

December 18, 2008

Via E-Mail: rule-comments@sec.gov

Ms. Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **Disclosure of Short Sales and Short Positions by Institutional
Investment Managers (Interim Final Temporary Rule 10a-3T and
Temporary Form SH) (Release No. 34-58785; File No. S7-31-08)**

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on Interim Final Temporary Rule 10a-3T (the “Rule”) and Temporary Form SH under the Securities Exchange Act of 1934 (“Exchange Act”), which require certain institutional investment managers to file information concerning their short sales and short positions in section 13(f) securities.² The new Rule extends the reporting requirements established by the Emergency Orders dated September 18, 2008, September 21, 2008, and October 2, 2008, with some modifications.³

The Release includes an extensive request for comments on a variety of topics involving disclosure of short sales and short positions. SIFMA is responding to these specific items, but is also recommending alternative approaches that would provide

¹ The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

² SEC Release No. 34-58785 (Oct. 15, 2008), 73 Fed. Reg. 61678 (Oct. 17, 2008) (the “Release”).

³ See Release Nos. 34-58724 (Oct. 2, 2008); 34-58591A (Sept. 21, 2008); and 34-58591 (Sept. 18, 2008)

the Commission with the information it needs, without imposing an undue burden on SIFMA member firms required to file Form SH. In the Release, the Commission noted that concerns about “the potential for sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets” and “possible unnecessary or artificial price movements that may be based on unfounded rumors and may be exacerbated by short selling,”⁴ were behind its adoption of Rule 10a-3T. While SIFMA shares the Commission’s concerns, we strongly urge the Commission to consider the policy goals further and do a thorough cost-benefit analysis prior to extending the rule or issuing additional rulemaking governing the disclosure of short sales and short positions.

SIFMA would be pleased to discuss any or all of these issues further at the Staff’s convenience. The discussion in this letter responds to the Commission’s requests for comments in the order in which they were presented in the Release, and does not necessarily represent SIFMA’s priorities in the order of greatest importance.

I. Description of Rule 10a-3T

A. Institutional Investment Managers Required to Report Short Sales

1. Scope of Investment Managers Covered

In response to the Commission’s request for comments regarding the scope of investment managers currently covered by Rule 10a-3T, SIFMA believes that the category of persons required to report under Form SH should be modified to cover institutional investment managers that engage in short selling or have short positions exceeding the de minimis thresholds, rather than the Form SH requirements being based on those persons required to file Forms 13F, in that they exercise “long” investment discretion over \$100 million or more in 13(f) securities.

2. Alternative Approaches to Reporting Positions and Activities

a. Weekly Short Sale Activity Reporting

SIFMA suggests that the weekly Form SH reporting focus exclusively on short sale activity that is marked short pursuant to Reg SHO, instead of the current regime of reporting both short sale and short position information under Rule 10a-3T. Provision of weekly start of day and end of day position information is burdensome and time-consuming, and unnecessary if the position information is provided on a quarterly basis (see discussion in b. below). Note, as discussed in Section I(B)(1)(c) below, SIFMA also recommends eliminating the requirement to report “short

⁴ Proposing Release at 61679.

transactions” resulting from a delivery of shares upon exercise or assignment of options. SIFMA believes that such weekly filings should remain non-public.

b. Quarterly Position Reporting

In response to the Commission’s request for information regarding alternative methods of collecting short position information, SIFMA believes that the Commission’s policy goals could be met by requiring reporting of short positions in section 13(f) securities on a quarterly basis, rather than the current Form SH weekly reporting regime. This would be in addition to the weekly short sale activity reporting described in Section I(A)(2)(a) above. The recommended quarterly position reporting would be triggered when an institutional investment manager has short positions at the end of a quarter which exceed a de minimis threshold of 5% or \$25 million. SIFMA believes that such quarterly filings should be non-public.

