SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 240

[Release No. 34-93613; File No. S7-18-21]

RIN 3235-AN01

Reporting of Securities Loans

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission" or "SEC") is proposing a rule to increase the transparency and efficiency of the securities lending market by requiring any person that loans a security on behalf of itself or another person to report the material terms of those securities lending transactions and related information regarding the securities the person has on loan and available to loan to a registered national securities association ("RNSA"). The proposed rule would also require that the RNSA make available to the public certain information concerning each transaction and aggregate information on securities on loan and available to loan.

DATE: Comments should be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's internet comment form (https://www.sec.gov/regulatory-actions/how-to-submit-comments); or
- Send an email to rule-comments@sec.gov. Please include File Number S7-18-21 on the subject line.

Paper comments:

• Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-18-21. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549-1090 on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Theresa Hajost, Special Counsel, Samuel Litz, Special Counsel, John Guidroz, Branch Chief, Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, at (202) 551-5777.

SUPPLEMENTARY INFORMATION: The Commission is proposing for public comment 17 CFR 240.10c-1 ("proposed Rule 10c-1" or "proposed Rule"), under the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. 78a *et seq.*].

Proposed Rule 10c-1 would apply to any person that loans a security ("securities lending transactions") on behalf of itself or another person. It would require such persons to report the specified material terms for each securities lending transaction and related information to an RNSA. Proposed Rule 10c-1 would also require that the RNSA disseminate certain information concerning each securities lending transaction to the public and certain aggregate loan information.

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I. Executive Summary

A. Introduction

1. Market Background

The securities lending market is opaque.[1] Section 984 of the Dodd-Frank Act provides the Commission with the authority to increase transparency, among other things, with respect to the loan or borrowing of securities.[2] It also mandates that the Commission promulgate rules designed to increase the transparency of information available to brokers, dealers, and investors.[3] Although various market participants, such as registered investment companies ("investment companies"), are required to make specified disclosures regarding their securities lending activities[4], parties to securities lending transactions are not currently required to report the material terms of those transactions.[5] The value of securities on loan in the United States as of

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[1] *See infra* Part II.B. The corporate bond and municipal securities markets are now more transparent and efficient markets. The regulatory concerns that led to these transformations included the lack of publicly available pricing information, which is similar to the concerns that would be addressed by proposed Rule 10c-1. The changes to these markets have provided investors with greater pricing transparency, lower search costs and greater price competition. *See, e.g.,* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *Chapter 7.A.2 – Bond Trading*, *in* FUNDAMENTALS OF SECURITIES REGULATION (6th ed. Supp. 2021). *See also* Interim Report of the Financial Stability Board Workstream on Securities Lending and Repos, *Securities Lending and Repos: Market Overview and Financial Stability Issues*, at 14 (Apr. 27, 2012), *available at* https://www.fsb.org/wp-content/uploads/r_120427.pdf.

[2] Pub. L. 111-203, 984(b), 124 Stat. 1376 (2010). Section 984(a) of the Dodd-Frank Act ("DFA"), now Section 10(c)(1) of the Exchange Act, makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or of any facility of any national securities exchange … to effect, accept or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Section 984 of the DFA focuses on the loan or borrowing of securities; therefore, the Commission is not proposing to include repurchase agreements within the scope of the rule.

[3] *Id*. Section 984(b) of the DFA directs the SEC 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."

[4] Investment companies are required to disclose certain information about their securities lending activities. *See*, *e.g.*, Form N-CEN, Item C.6 (requiring disclosures relating to an investment company's securities lending activities) and Form N-PORT, Items B.4 and C.12 (requiring disclosure by investment companies of certain information on borrowers of loaned securities and collateral received for loaned securities). *See also* 81 Fed. Reg. 81870 (Nov. 18, 2016) (discussing requirements for securities lending disclosures by investment companies).

[5] *See infra* Part II.B.

September 30, 2020, was estimated at almost $1.5 trillion.[6] Yet, despite its size, the securities lending market in the United States has a general lack of information available to its market participants, the public and regulators.[7] Based on the lack of transparency and statutory objective[8] to increase transparency in securities lending transactions, the Commission is proposing Rule 10c-1 under the Exchange Act, which would require any person who loans a security on behalf of itself or another person (a "Lender")[9] to provide the specified material terms of their securities lending transactions to an RNSA, as discussed more fully below.

Private data vendors have attempted to address the opacity in the securities lending market by developing systems that provide data to clients who both subscribe to those systems and provide their transaction data to the data vendor. Only subscribers can use those systems to receive information regarding securities lending transactions.[10] Moreover, as the private systems capture data only from their subscribers, the available data is not complete, nor is the transaction data captured by these private vendors available to the general public without a subscription, or available in one centralized location.

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[6] *See* Financial Stability Oversight Council (FSOC), 2020 Annual Report, figure 3.4.2.8, at 41, available at https://home.treasury.gov/system/files/261/FSOC2020AnnualReport.pdf. ("FSOC 2020 Annual Report"). *See infra* note 14.

[7] *See infra* Part VI.A.2.

[8] *See supra* note 3.

[9] Lender, when used in this release, refers to any persons that loans a security on behalf of itself or another person, including persons that own the securities being loaned ("beneficial owners"), as well as third party intermediaries, including banks, clearing agencies, or broker-dealers that intermediate the loan of securities on behalf of beneficial owners ("lending agent"). The term Lender does not extend to the borrower of securities in a securities lending transaction or any third party the intermediates the borrowing of securities on behalf of the borrower.

[10] *See infra* Part II.B.1.

Industry observers and market participants have suggested that the Commission consider measures to provide additional transparency in the securities lending market.[11] Furthermore, there have been other calls for additional transparency, including in testimony during a hearing before the House Financial Services Committee on March 17, 2021. Such testimony supported the creation of a "consolidated tape" or a public data feed of securities lending transactions.[12]

The lack of public information and data gaps creates inefficiencies in the securities lending market. The gaps in securities lending data render it difficult for borrowers and lenders alike to ascertain market conditions and to know whether the terms that they receive are consistent with market conditions.[13] These gaps also impact the ability of the Commission, RNSAs and other self-regulatory organizations ("SROs"), and other Federal financial regulators (collectively "regulators") to oversee transactions that are vital to fair, orderly, and efficient markets.[14] Indeed, the size of the U.S. securities lending market can only be estimated as the

[11] During a March 17, 2021, hearing before the House Financial Services Committee, Dennis Kelleher, CEO of Better Markets, former SEC Commissioner Michael Piwowar, now Executive Director of the Milken Institute Center for Financial Markets, and Michael Blaugrund, COO of the NYSE, each testified that additional transparency in the securities lending market is warranted. *See* Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part II: Hearing Before the H. Comm. on Fin. Serv., 117th Cong. (2021). As Michael Blaugrund stated during the hearing, "[a] system that anonymously published the material terms for each stock loan would provide the necessary data to understand shifts in short-selling activity while protecting the intellectual property of individual market participants."

[12] *Id*.

[13] *See infra* Part VI.A.2.

[14] In its 2020 Annual Report, FSOC describes securities lending as "support[ing] the orderly operation of capital markets, principally by enabling the establishment of short positions and thereby facilitating price discovery and hedging . . . it is estimated that at the end of September 2020 the global securities lending volume outstanding was $2.5 trillion, with around 57 percent of it attributed to the U.S." Financial Stability Oversight Council (FSOC), *2020 Annual Report*, at 45, *available at* https://home.treasury.gov/system/files/261/FSOC2020AnnualReport.pdf. *See also* Viktoria Baklanova, Adam Copeland & Rebecca McCaughrin, *Reference Guide to U.S. Repo and Securities Lending Markets* (Off. of Fin. Research, Working Paper No. 15-17, 2015) at 5, *available at* https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf ("OFR Reference Guide").

data currently "available on … securities lending transactions are spotty and incomplete."[15] Furthermore, the FSOC 2020 Annual Report noted data gaps in "certain important financial markets including transaction data … for securities lending arrangements…"[16]

2. Intended Objectives

To supplement the publicly available information involving securities lending, close the data gaps in this market, and minimize information asymmetries between market participants, proposed Rule 10c-1 is designed to provide investors and other market participants with access to pricing and other material information regarding securities lending transactions in a timely manner. For example, the Commission preliminarily believes that the data collected and made available by the proposed Rule would improve price discovery in the securities lending market and lead to a reduction of the information asymmetry faced by end borrowers and beneficial owners in the securities lending market. The Commission preliminarily believes the proposed Rule would close securities lending data gaps, would also increase market efficiency, and lead to increased competition among providers of securities lending analytics services and to reduced administrative costs for broker-dealers and lending programs.[17]

The data elements provided to an RNSA under proposed Rule 10c-1 are also designed to provide the RNSA with data that could be used for important regulatory functions, including facilitating and improving its in-depth monitoring of member activity and surveillance of securities markets. Further, the data elements are designed to provide regulators with information to understand: whether market participants are building up risk; the strategies that broker-dealers use to source securities that are lent to their customers; and the loans that broker-

[15] OFR Reference Guide, *supra* note 14, at 5.

