the July 15 call in response to the questions and requests set forth in the prior FIF letter. As discussed in Section D below, FIF members request that the Commission document the guidance below in writing (for example, through written FAQs). If the Commission is not planning to publish FAQs in the near future, FIF members request that the Commission promptly identify and communicate to FIF members any items set forth below where the Commission does not agree with the understanding of FIF members (or where the Commission believes that it is appropriate to provide additional context or detail). The 22 numbered items in this section correspond to the 22 sections from the prior FIF letter.

1. List of Threshold A securities

⁸ Ibid.

⁹ Ibid.

FIF members understand that the Commission will not provide a list of Threshold A securities. FIF members disagree with this decision by the Commission. As noted in the prior FIF letter, it is more efficient for the Commission to generate this list as opposed to requiring each manager to either generate its own list or license this data from a third-party vendor. If the Commission were to provide a list of Threshold A securities, this would also result in greater consistency in reporting across managers and higher quality data being reported to the Commission and disseminated to the public.

2. Definition of “gross short position”

Based on the discussion during the July 15 call, FIF members have prepared the scenarios in Section A above. FIF members believe that the scenarios and proposed reporting in Section A reflect the guidance from Commission representatives during the July 15 call. FIF members request confirmation from the Commission as to whether the understanding of FIF members is correct for these scenarios.

3. Parents and subsidiaries

FIF members understand as follows based on the July 15 call:

- The Form 13F FAQs (including Question 6) are not necessarily applicable to Form SHO reporting. Each manager will need to apply its own definition of “investment discretion” and “control” when reporting on Form SHO.

FIF members continue to discuss the definitions of “investment discretion” and “control” and could present additional questions in the future.

4. Parent and subsidiary reporting scenarios

See Item 3 above.

5. CUSIP reporting

FIF members understand as follows based on the July 15 call:

- The Commission considers a CINS to be a type of CUSIP.
- Form SHO will not require a CUSIP or CINS for a security that does not have a CUSIP or CINS.

6. Methodology to calculate gross short positions

This item is covered by the scenarios in Section A above.

7. Inter-listed securities

This item in the prior FIF letter did not include any questions or requests.

8. Closing price

FIF members understand as follows based on the July 15 call:

- When calculating the dollar value of a gross short position for an inter-listed security, a manager should use the U.S. closing price. For example, if a manager has a reportable gross short position in a security that is listed on the London Stock Exchange (“LSE”) and trades OTC in the U.S. (with an “F” share), the manager should use the U.S. closing price (for example, the closing price reported by OTC Markets) and not the closing price on the LSE.
- If an OTC security does not have a trade on the current trading day, and a vendor (for example, OTC Markets) publishes a closing price for the security for the current trading day based on the last trade that occurred in the security (which was on a prior trading day), a manager could use that closing price. In other words, this scenario would be considered as a closing price being available for the security for the current trading day.

9. Convertible equity securities and ADRs

FIF members understand as follows based on the July 15 call:

- Reporting is based on the security identifier (for example, CUSIP), so an ADR or other convertible equity security that has a CUSIP that is distinct from the CUSIP of the underlying equity security is treated as a separate class from the underlying equity security. When a firm calculates its percentage ownership each day for a Threshold A security that is an ADR or other convertible equity security (as described in the preceding sentence), the denominator is the shares outstanding of the ADR or other convertible equity security.

FIF members note that in many cases vendors provide the shares outstanding for the underlying equity security and not for the ADR or other derivative. This is a challenge that firms currently are not able to address. More generally, firms are not aware of any vendor solution that provides the outstanding shares based on the methodology set forth in the Form SHO instructions. We discuss this challenge in more detail in Section E below along with other challenges for firms in determining the shares outstanding for securities that are subject to Form SHO reporting.

10. Securities registered with the Commission that do not have any U.S. trading activity

Please see the scenarios presented in Section C below.