3. Additional Books and Records

The SEC has requested comment regarding additional requirements for the maintenance of books and records by broker-dealers. Many firms already keep detailed books and records that cover many of the areas the Commission has listed in its request for comments. As a result, SIFMA does not believe that additional rulemaking is required. Furthermore, any firm records of short sale activity would be available to the Commission staff through the regular document request channels.

4. Notice Filings for Short Sale Activity and Positions Exceeding Certain Thresholds

If the SEC maintains weekly short activity reporting and quarterly short position reporting, as described in Section I(A)(2) above, or retains the current reporting requirements under Rule 10a-3T, SIFMA does not believe that the Commission should adopt a notice filing for short activity and positions exceeding certain thresholds. If the Commission decides there should be such a notice filing requirement, SIFMA does not believe that these reports should become public, in the same manner as beneficial ownership reports filed under section 13(d) and (g) reports. The policy objectives behind reports filed under section 13 are different in that they are not related to control of an issuer which makes it necessary that they become public. SIFMA believes that making short sale information public at any time may reveal proprietary trading strategies which could impact the success of such strategies.

B. Short Sales and Short Positions Required to be Reported

1. Determining the Appropriate Measure for Information to be Reported

a. Scope of Securities Required to be Disclosed

In response to the Commission's request for comment regarding the scope of securities required to be disclosed, SIFMA would oppose extending short reporting requirements beyond the current universe of 13(f) securities included on the Commission's quarterly "13(f) List," as this would impose significant costs upon member firms that would outweigh any benefits that might be achieved. Moreover, SIFMA believes that the current approach of requiring reporting on Form SH of short sales and short positions in all 13(f) List securities is already overly-broad. SIFMA requests that in addition to the exclusion of options, the Commission exclude short sales in convertibles, warrants, and other debt securities, and exchange-traded funds ("ETFs") from the reporting requirements in Rule 10a-3T. Furthermore, the 13(f) List of securities could be narrowed to a subset of securities that represents the most actively-shortened securities in a given quarter, based on reported short interest figures supplied by the SROs. The SEC could publish this updated list on the SEC website in the same manner as the 13(f) List. Requiring firms to report short sales and short positions in a smaller universe of securities would be less burdensome on member firms, and also would provide the Commission with more targeted and useful data. Restricting the universe of short reporting to a narrowly-tailored subset of the 13(f) List would also serve to minimize difficulties regarding market-based valuation determinations (such as calculating applicable de minimis amounts).

In addition, disclosure should not include derivatives or other "short equivalent" positions in that such disclosure may actually be misleading because the seller of short derivative exposure frequently engages in short selling itself to hedge its risk of such derivative exposure. Such a derivative seller would already be obliged to report its hedging short sales under the current Form SH regime. If the buyer of the short derivative exposure also were required to report its derivative position, a second report would result. Reporting of such dual information could be misunderstood.

b. Position Reporting

As we have discussed with the Commission staff, SIFMA does not believe that the current definition of short position, for the purposes of Form SH is workable or appropriate for most broker-dealers. For books and records purposes, firm accounts have a long, short, or flat position in a particular security at the end of any day, which is determined by taking into consideration the opening position in an account and all activity booked to that account during the day.

In contrast, Rule 10a-3T defines short position as "the aggregate gross short sales of an issuer's section 13(f) securities (excluding options), less purchases to close out a short sale in the same issuer." For many full service broker-dealers to calculate an account's *position* based on whether a trade is marked long or short per the firm position, and to "net" only purchases to cover that short is fundamentally inconsistent with the manner in which these broker-dealers historically maintain and determine their account positions.⁵ It is important to note that within a firm there are often many accounts, which can be managed day-to-day by separate traders, who have a long position in the accounts they manage. Their orders, however, may be marked short based on the net firm position, *i.e.*, must consider the positions of other traders trading in other accounts that make up the firm position.

