January [*], 2025

DRAFT: 1/10/25
For Discussion Purposes Only

<u>Submitted electronically</u>

David Saltiel
Acting Director
Division of Trading and Markets
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Short Position and Short Activity Reporting by Institutional Investment Managers (RIN: 3235–AM34; Rel. No. 34-98738; File No. File Number S7-08-22)

Dear Acting Director Saltiel:

MFA[1] and AIMA[2] are submitting this letter on behalf of our respective members ("**Association Members**") requesting assurance from the staff ("**Staff**") of the Securities and Exchange Commission ("**Commission**" or "**SEC**") that they will not recommend enforcement action to the Commission under the Securities Exchange Act of 1934 ("**Exchange Act**") if Association Members do not comply with the

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[1] Managed Funds Association ("**MFA**"), based in Washington, DC, New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 member fund managers, including traditional hedge funds, credit funds, and crossover funds, that collectively manage over $3.2 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.

[2] The Alternative Investment Management Association ("**AIMA**") is the global representative of the alternative investment industry, with around 2,100 corporate members in over 60 countries. AIMA's fund manager members collectively manage just over $4 trillion in hedge fund and private credit assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 250 members that manage over $2 trillion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

reporting requirements set forth in new Rule 13f-2 and related Form SHO ("**Short Position Reporting Rule**")[3] until July 1, 2025 (or such later date as the Staff deems appropriate).[4] By granting such relief, the Staff would give Association Members an additional six months to begin complying with Rule 13f-2, with the first Form SHO report being due on August 14, 2025, for gross settled short positions, and daily changes to such positions, occurring in the month of July 2025.

Association Members subject to the Short Position Reporting Rule have been working very diligently on complying with the new requirements. This has included working to develop and implement system changes needed to capture the relevant data, as well as engaging with third-party providers that offer Form SHO reporting system software. Despite these significant efforts and expenditures, Association Members are very concerned about their ability to file their first Form SHO report by February 14, 2025, without the report containing incomplete or incorrect information due to both technical issues and uncertainty regarding how (or whether) to report certain data, given the lack of clear guidance from the Staff on certain issues.

For the reasons set forth below, we believe that a limited extension for compliance with the Short Position Reporting Rule until July 1, 2025, would address the significant compliance challenges raised by the rule and allow for a more orderly rollout of the new reporting regime. This extension would provide the Commission and the Staff the opportunity to publish necessary interpretative guidance and provide Association Members with critical additional time to build and test their new reporting systems and work through the outstanding reporting and interpretive questions, with the ultimate goal of providing accurate and uniform data to the Commission while maintaining the integrity of their technological systems.

Background

On October 13, 2023, the Commission adopted new Rule 13f-2 and related Form SHO. Rule 13f-2 requires "institutional investment managers"[5] ("**Managers**") to report to the Commission on Table 1 of Form SHO their end-of-month gross settled short positions in "equity securities"[6] where the Managers exceeded the specified gross short position threshold for such security during the month. Rule 13f-2 also requires Managers to report on Table 2 of Form SHO daily changes in the gross settled short positions

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3 Short Position and Short Activity Reporting by Institutional Investment Managers, 88 Fed. Reg. 75,100 (Nov. 1, 2023) ("**Adopting Release**"), available at: https://www.govinfo.gov/content/pkg/FR-2023-11-01/pdf/2023-23050.pdf.

4 We would be happy to work with the Commission on the legal form of any such relief, whether it be no-action relief, Commission order, or another form of relief that achieves the same outcome.

5 *See* Exchange Act Section 13(f)(6)(A).

6 *See* Exchange Act Section 3(a)(11) and Rule 3a11-1.

reported on Table 1. The compliance date for the Short Position Reporting Rule was January 2, 2025, with the first Form SHO report due 14 days after the end of the month (February 14, 2025).[7]

Technological Challenges of Complying with the New Short Position Reporting Rule

The Commission finalized the technical specifications for reporting to EDGAR on December 16—only two-and-a-half weeks before the compliance date—but the Form SHO EDGAR environment did not go live until January.[8] This is during a time of the year when financial services firms typically effect a "system freeze," when no changes to computer code are permitted to ensure financial data integrity for year-end financial reports. Association Members will not have adequate time to conduct test filings before the first Form SHO report is due on February 14. Requiring new system builds to occur in January and be finalized by early February, based on specifications only released in December, is unreasonable and materially increases the risk of submission errors.

There is no public policy rationale supporting such an expedited compliance period. These concerns are exacerbated by the sheer volume of information that the Short Position Reporting Rule requires Association Members to produce (in some cases, reports on thousands of short positions in a given month)[9] and by the requirement to collect and process data in entirely new ways (*e.g.*, reports based on settlement date rather than trade date, which is the standard for Schedules 13D and 13G reporting, as well as sourcing company LEI and FIGI data).

