



1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

August 31, 2021

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

Re: FINRA Regulatory Notice 21-19: Short Interest Reporting Enhancements and Other Changes Related to Short Sale Reporting

Dear Ms. Mitchell:

The Investment Company Institute¹ is writing to respond to the Financial Industry Regulatory Authority's (FINRA) Regulatory Notice requesting comment on potential enhancements to its short interest reporting program and other potential short sale-related initiatives.² These enhancements include (i) consolidating short interest data reported to FINRA for both listed and unlisted securities; (ii) increasing the data points for short interest data that FINRA collects and publishes on its website; and (iii) increasing the frequency of short interest position reporting and reducing the data submission timeframe that follows from the applicable settlement date. FINRA also requests comment on whether it should explore a reporting framework related to stock lending activity.

ICI supports enhancements to FINRA's existing aggregate short interest reporting and public dissemination program, provided that any enhancements increase the utility of the data to FINRA and market participants without increasing the risk of harm to overall market quality and to investors. Below, we explain our views and provide comments on certain changes that FINRA is considering.

¹ The [Investment Company Institute](https://www.ici.org) (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US\$31.5 trillion in the United States, serving more than 100 million US shareholders, and US\$9.6 trillion in assets in other jurisdictions. ICI carries out its international work through [ICI Global](https://www.ici.org/global), with offices in London, Hong Kong, and Washington.

² Short Sales, FINRA Regulatory Notice 21-19 (June 4, 2021) ("Regulatory Notice"), *available at* <https://www.finra.org/rules-guidance/notices/21-19>.

I. Background

Registered investment companies (“registered funds”) are not members of FINRA and therefore are not subject to FINRA Rule 4560’s short interest reporting requirements. Registered funds, however, have a strong interest as investors regarding how short interest information is publicly disseminated because this information may affect overall market quality. Additionally, registered funds may establish short positions as a means of carrying out investment strategies and/or managing portfolio risk on behalf of their shareholders. Short selling enhances market quality for all market participants—including registered funds and their shareholders—regardless of whether they engage in short selling. Specifically, short selling helps to promote market liquidity and price discovery, both of which enable efficient markets that most effectively allocate capital and functions in the interest of long-term investors. Short selling also contributes to capital formation.³

Registered funds are subject to SEC requirements to disclose their short activity to regulators and the public. For example, SEC rules require that funds prepare monthly schedules of their portfolio investments on Form N-PORT that include the issuer name, the amount of investment by issuer, and the associated payoff profile, *i.e.*, whether the investment is long or short.⁴ SEC rules also will require funds to disclose short sale borrowings on Form N-PORT as part of their total derivatives exposure.⁵ Although funds must prepare this information on a monthly basis, they are required to file the information with the SEC on a quarterly basis, 60 days after quarter-end. Further, only portfolio information for the third month of each fund’s fiscal quarter is made public, 60 days after quarter-end.⁶ This approach is intended to minimize the potential misuse of sensitive trading information, which could result in competitive harm and impose costs on funds and their shareholders.⁷

Given the sensitive nature of short position information, ICI supports FINRA’s approach to reporting and periodic dissemination of short interest data on an aggregated basis. We believe that this approach provides regulators with information they may need to conduct their regulatory oversight activities and investors with useful insight into short selling activity, while

³ The benefits of short selling for overall market quality are described in greater detail in the US Securities and Exchange Commission (SEC) Division of Economic and Risk Analysis’s 2014 study on short sale reporting. See SEC Division of Economic and Risk Analysis, *Short Sale Position and Transaction Reporting* (June 5, 2014), available at <https://www.sec.gov/dera/reportspubs/special-studies/short-sale-position-and-transaction-reportingpdf.html>.

⁴ Investment Company Act Rule 30b1-9; Part C of Form N-PORT.

⁵ Investment Company Act Rule 18f-4. The relevant provisions of Rule 18f-4 will become effective in 2022.

⁶ Funds are required to prepare monthly portfolio holdings reports within 30 days of month-end and make the information available to the SEC staff upon request. Funds also disclose their short interest positions in their financial statements attached to annual and semi-annual shareholder reports.