SIFMA also does not believe that the definition of short position currently in Rule 10a-3T effectively captures the type of position information in which the Commission is most interested. The Staff specifically indicated that it was primarily interested in short sale activity and in an investment manager's short exposure to any one particular issuer. Defining short positions as positions generated solely from transactions marked as short sales under Regulation SHO does not reflect a true short position and does not achieve the Commission's goal to capture short exposure. SIFMA believes that a more accurate measure of short exposure is based on the short position within an account (or even netted across accounts), which reflects the trader's (or firm's) intention to establish a short position. As such, we suggest that the Commission issue a clarification and revision to the Rule as soon as possible to more clearly articulate the Commission's policy objectives, and reflect the way most broker-dealers determine the positions in firm accounts.

Under Regulation SHO, a firm is required to aggregate and net accounts (either across the firm or within an aggregation unit) with short positions against accounts with long positions for the purposes of determining whether the firm is long or short for order marking purposes. Thus, a transaction marked "short" or "long" for Regulation SHO purposes, may not in fact be "short" or "long" at the account level in determining the actual position in a particular security in an account.

If the Commission were to insist that firms report only short positions that result from transactions marked as short sales under Regulation SHO, as reduced by purchases to cover those shorts, many large firms would have to fundamentally redesign their books and records systems, which would take a very significant amount of time and cost millions of dollars. Moreover, redesigning its books and records to

⁵ Throughout this letter references to a firm's position can also be read to mean a firm's aggregation unit position, to the extent a firm uses aggregation units for purposes of marking orders long or short.

adopt this methodology would also affect the scope of positions considered short and long and have downstream effects in most areas of regulatory reporting.

Please see Exhibit I for some examples of differences between position reporting from a books and records perspective and from a firm perspective.

c. Options Exercises and Assignments Transaction Reporting

Another aspect of the reporting requirements that SIFMA has discussed with the Commission relates to the treatment of shares delivered short upon the exercise or assignment of an option as a short transaction reportable on Form SH. Based, among other things, on the fact such deliveries upon assignment or exercise are required to be excluded from trade reporting under FINRA rules, firms have not previously developed systems to mark these deliveries as long or short. If the delivery upon the exercise or assignment of an option causes the account in which the option position resides to establish or increase its short position, this change in position will be reflected in the account and today, this information is captured in the short *positions* that firms report to the SEC as described herein.

SIFMA does not believe that requiring firms to include as short sale *transactions* the exercise or assignment of an option that result in a short position is necessary to carry out the Commission's goals behind Rule 10a-3T. The delivery of the shares that creates the short position is not otherwise reported to the market and any change in the firm's short exposure as a result of such exercise or assignment will be reflected in the firm's ultimate short position, which is reported.

If the Commission were to insist that firms shares that are delivered short upon exercise or assignment of an option as short transactions, there are certain assumptions that will have to be made as part of the processing (e.g., at what time of day is the exercise or assignment considered to have occurred since these transactions are processed in the back office and are not part of the front end sales and trading systems where historically order marking is captured). Once those assumptions are made, firms will then have to build systems to satisfy the reporting requirements. SIFMA requests that the Commission consider reasonable proposals from firms regarding the capture of this information since firms have different back office processes and also will require a reasonable time frame in which to implement the necessary systems changes.

2. Impact on Manipulative Activity

The Commission has requested comments on the potential benefits of information disclosed on Form SH. As SIFMA has indicated, we believe that the information

Form SH currently requires does not necessarily meet the Commission's stated policy goals, because it may not capture large short positions and also requires investment managers to produce information on an overly broad set of securities. SIFMA believes that if the Commission were to implement the modifications to the Rule SIFMA is suggesting, the information reported to the Commission would be more useful.

3. Short Sales vs. Short Positions

As described in Section I(B)(1)(a) above, SIFMA is advocating for quarterly reporting of short *positions*, and weekly reporting of short sale activity only. It is also necessary that the Commission modify the definition of short position to accurately capture the short exposure of broker-dealer firm accounts. See Section I(B)(1)(b).

