

# SEC Adopts Rule Regarding Reporting of Securities Loans

October 19, 2023

On October 13, 2023 the U.S. Securities and Exchange Commission (the “SEC” or “Commission”) adopted a new rule, 17 CFR 240.10c-1a (the “Final Rule”), governing the reporting of securities loans under the Securities Exchange Act of 1934 (the “Exchange Act”).<sup>1</sup> The Final Rule requires reporting of securities loan information to a registered national securities association (“RNSA”), meaning FINRA, which is then required to disseminate transaction-level and aggregated information to the public. The rule is intended to both provide surveillance information to the SEC and increase the transparency of the securities lending market to borrowers and beneficial owners.

Key takeaways include:

- The amendments adopted by the SEC in the Final Rule differ in several important respects from the Proposed Rule. For example, a departure from the proposal, lending information will be required to be reported by the end of the day on which a covered securities loan is effected rather than 15 minutes after execution.
- The Final Rule generally places the reporting responsibility on lenders and lending agents, though broker-dealers who borrow securities from their customers are required to report such loans.
- Individual and aggregate transaction data other than party identities and transaction sizes will be published on the morning of the business day following the date on which a transaction is effected or amended. Information regarding a loan’s size will be published on the 20th business day following execution or amendment.
- The Final Rule replaces the term “securities loan” with “covered securities loan” which is not a significant change from the proposal. However, the SEC includes some additional guidance in the preamble to the Adopting Release that helps distinguish reportable securities loans from repos and other financing transactions.

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<sup>1</sup> Reporting of Securities Loans, Release No. 34-98737, 68 (October 13, 2023) (the “Adopting Release”). The Adopting Release, with full text of the amendments, and related guidance, is available [here](#).

Reportable securities loans are limited to those involving the loan of securities for which cash market transactions are reportable under the CAT NMS Plan, FINRA's Trade Reporting and Compliance Engine ("TRACE") or the MSRB's Real-Time Transaction Reporting System ("RTRS")

- While not implemented in the rule text itself, the SEC offers some guidance on the cross-border application of the rule in the Adopting Release, noting that it will apply its "territorial approach" to jurisdiction.

The key provisions of the amendments are further discussed below.

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## Background

Pursuant to Sections 984(a) and (b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), on November 18, 2021, the SEC proposed Rule 10c-1 under the Exchange Act (the "Proposed Rule"). The Proposed Rule is intended to satisfy the SEC's statutory mandate to "promulgate rules that are designed to increase the transparency of information available to brokers, dealers, and investors with respect to loan or borrowing securities" within two years of the passage of the act.<sup>2</sup> With this Final Rule, the SEC intends for the data collected and publicized to improve price discovery and lead to a reduction of the information asymmetry purportedly faced by end borrowers and beneficial owners. The amendments adopted by the SEC differ in several important respects from the Proposed Rule.

The implementation schedule essentially provides for a 26-month total compliance period for reporting lenders, with interim deadlines for FINRA and a three-month testing period before data is publicly disseminated.

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## Information Reporting Requirements and Timing

### Information

The Final Rule requires reporting three categories of data:

- **Material Terms of New Securities Loans.** Data elements include: (i) identifying information of the security issuer; (ii) the ticker symbol or other security identifier; (iii) the date and time the loan was effected; (iv) the name of the platform or venue where the loan was effected; (v) amount (size, volume); (vi) the type of collateral

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<sup>2</sup> Pub. L. 111-203, sec. 984(b), 124 Stat. 1376 (2010).

used to secure the loan; (vii) rates, fees and charges, as relevant; (viii) percentage of collateral to value of reportable securities loaned; (ix) termination date; and (x) the type of borrower.

- **Loan Modifications Data.** If a previously reported loan is modified and results in a change to a required data element (see above), then the covered person must report: (i) the date and time of the modification; (ii) the specific modification and data element; and (iii) the loan's unique identifier.
- **Confidential Party Information.** The covered person must also report the following data elements to the extent known, but these will be kept confidential by the RNSA: (i) identifying information of the parties to the loan (except for customers of a broker-dealer borrowing under a "fully-paid lending" program); (ii) whether the security is loaned from a broker's or dealer's securities inventory to a customer of such broker or dealer; and (iii) whether the loan will be used to close out a fail to deliver pursuant to or outside of Regulation SHO.

Importantly, the Final Rule **does not require reporting of data on securities inventory available to loan**, which would have been required under the Proposed Rule. This element of the Proposed Rule was criticized by industry members as vague, highly burdensome and unlikely to produce useful data.

## Timing

The Final Rule requires data to be reported by **the end of the day** on which a loan is effected or modified, as applicable, a significant departure from the Proposed Rule, which proposed a 15-minute reporting deadline. This was another requirement that was criticized as unduly burdensome given the economics of securities lending and the practice of many securities borrowers and lenders of frequently modifying securities loans during the course of a day. However, notwithstanding this relief on timing for reporting, the time of day on which a loan is effected must still be reported.

## Information Dissemination

The Final Rule instructs RNSAs to publish, as soon as practicable, and not later than the morning of the business day after the loan is effected or modified: (i) the loan's RNSA-assigned unique identifier; (ii) public data elements (listed above) except for the loan amount; and (iii) relevant security identifiers. On the 20th business day after the loan is effected or modified, the Final Rule instructs RNSAs to make the loan amount data publicly available (along with relevant loan and security identifiers). The delay in reporting the loan amount diverges from the Proposed Rule and is an effort to avoid information being used to reverse engineer lending strategies, a complaint by many in

the industry regarding the originally proposed reporting timeline. Once published, information is also to remain available for five years.

The RNSA must also publish daily information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security and the security identifiers, as appropriate.