Furthermore, third-party providers that sell software packages for the Short Position Reporting Rule will need to have their software finalized before they can distribute it to end users, which makes it nearly impossible for many Managers, especially small and mid-sized Managers, to purchase the software, incorporate it into their internal systems, and test it before the first reporting date. The technological challenges of complying with new Form SHO are compounded by the fact that many of the same employees at Association Members and third-party providers who are working to build reporting systems for the Short Position Reporting Rule are simultaneously working to build new reporting systems

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[7] *See* Adopting Release, 88 Fed. Reg. at 75,100.

[8] *See* EDGAR Release 24.4 (last updated Dec. 16, 2024), available at: https://www.sec.gov/submit-filings/edgar-news-announcements/edgar-release-24-4.

[9] For example, one Association Member estimated that in a previous month it would have had to report on over 1,500 short positions, which means that it would have had to file a report with 1,500 rows for Table 1, plus an additional 31,500 rows for daily activity on Table 2 (1,500 x 21 days), for a total of 33,000 rows. Another Association Member estimated that, in January, it would have to report on approximately 400-500 securities for Table 1, with an additional 8,000 – 10,000 rows in Table 2. The size of these reports increases the challenges in quality control and complicates reprocessing if omissions or errors have occurred.

for new Form PF, the compliance date for which is March 12, 2025.[10] Those same people also often have responsibility for the regular fund accounting and reporting duties associated with the annual year-end regulatory and investor reporting.

Additional Time is Needed to File Form SHO Through EDGAR

The Commission has not addressed the potentially serious operational issues relating to the requirement that Form SHO be filed through the EDGAR system, nor has the Commission addressed Form SHO's potential impact on the integrity of the EDGAR system and the impact on other filings required to be submitted via EDGAR.

First, as noted above, the technical specifications for Form SHO were only released on December 16, and the Form SHO EDGAR environment did not go live until January. While some Managers are beginning testing by submitting mock forms, many Managers, including those with large filing obligations, will not be able to conduct a test filing. As a result, they will not be able to determine if they are completing Form SHO correctly until they file it for the first time. Furthermore, we understand that problems with the technical specifications are being discovered on an ongoing basis. As an example, some providers are encountering issues with converting date information from native formats to the EDGAR XML which is causing errors in transaction and settlement date information. Presumably with time these smaller technical issues will be worked out, but if there is no time to test a mock Form SHO, the problems will have to be resolved at the same time as Managers are filing Form SHO for the first time (along with other filings like Form 13F and Schedule 13G which are generally handled by the same personnel at these Managers).

Second, EDGAR has certain technological limitations that will impact Managers' ability to submit Form SHO. For example, only recently has the Commission updated the Form SHO XML specifications to allow filers to submit 1,000 securities on a single form (increasing from the initial limit of 100 securities). It is unclear what the Commission expects Managers who are required to report information regarding more than 1,000 securities to do—file multiple reports? Also, while EDGAR claims to accept files as large as 200MB for most filings, we understand, in practice, EDGAR often rejects files that are much smaller and these issues may be further exacerbated on days of unprecedent demand on the EDGAR system. Even if EDGAR accepts a submission, it can take a significant amount of time to upload to EDGAR. Given the anticipated volume of EDGAR filings (including other periodic filings such as Schedule 13G and Form 13F filings that will frequently be due on the same date as Form SHO filings), the Commission should assess the ability of EDGAR to readily handle the additional volume of Form SHO submissions on peak demand days like February 14 (and given that test filings could only be made starting *this month*, we assume no such assessment has occurred).

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10 Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers, 89 Fed. Reg. 17,984 (Mar. 12, 2024), available at: https://www.govinfo.gov/content/pkg/FR-2024-03-12/pdf/2024-03473.pdf.

Third, additional time is necessary to afford Managers the opportunity to file early to avoid the risk of overwhelming the EDGAR system. EDGAR routinely experiences technical issues and delays if too many filings are made on the same day, often requiring filers to spend long periods of time attempting to determine if their filings have been accepted to the system and/or potentially resubmit filings. This is a well-known issue, and the SEC actually publishes these "peak filing volume dates" and warns filers of these limitations.[11] Filing early can help manage the impact of this issue; however, the first reporting date does not afford Managers with sufficient time or flexibility to do so. When third-party providers are involved, this process can take even longer because of the back and forth that must occur between the Manager and the provider to ensure that the Form SHO XML submission files prepared by the provider accurately reflect the Form SHO data provided by the Manager and meet all relevant schema constraints and EDGAR business rules.

Finally, the operational issues identified above are compounded in months (such as February) where other filings are also due. For example, Schedule 13G filings are due 45 days after the end of the calendar quarter in which the investor beneficially owns more than five percent of the covered class and Form 13F filings are also due within 45 days after the end of each calendar quarter, meaning a large number of Managers are likely to be submitting Schedule 13G, Form 13F filings, *and* their initial Form SHO filings on February 14. The Commission does not appear to have considered the effect of setting the Form SHO filing deadline on the very same day as the due date for these other filings, which could result in an unprecedented strain on the EDGAR system. As a result, we expect many Managers will experience technical difficulties that may delay their ability to submit their Form SHO filings through EDGAR because of the number of filings being submitted by those same Managers or other market participants at the same time.