11. Shares outstanding

FIF members understand as follows based on the July 15 call:

- To determine the number of shares outstanding for a security, a manager should follow the following guidance from the Form SHO instructions: “The number of shares outstanding of the security for which information is being reported shall be determined by reference to an issuer’s

most recent annual or quarterly report, and any subsequent update thereto, filed with the Commission.”¹⁰

FIF members also understand that the Commission will not provide a file with the shares outstanding for each Threshold A security.

As discussed in the next sub-section, FIF members consider the guidance from Form SHO (relating to the determination of shares outstanding) to be problematic because it can result in the inaccurate calculation of a manager’s actual ownership percentage. More specifically, the next sub-section presents a recent real-world example where a manager with an actual average gross short position of .25% in a Threshold A security would be considered to have an average gross short position equal to 2.5%. The guidance from Form SHO is also problematic with respect to ETFs, which often have fluctuating outstanding share amounts. An additional concern is that FIF members are not aware of any existing vendor solution that provides the shares outstanding based on the methodology set forth in the Form SHO instructions.

In Section E below, FIF members recommend various approaches for the Commission to take to address the issues discussed in this sub-section. These recommendations include the following: providing guidance (or exemptive relief, if necessary) that the 2.5% threshold would not apply as of the initial compliance date for reporting; providing that the 2.5% threshold should not apply for ETFs; providing flexibility for firms in calculating the 2.5% threshold, consistent with the approach set forth in Commission Rule 13d-1(j)¹¹ (discussed below); and providing firms with the option to over-report.

12. Stock splits and reverse stock splits

As discussed in the preceding section, FIF members understand that a manager is required to determine the number of shares outstanding for a security “... by reference to an issuer’s most recent annual or quarterly report, and any subsequent update thereto, filed with the Commission.”¹²

This guidance presents a significant issue for certain stock splits and similar corporate actions. A recent Form 8-K filing by Nvidia Corporation illustrates this problem.¹³ On June 7, 2024, Nvidia filed a Form 8-K with the Commission to report a planned ten-for-one stock split of its common stock. The Form 8-K states that “Trading is expected to commence on a stock-adjusted basis at market open on June 10, 2024.”¹⁴ The Form 8-K filing does not report an updated number of outstanding shares. This means that a manager’s gross short position as a percentage of shares outstanding would be overstated by a factor of ten when the manager has to determine whether it meets the gross short position threshold. For example, a manager could have an average gross short position in Nvidia equal to .25% of the percentage of shares outstanding. After the stock split, the manager’s actual average gross short

¹⁰ Ibid.

¹¹ 17 CFR §240.13d-1(j).

¹² Ibid.

¹³ Nvidia Corporation, Form 8-K (June 7, 2024), available at <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001045810/000104581024000144/nvda-20240607.htm>.

¹⁴ Ibid.

position in Nvidia as a percentage of shares outstanding remains at .25%, but for purposes of the manager determining whether it meets the reporting threshold for this Threshold A security, the manager's percentage ownership would be 2.5%. This is because the numerator increases by a factor of ten (as a result of the stock split) but the denominator does not change (because the Commission's guidance requires the manager to use the outdated pre-split number of shares outstanding from Nvidia's May 29, 2024 10-Q filing¹⁵). FIF members note that similar problems arise with many ETFs, where the actual shares outstanding can fluctuate on an ongoing basis.

In Section E below, FIF members provide various recommendations to address the issues described in this sub-section. One recommendation is that the Commission, through an FAQ or other written guidance, provide managers with greater flexibility in calculating the number of shares outstanding for a security; this flexibility is necessary to enable managers to more accurately calculate their gross short positions as a percentage of shares outstanding. If the Commission believes that it cannot provide this flexibility based on the current wording of the Form SHO instructions, FIF members request that the Commission grant exemptive relief to enable managers to more accurately calculate their gross short positions as a percentage of shares outstanding. We discuss this recommendation and other recommendations in more detail in Section E below.