⁷ See Investment Company Reporting Modernization, Release Nos. 33–10231, 34–79095, IC–32314, 81 Fed. Reg. 81870 (Nov. 18, 2016), available at <https://www.govinfo.gov/content/pkg/FR-2016-11-18/pdf/2016-25349.pdf>.

mitigating harm to overall market quality and investors.⁸ To the extent that FINRA is considering ways to enhance the utility of this aggregate-level data to both regulators and the public, we support changes that maintain this critical balance.⁹

Some of the potential enhancements that FINRA is considering, however, would require FINRA members to report more granular short interest data more frequently, potentially disrupting the balance that FINRA has struck in its short sale reporting regime and causing harm to market quality and investors. More frequent public disclosure of individual short positions, for example, could reveal a market participant's investment strategy or portfolio management methods.¹⁰ This would likely encourage increased shorting of certain stocks by other market participants seeking to imitate those disclosed positions and/or downward selling pressure, both of which may increase market distortion and misrepresent the fundamental value of that security. As FINRA acknowledges, public dissemination of more granular short interest data may disincentivize market participants from to avoid engaging in short selling, thus diminishing its benefits to the market,¹¹ including price discovery, market efficiency, and liquidity. These concerns serve as the backdrop to the comments we provide below on some of the potential enhancements described in the Regulatory Notice.

II. Proprietary/Customer Information vs. Account-Level Information

FINRA is considering whether to require reporting and public dissemination of additional short interest data that distinguishes total short interest held across two categories: "proprietary" accounts versus "customer" accounts (both retail and institutional customers) for each equity security as of the close of the designated reporting settlement date. FINRA states that segregated data across these two categories would help to identify the type of market participant that holds a short position. Alternatively, FINRA is considering whether to require more granular regulatory reporting of short interest data at the account level for all equity securities.¹² FINRA states that account-level information would help to identify market participants with a large accumulation of short interest positions for purposes of reviewing compliance with SEC and FINRA short sale regulations.

⁸ FINRA publicly disseminates aggregate short interest information for OTC equity securities on a security-by-security basis. Exchanges also publicly disseminate short interest information for their listed securities in a similar aggregated fashion. *See, e.g.*, Nasdaq, Short Interest, <https://www.nasdaq.com/market-activity/quotes/short-interest>.

⁹ *See, e.g.*, Letter from Paul Schott Stevens, President and CEO, ICI, to Christopher Cox, Chairman, US Securities and Exchange Commission (Sept. 19, 2008); Letter from Ari Burstein, Senior Counsel, ICI, to Florence Harmon, Acting Secretary, US Securities and Exchange Commission (Dec. 16, 2008); Letter from Heather Traeger, Assistant Counsel, ICI, to Florence Harmon, Acting Secretary, US Securities and Exchange Commission (Dec. 16, 2008).

¹⁰ Market participants engage in short selling, for example, to execute long/short portfolio strategies or to hedge against portfolio risk.

¹¹ *See* Regulatory Notice at 9.

¹² FINRA would not require public dissemination of account-level short interest data.

ICI supports the level of aggregate short interest data that is currently reported and disseminated and cautions that the additional data elements under consideration could create investor confusion. A “proprietary” versus “customer” reporting designation, for example, could misrepresent the short selling activity attributable to specific types of market participants.¹³ Nevertheless, should FINRA determine to pursue one of the proposed alternatives, we prefer the category reporting designation rather than an account-level reporting requirement. Account-level reporting would yield large amounts of additional data that likely would not provide FINRA with an accurate snapshot of concentrations of gross short interest positions for a specific market participant.¹⁴ Given that FINRA would seek this information solely for regulatory purposes,¹⁵ it should instead determine how it could do so through existing regulatory reporting mechanisms that collect information on individual short selling activity, such as the consolidated audit trail (CAT).¹⁶ We believe that this approach could avoid imposing additional costly data reporting burdens.

III. Synthetic Short Positions

FINRA is also considering requiring firms to identify “synthetic short” positions in their short interest reports. FINRA states that this information would assist in understanding the extent to which market participants are using less traditional means of establishing short interest. In addition to the paired sale of a call option and purchase of a put option, we understand that there may be some types of transactions, *e.g.*, those involving security-based swaps, that could be deemed a “synthetic short” because they provide similar economic exposure as a short sale. We recommend that FINRA provide additional clarity as to the “other strategies” that would fall within the scope of this definition. To avoid potential disclosure of proprietary investment strategies or portfolio management methods, however, we strongly recommend that FINRA not require synthetic positions and non-synthetic positions to be separately reported.

IV. Frequency and Timing of Short Interest Reporting and Data Dissemination

FINRA is considering increasing the short interest reporting and dissemination timeframe from bi-weekly to either daily or weekly submissions and is also considering shortening the report submission timeframe from two days to one day after the designated reporting settlement date.

¹³ We understand that certain types of dealer activity could fall within either category; therefore, these reporting designations could lead to issues such as double counting.

¹⁴ We note, for example, that individual participants may have short interest positions across multiple accounts with different brokers that would be separately reported.

¹⁵ We emphasize that we would not support any type of public reporting for account-level information. Public dissemination at such a granular level would pose very significant risks to individual market participants of inappropriately disclosing their portfolio management methods or proprietary investment strategies.

