



June 5, 2025

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

**RE: Request for Extension of the Compliance Date for Reporting to CAT
Reliance on the Bona Fide Market Making Exception to the Locate
Requirement**

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ submits this letter to the Securities and Exchange Commission (the “Commission” or “SEC”) to request an extension of the July 1, 2025 compliance date for certain obligations of broker-dealers reporting to the Consolidated Audit Trail (“CAT”) for at least one year. Specifically, SIFMA requests a deferral of the requirement to include a flag in CAT reports indicating whether a short sale order was executed in reliance on the exception to the “locate” requirement for bona fide market making activity under Rule 203(b)(2)(iii) of Regulation SHO (the “BFMM Flag”). This request is made in light of the Commission’s recently announced comprehensive review of the scope of information required to be reported to the CAT, the Commission’s one-year extension of the compliance date for Rule 13f-2 under the Securities Exchange Act of 1934 (which was adopted as part of the same rulemaking as the BFMM Flag), and recent attempts to alter the scope of what constitutes “bona-fide market making” activity for purposes of the exception to the locate requirement set forth in Rule 203(b)(2)(iii) of Regulation SHO (the “BFMM Exception”), including through statements published by the SEC staff and positions taken in the course of enforcement investigations and settlements.

Given these considerations, SIFMA respectfully urges the Commission to extend the compliance date of the requirement to apply the BFMM Flag when reporting applicable short sale orders to CAT for at least one year. SIFMA would be happy to work with the Commission

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

on the form of any relief (e.g., a Commission exemptive order, no-action letter, or other form of relief consistent with the Commission's views).

Background

In October 2023, the Commission adopted Rule 13f-2 to require institutional investment managers to report on a monthly basis information on their gross short positions in equity securities, as well as certain related net trading activity affecting such positions.² As part of the same rulemaking, the Commission also adopted a requirement for a broker-dealer, when reporting short sale orders to the CAT for which a broker-dealer relied on the BFMM Exception, to include the BFMM Flag. This additional CAT reporting requirement was intended to supplement the short position information that would be reported under Rule 13f-2.³ The compliance date to begin applying the BFMM Flag to applicable short sale orders is currently July 1, 2025. Earlier this year, the Commission extended Rule 13f-2's compliance date by 12 months, until January 2, 2026, which the Commission stated was "appropriate to provide industry participants sufficient time to complete implementation of systems builds and testing, as well as work with Commission staff to address any outstanding operational and compliance questions[.]"⁴ For the reasons discussed below, SIFMA requests that the Commission extend the compliance date of the separate requirement to include a BFMM Flag in relevant short sale reports to CAT until at least July 2026.

Discussion

SIFMA believes that delaying the requirement to include a BFMM Flag when reporting applicable short sale orders to the CAT is appropriate in light of the recent announcement by Chairman Atkins instructing Commission staff "to undertake a comprehensive review of the CAT," which will include its costs and "the reporting requirements and scope of what is

² *Short Position and Short Activity Reporting by Institutional Investment Managers*, Release No. 34-98738 (Oct. 13, 2023), 88 FR 75100 (Nov. 1, 2023) ("Rule 13f-2 Adopting Release"). SIFMA notes that Rule 13f-2 currently is the subject of a legal challenge. See *Nat'l Assoc. of Private Fund Managers, et al. v. SEC*, No. 23-60626 (filed Dec. 13, 2023).

³ *Rule 13f-2 Adopting Release*, supra n. 2, 88 FR at 75135 ("To supplement the short sale-related data that would be reported by Managers to the Commission pursuant to Proposed Rule 13f-2 and on Proposed Form SHO, the Commission proposed to amend the CAT NMS Plan to require the Participants to require CAT reporting firms to report certain additional short sale-related data to the CAT, as discussed below."); 75140 ("The Amendment to CAT is intended to supplement the short sale-related data that will be reported by certain broker-dealers to the Commission pursuant to Rule 13f-2 and Form SHO.").