13. Reporting for derivative positions

FIF members understand as follows based on the July 15 call:

- A manager is only required to report activity in a derivative security if such activity increases or decreases the manager's gross short position in the reportable equity security that is underlying the derivative (an example of such activity would be the assignment of a call option to a manager where the manager borrows and delivers shares).

14. Calculating the U.S.-dollar value of a position held in another currency

FIF members understand as follows based on the July 15 call:

- A manager is required to implement reasonable policies and procedures for calculating and reporting gross short positions held in non-U.S. currencies by converting the value of those positions to U.S. dollars. The Commission is not specifying any particular means for how a manager should perform these currency conversion calculations.

Absent the Commission specifying how a manager should perform currency conversions, managers will calculate currency conversions consistent with their internal policies and procedures.

15. Reporting a short position of 0 in Table 1

FIF members understand as follows based on the July 15 call:

¹⁵ Nvidia Corporation, Form 10-Q (May 29, 2024), available at <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001045810/000104581024000124/nvda-20240428.htm>.

- A manager could end up reporting a gross short position of zero in Table 1 if the manager exceeds the reporting threshold for the security for the month but has a gross short position of zero (which could include having a gross long position) at the end of the month. In this scenario, for the applicable month, the manager would report activity for the security in Table 2 but would report a gross short position of zero in Table 1.

16. Signage

FIF members understand as follows based on the July 15 call:

- A manager should report its gross short position in Table 1 of Form SHO as a positive number (or zero, as applicable).
- For Table 2, a manager should report an increase in its gross short position as a negative number and report a decrease in its gross short position as a positive number.

17. Scenarios where an issuer's status changes during a calendar month

FIF members understand as follows based on the July 15 call:

- If a security is a Threshold A security for part of a month and a Threshold B security for part of a month, a manager is required to make several determinations. First, the manager must determine whether the manager's gross short position in the security was greater than \$500,000 for any of the days¹⁶ on which the security was a Threshold B security. Second, for each day on which the security was a Threshold A security, the manager is required to determine the dollar value of its gross short position. The manager must then average this amount over the days on which the security was a Threshold A security and determine whether the average exceeds \$10 million. Third, for each day on which the security was a Threshold A security, the manager is required to calculate its gross short position (in shares) as a percentage of outstanding shares. The manager must then average this amount for the days on which the security was a Threshold A security and determine whether the average exceeds 2.5%. If the manager exceeds any of these three thresholds, the manager is required to include the gross short position in Table 1 for the month and report all activity for the month in Table 2.

18. New managers

FIF members understand as follows based on the July 15 call:

- A new manager is subject to the same reporting deadlines as any other manager.

¹⁶ As used in this sub-section, "day" refers to a Settlement Date.

19. Multiple books or portfolios held as one back office account

FIF members continue to believe that the concept of an “account” could be defined in different ways for purposes of Form SHO reporting. FIF members continue to discuss this issue and could have further comments or questions in the future.

20. Reporting based on trade date

FIF members understand as follows based on the July 15 call:

- Reporting on Form SHO is based on settlement date, not trade date.

21. Publication of technical documentation; availability of the EDGAR system for test reporting

FIF members understand as follows based on the July 15 call:

- The Commission plans to publish technical documentation available during November.

During the call, FIF members expressed concerns about this timeline. Commission representatives stated that they would communicate these concerns to the Commission’s technology group.

22. Implementation date

This is discussed in Section E below.

C. Additional questions relating to the implementation of Rule 13f-2 and Form SHO reporting

In this section, FIF members set forth additional questions relating to the implementation of Rule 13f-2 and Form SHO reporting.

1. Reporting Table 2, Column 1 of Form SHO: Settlement Date

The instructions for Table 2, Column 1 of Form SHO provide as follows:

Column 1. Settlement Date. Enter in Column 1 each date during the reporting period on which a trade settles (settlement date). The Manager shall report information for each settlement date during the calendar month reporting period as described in these instructions.¹⁷

FIF members request confirmation that when the second sentence quoted above refers to “each settlement date during the calendar month” it is referring to each settlement date on which there is a resulting change in a manager’s gross short position. FIF members further request confirmation that

¹⁷ 17 CFR §249.332.

when the first sentence refers to “each date during the reporting period on which a trade settles (settlement date)” it is referring to any date when settlement activity occurs and there is a resulting change in a manager’s gross short position.