[16] FSOC 2020 Annual Report, *supra* note 14, at 187.

[17] *See infra* Part VI.A.1.

dealers provide to their customers with fail to deliver positions. Enhancing the transparency of data on securities lending transactions should provide more information to help illuminate investor behavior in the securities lending market and the broader securities market more generally. It will also provide beneficial owners and borrowers with better tools to ascertain current market conditions for securities loans and allow them to determine whether the terms that they receive for their loans are consistent with market conditions.

The Commission preliminarily believes that public disclosure of specified material information regarding securities lending transactions could improve efficiency in the securities lending market and the securities market in general by reducing frictions that can exist where pricing information is not publicly available.[18] In particular, providing access to timely, granular information about certain material terms of securities lending transactions would allow investors, including borrowers and lenders, to evaluate not only the rates for such transactions, but also any signals that rates provide, *e.g.*, that changes in supply and demand for a particular security may indicate an increase in short sales of that security.[19] In addition, increasing the accessibility of data could lower barriers to entry for would-be participants in the securities lending market as well as the securities markets more broadly because all market participants, not just counterparties to a trade or those that subscribe to certain services, would be able to view and analyze transactions that are taking place in the securities lending market. As a result, the

[18] Frictions in trading costs and price can stem from general lack of information on current market conditions, which can lead to inefficient prices for securities loans. *See infra* Part VI.A.2.

[19] Subject to certain exceptions, Rule 203 of Regulation SHO requires a broker-dealer to identify shares of a security that are available for borrowing prior to initiating a short sale in that security. *See* 17 CFR 242.203(b). Rule 204 of Regulation SHO requires a participant of a registered clearing agency to "close out" open short sale positions within specified timeframes by either purchasing or borrowing shares in order to make delivery. 17 CFR 242.204. As a result, heightened demand for borrowing shares of a security is frequently associated with an increased level of short selling activity in that security.

disclosure of the specified material terms of securities lending transactions might improve the efficiency and resiliency of the securities market by reducing frictions in the cost of borrowing securities, which may also have positive effects on the markets for the securities themselves. Additional benefits from increased transparency could include increased savings and profits for investors, improved terms for beneficial owners participating in lending programs, and improved competitiveness in the lending agent and broker-dealer businesses. The proposal might also reduce the cost of short selling and lead to an increase in fundamental research, which contributes to more efficient prices.[20] Finally, access to additional data can contribute to more informed portfolio management and lending decisions.[21]

II. Background

A. Market Structure

Securities lending is the market practice by which securities are transferred temporarily from one party, a securities lender, to another, a securities borrower, for a fee.[22] A securities loan is typically a fully collateralized transaction. Securities lenders, referred to as "beneficial owners," are generally large institutional investors including investment companies, central banks, sovereign wealth funds, pension funds, endowments, and insurance companies.[23]

Beneficial owners of large, static, unleveraged portfolios, mainly pension funds, increasingly cite securities lending as an important income-enhancing strategy with minimal, or

[20] Fundamental research typically involves analyzing and interpreting publicly-available company information to determine whether a stock is under- or overvalued. *See*, *e.g.*, ZVI BODIE, ALEX KANE & ALAN J. MARCUS, INVESTMENTS 363 (2008).

[21] *See infra* Part VI.C.1.b).

[22] *See*, *e.g.*, OFR Reference Guide, *supra* note 14, at 24.

[23] *Id*. at 29.

at least controlled, risk.[24] This incremental income not only helps defined-benefit pension funds to generate income, but also provides investment company investors with additional returns.[25]

Broker-dealers are the primary borrowers of securities; they borrow for their market making activities or on behalf of their customers.[26] Broker-dealers who borrow securities typically re-lend those securities or use the securities to cover fails to deliver or short sales[27] arising from proprietary or customer transactions.[28] While the identities of the ultimate securities borrowers are usually unknown, anecdotally, hedge funds rank among the largest

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[24] *See* Lipson, Sabel & Keane, *infra* note 37, at 1; OFR Reference Guide, *supra* note 14, at 29; *A Pilot Survey of Agent Securities Lending Activity* (Off. of Fin. Research, Working Paper No. 16-08, 2016) at 4. https://www.financialresearch.gov/working-papers/2016/08/23/pilot-survey-of-agent-securities-lending-activity/ ("*OFR Pilot Survey*").

[25] OFR Reference Guide, *supra* note 14, at 29. *See also* Zoltan Pozsar, *Shadow Banking: The Money View* (Off. of Fin. Research, Working Paper No. 14-04, 2014), *available at* https://www.financialresearch.gov/working-papers/files/OFRwp2014-04_Pozsar_ShadowBankingTheMoneyView.pdf. The majority of passive and exchange traded funds (ETFs) also engage in securities lending. In each case, securities lending has been an important revenue source that can compound each year to offset fees and transaction costs, protect an asset manager's profit margins, and improve fund investor returns. *See*, *e.g.*, TOMASZ MIZIOŁEK, EWA FEDER-SEMPACH & ADAM ZAREMBA, *The Basics of Exchange-Traded Funds*, *in* INTERNATIONAL EQUITY EXCHANGE-TRADED FUNDS, at 97-98 (1st ed. 2020).

[26] Dealers, which often act as market makers, borrow securities to settle buy orders from customers. *See* OFR Reference Guide, *supra* note 14, at 33. *See also Comptroller's Handbook: Custody Services/Asset Management*, Off. of the Comptroller of the Currency, at 28 (Jan. 2002), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/custody-services/index-custody-services.html ("*Comptroller's Handbook*"); *OFR Pilot Survey, supra* note 24, at 2-3.

[27] Regulation SHO requires, among other things, that fails to deliver be closed out by purchasing securities of like kind and quantity by no later than the settlement day after settlement is due, or no later than two settlement days after settlement is due for short sales resulting from long sales or from bona fide market making activity. As previously emphasized by the Commission, the determination of whether a short sale qualifies for the bona fide market making is based on a variety of facts and circumstances surrounding a transaction, and must be made on a trade-by-trade basis. *See* Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690 (Oct. 17, 2008), *available at* http://www.sec.gov/rules/final/2008/34-58775fr.pdf.

[28] Brokers' and dealers' securities lending and borrowing activities are governed by a number of regulations including 17 CFR 240.15c3-3 ("Exchange Act Rule 15c3-3"; commonly referred to as the "Customer Protection Rule"), 17 CFR 240.15c3-1 ("Exchange Act Rule 15c3-1; commonly referred to as the "Net Capital Rule"), 17 CFR 240.8c-1 and 17 CFR 240.15c2-1 ("Exchange Act Rules 8c-1 and 15c2-1 commonly referred to as the "hypothecation rules"). *See also Comptroller's Handbook*, *supra* note 26, at 28.

securities borrowers and access the lending market mainly through their prime brokers.[29] Brokers and dealers may also lend securities that are owned by the broker or dealer, customer securities that have not been fully paid for (*i.e.*, have been purchased with a margin loan from the broker-dealer), and the securities of customers who have agreed to participate in a fully paid securities lending program offered by their broker-dealer.[30]

Securities lending transactions are usually facilitated by a third party. Custodian banks have traditionally been the primary lending agent or intermediary and lend securities on behalf of their custodial clients for a fee.[31] Advances in technology and operational efficiency have made it easier to separate securities lending services from custody services. Such developments have given rise to specialist third-party agent lenders, who have established themselves as an alternative to custodial banks.[32] Agent lenders provide potential borrowers with the inventory of securities available for lending on a daily basis.[33]

In addition to agent intermediaries, [34] there are also principal intermediaries, such as prime brokers, securities dealers, and specialist intermediaries. The role of the principal intermediary is to provide credit transformation for lending clients who are not willing to assume

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[29] OFR Reference Guide, *supra* note 14, at 33. Many trading strategies rely on the ability of the trader to borrow securities. For example, traders often borrow securities to establish a short position in one security to hedge a long position in another security. *Id*.