⁴ *Order Granting Temporary Exemption Pursuant to Section 13(f)(3) of the Securities Exchange Act of 1934 from Compliance with Rule 13f-2 and Form SHO*, Release No. 34-102380 (Feb. 7, 2025), 90 FR 9568 (Feb. 13, 2025) (noting that the Commission published the web-fillable version of Form SHO, the related technical specifications, and EDGAR Filer updates in December 2024, less than one month before the scheduled January 2, 2025 compliance date).

collected.”⁵ As SIFMA and other market participants have repeatedly noted, the cost of the CAT, which is borne by market participants and self-regulatory organizations (“SROs”), has grown exponentially beyond what the Commission originally anticipated, based in part on the significant growth in the number of data elements the Commission has required to be reported to the CAT over the years.⁶ The BFMM Flag is but another example of this growth. Accordingly, SIFMA urges the Commission to delay the implementation of the BFMM Flag requirement while the Commission staff conducts its review. We believe this review should include consideration of whether the BFMM Flag is even necessary from a regulatory perspective given that reliance on the BFMM Exception is required to be documented in books and records and therefore is already available to the Commission and other regulators upon request, as described further below.⁷ SIFMA believes that a delay of the reporting of the BFMM Flag by at least one year should allow the Commission sufficient time to conduct its review.

As we noted in our prior comment letter to the Commission regarding its proposal to adopt Rule 13f-2, the reporting burden associated with including the BFMM Flag in reports of applicable short sale orders to the CAT materially outweighs the potential benefit of the information reported.⁸ Since at least as far back as January 2005 when Regulation SHO became effective, market participants have documented their reliance on the BFMM Exception in their books and records, and so that information is readily available to the Commission and other regulators upon request. Indeed, as broker-dealers have been working over the past several months on system changes to prepare to include the BFMM Flag in CAT reports beginning on the July 1, 2025 compliance date, they continue to believe the burdens outweigh the regulatory benefits of the BFMM Flag.

In addition to the costs that firms are incurring to upgrade their systems and update their procedures to comply with this new CAT reporting requirement, firms also will incur ongoing costs as a result of this requirement because the CAT will be required to collect, process, and

⁵ Paul S. Atkins, Prepared Remarks before SEC Speaks, May 19, 2025, *available at* <https://www.sec.gov/newsroom/speeches-statements/atkins-prepared-remarks-sec-speaks-051925>. FINRA’s CEO made similar statements earlier this year. See Robert Cook, CAT Should Be Modified to Cease Collecting Personal Information on Retail Investors, FINRA Blog (Jan. 17, 2025), *available at* <https://www.finra.org/media-center/blog/cat-should-be-modified-to-ceasecollecting-personal-information-on-retail-investors>.

⁶ See, e.g., Letter from Ellen Green and Joseph Corcoran, SIFMA to Vanessa Countryman, SEC re: Latest SRO CAT Fee Filings and Comprehensive Review of the CAT (Feb. 14, 2025), *available at* <https://www.sifma.org/wp-content/uploads/2025/02/SIFMA-Comment-Letter-SRO-CAT-Fee-Filings-2025-2.14.25.pdf>.

⁷ As part of its review, the Commission should consider whether, based on the “facts and circumstances” nature of the application of the BFMM Exception, the Commission’s various published interpretive guidance (in forms that include Commission rule proposals, Commission final rules, and Staff FAQs), and related questions raised throughout many years since the Commission adopted the BFMM Exception (further discussed below), the BFMM Flag in its current form would elicit uniform information across all reporting entities consistent with its intended purpose of supplementing Rule 13f-2 reporting.

⁸ Letter from SIFMA and SIFMA Asset Management Group to Vanessa Countryman, SEC re: Short Position and Short Activity Reporting by Institutional Investment Managers (Apr. 26, 2022), *available at* https://www.sifma.org/wp-content/uploads/2022/04/SIFMA-Comment-Letter_Proposed-Exchange-Act-Rule-13f-2-and-Form-SHO-Final-4-26-2022.pdf.

store this additional information – which costs will then be passed on in substantial part to the firms. Fortunately, because the BFMM Flag has not yet gone live, the Commission has the opportunity to relieve the industry from incurring these costs while the Commission staff conducts its comprehensive review of the CAT.

