Statement

Reporting of Securities Loans

Commissioner Hester M. Peirce

Oct. 13, 2023

Thank you, Mr. Chair. While providing transparency regarding securities lending is a worthy and statutorily mandated objective, the approach we are voting on today is not the right way to achieve that objective. Accordingly, I cannot support this recommendation.

Though I do have substantive concerns with aspects of the rule, my concerns are mostly practical. The final rule drops some of the most problematic parts of the proposal, including the requirement to disclose securities available to lend, and alters others, including the requirement to report within fifteen minutes. These changes should make the rule more workable than what was proposed, but they cannot save a rule which has not properly contemplated timing at every step of the process.

Consider, for example, the initial thirty-day comment period. A number of trade associations explained that thirty-day comment periods are appropriate for ministerial rulemakings, not for obtaining comment on "an entirely new regulatory framework with significant requirements on the securities lending markets and the varied participants in them, including broker-dealers, agent lender banks, and investment advisers of mutual funds, private funds and pension funds, among other investors."[1] Although the Commission reopened the comment period for this rule in conjunction with another rulemaking,[2] the length of the initial comment period is key in commenters' decisions on what kind of effort to expend in commenting. Given that we were already more than a decade out from Dodd-Frank, we could have started this rulemaking project with a concept release, a roundtable, and a long comment period.

Timing considerations continue to be a problem for implementation. At first glance, the implementation period seems reasonable, but this rule requires a multi-phase implementation process. First, FINRA, which will be collecting and publishing the securities lending data, has four months to propose its implementing rules. This timeline is extremely aggressive given that FINRA has to set up the reporting infrastructure, including creating a system for generating unique identifiers. Second, FINRA's rules have to be effective within a year. This constrains its ability to work with industry participants, as the release acknowledges it must do to get this system right. Third, firms will have to begin reporting one year after FINRA's rule is final. That timeline leaves little room to work out any glitches in early submissions. Finally, FINRA will barely be able to take a breath before it has to begin publicly reporting the information; the release affords it only ninety days after firms start reporting to get its process for disseminating the data up and running. The Commission may be getting its second CAT.

A better implementation approach not only would have afforded more time for each step of this process, but it would have taken a phased approach to applying the rule. We should have started with U.S. listed equity securities and then moved on to other asset classes. We also could have offered smaller entities additional time for

compliance. A phased process would have allowed FINRA and market participants to transition more smoothly to a new reporting regime. I fear that we have set both up to fail.

Although practical obstacles stand in the way of a yes vote, I appreciate the staff's hard work, including refining areas of the release to afford greater clarity. Haoxiang and Heather, thank you for working with me. I am sorry we did not get there on this rule. Thank you also to staff in the Division of Trading and Markets, the Division of Economic and Risk Analysis, and the Office of General Counsel. The improvements in the final rule are a reflection of your excellent work on a difficult rule.

I have a number of questions:

1. What are the initial and ongoing compliance costs associated with the rule? What are we planning to do to help minimize those costs during the implementation process?
2. While the release has some helpful language, the rule text could be more clear. One commenter recommended "revising the proposed securities loan definition to limit it to transactions covered by a securities lending agreement against a transfer of collateral, and documented as a securities loan on the lender's books and records [and to] exclude short positions, short-arranged financing in connection with prime brokerage client short activities, and repurchase agreements." Why didn't we write a more definitive definition into the rule text?
3. Why are we requiring the publication of loan-by-loan data? Why not publish aggregate data by security instead?
4. One of the required data elements is the time that the covered securities loan was effected, which is in addition to the date the loan was effected. One of the reasons for moving away from fifteen-minute reporting was that terms of loans are finalized throughout the day. How is a covered person supposed to pinpoint a particular time a loan was effected? Why does the precise time even matter if we have the date?
5. Can FINRA allow pricing data to be reported as a spread to a benchmark rate, an issue raised by a number of commenters?
6. Should we require FINRA to take special steps to protect the sensitive data it will collect pursuant to this rule? By rushing FINRA's process, are we increasing the likelihood of a potential data breach?
7. Why are we requiring reporting agents to be a broker, dealer, or clearing agency?
8. We require the reporting of inter-affiliate transactions, including those that are not arms-length.
    a. Why? Won't those transactions degrade the value of the data?
    b. The release mentions that the decision not to exclude inter-affiliate loans turns in part on wanting to ensure that we capture loans by owners of large portfolios who conduct their lending programs using an affiliated agent lender. Wouldn't we capture those loans without the inter-affiliate exemption because the agent lender acts on behalf of the pool and thus would be a covered person?
9. The release includes a section on cross-border application and states that the rule "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." The release states that "there will be some overlap with" the foreign securities lending reporting regimes. What can we do to minimize duplicative reporting?
10. The release notes that crypto asset securities would be reportable under the rule. What are we planning to do to assist FINRA in identifying which crypto assets are covered so that it can reach out to the relevant market participants for their input as it is writing its implementation rules?
11. Section 10(c)(1) makes it unlawful for any person to effect a securities loan transaction in contravention of the rules we are adopting today. Given the granular, technical, prescriptive nature of these rules, foot

faults are inevitable. Will a party to a securities lending transaction be able to void the transaction if it discovers that its counterparty violated our rules?

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[1] Joint Trades Comment Letter at 2 (Nov. 23, 2021), https://www.sec.gov/comments/s7-18-21/s71821-9402961-262828.pdf.

[2] Reopening of Comment Period for Reporting of Securities Loans (Mar. 2, 2022), https://www.sec.gov/files/rules/proposed/2022/34-94315.pdf.