[30] *See* Exchange Act Rule 15c3-3.

[31] *See infra* Part VI. *See*, *e.g.*, *Comptroller's Handbook*, *supra* note 26, at 27. Beneficial owners typically share a portion of their total compensation with the agent and it is common for the beneficial owner to retain most of it. *See*, *e.g.*, *OFR Pilot Survey*, *supra* note 26, at 2.

[32] OFR Reference Guide, *supra* note 14, at 31.

[33] *Id*. at 34.

[34] Agent intermediaries include custodian banks, agent lenders and other third parties, such as asset managers or specialized consultants. *Id*. at 30-31.

exposure to certain types of borrowers. For example, a prime broker assumes credit exposure to the borrower.[35] In short, agent intermediaries aggregate supply on lendable assets, while principal intermediaries aggregate demand for lendable assets.[36] Some large investment companies and their fund managers have created their own securities lending programs and use their own employees to staff the program rather than using the services of a custodial bank lending desk or third-party agent lender.[37]

Traditionally, securities lending and borrowing transactions have been conducted on a bilateral basis.[38] Generally, when an end investor wishes to borrow securities, and its broker-dealer does not have those securities available in its own inventory or through customer margin accounts to loan, the broker-dealer will borrow the securities from a lending agent with whom it has a relationship. The broker-dealer will then re-lend the securities to its customer. Loans from lending programs to broker-dealers occur in what is referred to as the "Wholesale Market", while loans from a broker-dealer to the end borrower occur in what is referred to as the "Retail

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[35] *Id*. at 32.

[36] *Id*.

[37] As a low-margin business, beneficial owners' portfolios need to be of a sufficient size for a securities lending program to be economically feasible. *See* OFR Reference Guide, *supra* note 14, at 29. *See also* Anthony A. Nazzaro, *Chapter 4 - Evaluating Lending Options*, *in* SECURITIES FINANCE, at 83-84 (Frank J. Fabozzi & Steven V. Mann ed. 2005). *See also* Fidelity, *Fidelity Agency Lending*, *available at* https://capitalmarkets.fidelity.com/fidelity-agency-lending; Fidelity, *Q&A: New Securities Lending Agent for the Fidelity Funds* (July 8, 2020), *available at* https://institutional.fidelity.com/app/proxy/content?literatureURL=/9899781.PDF. Also a few large pension and endowment funds lend directly. *See* Paul C. Lipson, Bradley K. Sabel & Frank M. Keane, *Securities Lending*, Federal Reserve Bank of New York Staff Report no. 555, at 2 (Mar. 2012), *available at* www.newyorkfed.org/research/staff_reports/sr555.pdf.

[38] *See*, *e.g.*, *id*. at 36. Typically, the parties enter into a written contract that sets out their legal rights and obligations. *See* OFR Reference Guide, *supra* note 14, at 36. While there are some differences in the contract provisions used, usually the general terms are the same. *See* Lipson, Sabel & Keane, *supra* note 37, at 44-45. In the United States, a Master Securities Loan Agreement (MSLA) is normally used to set out the legal rights and obligations of the parties in securities lending transactions. *See* OFR Reference Guide, *supra* note 14, at 36. A copy of the Master Securities Lending Agreement ("MSLA") published by SIFMA is *available at* https://www.sifma.org/resources/general/mra-gmra-msla-and-msftas/.

Market". Obtaining a securities loan often involves an extensive search for counterparties by broker-dealers.[39]

There are also digital platforms for secured financing transactions, including securities lending, which provide electronic trading in the securities lending market.[40] Another approach to securities lending is based on a competitive blind auction to determine the optimal lending strategy for beneficial owners who opt to use the auction route. The auction process is intended to improve price transparency for borrowers who pay for access to lendable assets.[41] There are also efforts to develop and expand peer-to-peer lending platforms involving multiple beneficial owners and borrowers, where securities lending transactions take place without the use of traditional intermediaries.[42]

Additionally, the Options Clearing Corporation ("OCC") has two stock loan programs: the Stock Loan Program (formerly "Hedge") and the Market Loan program.[43] The Stock Loan Program allows OCC clearing members to use borrowed and loaned securities to reduce OCC margin requirements, which OCC considers as reflecting the real risks of their intermarket hedged positions. In this program OCC serves as a principal counterparty, by becoming the lender to the borrower and the borrower to the lender for each transaction. In its Market Loan

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[39] *See*, *e.g.*, Adam C. Kolasinski, Adam V. Reed & Matthew C. Ringgenberg, *A Multiple Lender Approach to Understanding Supply and Search in the Equity Lending Market*, 68 J. FIN. 559-95 (2013).

[40] *See*, *e.g.*, Equilend, *Next-Generation Trading (NGT)*, https://www.equilend.com/services/ngt/.

[41] *See*, *e.g.*, eSecLending, *The eSecLending Difference*, https://www.eseclending.com/why-eseclending/. *See also* OFR Reference Guide, *supra* note 14, at 32.

[42] *See*, *e.g.*, The Global Peer Financing Association, *available at* https://globalpeerfinancingassociation.org.

[43] *See* The Options Clearing Corporation, *Stock Loan Programs*, https://www.theocc.com/Clearance-and-Settlement/Stock-Loan-Programs; *see also* The Options Clearing Corporation, *Market Loan Program FAQs*, https://www.theocc.com/Clearance-and-Settlement/Stock-Loan-Programs/OCC-Market-Loan-Program-FAQs.

program OCC processes and maintains stock loan positions that have originated through a Loan Market.[44] OCC acts as central counterparty to these matched loans and provides clearing and settlement services to the market and OCC clearing members.[45]

Securities loans may be either for a specific term or open-ended with no fixed maturity date. The typical market practice is for securities loans to be open-ended, allowing the security on loan to be recalled by the beneficial owner. The open recall feature of a securities loan is driven by the assumption that participation in securities lending should not impact the investment strategy of the lender.[46] For example, a security may be recalled when its beneficial owner would like to sell it or exercise its voting rights.[47] Loans that provide the borrower with certainty regarding the length of the loan can be more valuable to the borrower.[48]

Normally, the beneficial owner has specific guidelines regarding which counterparties can borrow its securities and the type of collateral it accepts. Lenders who are able and willing to be flexible on the type of collateral they will accept to secure the loan are more attractive to some borrowers.[49] Beneficial owners may have different approaches to securities lending and

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[44] OCC currently clears securities lending transactions for Automated Equity Finance Markets, Inc., a wholly owned subsidiary of EquiLend Clearing LLC. *See* The Options Clearing Corporation, *Market Loan Program FAQs*, https://www.theocc.com/Clearance-and-Settlement/Stock-Loan-Programs/OCC-Market-Loan-Program-FAQs.

[45] The Depository Trust & Clearing Corporation (DTCC), through its equities clearing subsidiary, National Securities Clearing Corporation (NSCC), has proposed a rule change for regulatory approval to centrally clear securities financing transactions, which would include securities loans. *See* SEC, Notice of Filing of Proposed Rule Change to Establish the Securities Financing Transaction Clearing Service and Make Other Changes, SR-NSCC-2021-010 (Aug. 5, 2021), *available at* https://www.sec.gov/rules/sro/nscc.htm#SR-NSCC-2021-010.

[46] OFR Reference Guide, *supra* note 14, at 34.

[47] OFR Reference Guide, *supra* note 14, at 29.