FIF members also request confirmation that a manager should not report for a settlement date in Table 2 if there is no change in the manager’s gross short position for that settlement date (in other words, a manager should omit that settlement date from Table 2 as opposed to reporting a change in gross short position of “0” for that settlement date).

2. Common shares registered in connection with the registration of American Depositary Shares

Toyota Motor Corporation

FIF members believe that the common stock of Toyota Motor Corporation should not be a reportable security because there is no U.S. trading symbol (either listed or OTC) for this security. FIF members request confirmation on this point. The following is an excerpt from the Form 20-F filed by Toyota Motor Corporation on June 25, 2024¹⁸:

Commission file number: 001-14948

TOYOTA JIDOSHA KABUSHIKI KAISHA

(Exact name of registrant as specified in its charter)

TOYOTA MOTOR CORPORATION

(Translation of registrant’s name into English)

Japan

(Jurisdiction of incorporation or organization)

1 Toyota-cho, Toyota City

Aichi Prefecture 471-8571

Japan

+81 565 28-2121

(Address of principal executive offices)

Yoshihide Moriyama

Telephone number: +81 565 28-2121

Facsimile number: +81 565 23-5800

Address: 1 Toyota-cho, Toyota City, Aichi Prefecture 471-8571, Japan

(Name, telephone, e-mail and/or facsimile number and address of registrant’s contact person)

¹⁸ Available at

<https://www.sec.gov/ix?doc=/Archives/edgar/data/1094517/000119312524167462/d807954d20f.htm>.

Securities registered or to be registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
American Depositary Shares*	TM	The New York Stock Exchange
Common Stock**		

* Each American Depositary Share representing ten shares of the registrant's Common Stock.

** No par value. Not for trading, but only in connection with the registration of American Depositary Shares, pursuant to the requirements of the U.S. Securities and Exchange Commission.

Securities registered or to be registered pursuant to Section 12(g) of the Act:

None

Securities for which there is a reporting obligation pursuant to Section 15(d) of the Act:

None

LATAM Airlines Group S.A.

FIF members believe that the common stock of LATAM Airlines Group S.A. should not be a reportable security because there is no U.S. trading symbol (either listed or OTC) for this security. FIF members request confirmation on this point. The following is an excerpt from the Form 20-F filed by LATAM on February 22, 2024¹⁹:

Commission File Number: 1-14728

LATAM Airlines Group S.A.

(Exact name of registrant as specified in its charter)

LATAM Airlines Group S.A.

(Translation of registrant's name into English)

Republic of Chile

(Jurisdiction of incorporation or organization)

Presidente Riesco 5711, 20th Floor

Las Condes

Santiago, Chile

(Address of principal executive offices)

Andrés del Valle

Tel.: 56-2-2565-3844 E-mail: InvestorRelations@latam.com

Presidente Riesco 5711, 20th Floor

¹⁹ Available at <https://www.sec.gov/Archives/edgar/data/1047716/000162828024006398/ltm-20231231.htm>.

Las Condes

Santiago, Chile

(Name, telephone, e-mail and/or facsimile number and address of company contact person)

Securities registered or to be registered pursuant to Section 12(b) of the Act:

None

Securities registered or to be registered pursuant to Section 12(g) of the Act:

Title of each class:

Name of each exchange on which registered:

American Depositary Shares (as evidenced by American Depositary Receipts), each representing one share of Common Stock, without par value

Over The Counter (OTC) Markets

Common Stock, without par value

Santiago Stock Exchange

Securities for which there is a reporting obligation pursuant to Section 15(d) of the Act:

