Managed Funds Association
The Voice of the Global Alternative Investment Industry
Washington, D.C. | New York

September 30, 2021

Via Electronic Mail: pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 21-19; FINRA Requests Comment on Short Interest Position Reporting Enhancements and Other Changes Related to Short Sale Reporting

Dear Ms. Mitchell:

Managed Funds Association[1] ("MFA") welcomes the opportunity to submit comments on FINRA's request for comment on proposed enhancements to the short sale reporting program. We believe that the overall proposal will advance FINRA's efforts to safeguard market integrity and promote healthy capital markets.

MFA supports FINRA's efforts to increase transparency regarding market activity by publishing at no cost aggregate short interest data for exchange-listed equity securities consolidated with the over-the-counter ("OTC") short interest data that it currently publishes on its website. MFA also supports FINRA's proposal to provide certain additional data about the securities included in the short interest data, and to increase the frequency of short interest data publication from twice a month to weekly.

Short interest data should be provided to the public in an aggregated format, per symbol across all FINRA member firms, and not broken up into proprietary and customer account categories, as aggregated data will be more useful and less confusing to the public. Aggregate short interest data is also less likely to reveal proprietary strategies.

MFA is concerned with FINRA's proposal to require reporting of account-level short interest position information. Instead, MFA suggests that FINRA should request such information from its members when it is needed. While we welcome and appreciate FINRA's statements that such reporting would be "for regulatory purposes only" and is "not to be disseminated publicly", MFA believes that there are potential material negative consequences of requiring the reporting of additional account-level information, such as increased risk from cyberattacks and data

[1] MFA represents the global alternative investment industry and its investors by advocating for regulatory, tax and other public policies that foster efficient, transparent, and fair capital markets. MFA's more than 130 member firms collectively manage nearly $1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia.

breaches, as well as the potential for retaliation against investors or harm to market participants should the data inadvertently be made public. In our view, under no circumstances should individual short interest positions be published or disclosed, as it would harm individual market participants by allowing others to take advantage of such information, reveal proprietary strategies, deter the use of short sales, impede price discovery, and decrease market efficiency.[2]

A. MFA Supports the Publication of Consolidated Short Interest Data

MFA supports FINRA's proposal to consolidate the publication of short interest data for listed and unlisted equity securities and provide it at no cost on FINRA's website. We believe it would be useful for market participants to be able to access aggregate short interest data for listed and OTC equity securities in one place. In addition, we support FINRA's proposal to add a security's total shares outstanding and public float, when available, and whether the security is a threshold security, to the short interest data that it publishes. By consolidating aggregate short interest data for both listed and OTC equity securities, as well as providing additional data about the securities for investors, MFA believes FINRA would be providing accessible, useful data to investors and supporting fair and transparent markets.

With respect to including in the short interest data outstanding stock borrows by customers as part of arranged financing programs, MFA is supportive of including such information to the extent it is feasible for FINRA members to report such information, can be published in an aggregate manner with all other short interest data, protects the anonymity of investors, and maintains the confidentiality of investors' individual loans. With respect to synthetic short positions created through options, MFA understands that it will be an enormous challenge for FINRA members to provide accurate short interest information in relation to such positions. As such, we do not support including synthetic short positions created through options in the short interest data that is reported or published if the information cannot be provided in an accurate and standardized manner.

While we support publication of short interest data aggregated per symbol across all broker-dealers, we do not support publication of short interest data by market participant category, such as by proprietary and customer accounts or institutional and retail investors, as such data could be misinterpreted, resulting in harm to investors.

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[2] *See* Asger Lunde et al., Copenhagen Economics, *Market Impact of Short Sale Position Disclosures* (2021), https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/3/573/1629798050/disclosure-requirement-for-short-positions.pdf. We note that as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Securities and Exchange Commission ("SEC") staff studied the feasibility, benefits, and costs, of adding a real-time short position reporting regime in 2014. As a result of the staff's findings, the SEC ultimately did not adopt or implement a short sale reporting regime. In the study, the SEC staff noted concerns that real-time short interest public reporting could "facilitate copycat and order anticipation strategies that could discourage liquidity supply, fundamental analysis vital to price efficiency, and hedging that facilitates capital formation." The SEC staff also warned the risk of these effects "may be amplified" if public reporting identifies short sellers. *See* Staff of the Division of Economic and Risk Analysis of the U.S. Securities and Exchange Commission, *Short Sale Position and Transaction Reporting* at iv (2014), https://www.sec.gov/files/short-sale-position-and-transaction-reporting%2C0.pdf.