[48] *See*, *e.g.*, Mark C. Faulkner, *Chapter 1 – An Introduction to Securities Lending*, *in* SECURITIES FINANCE, at 8 (Frank J. Fabozzi & Steven V. Mann ed. 2005). A relatively static portfolio with low securities turnover is more attractive to securities borrowers because it minimizes recalls of loaned securities. *See also* OFR Reference Guide, *supra* note 14, at 29.

[49] Faulkner, *supra* note 48, at 6.

associated risks.[50] For example, some beneficial owners may prefer "volume lending," in which large volumes of easier to lend securities are lent and returns can be enhanced with varying risk, such as the type of collateral accepted or investment of cash collateral in higher-yielding and riskier vehicles. Other beneficial owners may take a "value lending" approach where they lend in-demand securities, which generate higher borrower fees, and take a more conservative approach to the type of collateral accepted or the reinvestment of cash collateral.[51] Different types of beneficial owners also operate under different laws and regulatory frameworks, which may or may not include regulations or regulatory guidance on securities lending activities. For example, investment companies are registered with the SEC under the Investment Company Act of 1940 and rules thereunder.[52] Defined benefit plans are subject to the Employee Retirement Security Act ("ERISA"), as administered by the U.S. Department of Labor. Insurance companies are regulated at the state level.

In the United States, the most common form of collateral for equity security loans is cash. The borrower of the security typically deposits 102% or 105% of the current value of the asset being loaned as collateral.[53] The Lender then reinvests this collateral, usually in low-risk interest-bearing securities, then rebates a portion of the interest earned back to the borrower. The difference between the interest earned and what is rebated to the borrower is the lending fee earned by the Lender. The portion of the interest earned on the reinvested collateral that is returned to the borrower is called the rebate rate, and is a guaranteed amount set forth in the

[50] *See* OFR Reference Guide, *supra* note 14, at 30.

[51] *See* MIZIOŁEK, et al., *supra* note 25, at 12.

[52] *See supra* note 4.

[53] *OFR Pilot Survey*, *supra* note 26, at 12. "Margins on securities loans are negotiable. The variation around the standard margins of 102 percent and 105 percent can be attributed to firm-specific differences in margining policies and the quality and type of the collateral security."

terms of the loan. It is possible for the Lender to lose money on the loan if the interest earned on the reinvestment of the collateral does not exceed the rebate rate. If the security is in high demand in the borrowing market, the rebate rate may be negative, indicating that the borrower does not receive any rebate and must also provide additional compensation to the Lender.

When collateral for a security loan is in the form of other securities, the borrower pays the Lender a set fee. The fee depends on the availability of the security being borrowed; securities in high demand command a higher fee.[54]

While a security is on loan the borrower receives any dividends, interest payments, and, in the case of equity security loans, holds the voting rights associated with the shares.[55] Usually the terms of the loan stipulate that dividends and interest payments must be passed back to the beneficial owner in the form of substitute payments.

B. Transaction Reporting

As discussed above, certain institutional investors, including pension funds (which provide retirement benefits) and mutual funds (which retail and institutional investors rely on to meet financial needs) lend out their securities to earn incremental income, help pension funds generate income, and provide additional returns for their long-term savers.[56] As discussed below, the existing data are not comprehensive or centralized, and there are significant information asymmetries between market participants.[57] The transaction information that would be provided to an RNSA under proposed Rule 10c-1 would include securities lending transaction

[54] *OFR Pilot Survey*, *supra* note 26, at 2.

[55] *See*, *e.g.*, OFR Reference Guide, *supra* note 14, at 36.

[56] *See supra* Part II.A. *See also* OFR Reference Guide, *supra* note 14, at 30.

[57] *See*, *e.g.*, *infra* Part VI.A.2.

information from all Lenders, and most of the information would be made publicly available. The Commission preliminarily believes the proposed Rule would provide material, granular, and timely data regarding the terms of securities lending transactions thereby allowing market participants, the public, and regulators access to key market information.

1. Data Available from Private Vendors

Currently, the predominant sources of pricing information for securities loans are private vendors who offer a variety of systems for borrowers and lenders of securities to provide and receive information regarding securities lending transactions. Some, if not all, of the private vendors operate their systems on a "give-to-get" model, which effectively precludes access to their systems unless the would-be subscriber has securities lending transaction information to provide. Some private securities lending data vendors provide an intraday data feed or end of day information on securities lending transactions by various market participants as well as analytic services involving such data. The data are collected from securities lending transaction participants, including beneficial owners, broker-dealers, agent lenders and custodians. Commonly collected data elements include CUSIP identifiers for securities on loan, quantity, borrowing cost, utilization of available supply, owner domicile, and type of collateral held.[58]

However, the available data are incomplete, as private vendors do not have access to pricing information that reflects all transactions. This in part, reflects the voluntary submission of transaction information by subscribers to vendors and is compounded by the unknown comparability of data due to, among other things, the variability of the transaction terms disseminated, as well as how those terms are defined. As no single vendor has information for all securities lending transactions that take place, some persons pay to subscribe to multiple

[58] *See* OFR Reference Guide, *supra* note 14, at 63.

vendors' systems in order to capture as much of the currently available data as they determine to purchase, which can be expensive.[59]

III. Discussion of Proposed Rule

A. Reporting

1. Obligation to Provide Information to an RNSA

The Commission is proposing Rule 10c-1(a), which would require any person that loans a security[60] on behalf of itself or another person to provide to an RNSA the information required by paragraphs (b) through (e) of proposed Rule 10c-1 ("10c-1 information") as discussed below[61] in the format and manner required by the rules of the RNSA.

a) Obligation of Lender to Provide 10c-1 Information

Proposed Rule 10c-1 would apply to all Lenders. Section 10(c)(1) of the Exchange Act makes it unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange to effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[62] The term "person," for purposes of the Exchange Act, means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.[63] Accordingly, Section 10(c)(1) of the

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[59] *See*, *e.g.*, *Beneficial Owners Demand Independent Benchmarking*, GLOBAL INV., 2017 WLNR 5380098 (Feb. 2, 2017).

[60] *See* Section 3(a)(10) of the Exchange Act, which defines the term "security." 15 U.S.C. 78c(a)(10).

[61] *See infra* Part III.B.

[62] 15 U.S.C. 78j(c).

[63] 15 U.S.C. 78c(a)(9).

Exchange Act provides the Commission with broad authority to implement rules regarding securities lending transactions involving any person, including banks, insurance companies, and pension plans, so long as the rules involving the loan or borrowing of securities prescribed by the Commission are necessary or appropriate in the public interest or for the protection of investors. The Commission preliminarily believes that the proposed Rule is necessary or appropriate in the public interest or for the protection of investors. As discussed further in Part VI, the securities lending market lacks public information regarding securities lending transactions, which creates inefficiencies in the securities lending market. The proposed Rule is designed to address these inefficiencies in the securities lending market by making more comprehensive information regarding securities lending transactions publicly available, which could better protect investors by eliminating certain information asymmetries that currently exist in the securities lending market. The removal of such information asymmetries may improve market efficiencies in the securities market and enhance fair, orderly, and efficient markets for borrowing of the securities and the market for such underlying securities. Additionally, as discussed in greater detail in Part VI.C.2, proposed Rule 10c-1 would provide a number of regulatory benefits related to surveillance and enforcement, reconstruction of market events, and research.

Proposed Rule 10c-1(a) would require Lenders to provide certain terms of securities lending transactions to an RNSA.[64] The Commission preliminarily believes that any person that loans a security on behalf of itself or another person,[65] which would include banks, insurance companies, and pension plans, should be required to provide the material terms of lending

[64] *See infra* Part III.A.2 (Discussion of which Lenders are required to provide the 10c-1 information to the RNSA).

[65] *See infra* Part III.A.2 (Discussion of the hierarchy regarding who is required to provide information to the RNSA).

transactions to ensure that proposed Rule 10c-1 is appropriately "designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities."[66] Although the majority of securities lending transactions involve broker-dealers, over which the Commission has direct regulatory oversight,[67] a significant percentage of securities lending transactions occur away from broker-dealers.[68] The Commission preliminarily believes that any person that loans a security on behalf of itself or another person should be required to provide the specified terms of a securities lending transaction because excluding certain persons – such as banks, insurance companies, and pension plans – would lead to incomplete information regarding securities lending transactions, which might reduce the benefits of the public availability of 10c-1 information and potentially lead to competitive advantages for those Lenders that are not required to provide 10c-1 information to an RNSA.