None

3. Correcting errors

The Form SHO instructions provide that “A Manager that determines that it has filed a Form SHO with errors that affect the accuracy of the short sale data reported must file an amended and restated Form SHO within ten (10) calendar days of discovering the error.”²⁰ FIF members request that the Commission provide guidance that a manager would not be required to amend a previously submitted Form SHO for a change that is not material, as determined based on a manager’s policies and procedures. As an example, the Form 13F instructions provide an exception for reporting a position that is below a specified share amount and dollar value.²¹

D. FIF members request that the Commission publish FAQs

It is very important for the Commission to publish FAQs (or equivalent documentation) to clarify the issues and questions raised in this letter and the prior FIF letter and issues and questions raised by other market participants. It is standard practice for the Commission and self-regulatory organizations (“SROs”) to which the Commission has delegated rulemaking authority to publish FAQs to clarify reporting requirements. The following are examples of reporting requirements for which the Commission or the applicable SRO (or SROs) have published written FAQs:

- Commission Rule 605²²

²⁰ 17 CFR §249.332.

²¹ Form 13F, Information Required of Institutional Investment Managers Pursuant to Section 13(f) of the Securities Exchange Act of 1934 and Rules Thereunder, available at <https://www.sec.gov/about/forms/form13f.pdf>.

²² Securities and Exchange Commission, Division of Market Regulation, “Staff Legal Bulletin No. 12R (Revised), Frequently Asked Questions About Rule 11Ac1-5” (June 22, 2001), available at <https://www.sec.gov/interps/legal/slbim12a.htm>. Securities and Exchange Commission, Division of Trading and Markets, “Responses to Frequently Asked Questions Concerning Rule 605 of Regulation NMS” (Feb. 22, 2013), available at <https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-questions-0>.

- Commission Rule 606²³
- Consolidated audit trail²⁴
- Electronic Blue Sheets²⁵
- FINRA Rule 6151²⁶
- Large Options Position Reporting²⁷
- Large Trader Reporting²⁸
- MSRB Real-time Reporting System²⁹
- Reporting by Institutional Investment Managers (Form 13f-1)³⁰
- Schedules 13D and 13G³¹
- Security-based swap transactions³²
- Short interest reporting³³
- TRACE³⁴
- FINRA/NYSE Trade Reporting Facility; FINRA/Nasdaq Trade Reporting Facility; FINRA OTC Reporting Facility.³⁵

FAQs serve an important function to clearly communicate details relating to the applicable reporting requirement. Publishing FAQs also supports consistency in reporting across reporting firms and

²³ Securities and Exchange Commission, Division of Trading and Markets, “Responses to Frequently Asked Questions Concerning Rule 606 of Regulation NMS,” available at <https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-questions/faq-rule-606-regulation>.

²⁴ FAQs, available at <https://catnmsplan.com/faq>.

²⁵ Financial Industry Regulatory Authority, “Frequently Asked Questions about Electronic Blue Sheets (EBS),” available at <https://www.finra.org/filing-reporting/electronic-blue-sheets-ebs/faq>.

²⁶ Financial Industry Regulatory Authority, “FINRA Rule 6151 Frequently Asked Questions,” available at <https://www.finra.org/filing-reporting/rule-6151-reporting-compliance#faqs>.

²⁷ Options Clearing Corporation, “Large Options Positions Reporting (LOPR), Frequently Asked Questions (FAQs),” Version 1.6 (June 2020), available at https://www.theocc.com/getmedia/d25ec99c-6524-428a-acf1-5caab53326fe/lopr_faqs.pdf.

²⁸ Securities and Exchange Commission, Division of Trading and Markets, “Responses to Frequently Asked Questions Concerning Large Trader Reporting,” available at <https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-questions/responses-frequently-0>.

²⁹ Municipal Securities Rulemaking Board, “Questions and Answers Notice Concerning Real-Time Reporting of Municipal Securities Transactions” (Aug. 9, 2016), available at <https://www.msrb.org/Questions-and-Answers-Notice-Concerning-Real-Time-Reporting-Municipal-Securities-Transactions>.

