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Short Attacks – New “Short and Distort”
Rulemaking Petition Regarding Short Selling

Even amidst the arrival of the coronavirus bear market, third parties seek to profit by driving a company’s stock price down or promoting negative, and at times manipulatively misleading, rumors and misinformation. Whether or not combined with rapid accumulations of short positions against the company’s stock by individuals and others working in concert, or reaching the level of a full-fledged “short attack” or “bear raid,” the lack of a robust regulatory framework regarding short selling and associated campaigns creates problems for companies, institutional and retail investors and the capital markets more generally. Recognizing this problem, a group of law professors led by Professors John C. Coffee, Jr. and Joshua Mitts, of Columbia Law School, recently submitted a [petition for rulemaking](#) to the SEC, calling for reforms to the U.S. regulatory framework applicable to short selling. The proposed reforms would address some of the risks of manipulation and abuse now prevalent in the market for short activism. If implemented, these rules would be a step towards leveling the playing field for companies that are the targets of this activity.

The Petition for Rulemaking proposes two fundamental reforms. First, the professors call on the SEC to impose a duty to promptly update a voluntarily disclosed short position, when the initial disclosure has become stale and misleading. Second, the Petition seeks clarification from the SEC that quickly closing a short position following the publication of a report designed to drive down the target’s stock price can constitute fraudulent scalping in violation of Rule 10b-5. These reforms reflect a common sense, practical approach to protecting the integrity of the U.S. markets from the abuses of short activism.

We [wrote last year](#) about developments in the regulation of short activism in France, and we have in the past called for and [reported on](#) proposed changes to the U.S. disclosure requirements with respect to securities ownership and the regulation of short trading. The principal U.S. stock exchanges have also called for regulatory reform with respect to short selling and trading: for example, the NYSE, together with the National Investor Relations Institute and the Society of Corporate Secretaries and Governance Professionals (now known as the Society for Corporate Governance), petitioned the SEC on this subject (twice, in [2013](#) and [2015](#)) and so has Nasdaq (in [2015](#)), to call for enhanced disclosure of short positions. Further [calls for reform](#) with respect to accelerated and expanded Schedule 13F ownership reporting by institutional investment managers, including with respect to short positions, have also been made.

At a time when markets and investors are under such great stress, long-overdue reform of the regulatory framework applicable to short selling and short activism is particularly important. Prevalent short-selling practices present unique risks to market integrity; we fully support the Petition for Rulemaking submitted to the SEC by Professors Coffee and Mitts and their colleagues and urge prompt action.

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