The Commission proposes to limit the obligation to provide the specified material terms to an RNSA only to the Lender to avoid the potential double counting of transactions that could arise if the Rule required both sides of the securities lending transaction to provide the material terms. Furthermore, the Commission preliminarily believes that the Lender is in the better position to provide the material terms of the securities lending transactions. Lenders are more likely to have access to all of the 10c-1 information. For example, a borrower will not be privy

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

[67] *See* 15 U.S.C. 78o.

[68] While the Commission preliminarily believes that the majority of transactions involve broker-dealers the precise percentage is currently unknown. Based on 2015 survey data the Commission estimates that broker-dealers facilitate between 60% and 90% of transactions in the equity lending market. *See OFR Pilot Survey*, *supra* note 26, at 7-8.

to information required to be provided to the RNSA under paragraph (e) of proposed Rule 10c-1, such as the number of securities available to loan. Additionally, entities such as investment companies, broker-dealers, and banks, which engage in securities lending transactions, typically tend to be larger institutions because of the scale necessary to make the lending of securities cost-effective.[69] To the extent that smaller entities engage in securities lending, they generally employ lending agents, which as discussed below in Part III.A.2.a), would relieve these smaller lending entities from having to provide the 10c-1 information to the RNSA. Accordingly, the Commission preliminarily believes that requiring only the Lender to provide the 10c-1 information will alleviate the potential for the double counting of transactions and limit the burdens of proposed Rule 10c-1 to larger institutions.

Proposed Rule 10c-1 would apply to all securities.[70] The Commission preliminarily believes that proposed Rule 10c-1 should apply to all securities to ensure that a complete picture of transactions involving the loan of securities is provided to the RNSA. According to the OFR Pilot Survey, nearly half of the dollar value of assets on loan in 2015 were debt instruments.[71] If the Commission were to limit the scope of the proposed Rule (*e.g.*, to only equity securities) then a significant number of securities lending transactions would be excluded and the market efficiencies and reduction of information asymmetry that the Commission anticipates will result from proposed Rule 10c-1 would not accrue to non-equity securities.[72] Accordingly, the

[69] *See*, *e.g.*, Faulkner, *supra* note 48, at 6 (the economies of scale offered by agents that pool together the securities of different clients enable smaller owners of assets to participate in the market. The costs associated with running an efficient securities lending operation are beyond many smaller funds).

[70] *See* Exchange Act Section 3(a)(10), *supra* note 60.

[71] *See OFR Pilot Survey*, *supra* note 26, at 8.

[72] Additionally, Congress did not limit or specify the classes of securities in Section 984 of the DFA.

proposed Rule includes 10c-1 information for all securities lending transactions and is not limited to loans of equity securities.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

1. Should persons required to provide information regarding securities lending transactions to an RNSA under proposed Rule 10c-1 be limited to only persons registered with the Commission, such as brokers-dealers, investment companies, investment advisers, and clearing agencies? If so, why? What would be the impact or limitations on the information made available to the public and regulators if proposed Rule 10c-1 limited the requirement to provide information to an RNSA to persons registered with the Commission? Please identify any relevant data, such as the number of securities lending transactions that would not be provided to an RNSA if the rule were limited to registered persons and the dollar value of such transactions, which would be useful for the Commission in considering the effects of the proposed Rule.

2. What, if any, are the broader impacts of requiring that certain information be provided to an RNSA, for example to help borrowers and lenders evaluate rates and signals, such as whether a security is hard to borrow or heavily shorted? Would such a requirement bring more efficiency to the market? Please explain.

3. Are there certain types or categories of Lenders that should be excluded from the requirements under proposed Rule 10c-1 to provide 10c-1 information to an RNSA? If so, please identify such Lender or Lenders, and explain why they should be excluded from the requirements under proposed Rule 10c-1. For example, should clearing agencies be excluded from the requirements under proposed Rule 10c-1 to provide Rule 10c-1 information to an

RNSA? If so, why? How would such an exclusion impact the information available to the public and regulators? Should a broker-dealer that is borrowing securities from a Lender that is not a broker-dealer have a requirement to provide 10c-1 information to an RNSA rather than the non-broker-dealer Lender? If so, why?

4. Should borrowers be required to provide 10c-1 information instead of, or in addition to, Lenders providing such information? Would such a requirement increase the overall costs and burden of the requirement to provide 10c-1 information to an RNSA? Is there information that a borrower of securities is in a better position to provide? Do commenters agree that the requirement to provide 10c-1 information to an RNSA is appropriately placed on Lenders? If not, why not?

5. Does the proposed Rule not cover any transactions that commenters believe should be covered? Does the scope of the proposed Rule create opportunities for gaming or evasion of the reporting requirements, whether through other economically equivalent instruments or otherwise? If so, please explain.

6. The Commission is proposing to include all securities in the scope of the Rule. Is this appropriate, or should certain types of securities be excluded from the Rule? If so, which types of securities should be excluded, and why? Are certain types of securities not lent?

7. Should the proposed Rule include an exception or exemption for certain securities, such as government securities, from the requirement to provide 10c-1 information to an RNSA in proposed Rule 10c-1? If so, please identify the type of security and the rationale for excluding such security from the requirement to provide 10c-1 information to an RNSA in proposed Rule 10c-1.

8. Should the Commission define what it means to "loan a security"? Should such a definition be included in the Rule? What further information is needed?

9. Is the discussion and overview of the securities lending market included in this release accurate? If not, what is inaccurate regarding the discussion of the securities lending market? Are there differences in the securities lending market depending on the type of security loaned, including whether the terms and structures of loans are the same or different depending on security type.

10. As drafted, would the proposed Rule cover all securities lending transactions? If not, what transactions would not be covered by the proposed Rule? How might a Lender structure a securities lending transaction to avoid providing information to an RNSA?

b) Providing Information to an RNSA

The Commission preliminarily believes that Lenders should be required to provide the material terms of securities lending transactions to an RNSA. Currently, FINRA is the only RNSA and has experience establishing and maintaining systems that are designed to capture transaction reporting, such as the system in proposed Rule 10c-1. For example, FINRA has established and operates several systems for the reporting of transactions in equity and fixed income securities.[73] Indeed, the majority of securities lending transactions are through broker-dealers that are members of FINRA.[74] Most broker-dealers already have connectivity to

[73] FINRA operates a number of transparency reporting systems including the Alternative Display Facility (displaying quotations, reporting trades, and comparing trades); OTC Transparency (over-the-counter (OTC) trading information on a delayed basis for each alternative trading system (ATS) and member firm with a trade reporting obligation under FINRA rules); OTC Reporting Facility (ORF) (reporting of trades in OTC Equity Securities executed other than on or through an exchange and for trades in restricted equity securities effected under Rule 144A under the Securities Act of 1933 and dissemination of last sale reports); Trade Reporting and Compliance Engine (TRACE) (facilitates the mandatory reporting of over-the-counter transactions in eligible fixed income securities); and Trade Reporting Facility (TRF) (reporting of transactions effected otherwise than on an exchange).

[74] *See supra* note 68.

FINRA's systems to report trades in equity and fixed income securities. Accordingly, this requirement might help reduce the cost of providing information to an RNSA because most FINRA members will already have established connectivity to FINRA's systems. Furthermore, as discussed below,[75] the proposal would allow Lenders, including lending agents, who are not members of FINRA to contract with reporting agents that have connectivity to FINRA. The Commission preliminarily believes that this could reduce the costs for a non-FINRA-member Lender because rather than incur the costs associated with directly reporting 10c-1 information, including the costs of establishing connectivity with FINRA, it will have the option to use a third party with existing connectivity to provide the Lender's 10c-1 information to FINRA. In addition, requiring 10c-1 information be provided to FINRA could assist FINRA with its surveillance of FINRA Rules 4314 (Securities Loans and Borrowings), 4320 (Short Sale Delivery Requirements), and 4330 (Customer Protection – Permissible Use of Customers' Securities) regarding securities lending and short selling.