³⁰ Securities and Exchange Commission, Division of Investment Management, “Frequently Asked Questions About Form 13F” (May 25, 2023), available at <https://www.sec.gov/divisions/investment/13ffaq>.

³¹ Securities and Exchange Commission, Division of Corporation Finance, “Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, Compliance and Disclosure Obligations” (Oct. 7, 2022), available at <https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm>.

³² Securities and Exchange Commission, Division of Trading and Markets, “Frequently Asked Questions on Regulation SBSR,” available at <https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-questions/frequently-asked-0>.

³³ Financial Industry Regulatory Authority, “Frequently Asked Questions (FAQ) about Short Interest Reporting,” available at <https://www.finra.org/filing-reporting/regulatory-filing-systems/short-interest/faq>.

³⁴ Financial Industry Regulatory Authority, “Frequently Asked Questions (FAQ) about the Trade Reporting and Compliance Engine (TRACE),” available at <https://www.finra.org/filing-reporting/trace/faq>.

³⁵ Financial Industry Regulatory Authority, “Trade Reporting Frequently Asked Questions,” available at <https://www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq>.

enhances the overall quality of reporting. Given the value of published FAQs for the Commission and market participants, as well as the common practice of the Commission and SROs to publish FAQs for reporting requirements, FIF members request that the Commission publish FAQs for short position reporting to clarify the issues and questions raised in this letter and the prior FIF letter and issues and questions raised by other market participants.

E. FIF members request that the Commission provide an extension of the current time period for managers to implement the new short position reporting requirement; FIF members request that the Commission provide interpretive guidance (or, if necessary, exemptive relief) with respect to the 2.5% reporting threshold for Threshold A securities

1. Challenges with meeting the current compliance date for Form SHO reporting

The compliance date for Form SHO reporting is January 2, 2025. For the reasons discussed in this section, FIF members are concerned about their ability to report by this compliance date. FIF members note that on the same date that the Commission adopted Rule 13f-2 and Form SHO, the Commission also adopted a rule to require the reporting of securities loans, and the compliance date for covered persons to report securities loans is not until January 2, 2026.³⁶

Reporting based on the daily shares outstanding for Threshold A securities

In the past, managers have never been required to identify, and submit regulatory reports based on, the daily outstanding shares for every Threshold A security as reported in each issuer's most recent public filing with the Commission that reports the shares outstanding. At this time, FIF members are not aware of any vendor that provides this type of product, and it would not be feasible or reasonable to require all managers (and potential managers)³⁷ to independently parse through each issuer's multiple EDGAR filings to collect this data for all equity securities.

There is an important reason that no vendor provides this type of data product. Because the Commission's guidelines require managers to calculate shares outstanding based on an approach that, in many scenarios, does not reflect the actual outstanding shares for a security, no customer would license this product for any purpose other than for Form SHO reporting purposes.

³⁶ Securities Exchange Act Release No. 98737 (Oct. 13, 2023), 88 FR 75644 (Nov. 3, 2023) (Reporting of Securities Loans).

³⁷ There is a significant question as to whether regulators will expect managers to build monitoring systems to demonstrate that such managers do not exceed the 2.5% gross short position reporting threshold for Threshold A securities even if such managers know that they will never exceed this reporting threshold. In other words, can a manager be subject to sanction for not being able to demonstrate that it has not exceeded the 2.5% reporting threshold, or will a manager only be subject to sanction if the regulators determine that a manager has exceeded the 2.5% reporting threshold and not properly reported? If the answer is the former, this is a significant cost that will be imposed on all managers, and the Commission should consider potential approaches to mitigate these costs.

