Securities Regulation Daily Wrap Up, TOP STORY—SEC proposes to enhance securities lending transparency, updated recordkeeping, (Nov. 19, 2021)

Securities Regulation Daily Wrap Up

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New Rule 10c-1 would enhance the transparency and efficiency of the securities lending market by requiring data to be reported and made public in short order.

By unanimous vote, the SEC has advanced two new proposed rules: one is intended to increase the transparency and efficiency of the securities lending market, and the other updates the electronic recordkeeping requirements for intermediaries. The lending transparency proposal would require reporting of the material terms of securities lending transactions, which is not currently required, and that certain of this information swiftly be made available to the public. The second proposal would update electronic record preservation requirements applicable to broker-dealers, security-based swap dealers, and major security-based swap participants to be in step with modern technology. Comments for both proposals are due 30 days after publication in the *Federal Register* (*Reporting of Securities Loans*, Release No. 34-93613, and *Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants*, Release No. 34-93614, November 17, 2021).

Securities lending. The Commission proposed for comment new Exchange Act Rule 10c-1: "Securities lending transparency." The release explains that securities lenders are usually large institutional investors, such as pension funds, who use lending as an income-enhancing strategy. Broker-dealers are the primary borrowers, and they typically re-lend those securities or use the securities to cover fails to deliver or short sales. The transactions are usually facilitated by a third party, such as a custodial bank or specialist agent lender.

Under the Dodd-Frank Act, the Commission has the authority to increase the transparency of both the loaning or borrowing securities and of the information available to brokers, dealers, and investors. At the moment, parties to securities lending transactions are not required to report the material terms of those transactions, rendering the securities lending market opaque and creating significant information asymmetries between market participants. While there are private data vendors, only subscribers can use these systems, and the systems only capture data from subscribers, so the data is neither comprehensive nor centralized.

Rule 10c-1. The Commission intends that proposed Rule 10c-1 will provide investors and other market participants with access to pricing and other material information regarding securities lending transactions in a timely manner. The rule will require any person loaning a security on their own behalf or for another person to report the material terms of the lending transaction plus related information regarding the securities the lender has on loan and available to loan. The report would be made to a registered national securities association ("RNSA") which would then be required to make available to the public information about each transaction, as well as aggregate information about securities on loan and available to loan.

To provide a complete picture, the rule would apply to all securities, and to all lenders. For the purposes of the rule, any person loaning a security on behalf of itself or another person would be a "lender," including banks, insurance companies, and pension plans. The material terms required to be reported by lenders to an RNSA within 15 minutes of a transaction, and which would be made public no later than the next business day, include the:

- Legal name of the issuer of the securities to be borrowed;
- Ticker symbol of those securities;

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- Time and date of the loan;
- Name of the platform or venue, if one is used;
- Amount of securities loaned;
- Rates, fees, charges and rebates for the loan as applicable;
- Type of collateral provided for the loan and the percentage of the collateral provided to the value of the loaned securities;
- Termination date of the loan if applicable; and
- Borrower type, e.g. broker, dealer, bank, customer, clearing agency, custodian

In addition, information on loan modifications would be provided to the RNSA if the modifications involve any of the terms listed above. Other information would not be made public, such as the legal names of the parties to the loan and other information that would identify market participants or reveal information about their internal operations or investment decisions

Chairman Gensler said: "In today's fast-moving financial markets, it's important that market participants have access to fair, accurate, and timely information. I believe this proposal would bring securities lending out of the dark. We have put out this proposal for comment, and I look forward to hearing feedback from the public." SEC Chief Economist Jessica Wachter added that the "rule will bring much needed transparency into the securities lending market giving the market information that is both comprehensive and timely."

Electronic recordkeeping. The Commission also published proposed rule amendments meant to update the electronic recordkeeping requirements applicable to broker-dealers, security-based swap dealers, and major security-based swap participants. The proposal updates a rule adopted in 1997 and rooted in the technology of that time to be compatible with modern electronic recordkeeping systems. The current rule requires that records be preserved exclusively in a non-rewriteable, non-erasable format known as write once, read many ("WORM").

The proposed amendments to Exchange Act Rule 17a-4 would provide an audit trail alternative to the WORM requirement. This means that forms may preserve electronic records in a manner permitting their recreation if the original is altered, over-written, or destroyed. Accompanying amendments to Rule 18a-6 would provide for the use of either the audit trail or WORM method for newly-created records. The rule amendments would require a broker-dealer of security-based swap entity to produce electronic records in a reasonably usable electronic format to allow securities regulators to search and sort information on the records. The requirements in both sets of rules apply to records that registrants must preserve for specified periods of time.

In a statement, Chairman Gensler noted that there have been many changes "with respect to database management, among other technologies, in the last 24 years. This proposal would bring the Commission's rule in line with technological innovation, and I am pleased to support it."

The releases are Nos. 34-93613 and 34-93614.

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