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## Definition of Covered Persons

The final rule imposed the reporting requirement on “covered persons” that effect covered securities loans concerning reportable securities.<sup>3</sup> Whereas the proposed rule did not have a definition for “covered persons,” the final rule defines the term to mean:

- any person that agrees to a covered securities loan on behalf of a lender (“intermediary”);<sup>4</sup>
- any person that agrees to a covered securities loan as a lender when an intermediary is not used; or
- a broker or dealer borrowing fully paid or excess margin securities when the customer of the broker or dealer is not a covered person.<sup>5</sup>

Overall, the definition does not significantly change the scope of the Final Rule from the Proposed Rule outside of the explicit objections, but it does make clear that agents are only subject to the rule when they contractually execute the loan on behalf of a principal.

### Use of a Reporting Agent

Consistent with the Proposed Rule, the Final Rule allows a covered person to rely on a reporting agent to fulfill the covered person’s reporting obligation if they enter into a mutual written agreement wherein the covered person agrees to provide timely information access to the agent, and the agent agrees to report such information to an

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<sup>3</sup> The definition of “covered person” uses the term “agrees to” instead of “loans a security” as proposed to make clear that a customer of a broker or dealer that loans a reportable security to the broker or dealer in a fully paid lending arrangement is not required to comply with the final rule—only the broker dealer is.

<sup>4</sup> The definition excludes a clearing agency when providing only the functions of a central counterparty and a central securities depository.

<sup>5</sup> Notwithstanding this, the obtaining or exercise by a broker-dealer of rehypothecation rights attached to margin securities pledged to the broker-dealer, on its own, will not be a “covered securities loan” for purposes of the Final Rule. Where margin securities subject to a broker-dealer’s rehypothecation rights are actually lent by such broker-dealer to another party, however, the loan does need to be reported.

RNSA. In addition to registered broker-dealers, the Final Rule permits a registered clearing agency to act as a reporting agent.

Third-party service providers can also be employed by covered persons to assist with reporting to FINRA. However, whereas use of a recognized “reporting agent” shifts liability for failure to report to FINRA to the agent (provided that the agent is timely provided with the necessary information), use of another third-party vendor does not.

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## Covered Securities Loans under the Final Rule

A “covered securities loan” is any transaction where any person lends a “reportable security” to another (except for a position at a clearing agency that results from central counterparty services such as novation of a securities loan to clear it). Under the Final Rule, reportable covered securities loans include collateralized and uncollateralized loans, loans for profit as well as those that do not include a fee or rebate, and inter-affiliate loans as well as arms-length loans with unaffiliated parties.<sup>6</sup>

While the Final Rule does not include legal documentation or other formal indicia to differentiate securities loans from repos or other structurally similar transactions (other than that there must be a transaction where one person “lends” a reportable security), the Adopting Release and discussion with Commission staff during the open meeting make reasonably clear that the Commission does not intend to include repurchase and sale agreements (commonly known as “repos”) intended solely as cash financing transactions within the scope of the rule because Section 984 of Dodd-Frank focuses on the loan or borrowing of securities. Based on these materials, the Commission appears to distinguish securities lending from non-reportable repos based on the purpose and economics of a transaction, though a so-called “permitted purpose” under Federal Reserve Board margin rules is not required for a loan to be reportable.<sup>7</sup> In the preamble to the Final Rule, the SEC proposed that the SEC Office of Financial Research collect data on repos in order to provide clarification in the future.<sup>8</sup>

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## Cross-Border Application

While many commentators urged the Commission to adopt explicit cross-border rules to provide clarity on the jurisdictional application of Rule 10c-1, the Commission chose

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<sup>6</sup> Adopting Release at 66-72.

<sup>7</sup> See *Id.* at 80-81.

<sup>8</sup> *Id.* at 74.

instead to provide guidance in the preamble to the Adopting Release. Unfortunately, that guidance is not a model of clarity.

Concretely, the guidance states that the rule is “intended to reach the full scope of the cross-border authority provided for by Section 10(c) of the Exchange Act” and that the Commission’s understanding of that scope is informed by (i) its “territorial approach” to jurisdiction as discussed in adopting Regulation SBSR and elsewhere<sup>9</sup> and (ii) a reading of the statutory text “to determine the domestic conduct that is covered.” Based on the language in Section 10(c), specifically that it is unlawful to “effect, accept, or facilitate” a transaction involving a loan or borrowing of securities in contravention SEC rules, the SEC concluded that the Final Rule’s “reporting requirements will generally be triggered whenever a covered person effects, accepts, or facilitates (in whole or in part) in the U.S. a lending or borrowing transaction.” Loans by non-U.S. lenders are not excluded per se and would appear to be clearly included at least when personnel of such lenders effect, accept or facilitate such loans from locations within the United States.

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## Implementation Schedule

As noted above, the Final Rule will be effective 60 days after it is published in the Federal Register. However, the Final Rule’s reporting obligations will be only be effective 24 months after the Effective Date. The implementation schedule is as follows:

- FINRA must propose rules pursuant to the Final Rule within four months of the Effective Date;
- The proposed FINRA rules must be effective no later than 12 months after the Effective Date;
- Covered persons must report information under the Final Rule starting on the first business day 24 months after the effective date of the Final Rule (the “Reporting Date”); and
- FINRA must begin publicly disseminating information within 90 calendar days of the first Reporting Date.

Loans that are open as of the Reporting Date do not need to be reported unless they are materially amended on or after the Reporting Date. However, once they are amended,

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<sup>9</sup> See *Id* at 164.

the full information must be provided, including the date and time the loan was originally entered into.<sup>10</sup>

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Please do not hesitate to contact us with any questions.



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<sup>10</sup> Adopting Release at 108.