4. Possible Evasion of Reporting Requirements Through Alternative Investments

The Commission requested comments on the possible evasion of the reporting requirements through the use of other investment products such as synthetic instruments or through third parties. There are many different strategies that can be supported by synthetic instruments and SIFMA believes that it would be nearly impossible for firms to track the types of synthetic transactions specifically intended to function as short sales.

5. Disclosure of Options, ETFs, and Single Stock Futures

As stated in Section I(B)(1)(a) above, SIFMA continues to believe that options, ETFs, and single stock futures should be excluded from the reporting regime under Rule 10a-3T.

6. Harmonization of Transaction Reporting Rules

Broker dealers are currently required to provide various reports to SROs and the Commission that provide the regulators with much of the information also required on Form SH (e.g., (i) OATS reporting captures trades (long and short) effected on the exchange, (ii) reporting to a trade reporting facility, required by FINRA/Nasdaq, captures equities trades including an indication of short sales, (iii) electronic blue sheets, produced for SEC/SROs upon request, provide all firm and customer transaction activity). If over time these reports could be harmonized to require one confidential report to capture the information that regulators need to monitor firm activity it would be beneficial, not only to firms, but also to regulators.

7. Harmonization of Rules with Non-U.S. Jurisdictions

SIFMA believes that the Commission should make efforts to harmonize its short position reporting requirements with those of foreign regulators, to the extent practicable and consistent with the above comments. SIFMA believes that achieving uniformity is a significant challenge, but nonetheless the Commission should take steps to assess the various regimes and work to harmonize regulations to reduce the challenges associated with cross-border reporting without increasing the burdens of the U.S. reporting requirements. At a minimum, SIFMA urges the Commission to consider these cross-border costs as part of its cost-benefit analysis of Form SH reporting.

C. Exceptions to the Filing and Reporting Requirements

1. De Minimis Thresholds

SIFMA asserts that there should be significant changes to the exceptions to the filing and reporting requirements under Rule 10a-3T. First, SIFMA believes that for any reporting regime (weekly, quarterly, etc.) the de minimis thresholds should be raised to 5% of the issuer's total shares outstanding and \$25 million fair market value. Increasing the de minimis thresholds in this manner would narrow the amount of irrelevant information reported to the SEC and facilitate the Commission's review and analysis of data.

2. Riskless Principal Transactions

The optional reporting exception in Rule 10a-3T for "riskless principal" transactions is appropriate because these types of trades are done by a broker-dealer to facilitate customer orders and the trader does not intend to manipulate the stock. Some SIFMA firms believe, however, that the existing riskless principal exclusions are too limited. Currently, the Commission provides that the following situations fall within the riskless principal exception: (i) a broker-dealer receives an order to sell a section 13(f) security from a customer who is net long on the securities being sold, and the broker-dealer then seeks to execute that order, either in whole or in part, by selling the section 13(f) security as riskless principal, and the broker-dealer has an overall net short position in such section 13(f) security; or (ii) a broker-dealer receives an order to buy a section 13(f) security from a customer, and the broker-dealer then seeks to execute that order, either in whole or in part, by purchasing the section 13(f) security as riskless principal, and then selling the section 13(f) security to the customer, and the broker-dealer has an overall net "short" position in such section 13(f) security. In both scenarios, the short sales need not be reported by the broker-dealer on Form SH.

As stated above, besides selling to a client as riskless principal, Rule 10a-3T only allows firm to exclude riskless principal sales to the street if the underlying customer sell order is a long sale, not a short sale. If, however, the client is a short seller, this is not included in the riskless principal exclusion, above. Thus, the Commission is counting client short sale activity that is done riskless principal under the broker-dealer's short positions on Form SH. Instead, these should be reportable under the client's Form SH obligation, if applicable, and not on the broker-dealer's Form SH.

3. Exemptions for Hedging Transactions and Additional Exclusions

SIFMA continues to advocate for the exclusion of the following categories of short sale activity from the reporting requirements of broker-dealers: (1) short sale activity in connection with customer facilitation accounts; (2) short sale activity of specialists and market makers; and (3) short sale activity that results from bona fide hedging. Only short sale activity that is broker-dealer proprietary activity ("G" order) or that is conducted from firm inventory accounts should be covered by Rule 10a-3T. Excluding these categories of short sale activity is consistent with the stated purpose of the Rule. Such exclusion should be voluntary, however, as some firms may find it more difficult to identify and carve-out such short sales and short positions at this time.