Under Section 10 of the Exchange Act, the Commission has the authority to require persons that are not members of an RNSA to provide information to an RNSA, and has previously exercised this authority. Exchange Act Rule 10b-17 requires any issuer of a class of securities publicly traded by the use of any means or instrumentality of interstate commerce or of the mails to provide certain information to an RNSA within a prescribed period of time to give notice to the market regarding certain corporate events, such as the payment of dividends, stock splits, or rights offerings.[76] The Commission approved FINRA rules and fees to support its

[75] *See infra* Part III.A.2.

[76] 17 CFR 240.10b-17.

administration of Exchange Act Rule 10b-17, which provided for oversight of non-FINRA members' compliance with Rule 10b-17.[77]

The Commission could take an alternative approach to providing 10c-1 information to an RNSA. For example, as discussed in Part VI below, the Commission could require that Lenders provide 10c-1 information directly to the Commission. The Commission does not currently have the systems designed to facilitate trade-by-trade reporting and disclosure as contemplated by the proposed Rule. As noted above, FINRA has established and maintained systems similar to what is contemplated in the proposed Rule. As such, the Commission preliminarily believes that requiring Lenders to provide 10c-1 information to FINRA rather than to the Commission, will effectively accomplish the policy objectives of the Rule. As discussed throughout this release, the Commission preliminarily believes that FINRA is well-positioned to accommodate the trade-by-trade reporting of securities lending transactions.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

11. Are there methods for the Commission to improve transparency in the securities lending market other than requiring Lenders to provide the material terms of a securities lending transaction to an RNSA? If so, how would the commenter suggest improving transparency in the securities lending market?

12. Would Lenders use a reporting agent to provide 10c-1 information to an RNSA? Why might a Lender choose not to use a reporting agent? Would Lenders be unwilling to use

[77] *See* FINRA Rule 6490; *See also* Exchange Act Release 62434 (July 1, 2010); 75 FR 39603 (July 9, 2010) (approving FINRA Rule 6490).

reporting agents due to concerns regarding maintaining the confidentiality of the information that the reporting agent would be required to provide an RNSA?

13. Should proposed Rule 10c-1 require that Lenders provide material information to an entity other than an RNSA? For example, should proposed Rule 10c-1 require the material terms of a securities lending transaction be provided directly to the Commission, a clearing agency, or some other entity? If so, should the proposed Rule require that such entity be registered with the Commission? If the commenter believes the entity does not need to be registered with the Commission please explain how the Commission would oversee the repository of the information?

14. Do commenters believe that FINRA, as the only current RNSA, is the appropriate organization to receive, store, and disseminate the 10c-1 information? What concerns do commenters have, if any, about requiring Lenders that are not FINRA members to either provide information to FINRA themselves, or contract with a reporting agent to provide the information to FINRA on their behalf? Do commenters believe the proposed approach of establishing RNSAs as the exclusive recipients and disseminators of 10c-1 information has implications for data quality, compared to alternative approaches? If so, are there alternative approaches commenters believe would address or mitigate those implications?

2. Persons Responsible for Providing Information to an RNSA

To reduce the potential for double counting of securities lending transactions and limit the burden on Lenders, proposed Rule 10c-1 would specify who is responsible for providing information to an RNSA in certain factual circumstances. First, although the proposed Rule places an obligation on any person that loans a security on behalf of itself or another person, if

such Lender is using an intermediary such as a bank, clearing agency,[78] or broker-dealer for the loan of securities, such lending agent shall have the obligation to provide the 10c-1 information to an RNSA on behalf of the Lender.[79] Second, persons with a reporting obligation, including a lending agent, could enter into a written agreement with a broker-dealer that agrees to provide the 10c-1 information to the RNSA on its behalf ("reporting agent"). Finally, Lenders are required to directly provide the RNSA with the 10c-1 information if the Lender is not using a lending agent or not employing a reporting agent to provide the 10c-1 information to an RNSA.

a) Lending Agent Provides Information to an RNSA

The Commission preliminarily believes it is appropriate to require lending agents to provide 10c-1 information to the RNSA on behalf of beneficial owners that employ lending agents, because lending agents are in the best position to know when securities have been loaned from the portfolios that the lending agent represents. Indeed, a beneficial owner might not know that the lending agent has lent securities from the portfolio until after the time prescribed by proposed Rule 10c-1 to provide 10c-1 information to the RNSA. Furthermore, by requiring the lending agent to provide 10c-1 information to the RNSA, the proposed Rule would require the party intermediating the loan (*i.e.*, the lending agent) to also be responsible for providing the material terms of the loan to the RNSA. Specifically, lending agents are directly involved with the loan of securities on behalf of a beneficial owner. In such a circumstance, the beneficial

[78] The Commission understands that certain clearing agencies currently are offering to act as an intermediary on behalf of beneficial owners to lend the beneficial owners' securities. In this circumstance, a clearing agency would be acting as a lending agent and would be required to provide 10c-1 information to an RNSA. Specifically, it is the clearing agency's action as an intermediary on behalf of a beneficial owner to loan the beneficial owner's securities that triggers the requirement to provide the proposed 10c-1 information to an RNSA and not the clearance of the securities lending transaction by itself.

[79] As discussed in *supra* Part II.A, certain digital platforms provide electronic trading in the securities lending market. These platforms, to the extent they serve as lending agents on behalf of beneficial owners, would be required to provide the 10c-1 information to an RNSA. If a platform is not serving as a lending agent, the beneficial owner would be required to provide the 10c-1 information to an RNSA.

owner is passive. For purposes of proposed Rule 10c-1, a beneficial owner that makes available the securities in its portfolio for a lending agent to lend on its behalf is not directly involved with the lending of its securities. Rather, it is the active steps taken by the lending agent that directly results in a loan of securities. For example, a customer of a broker-dealer that participates in their broker-dealer's fully paid lending program might lack the ability to provide 10c-1 information to the RNSA.[80] Additionally, the beneficial owner may lack access to some of the 10c-1 information, such as the identifying information of the borrower. Similarly, an institutional investor that uses a lending agent to manage its securities lending program might not know within 15 minutes that the lending agent has loaned securities from the institutional investor's portfolio, or details on the specific borrower, negotiated fees, or rebate rates.[81]

Accordingly, under proposed Rule 10c-1(a)(1)(i)(B) the beneficial owner would not be required to provide the 10c-1 information to an RNSA for any loan of securities intermediated by a lending agent. The Commission preliminarily believes that responsibility for failing to provide 10c-1 information to an RNSA should be on the lending agent and not the beneficial owners because the lending agent is directly responsible for the loan of securities. Furthermore, placing responsibility on beneficial owners who do not have access to all the necessary information to provide information to the RNSA might have a chilling effect on persons being willing to loan securities, which could negatively impact the securities market generally.

[80] *See* Exchange Act Rule 15c3-3(b)(3). 17 CFR 240.15c3-3(b)(3).