Delaying the implementation of the BFMM Flag by at least one year would also be consistent with the Commission’s decision to issue exemptive relief providing a one-year extension of the compliance date for Rule 13f-2. Given the Commission’s prior statements that the BFMM Flag was intended to supplement 13f-2 reporting, it is entirely appropriate for the Commission to also extend the BFMM Flag compliance date.⁹

Moreover, as noted in SIFMA’s comment letter on the Commission’s proposed Rule 13f-2, due to the “facts and circumstances” nature of identifying whether trading activity constitutes bona fide market making, there are different ways in which firms can, and do, engage in bona fide market-making and, accordingly, the BFMM Exception is properly relied upon in a range of circumstances.¹⁰ As was noted in the original 2004 Regulation SHO Adopting Release,¹¹ the scope of the BFMM Exception is, in the first instance, based on the definition of the term “market maker” in the Securities Exchange Act of 1934.¹² The 2004 Adopting Release highlighted that “[e]xcepting bona-fide market making activity from the locate requirement will benefit investors and the market by preserving necessary market liquidity,” and also indicated that the exception would be applied flexibly, *i.e.*, that “determining whether or not a market maker is engaged in bona-fide market making would depend on the facts and circumstances of the particular activity.”¹³ When adopting amendments to Regulation SHO in 2008, the Commission expanded its earlier guidance by providing examples of the type of activities that

⁹ *See Rule 13f-2 Adopting Release*, supra n. 2. Without the corresponding 13f-2 short position data that the BFMM Flag reporting was intended to supplement, it will not be as apparent to the Commission or FINRA whether the short sales reported in CAT with the BFMM Flag in fact led to the creation or increase of a short position on the books of the selling broker-dealer. As we noted in our prior comment letter, there may be many instances where a market maker may need to mark orders to sell as “short,” based on Commission staff’s guidance in FAQ 2.5 on decrementing sell orders submitted but not yet executed, even where the market maker actually holds a long position in the security being sold. Reporting the BFMM Flag divorced from short position reporting under 13f-2 likely reduces its purported benefit as a supplemental data point for 13f-2 reporting and may result in an adjusted cost benefit analysis.

¹⁰ *See*, Letter from SIFMA and SIFMA Asset Management Group to Vanessa Countryman, SEC re: Short Position and Short Activity Reporting by Institutional Investment Managers at 25; *see also*, *Reg SHO FAQ 4.8* (“Whether activity is ‘bona-fide’ will depend on the facts and circumstances of the particular activity.”).

¹¹ Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (“2004 Regulation SHO Adopting Release”).

¹² 15 U.S.C. § 78c(a)(38) (defining the term “market maker” as “any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.”).

¹³ 2004 Regulation SHO Adopting Release, 69 FR at 48014.

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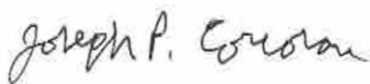
would fall within the BFMM Exception, although notably none of this guidance was published for public notice and comment, which would have, among other things, given the public an opportunity to draw the Commission's attention to the role of "over-the-counter" ("OTC") market makers trading under the then recently-effective Order Protection Rule under Regulation NMS.¹⁴

Since that time, there have been attempts to alter the scope of the BFMM Exception, including through statements published by the SEC staff, and positions taken in the course of enforcement investigations and settlements. There are different ways in which broker-dealers engage in bona fide market making, including not only through market making on exchanges, but through wholesale market making and otherwise facilitating customer orders in the OTC markets. SIFMA would welcome the opportunity to engage with the SEC to help ensure that the BFMM Exception is applied and interpreted in a manner that helps preserve the important liquidity provision and many other benefits that accrue to investors from bona fide market-making, which was the original motivation for the adoption of the BFMM Exception over 21 years ago.

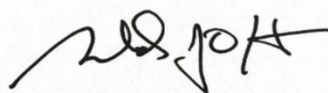
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SIFMA appreciates the opportunity to submit this request that the Commission extend until at least July 2026 the compliance date for the requirement to populate the BFMM Flag in relevant short sale reports to CAT. This extension would (1) allow the Commission to study whether the BFMM Flag is necessary in the future version of the CAT; (2) be consistent with the extension of the compliance date for Rule 13f-2; and (3) allow the Commission to review and potentially update its existing guidance regarding the scope of the BFMM Exception. If you have any questions or need any additional information, please contact Joe Corcoran at (202) 962-7383 or Gerald O'Hara at (202) 962-7343.

Sincerely,



Joseph Corcoran
Managing Director and Associate General
Counsel



Gerald O'Hara
Vice President and Assistant General
Counsel

¹⁴ 17 CFR § 242.611.