



441 G St. N.W.  
Washington, DC 20548

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November 16, 2023

The Honorable Sherrod Brown  
Chairman  
The Honorable Tim Scott  
Ranking Member  
Committee on Banking, Housing, and Urban Affairs  
United States Senate

The Honorable Patrick McHenry  
Chairman  
The Honorable Maxine Waters  
Ranking Member  
Committee on Financial Services  
House of Representatives

Subject: *Securities and Exchange Commission: Short Position and Short Activity Reporting by Institutional Investment Managers*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Securities and Exchange Commission (SEC) entitled “Short Position and Short Activity Reporting by Institutional Investment Managers” (RIN: 3235-AM34). We received the rule on October 17, 2023. It was published in the *Federal Register* as a final rule on November 1, 2023. 88 Fed. Reg. 75100. The effective date is January 2, 2024.

According to SEC, the final rule is designed to provide greater transparency through the publication of short sale-related data to investors and other market participants. SEC stated that, under the new rule, institutional investment managers that meet or exceed certain specified reporting thresholds are required to report on a monthly basis using the related form, specified short position data and short activity data for equity securities. In addition, SEC is adopting an amendment to the national market system plan governing the consolidated audit trail to require the reporting of reliance on the bona fide market making exception in SEC’s short sale rules.

Enclosed is our assessment of SEC’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

Shirley A. Jones  
Managing Associate General Counsel

Enclosure

cc: J. Matthew DeLesDernier  
Deputy Secretary  
Securities and Exchange Commission

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
SECURITIES AND EXCHANGE COMMISSION  
ENTITLED  
“SHORT POSITION AND SHORT ACTIVITY REPORTING  
BY INSTITUTIONAL INVESTMENT MANAGERS”  
(RIN: 3235-AM34)

(i) Cost-benefit analysis

The Securities and Exchange Commission (SEC) stated the final rule will enhance its ability to protect investors and investigate market manipulation by providing a clearer view into the short selling market and improving SEC’s reconstruction of significant market events. SEC further stated this in turn may lead to improved identification of manipulative short selling strategies which may also serve as a deterrent to would-be manipulators and thus may help prevent manipulation. SEC finally stated the final rule will also improve its observation of short sale activity that potentially poses a systemic risk. SEC also discussed the effects of the final rule on separate groups.

SEC provided the costs of the final rule. SEC stated these costs include managers reporting position and activity data, broker-dealers updating consolidated audit trail reporting processes, and SEC processing and releasing the manager reports. SEC stated the final rule will result in an estimated maximum of \$119,975,800 in initial costs and \$72,026,064 in annual costs.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

SEC certified the final rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

As an independent regulatory agency, SEC is not subject to the requirements of the Act.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to

GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

SEC did not address the Act in the final rule.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

SEC published a proposed rule on March 16, 2022. 87 Fed. Reg. 14950. SEC received comments from individual investors as well as other market participants, such as trade associations, institutional investment managers, investment advisers, broker-dealers, non-profit organizations, and academicians. SEC addressed the comments in the final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

SEC determined the final rule contained information collection requirements (ICRs) subject to PRA. The ICR is entitled “Amendments to Enhance Short Sale Data”, and it is associated with OMB Control Number 3235-0804. SEC estimated burdens of the ICR in the final rule.

Statutory authorization for the rule

SEC promulgated the final rule pursuant to section 2 of title 7; section 5221 of title 12; sections 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78j-4, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 *et seq.*, and 8302 of title 15; and section 1350 of title 15, United States Code; and Public Laws 111–203 and 112–106.

Executive Order No. 12866 (Regulatory Planning and Review)

As an independent regulatory agency, SEC is not subject to the requirements of the Order.

Executive Order No. 13132 (Federalism)

As an independent regulatory agency, SEC is not subject to the requirements of the Order.