FIF members note that Commission Rule 13d-1(j) permits, but does not require, a person to determine the outstanding shares for a security based on the issuer's most recent public filings. Rule 13d-1(j) provides:

For the purpose of sections 13(d) and 13(g) of the Act, any person, in determining the amount of outstanding securities of a class of equity securities, may rely upon information set forth in the issuer's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to the Act, unless such person knows or has reason to believe that the information contained therein is inaccurate.³⁸

It is noteworthy that Rule 13d-1(j) provides flexibility for a person to rely on data outside of an issuer's public filings. In fact, Rule 13d-1(j) goes further and prohibits a person from relying on an issuer's public filings if the person knows or has reason to believe that the information in the public filings is not accurate. This is in contrast to Form SHO, which requires managers, in many cases, to report based on public filing information that is no longer accurate.

Distinguishing Threshold A and Threshold B securities

In the past, managers have never been required to identify and distinguish all securities as Threshold A or Threshold B securities. Many, if not all, managers will seek to engage one or more third-party vendors to assist with this new processing requirement, and many managers have been engaged in discussions with vendors. A reasonable time period will be required for vendors to fully develop data products to identify and distinguish Threshold A and Threshold B securities, and for industry members to license these products and incorporate these data products into their reporting processes.

Reporting based on settlement date

The requirement to report based on settlement date has presented challenges for managers because managers often track short and long positions based on trade date, rather than settlement date.

Questions that require further clarification; FAQs; applying the definitions of "investment discretion", "control" and "account" to a firm's business activities

While Commission representatives have responded to many of the questions raised by FIF members in the prior FIF letter, there are various fundamental scenarios that require further clarification, as set forth in this letter. FIF members also consider it important for the Commission to document its guidance through written FAQs, as discussed above. In addition, managers require time to interpret various reporting requirements as applied to their own business activities. For example, firms will need to apply the definitions of "investment discretion", "control" and "account" to their own business activities notwithstanding the current ambiguities as to how these terms should be applied to specific real-world scenarios.

³⁸ 17 CFR §240.13d-1(j).

Reporting the activity of certain subsidiaries

Each manager will need to apply the definitions of “investment discretion” and “control” to its own business activities. This could result in a manager determining that it needs to report positions held by one more subsidiaries, including subsidiaries that are located outside the U.S. and subsidiaries that are not registered broker-dealers. In many cases, these subsidiaries are not subject to any requirement to report short positions or associated short activity. Mandating and managing the collection and communication of short positions by subsidiaries is presenting an additional challenge for FIF members.

2. Challenges with the 2.5% reporting threshold for Threshold A securities

In this letter, FIF members have identified the following challenges with the 2.5% reporting threshold for Threshold A securities:

- FIF members are not aware of any vendor that currently provides a data product that would enable a manager to calculate the shares outstanding based on the methodology required by Form SHO
- In many cases, the methodology for calculating the 2.5% threshold for Threshold A securities required by Form SHO would result in an inaccurate calculation of a manager’s actual ownership percentage for ETFs
- In many cases, the methodology for calculating the 2.5% threshold for Threshold A securities required by Form SHO would result in an inaccurate calculation of a manager’s actual ownership percentage after a stock split.

The Commission’s required methodology also could result in an inaccurate calculation in other scenarios (for example, where an issuer has effected stock buy-backs).

3. FIF member recommendations

Based on the current challenges for firms in meeting the current compliance date for Form SHO reporting and based on the current challenges with the 2.5% reporting threshold for Threshold A securities, FIF members request that the Commission consider the following recommendations.

Extend the compliance date for Form SHO reporting

The Commission should extend the compliance date for Form SHO reporting until a date that is a reasonable period (for example, six months) from the date that the Commission publishes written FAQs in response to requests for interpretive guidance from FIF members and other market participants.

Provide guidance that the 2.5% threshold would not apply as of the initial compliance date

Given that FIF members are not aware of any vendor product that would enable a manager to calculate the shares outstanding for a security as required under Form SHO, the Commission should provide

interpretive guidance (or, if necessary, exemptive relief) that the 2.5% threshold would not apply as of the initial compliance date for Form SHO reporting. In other words, a manager would only be required to report a Threshold A security for a month if the manager exceeds the \$10 million threshold for the security for the month.