¹⁶ The information reported to the CAT includes the “material terms” of an order, which include the identity of the selling participant and whether the order is long, short, or short exempt. We recognize that this information currently cannot be used provide a snapshot of an account’s gross short positions at a particular time. *See* Regulatory Notice at 22 n.21. However, we recommend that FINRA first conduct an analysis to identify the costs and benefits of modifying the CAT to obtain this data instead of doing so through the FINRA Gateway.

FINRA states that increasing the frequency and shortening the submission period would provide regulators and market participants with a timelier view of short interest that would enhance the regulatory value of the data and better inform investment decisions.

We support FINRA adopting a weekly submission timeframe, which would be twice as frequent as the current bi-weekly reporting requirement, but do not support daily reporting and dissemination. Aggregate short interest data that becomes publicly available on a weekly basis offers additional benefits, such as greater transparency and market color, to regulators, market participants and investors, that may outweigh the additional costs of more frequent reporting. Moving from bi-weekly to daily reporting and dissemination, however, would significantly increase costs and may decrease data quality without much added benefit. For example, short selling levels are unlikely to fluctuate day-to-day to such an extent that daily data would provide meaningful additional insight over weekly reports. Further, our members note that they likely would not utilize the significant additional volume of daily short interest data if it becomes available.

V. Reporting Framework for Stock Lending Activity

FINRA asks whether it should create a reporting framework for stock lending activity. As examples of potential data elements, FINRA mentions loan terms *e.g.*, rebate rate), loan amount, and counterparty information. FINRA indicates that if it were to implement a stock lending reporting regime, it might consider, in the future, the appropriateness of public transparency into stock loan rebate rates and other negotiated terms.

The SEC has indicated that it may consider proposing rules to further implement section 984(b) of the Dodd-Frank Act, which requires that the Commission engage in rulemaking “to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities.” We urge FINRA to coordinate closely with the SEC before FINRA further considers a potential reporting framework for stock lending activity to ensure that FINRA’s efforts do not duplicate or conflict with the SEC’s rulemaking initiative.

ICI supports transparency of key data about stock lending activity, which may be useful to regulators and market participants. As described below, funds already provide extensive reporting and disclosure regarding their stock lending activities. Stock lending may be utilized by market participant for a variety of reasons, not limited to short selling.¹⁷ We therefore urge FINRA to not conflate stock lending with short selling. FINRA should consider fully the information that registered funds and other market participants currently report about stock lending activities before determining the need for a new stock lending reporting framework for FINRA members. We also caution FINRA against considering public transparency before

¹⁷ For example, stock lending may be used by dealers to settle transactions from clients, provide collateral for other transactions, or in connection with portfolio management strategies other than short selling. *See* Securities Finance Trust Company, *Securities Lending Best Practices: A Guidance Paper for Institutional Investors* (2018) at 4-8, available at <https://www.esec lending.com/resources/eSecLending-Best-Practices.pdf>.

Ms. Jennifer Piorko Mitchell
August 31, 2021
Page 6

gaining experience with regulatory reporting of stock lending data, some of which is sensitive or proprietary.

Currently, funds must report on Form N-PORT the identity of entities that have borrowed securities from the fund, the value of securities on loan to the borrower, and the value of collateral provided to the fund.¹⁸ Funds must report on Form N-CEN the fund's stock lending agents, types of payments made to stock lending agents, whether the stock lending agent or another party has agreed to indemnify the fund with respect to stock lending losses, and income from stock lending activities.¹⁹ Funds are required to disclose additional information about their stock lending activities in the fund's Statement of Additional Information, including income from stock lending and fees and compensation the fund pays for stock lending services.²⁰

* * *

We hope that this information and these recommendations are helpful to FINRA in considering potential enhancements to its short interest reporting program. If you have any questions, please contact Sarah Bessin at sarah.bessin@ici.org or Nhan Nguyen at nhan.nguyen@ici.org.

Regards,

/s/ Sarah A. Bessin

Sarah A. Bessin
Associate General Counsel

/s/ Nhan Nguyen

Nhan Nguyen
Assistant General Counsel

¹⁸ Investment Company Act Rule 30b1-9; Item B.4 of Form N-PORT.

¹⁹ Investment Company Act Rule 30a-1; Item C.6 of Form N-CEN.

²⁰ Part B, Item 19(i) of Form N-1A.

Ms. Jennifer Piorko Mitchell

August 31, 2021

Page 7

cc: Yvonne Huber, Vice President, Market Regulation Department, FINRA
Racquel Russell, Associate General Counsel, Office of General Counsel, FINRA