[81] For additional discussion of how lending agents manage the portfolios of the beneficial owners that they lend shares on behalf of, *see infra* Part VI.B.4.b) (discussing how lending programs generally pool shares across accounts with which they have lending agreements to create a common pool of shares available to lend).

b) Reporting Agent Provides Information to an RNSA

The Commission preliminarily believes it is appropriate that a Lender, including a lending agent, be able to enter into a written agreement with a broker-dealer acting as a reporting agent to permit the reporting agent to provide the 10c-1 information to an RNSA on behalf of the Lender because such an arrangement will ease burdens on Lenders, including lending agents, that do not have or do not want to establish connectivity to the RNSA. In order to employ a reporting agent to report the 10c-1 information to the RNSA on behalf of the Lender, proposed Rule 10c-1 would require the Lender and reporting agent to enter into a written agreement. Such written agreements under proposed Rule 10c-1(a)(1)(ii)(A) would memorialize and provide proof of the contractual obligations for the reporting agent to provide the 10c-1 information to an RNSA. Proposed Rule 10c-1(a)(1)(ii)(B) would require the reporting agent to provide the 10c-1 information to an RNSA if the reporting agent has entered into a written agreement to provide the 10c-1 information to an RNSA pursuant to Rule 10c-1(a)(1)(ii)(A) and such reporting agent is provided timely access to such 10c-1 information. The Commission preliminarily believes that it is appropriate for a reporting agent to be responsible for providing information to the RNSA if it contractually agrees to provide such information to the RNSA and it has timely access to such information. In such an instance, the person who enters into the written agreement with the reporting agent is not required to provide the 10c-1 information to the RNSA. If, however, the reporting agent is unable to provide 10c-1 information to the RNSA because it lacks timely access to it, the person who enters into the written agreement with the reporting agent is responsible for providing such information to the RNSA.[82] For purposes of proposed

[82] For example, if a reporting agent establishes an automated system that pulls 10c-1 information directly from the records management system of a beneficial owner but the beneficial owner disables the connectivity to the automated system for any reason, the reporting agent would not have access to the 10c-1 information. As a result,

Rule 10c-1 "timely access" would mean that the reporting agent has access to the 10c-1 information with sufficient time to provide such information to the RNSA within the fifteen minutes after the securities loan is effected or the terms of the loan are modified. This paragraph of proposed Rule 10c-1 is designed to ensure that persons provide the 10c-1 information to a reporting agent so that the reporting agent can provide the information to an RNSA within the required timeframe. The Commission preliminarily believes that clearly delineating who is responsible for providing the 10c-1 information to the RNSA would aid in compliance with proposed Rule 10c-1 because each party will have a clear understanding of its obligations when it enters into a reporting agreement. Namely, the person or lending agent would have an obligation to provide access to the 10c-1 information to the reporting agent in a timely manner; and the reporting agent would have an obligation to provide the 10c-1 information to the RNSA.

Furthermore, proposed Rule 10c-1(a)(2)(ii) would require that the reporting agent enter into a written agreement with the RNSA. Such written agreement must explicitly permit the reporting agent to provide 10c-1 information on behalf of Lenders. Additionally, proposed Rule 10c-1(a)(2)(iii) would require the reporting agent to provide the RNSA with a list of each beneficial owner or lending agent on whose behalf the reporting agent is providing 10c-1 information and to update the list by the end of the day when the list changes. By requiring a written agreement between the reporting agents and the RNSA, the proposed Rule would require that the parties create documentation regarding the agreement to provide 10c-1 information, which would further provide evidence of the commitment by the reporting agent to provide 10c-1 information to the RNSA. Additionally, requiring the reporting agent to provide the identities

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the beneficial owner would be required to provide 10c-1 information to an RNSA under paragraph (a)(1)(ii)(C) of proposed Rule 10c-1.

of each person and lending agent on whose behalf the reporting agent is providing 10c-1 information to the RNSA provides the Commission with the ability to obtain the identities of such Lenders and broker-dealers (as discussed below) from the RNSA, which would aid the Commission with its oversight of the Lenders that have entered into agreements with reporting agents, including with their compliance with the proposed Rule.

Under the proposed Rule, only a broker-dealer could serve as a reporting agent. The Commission preliminarily believes that limiting who can act as a reporting agent to broker-dealers, which are regulated directly by the Commission, is in the public interest and would protect investors because it would aid the Commission in overseeing compliance with proposed Rule 10c-1. Specifically, by limiting reporting agents to broker-dealers the Commission could directly oversee the reporting agent's compliance with the requirement to provide 10c-1 information to the RNSA. Additionally, requiring that reporting agents be broker-dealers provides the RNSA, as well as other self-regulatory organizations ("SROs"), with the ability to oversee the activity of its members that perform a reporting agent function. If reporting agents were to include other entities the Commission might lack an efficient way to oversee how the entity is complying with its responsibility to provide 10c-1 information to an RNSA under proposed Rule 10c-1.

Proposed Rule 10c-1(a)(2)(i) would require any reporting agent that enters into a written agreement to provide information on behalf of another person to establish, maintain, and enforce reasonably designed written policies and procedures to provide 10c-1 information to an RNSA in the manner, format, and time consistent with Rule 10c-1. Accordingly, a broker-dealer could not act as a reporting agent unless the broker-dealer establishes, maintains, and enforces such written policies and procedures. The requirement for a reporting agent to have such written policies and

procedures would provide regulators with a means to examine and enforce a reporting agent's compliance with proposed Rule 10c-1.

Proposed Rule 10c-1(a)(2)(iv) would also require that the reporting agent maintain certain information for a period of three years, the first two years in an easily accessible place. The information required to be maintained would include the 10c-1 information provided by the beneficial owner or the lending agent to the reporting agent, including the time of receipt, as well as the 10c-1 information that the reporting agent sent to the RNSA, and time of transmission. Additionally, the reporting agent would have to retain the written agreements between the reporting agents and beneficial owners, lending agents, and the RNSA. The recordkeeping requirements are designed to help facilitate the Commission's oversight of reporting agents and review the reporting agents' compliance with the requirement to provide the 10c-1 information to the RNSA.

c) Beneficial Owner Provides Information to an RNSA

As discussed above, proposed Rule 10c-1(a)(1)(i)(B) and (a)(1)(ii)(C) provide that if a lending agent or reporting agent is responsible for providing information required by Rule 10c-1 to an RNSA pursuant to paragraphs (a)(1)(i) or (ii), the beneficial owner is not required to provide the 10c-1 information to the RNSA. Accordingly, if a beneficial owner does not employ a lending agent or enter into a written agreement with a reporting agent, the beneficial owner would be responsible for complying with the requirements of proposed Rule 10c-1(a) to provide 10c-1 information to the RNSA. The Commission preliminarily believes that only large beneficial owners run their own lending programs without the assistance of a lending agent because securities lending is a low-margin business and portfolios need to be of a sufficient size

for a securities lending program to be economically feasible.[83] Furthermore, to the extent a beneficial owner is not using a lending agent, the Commission preliminarily believes that it would likely enter into a written agreement with a reporting agent.

d) Examples of Who is Responsible for Providing Information to an RNSA

To provide clarity regarding who is responsible for providing 10c-1 information to an RNSA the Commission offers the following examples:

A. Beneficial Owner and Lending Agent: A beneficial owner is represented by a lending agent that is a bank. The lending agent intermediates the loan of securities to a broker-dealer (the borrower) on behalf of the beneficial owner. In this scenario, the lending agent would be responsible for providing the 10c-1 information to the RNSA. If, however, the beneficial owner uses a person to intermediate the securities lending transaction that is not a bank, clearing agency, or broker-dealer the beneficial owner would be responsible for providing the 10c-1 information to the RNSA.

B. Beneficial Owner and Clearing Agency: As noted above, some clearing agencies have established programs to intermediate the loan of securities on behalf of beneficial owners. In such a scenario, the clearing agency would be a lending agent and, similar to example A, would be responsible for providing the 10c-1 information to the RNSA. A clearing agency not acting as a lending agent would not have a responsibility to provide 10c-1 information to an RNSA. For example, if the clearing agent cleared a securities lending transaction but did not act as an intermediary on behalf of a beneficial owner for the loan of

[83] *See supra* note 37.

securities, the clearing agency would not be responsible for providing the 10c-1 information to an RNSA.

C. Lending Agent and Reporting Agent: Same scenario as example A, however, this time the lending agent has entered into a written agreement with a reporting agent, which happens to be the same broker-dealer that borrowed the shares in example A. In this scenario, the reporting agent– even though it is the broker-dealer that borrowed the securities – would be responsible for providing the 10c-1 information to the RNSA.

D. Onward Lending: Same scenario as example A, however, the broker-dealer that borrowed the securities in example A loans the borrowed securities to a hedge fund. In this scenario, the broker-dealer would be responsible for providing the 10c-1 information to the RNSA regarding the securities lending transaction between the broker-dealer and the hedge fund because the broker-dealer is lending the securities that it borrowed. In this instance, the broker-dealer is loaning the securities on behalf of itself. The obligations to provide information as described in example A for the first lending transaction would remain unchanged.

E. No Lending Agent or Reporting Agent: If a beneficial owner does not employ a lending agent or reporting agent, and loans its securities, the beneficial owner would be responsible for providing the 10c-1 information to the RNSA.

