

Statement

Statement on Reporting of Securities Loans



Commissioner Mark T. Uyeda

Oct. 13, 2023

Thank you, Chair Gensler. Under Section 984(b) of the Dodd-Frank Act, the Commission is required to promulgate rules “designed to increase the transparency of information available to brokers, dealers, and investors with respect to the loan or borrowing of securities.”^[1] Today, the Commission considers adopting final Rule 10c-1a to fulfill that obligation. This rule would require covered persons to provide to a registered national securities association—which is effectively FINRA—information concerning certain securities loans within specified time periods, and would require FINRA to make certain information publicly available. The final rule also contains requirements for FINRA on data retention and reasonable fees.

I have significant concerns with the rulemaking process on this proposal. The Commission issued for comment a proposed rule regarding the reporting of securities loans, which was published in the Federal Register on December 8, 2021.^[2] Comments were due 30 days later on January 7, 2022, a period which spanned the first Christmas and New Year’s Day holidays in which people were able to travel after COVID restrictions were lifted.

Subsequent to the end of that comment period, the Commission proposed a rule on short sale reporting.^[3] These two rules are significantly inter-related: one calls for position and activity reporting by persons who borrow securities to engage in short sales, and the other involves reporting of loans of securities, which is used to facilitate short sales. Thus, the Commission reopened the comment period for the proposal regarding the reporting of securities loans and briefly stated that it was “soliciting comment on any potential effects of the proposed ... rule regarding short sale disclosure that the Commission should consider in determining whether to adopt the proposed ... rule regarding the reporting of securities loans.”^[4] It was published in the Federal Register on March 2, 2022 and comments were due 30 days later on April 1, 2022. While there were no holidays over this period, a 30 day comment period was far too short to expect thoughtful analysis from the public on the interaction of the two complicated proposals.

Now some might argue that given that 18 months have elapsed since the close of the reopened comment period, combined with the fact that the Commission has accepted late comments, those deadlines are rendered irrelevant. But that’s not the case. I have been involved in rulemaking at the SEC since 2006. It is my experience that interested parties have to decide early on whether to invest the resources necessary to prepare a comment letter. Short deadlines discourage interested persons and other stakeholders from even starting the effort to write a comment. Moreover, given the large volume of other proposals that were out for comment at the same time in 2022, stakeholders essentially needed to pick and choose the proposals for which it might be feasible to prepare a comprehensive and thoughtful comment letter. After all, writing comment letters is not a costless exercise.

Given the tight interrelation of the two rules, changes to each of them from the proposal stage to the final rule stage need to be considered in weighing the interactive effects on their costs and benefits. The potential interactive effects of these combined changes would have benefitted from additional public comment—and this time, with a comment period of sufficient length. There has not been an opportunity for the public to weigh in and comment on what is essentially a different regime being considered today.

Even taken in isolation, the changes from the proposal to final Rule 10c-1a on the reporting of securities loans are qualitatively of such a nature as to warrant a re-proposal, along with an updated economic analysis, so as to provide public feedback on this new set of regulatory and policy choices. The modifications from the proposed rule—admittedly made in response to comments and hopefully constituting improvements—nonetheless collectively render the final rule sufficiently different from the original proposal. The changes include modifications to the scope of persons required to report, the scope of securities for which loans must be reported, the type of loan transaction to which the final rule applies, the information required to be reported, and the timing of required reporting and responsibilities of the RNSA.

While some changes may not be large, some are substantial, and collectively they amount to a fundamentally different reporting regime. For example, the data reporting requirement to FINRA within 15 minutes after a loan is effected has been replaced by a requirement to report such elements by the end of that day. That is potentially up to a 32-fold difference in reporting time. But it raises reasonable questions: if at the end of the day, perhaps T+1 or later would make more sense. When considered alongside the changes in the short selling reporting rule, the argument for a re-proposal becomes even more compelling. Changes to the short sale reporting rule include streamlining Form SHO, adjusting reporting thresholds, dropping the “buy to cover” order mark, and modifying the rule text as well as the instructions to Form SHO. How do all of these changes work when taken together?

There are important trade-offs within the interaction of these two rules. For example, when these changes from the proposal are taken together, to what extent can the resulting information be used to estimate particular short selling positions and is that acceptable? Simply put, the public has not had the opportunity to comment on this very different regime than the one that was proposed and, for that reason, one could argue that this final rule is arbitrary and capricious. A re-proposal with an appropriate economic analysis and a proper comment period might have gone a long way to address my concerns. In light of those concerns, however, I cannot support the adoption of this rule. I thank the staff in the Divisions of Trading and Markets and Economic and Risk Analysis as well as the Office of General Counsel for their efforts.

[1] Pub. L. 111-203, sec. 984(b), 124 Stat. 1376 (2010).

[2] See Reporting of Securities Loans, Reporting Release No. 34-93613 (Nov. 18, 2021) [86 FR 69802 (Dec. 8, 2021)], available at <https://www.sec.gov/files/rules/proposed/2021/34-93613.pdf>.

[3] See Short Position and Short Activity Reporting by Institutional Investment Managers, Release No. 34-94313, (Feb. 25, 2022) [87 FR 14950 (March 16, 2022)], available at <https://www.sec.gov/files/rules/proposed/2022/34-94313.pdf>.

[4] See Reopening of Comment Period for Reporting of Securities Loans, Release No. 34-94315 (Feb 25, 2023) (underlining added) [87 FR 11659 (March 2, 2022)], available at <https://www.sec.gov/files/rules/proposed/2022/34-94315.pdf>.