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The Grey Area of US Sec Rule 13f-2: Short Selling Reporting

By now, we all know the ins and outs of US SEC Rule 13f-2:

What: short position reporting for institutional investment managers

Who: institutional investment managers, banks, insurance companies, broker/dealers and corporations and pension funds that manage their own investment portfolios. It also extends to any person or entity that has investment discretion over the account of any other person or entity.

When: starting 2 January 2025 within 14 calendar days of the end of each calendar month

How: Form SHO filed electronically via EDGAR portal in XML format


But what about the application to foreign investment managers – do they need to report? And what of short sale transactions conducted abroad by US and non-US investment managers?

In the Short Position Reporting Adopting Release, the SEC stated that Rule 13f-2's cross-border reach is "based on the territorial approach that the [SEC] has applied when crafting rules to implement other provisions of the Exchange Act [e.g., provisions under the Dodd-Frank Act]," and is consistent with the territorial approach found in the Supreme Court's ruling in *Morrison v. National Australia Bank, Ltd.* More specifically, the SEC stated that it views Section 13(f)(2) of the Exchange Act "by its terms, to apply to any institutional investment manager already subject to U.S. reporting requirements," and that "the relevant domestic conduct under [S]ection 13(f)(2) is being an institutional investment manager operating in the U.S. securities markets such that the investment manager is subject to filing reports with the [SEC]." When such domestic conduct is present in the United States, "[S]ection 13(f)(2)'s regulatory reporting obligation will generally apply."

Although the SEC has not yet issued FAQs or other guidance regarding Rule 13f-2, given the overlap in the relevant definitions, the SEC's statements on the cross-border application of Rule 13f-2 effectively suggests the geographic scope of Rule 13f-2 is broad and overlaps with the scope of existing Form 13F.

The precise territorial application of Rule 13f-2 is ambiguous. Petitioners in pending litigation before the Fifth Circuit Court of Appeals challenging the SEC's adoption of Rule 13f-2 have contended that the SEC failed to assess the costs and benefits of reporting foreign short sales. However, the SEC recently took the position that "contrary to petitioners' contention..., the Short Sale Rule does not apply to short sale transactions of foreign equity securities effected outside the United States, which are not subject to the requirements of Regulation SHO." The brief further states that "just as Regulation SHO does not apply to securities transactions effected outside the United States, neither does the Short Sale Rule" and concludes that petitioners "mistakenly contend[ed] that the Short Sale Rule 'impose[s] a global short-sale reporting regime.'"

While the SEC response is helpful, this appears to contradict the language in the Short Position Reporting Adopting Release – "Transparency regarding short selling by [institutional investment managers] of securities of U.S. and non-U.S. issuers is important regardless of where those sales occur." By which the SEC indicated that institutional investment managers should report on Form SHO short sales of equity securities issued by non-U.S. issuers and short sales occurring outside of the United States.

Clearly, the SEC needs to step into the grey area and make it more, black and white. 

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