B. MFA Supports Increasing the Frequency of Short Interest Position Reporting and Publication

MFA also supports increasing the frequency of short interest position reporting to FINRA and publication on its website from twice a month to weekly. We believe that regular reporting and publication ensures that investors have access to timely information to inform their investment decisions. The challenge is to balance the frequency of disclosure to provide market participants with meaningful information without distorting incentives to produce and execute proprietary investment strategies, which could ultimately be harmful to price efficiency. MFA believes increasing the frequency of short interest position reporting to weekly would provide FINRA with more timely information for regulatory use. MFA also supports FINRA reducing its processing time for disseminating short interest data to the extent it can provide accurate data in a shorter timeframe that does not negatively impact the marketplace by deterring short selling.

C. Consequences of Reporting Account-Level Short Interest Position Information

As noted above, MFA strongly supports FINRA publishing consolidated aggregate short interest data and collecting/publishing the data from its members on a more frequent basis. The increased transparency of this meaningful information would be beneficial to markets and market participants and promote equal access to the information by all investors.

However, FINRA is also considering that firms provide, for regulatory purposes, account-level short interest position information for equity securities. We question the utility of this aspect of the proposal, since FINRA and regulators already have access to this data for forensic purposes, and the creation and reporting to FINRA of this information greatly increases the risk of inadvertent disclosure and data theft. MFA believes that the risks of increased cyberattacks and of a data breach of investor confidential account information far outweigh the benefit to FINRA receiving additional account-level short interest information from members. Cyberattacks are continuously on the rise affecting all types of institutions and putting their information at risk. Most recently, in December 2020, nine federal agencies and more than 100 private sector groups were targeted in a cyberattack. Corporations have also suffered cyber breaches, including Finastra, Twitter, Marriott, Zoom, Magellan Health, and SolarWinds in 2020, which has had widespread adverse effects.[3]

In addition to cyberattacks, investors' confidential information could be leaked through other means, such as inadvertent disclosure, theft, or lawsuits. As FINRA is aware, short sellers at times face retaliation, which is most threatening when their positions and counterparties are known in detail, with retaliation ranging from short-squeezes to nuisance lawsuits, intimidation, and physical violence. Beyond retaliation, investors with short positions could be subject to others trying to predict or reverse engineer their investment strategies, which could cause negative consequences to the prices received by the original investor, or copycat investing, which could cause exaggerated price adjustments and inefficiencies to the market.

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[3] *See* Frank Downs and Dustin Brewer, ISACA, *Top Cyberattacks of 2020 and How to Build Cyber Resiliency* (last updated Feb. 3, 2021), https://www.isaca.org/resources/news-and-trends/industry-news/2020/top-cyberattacks-of-2020-and-how-to-build-cyberresiliency.

MFA also anticipates that member firms may pass the cost of account-level short position reporting on, directly or indirectly, to short sellers. As short selling is already a complex and costly activity (due to securities borrowing and collateralization costs, tax treatment, the cost of fundamental case research and its potential loss to copycats, among other costs, as well as the risk of retaliation), adding further transaction costs and other risks on short sellers may tend to reduce the number of short sellers active in the markets and thereby deprive the markets of the important price discovery and countercyclical balance that short sellers provide to the equity markets. MFA believes regulators should tailor reporting requirements to ask for only the data that is necessary to achieve its function.

D. MFA Suggests Waiting for the Securities and Exchange Commission's Security-Based Swap Reporting and Dissemination Rules

FINRA requested comments on whether any other types of strategies, such as those involving swaps, should be included in synthetic short interest reporting. MFA suggests that FINRA wait for the SEC to finish implementing its security-based swap reporting rules under Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information ("Regulation SBSR") before considering whether to require reporting or dissemination of information relating to swaps. Preempting the SEC in this space may cause confusion among market participants and have a negative effect on the transparency and price discovery enhancements that will result from the framework being implemented under Regulation SBSR.

E. Other Short Sale-Related Initiatives

FINRA also requested feedback on whether it should create a reporting framework for stock lending activity. While this is a broker-dealer issue, MFA believes it would be hard to report this data because lending terms are not uniform and therefore, it could be difficult to provide standardized, meaningful information that could be used by market participants and FINRA.

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MFA is supportive of FINRA's overall effort to improve aggregate short interest reporting and publication and believes that the consolidation of aggregate short interest data that is collected weekly and published more frequently will greatly benefit investors by providing greater market transparency in a way that does not harm individual investors.

MFA would be pleased to discuss further the proposal and the issues raised in this letter with FINRA staff. Please do not hesitate to contact Erin Galipeau or the undersigned at (202) 730-2600.

Respectfully Submitted,

/s/ Jennifer W. Han

Jennifer W. Han
Chief Counsel & Head of Regulatory Affairs