Provide flexibility to managers in calculating the shares outstanding for a security

If the Commission does not agree to provide an exemption to managers from the requirement to apply the 2.5% threshold (as proposed in the preceding sub-section), the Commission should publish interpretive guidance (or, if necessary, grant exemptive relief) to provide greater flexibility to managers in how to calculate the shares outstanding for a security (consistent with Commission Rule 13d-1(j)). Providing this flexibility would address two independent challenges discussed in this letter: first, the current methodology required by the Commission can result in an inaccurate calculation of a manager's actual ownership percentage; second, FIF members are not aware of any data product that that would enable managers to calculate the shares outstanding for a security as required under Form SHO.

FIF members note that even with this additional flexibility, managers will face significant challenges in determining the shares outstanding for all securities. In Item 11 of the letter that FIF submitted to the Commission on June 24, 2024, FIF members provide a specific example of a security where vendors provide outstanding share amounts that are inconsistent. Today, when firms report on Schedule 13D and 13G, they often need to conduct a manual and time-consuming analysis to determine the correct shares outstanding for a security. This would be a significantly greater challenge for Form SHO reporting for various reasons, including the following:

- Form SHO has a lower percentage threshold for reporting as compared to Schedules 13D and 13G.
- Form SHO requires a firm to determine the shares outstanding for every settlement date, in contrast to Schedule 13G reporting for “qualified institutional investors”, which as of September 2024 will be based on a quarterly determination for positions that exceed 5% and a monthly determination for positions that exceed 10%.³⁹
- The Commission has granted no-action relief with respect to Schedule 13D and 13G reporting positions in ETFs,⁴⁰ but this relief does not apply to Form SHO reporting.
- Firms can add footnotes to their Schedule 13D and 13G filings to clarify the assumptions underlying their outstanding share calculations, but this is not available for Form SHO reporting.
- For Schedule 13D and 13G, firms calculate shares outstanding for ADRs based on the underlying class, but Form SHO requires calculating the shares outstanding for ADRs based on the ADRs as a separate security. The current challenges for firms in calculating the shares outstanding for ADRs as required by Form SHO are discussed in the prior FIF letter.

Based on these challenges, FIF members recommend that the Commission provide guidance that the 2.5% threshold will not apply as of the initial compliance date. If the Commission does not agree to this

³⁹ 17 CFR §240.13d-1(b).

⁴⁰ PDR Services Corporation (Dec. 14, 1998).

recommendation, FIF members request that the Commission provide flexibility to firms in calculating the 2.5% threshold, as discussed in this sub-section.

Given the current challenges for managers in determining the shares outstanding for a security, the Commission also should provide guidance that a manager is entitled to rely on data sources that are widely available to industry members.

Remove the 2.5% threshold for ETFs

The Commission should publish interpretive guidance (or, if necessary, grant exemptive relief), to remove the 2.5% threshold for ETFs. This relief is necessary because of the ongoing fluctuation in shares outstanding for many ETFs. This relief also would be consistent with relief previously granted by the Commission relating to Schedule 13D and 13G reporting for ETFs.⁴¹

Permit managers to over-report

Given the challenges with applying the 2.5% threshold, FIF members also would like to discuss with Commission representatives potential interpretive guidance or exemptive relief that would allow a manager, at the manager's option, to over-report (for example, the Commission could allow a manager to report all reportable securities based on Threshold B). This approach would address the challenges with calculating the 2.5% threshold for Threshold A securities, provide additional data to the Commission and the public, reduce operational and compliance costs for managers, and reduce the time that managers would need to implement Form SHO reporting.

* * * * *

FIF appreciates the Commission's attention to the items set forth above. Please contact me at howard.meyerson@fif.com if you would like clarification on any of the items set forth in this letter.

Very truly yours,

/s/ Howard Meyerson

Howard Meyerson
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⁴¹ Ibid.

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