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United States Government Accountability Office  
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B-317337

October 28, 2008

The Honorable Christopher J. Dodd  
Chairman  
The Honorable Richard C. Shelby  
Ranking Minority Member  
Committee on Banking, Housing, and Urban Affairs  
United States Senate

The Honorable Barney Frank  
Chairman  
The Honorable Spencer Bachus  
Ranking Minority Member  
Committee on Financial Services  
House of Representatives

Subject: *Securities and Exchange Commission: Disclosure of Short Sales and Short Positions 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 (Commission), entitled “Disclosure of Short Sales and Short Positions by Institutional Investment Managers” (RIN: 3235-AK23). We received the rule on October 16, 2008. It was published in the *Federal Register* as an “interim final temporary rule; request for comments” on October 17, 2008. 73 Fed. Reg. 61,678.

The interim final temporary rule adopts Exchange Act Rule 10a-3T which requires institutional investment managers that exercise investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value of at least \$100 million to file Form SH with the Commission following a calendar week in which it effected a short sale in a section 13(f) security, with some exceptions. The interim final temporary rule became effective on October 18, 2008. The Commission found good cause for the rule to become immediately effective notwithstanding the requirement of the Congressional Review Act that major rules not become effective until 60 days after publication or receipt by Congress. 5 U.S.C. § 808(2). The interim final temporary rule will be effective until August 1, 2009.

Enclosed is our assessment of the Commission's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that the Commission complied with the applicable requirements.

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 Michael R. Volpe, Assistant General Counsel, at (202) 512-8236.

signed

Robert J. Cramer  
Associate General Counsel

Enclosure

cc: Florence E. Harmon  
Acting 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  
"DISCLOSURE OF SHORT SALES AND SHORT POSITIONS  
BY INSTITUTIONAL INVESTMENT MANAGERS"  
(RIN: 3235-AK23)

(i) Cost-benefit analysis

The Securities and Exchange Commission (Commission) prepared a cost-benefit analysis in conjunction with the interim final temporary rule. The Commission expects that Rule 10a-3T and Form SH will help restore investor confidence in the markets and reduce manipulative behavior, which should help to alleviate any undue crisis of investor confidence and may strengthen the market's ability to correctly incorporate accurate information into securities prices. Also, the Form SH disclosure will enable staff to study the impact of short selling on the market in times of financial crisis. The Commission estimates the costs will be \$93.5 million in filing costs for the 1,000 Form SH Reports that will be filed with the Commission each week through August 1, 2009. In addition, the Commission notes that many institutional managers faced costs associated with creating a reporting mechanism to capture the data required by Form SH and will face association implementation costs.

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

The Commission certified that the interim final temporary rule will not have a significant impact on a substantial number of small entities, and therefore the Commission did not undertake a Regulatory Flexibility Analysis. In the interim final temporary rule, the Commission solicits comments on the certification and asks that commenters describe the nature of any impact on small entities and prove any empirical data.

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

The Unfunded Mandates Reform Act of 1995 is inapplicable to the Commission, because it is not an agency for purposes of the Act. 2 U.S.C. § 658(1).

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

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

The Administrative Procedure Act requires an agency to publish a notice of proposed rulemaking in the *Federal Register*. 5 U.S.C. § 553(b). An agency is also required to publish an adopted rule in the *Federal Register* 30 days before the rule becomes effective. 5 U.S.C. § 553(d). An agency may waive these requirements if it finds good cause. The Commission found good cause to have Rule 10a-3T and Form SH effective as temporary interim rules on October 18, 2008, and that notice and public procedure in advance of effectiveness of the rules are impracticable, unnecessary, and contrary to the public interest.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The interim final temporary rule contains a collection of information under the Act titled “Form SH” (OMB Control No. 3235-0646). The Office of Management and Budget approved Form SH on September 19, 2008, and approved the revised Form SH burden estimates on an emergency basis. The Commission estimates that 1,000 institutional investment managers will file 36 Form SH reports annually at an estimated 20 hours per filing for a total annual reporting burden of 720,000 hours. The Commission estimates the total costs will be \$90 million per year.

Statutory authorization for the rule

The Commission issued the interim final temporary rule pursuant to the authority of sections 3(b), 10, and 23(a) of the Exchange Act, as amended.

Executive Order No. 12,866

The Commission is not subject to Executive Order 12,866 because it is an independent regulatory agency, as defined by 44 U.S.C. § 3502(5).

Executive Order No. 13,132 (Federalism)

The Commission is not subject to Executive Order 13,132 because it is an independent regulatory agency, as defined by 44 U.S.C. § 3502(5).