D. Transition and Expiration Dates of Rule 10a-3T

Because of the difficulties and expenses related to the filing of Form SH, SIFMA believes that the Commission must consider revising the Rule as soon as practicable and implement certain, if not all of the changes described herein. In particular, the Commission should make clear that the definition of short position should be amended to include all short positions at the account level and not just positions that result from short sales. See Section 1(B)(1)(b). Also, it is imperative that the Commission consider the comments regarding the capture of short deliveries of shares as a result of the exercise and assignment of options. If such requirement is not eliminated, SIFMA requests that the Commission provide guidance and a reasonable timeframe for implementation of systems to capture this information. See Section 1(B)(1)(c) above.

Modifications to the existing Rule and any new reporting regime that the Commission may deem appropriate after the expiration of the Rule on August 1, 2009 should reflect the comments made herein. The comments are designed to provide the Commission with better information and reduce the unnecessary costs and burdens currently being borne by broker-dealers. SIFMA requests that any changes to the Rule or clarifications provide reporting firms with sufficient time to implement any operational and systems changes necessary to comply with the new or changed requirements.

Prior to making any decision on a continuing reporting regime, the Commission should closely analyze the utility of the data received to date and shape any such reporting regime accordingly. The SEC should also clearly articulate publicly how the regulatory goal of Form SH is being served before deciding to extend the Rule. SIFMA and its members welcome the opportunity to work with the SEC on any proposed changes to the current Rule or any future rule proposals.

II. Form SH

A. Timing and Nonpublic Nature of Form SH

1. Reporting on Form SH

As stated in Section I(A)(2) above, SIFMA recommends changing the reporting of position information to quarterly reporting. SIFMA also continues to request that the reporting cycle be changed from a “Sunday to Saturday” reporting week to a “Saturday to Friday” reporting week which would be more consistent with other reporting requirements and the way in which broker-dealers maintain their books and records.

In addition, under the current Rule 10a-3T, for the week in which the new 13(f) List is published, SIFMA requests that the Commission should formally instruct firms to report short activity for that week based on the 13(f) List that was available on Monday at 9:30 a.m. ET. This will avoid any confusion about splitting the week between two different 13(f) Lists.

2. Reporting New Positions

In connection with any ongoing position reporting obligation, SIFMA recommends that all positions and not just new positions continue to be included. As the Commission recognized in adopting 10a-3T, it is particularly difficult for broker-dealers to separate out prior positions from new positions. Some large firms estimate that implementing a system to capture only new short positions could cost at least \$1 million to develop and support and take a year or more to implement. As the Commission noted in the Release, such a framework would also require broker-dealers to keep two separate sets of books and records (e.g., records of “actual” short positions versus “Form SH” short positions).

3. Intraday Short Positions

In response to the Commission’s request for comments regarding the disclosure of intraday activity, SIFMA continues to believe that obtaining intraday information is not feasible using existing broker-dealer systems. Changing the systems to capture

intraday short positions will cost millions of dollars to develop and require months of development time.

4. Confidential Treatment

SIFMA continues to believe that the confidential treatment for *all* data disclosed on Form SH is essential. Many firms act as fiduciary for their strategies that sell short. Delayed reporting or other measures that fall short of non-public Form SH reporting invite misuse of such proprietary data, including front-running and activities prohibited under section 10 of the Exchange Act.

5. Frequency of Reporting

As stated previously, SIFMA believes that if the Commission were to adopt our recommendation regarding the quarterly reporting of short position information, the filing requirements should track those of Form 13F (e.g., quarterly within 45 days of the end of the quarter), with the caveat that the Commission should take into account the other modifications to the Form SH reporting regime suggested previously herein in Sections I(A) and I(B) above.