For these and other reasons, we believe that delaying the compliance date for Form SHO would give the Commission time to address the serious operational issues raised by requiring Form SHO to be filed through EDGAR and its effect on the integrity of the EDGAR system.

Interpretive Challenges with Complying with the New Short Position Reporting Rule

The Commission has yet to clarify material ambiguities market participants have raised regarding the Short Position Reporting Rule. This leaves Managers susceptible to being second-guessing by the Staff regarding the requirements of the Short Position Reporting Rule and the substance of their Form SHO reports. This is particularly challenging given the scope of covered instruments and potentially expansive extra-territorial reach of the Short Position Reporting Rule seemingly set forth in the Adopting Release, where the Commission states: "Transparency regarding short selling by Managers of securities

[11] *See* Peak Filings Dates in 2024 / 2025, available at: https://www.sec.gov/submit-filings/filer-support-resources/edgar-calendar and https://www.sec.gov/filergroup/announcements-old/2024-peak-filing-volume-dates.

of U.S. and non-U.S. issuers is important regardless of where those sales occur."[12] However, the Commission, in its briefs in *Nat'l Assoc. of Private Fund Managers, et al. v. SEC,* has taken a much more limited interpretation of the extra-territorial reach of the Short Position Reporting Rule, *i.e.*, one that is consistent with the reach of existing Regulation SHO. While some market participants have decided to rely upon the position set forth in the Commission's briefs, other market participants are not, instead choosing to abide by the explicit language in the Adopting Release. This is an example where clear guidance from the Commission and the Staff regarding how the Short Position Reporting Rule applies extra-territorially is necessary, particularly given the range of permutations in cross-border issues (*e.g.*, application of the rule to dually-listed stock, ADRs, and Section 12 registered securities of foreign private issuers that are not U.S.-listed securities). Moreover, the Commission's briefs have resulted in significantly differing interpretations of other key interpretive issues (*e.g.*, securities in-scope of Threshold B and exceptions for non-U.S. Managers with a limited nexus to the United States, such as non-U.S. Managers who are only 13F filers).

Opportunity to Avoid Unintended but Erroneous Data Distribution

Given that the compliance date for the new Short Position Reporting Rule has already passed, and although Managers and the broader industry are using their best judgment, they are being forced to make more than a few assumptions in designing and building systems to collect and report the data required by the new rule. We strongly believe that granting an extension for compliance with the Short Position Reporting Rule will result in more meaningful, useful, and higher quality data being reported. This will reduce the near certainty of the Commission compiling, and therefore publishing, inconsistent and misleading data. Indeed, any changes to technical specifications or last-minute interpretive guidance from the Staff only increases the likelihood that initial builds may have to be redesigned and rebuilt later when reporting guidance is ultimately issued by the Staff or the technical specifications are changed. Absent the requested relief, there is a high probability of conflicting approaches, mistakes, and revisions for each filer. This will require a heightened rate of amendments to filed Forms SHO and potentially cause knock-on issues if the incorrect data is aggregated. Given the publication of aggregated data, it is even more important that the market has a clear and uniform understanding of the Short Position Reporting Rule so that the dissemination of misleading data can be mitigated and/or avoided.[13]

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[12] *See* Adopting Release at 75,109.

[13] In addition, as Association Members have experienced with regard to Regulation SHO short sale marking cases, we are very cognizant that the reporting private fund advisers provide to their prime brokers has a significant impact on surveillance and risk systems used by the Commission and others. We are concerned that implementation of direct reporting information without adequate testing could cause very meaningful downstream, symbol specific, and public inaccuracies that could be avoided with more guidance and testing.

Request for Relief

In light of the foregoing, we respectfully request assurance from the Staff that they will not recommend enforcement action to the Commission if Association Members do not comply with the new requirements of the Short Position Reporting Rule until July 1, 2025 (or such later date as the Staff deems appropriate). Even though the compliance date was January 2, 2025, this compliance relief will provide the Commission and the Staff the opportunity to publish necessary interpretative guidance[14] and provide Association Members with additional time to build and test the new reporting systems based on the recently-finalized technical specifications and work through the outstanding reporting and interpretive questions before the first round of Form SHO reports are due. This relief is necessary to satisfy the goal of providing accurate and uniform data to the Commission while maintaining the integrity of the EDGAR system.

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We thank the Staff for considering our request for an extension for compliance with the Short Position Reporting Rule, and the Associations would be pleased to meet with the Staff to discuss our request. Please do not hesitate to contact Matthew Daigler at (202) 730-2600 with any questions regarding this letter.

Respectfully yours,

MFA, AIMA

Cc: Carol McGee, Associate Director, Division of Trading and Markets
Josephine J. Tao, Assistant Director, Division of Trading and Markets

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[14] Delaying the compliance date of the Short Position Reporting Rule also would give the Commission time to solicit public comment on outstanding reporting and interpretive questions raised by the rule. This would facilitate compliance with Rule 13f-2 and greatly improve the consistency of data reported to the Commission.