If the reporting frequency remains weekly, SIFMA recommends that reports continue to be submitted on the following Friday (and with respect to a narrowed universe of securities, as discussed above). This amount of time is necessary to create and format the reports as currently required.

6. EDGAR

SIFMA recommends that the Commission continue to use EDGAR as the filing mechanism because firms are familiar with the system and use it regularly for other filings. The XML tagged data file format is more easily generated because there is less chance of a submission error from a formatting perspective. However, many firms may not have technical support personnel knowledgeable in using the XML specification for the data generated. The SEC should, therefore, provide firms the option of using either ASCII or XML. Further, the SEC template should be enhanced to make it easy to input the data through automation (i.e., provide a means to upload the data if this is not already an option).

B. Form SH

SIFMA does not have a preference for ASCII or XML data file format. Generally, both formats would take equal time to generate and produce the Form SH. Unlike many other issues surrounding Form SH, the file format imposes relatively little cost.

III. Cost-Benefit Analysis

SIFMA generally agrees that the costs and estimated time for filing the Form SH each week going forward are accurate. We note, however, that if the SEC retains the current rules and guidance regarding reporting short sales, it would cost each firm several million dollars and take hundreds of hours to build systems that both (1) capture only short positions that result from short sales reportable under Regulation SHO (taking into account buys to close), and (2) capture the assignment/exercise of options as short sales. SIFMA believes that implementing many of the recommendations in this letter will help to mitigate costs without interfering with the Commission's goals for disclosure of short activity.

* * *

SIFMA greatly appreciates the Commission's consideration of the issues raised above, which are intended to ensure that any future reporting of short sale information be accomplished in a logical and efficient manner, and without requiring firms to incur extensive costs which are not commensurate with the benefits to be derived from such disclosure. We would be pleased to discuss these comments in greater detail with the Commission and the Staff. I can be reached in this regard at 202-962-7385 or at mmacgregor@sifma.org.

Sincerely,

Melissa MacGregor
Managing Director & Associate General
Counsel

Enclosure

cc: Dr. Erik R. Sirri, Director, Division of Trading and Markets
James Brigagliano, Associate Director, Division of Trading and Markets
Marlon Quintanilla Paz, Senior Counsel, Division of Trading and Markets
Douglas J. Scheidt, Associate Director and Chief Counsel, Division of
Investment Management

EXHIBIT 1

EXAMPLE: Account Long But Firm Short for Reg SHO Order Marking Purposes

- Firm has three accounts: Account A, Account B and Account C
- Start of day position for firm for Reg SHO order marking purposes is net short 10,000 XYZ shares
 - Account A long 15,000 XYZ shares
 - Account B short 30,000 XYZ shares
 - Account C long 5,000 XYZ shares
- Firm sells 20,000 shares from Account A
 - Sale marked short for full 20,000 shares under Reg SHO even though account long 15,000
- Firm does not transact in Account B or Account C

What does the firm report on Form SH?

- Number of Securities Sold Short (Element 6): Firm reports short sale of 20,000 XYZ shares; under Reg SHO, sale short because firm was net short at time of sale
- Short Position (Element 7): Firm reports end of day short position of 35,000, calculated on account-by-account basis without netting across accounts

Summary Table

	Reg SHO Order Marking/Positions					Form SH Reporting		
	Start of Day Position	Purchases	Long Sales per Reg SHO	Short Sales per Reg SHO	End of Day Position	Start of Day Position (Element 5)	Securities Sold Short (Element 6)	End of Day Position (Element 7)
Account A	15,000	0	0	20,000	(5,000)	0	20,000	(5,000)
Account B	(30,000)	0	0	0	(30,000)	(30,000)	0	(30,000)
Account C	5,000	0	0	0	5,000	0	0	0
Net Firm Position	(10,000)				(30,000)			
Trading Activity Totals		0	0	20,000				
Form SH Totals						(30,000)	20,000	(35,000)