F. Reporting Agent Fails to Provide 10c-1 Information to the RNSA on Behalf of a Person or Lending Agent: A lending agent enters into a written agreement with a reporting agent to provide 10c-1 information to an RNSA. The lending agent provides the reporting agent with timely access to the 10c-1 information, but the reporting agent fails to provide such information to the RNSA. The reporting agent would have violated proposed Rule 10c-1 because it would have been responsible for providing 10c-1 information to the RNSA.

However, if the reporting agent was not provided with timely access to the 10c-1 information by the lending agent, the lending agent would have been responsible for providing the 10c-1 information to the RNSA.

G. Fully Paid Securities Lending Program: If a broker-dealer lends a customer's securities that are fully paid, the broker-dealer would be responsible for providing the 10c-1 information to the RNSA. In this instance, the broker-dealer, acting as the lending agent, is loaning the securities on behalf of its customer.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

15. Should proposed Rule 10c-1 permit reporting agents to be entities other than broker-dealers? If yes, what other persons should be added to the list of persons with whom a Lender can enter into a written agreement to provide the 10c-1 information to an RNSA and why?

16. Should lending agents include other entities in addition to banks, clearing agencies, and broker-dealers? If yes, what other entities should be added to the list of persons with whom a Lender can enter into a written agreement to provide the 10c-1 information to an RNSA and why?

17. The proposed Rule requires a reporting agent that provides 10c-1 information to an RNSA on behalf of another person to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with the proposed Rule by the reporting agent. Is such a requirement necessary or should it be modified? Please explain why or why not. The proposed Rule also requires that a reporting agent retain records of 10c-1 information provided to the RNSA for three years. Is such a requirement necessary or should it

be modified? Please explain. Are there other records or supporting records that should be retained? If yes, what is the length of time that a reporting agent should retain such records and why?

18. What impact, if any, would the recordkeeping requirements in paragraph (a)(2)(iv) have on liquidity in the lending market or the cash market for securities that are subject to the requirement to provide 10c-1 information?

19. Should the proposed Rule require that a person who enters into a written contract whereby a reporting agent agrees to provide 10c-1 information to an RNSA, pursuant to paragraphs (a)(1)(ii) of the proposed Rule, make a determination that it is reasonable to rely on the reporting agent to provide 10c-1 information? Please discuss. Should the reporting agent be required to provide regular notice to its principal of compliance by the reporting agent with its 10c-1 reporting responsibilities (e.g., if the reporting agent fails to timely provide the 10c-1 information to an RNSA)? Please discuss. Should the reporting agent be required to provide notice to its principal and/or the RNSA if it is unable to timely access the Lender's 10c-1 information? Please discuss.

20. Should the Rule identify specific contractual terms that must be included in the written agreement between the reporting agent and the person with the requirement to provide 10c-1 information to the RNSA? If so, what specific contractual terms should the Rule include, e.g. notice when 10c-1 information is provided to the RNSA, notice that information was provided late?

B. Information to be Provided to an RNSA

As discussed throughout this release, to increase the transparency of information available to market participants with respect to the loan or borrowing of securities, proposed

Rule 10c-1 contains data elements consisting of the specified material terms of securities lending transactions that Lenders must provide to an RNSA. The Commission preliminarily believes that the data elements that would be provided to an RNSA, and the subsequent public disclosure of certain of these data elements, would vastly increase the transparency of information available. Unlike the data that is currently available through private vendors, the data that an RNSA would make public under proposed Rule 10c-1 would be available to all without charge or usage restrictions, would have consistently applied definitions and requirements, and would capture all loans of securities. Proposed Rule 10c-1 may, therefore, provide a more complete and timely picture of trading, including interest in short selling and price discovery for securities lending. The data elements provided to an RNSA under proposed Rule 10c-1 are also designed to provide RNSAs with data that might be used for in-depth monitoring and surveillance.

Paragraphs (b) through (d) contain loan-level data elements. These data elements would be required to be provided to an RNSA within 15 minutes after each loan is effected or modified, as applicable.[84] Paragraph (e) contains additional data elements related to the total amount of each security available to loan and total amount of each security on loan that Lenders must provide to the RNSA by the end of each business day that such person was required to provide information to an RNSA under paragraph (a) or had an open securities loan about which it was required provide information to an RNSA under paragraph (a). Proposed Rule 10c-1 also requires RNSAs to make the data elements provided under paragraphs (b), (c), and (e)[85] publicly available as soon as practicable, and in the case of paragraph (e) data, not later than the next

[84] As discussed in detail below, paragraph (c) would only require that information about a modification be provided to an RNSA in certain circumstances. *See* Part III.B.1.b); *see also* proposed Rule 10c-1(c).

[85] As discussed below, proposed Rule 10c-1(d) requires the provision of certain data to an RNSA that will not be made public by the RNSA. These data elements are important for regulatory purposes but public release of the data would identify market participants or could reveal information about the internal operations of a market participant.

business day. For the purposes of proposed Rule 10c-1, a loan would be effected when it is agreed to by the parties. Similarly, a loan would be modified when the modification is agreed to by the parties.

As discussed in Part VI, the Commission preliminarily believes that the requirement to provide to an RNSA the loan-level data elements in proposed Rule 10c-1(b) through (d) within 15 minutes after each loan is effected (or, for modifications, within 15 minutes after a loan is modified) and the subsequent disclosure of certain of these data elements by the RNSA as soon as practicable would increase the transparency of information available to market participants by allowing for the evaluation of the terms of recently effected loans and any signals that these terms provide. Also, in a fast-moving market, market participants would benefit from visibility into recent transactions when considering whether to accept proposed terms for new loans or accept requests to modify existing loans.

Further, as discussed in Part VI, the Commission also preliminarily believes that the requirement to provide to an RNSA the data elements concerning the total amount of securities available to lend and the total amount of securities on loan in proposed Rule 10c-1(e) at the end of each day will provide market participants with an understanding of the available supply of securities and a simple, centralized daily snapshot of the number of securities on loan.[86] The total amount of securities on loan varies over the course of the day, but the Commission preliminarily believes that the intraday information would not be necessary in light of other 10c-1 information that will be made public intraday by the RNSA. For example, market participants can use the intraday loan-level data made public by the RNSA under paragraphs (b) and (c) and

[86] As discussed below, the Commission is not specifying the parameters of "the amount of the security" to allow an RNSA flexibility with respect to any proposed rules. For example, an RNSA could propose rules that identify for different types of securities the information that constitutes the "amount of the security." *See infra* Part III.B.1.a).

the most recent daily information made public by the RNSA under paragraph (e) together to estimate intraday information.

Regardless of whether the data element is required to be provided to an RNSA intraday or daily, proposed Rule 10c-1 would require the RNSA to make certain data elements public as soon as practicable. The Commission preliminarily believes that not mandating a specific timeframe will provide the RNSA with flexibility to structure its systems, policies, and procedures but anticipates that the RNSA would make the data publicly available on a rolling basis very shortly after receipt. With respect to information under paragraph (e), such information would be required to be made publicly available as soon as practicable but not later than the next business day. Because the RNSA would be required to perform calculations to aggregate by security the data elements provided under paragraph (e), the Commission preliminarily believes that specifying this timeframe would provide RNSAs with the time needed to perform these calculations while also requiring that the information be made publicly available in a timely manner.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

21. Does the reporting of loan-level information within 15 minutes after each loan is effected or modified, as applicable, provide sufficient transparency? Please explain why or why not. If it would not, please provide an alternative and explain why the alternative would be preferable. For example, would end of day reporting for loan-level information provide sufficient transparency – why or why not?

22. For the data elements provided to an RNSA under paragraphs (a) through (c), should the Commission specify how quickly an RNSA should make the information publicly

available? If so, which information and how long should an RNSA be given? Would limiting an RNSA's flexibility to structure its systems, policies, and procedures by specifying a timeframe create operational problems for the RNSA?

23. Should the Commission specify a different or more specific timeframe than "not later than the next business day" for the RNSA to make information provided under paragraph (e) publicly available? Does the "no later than the next business day" timeframe provide RNSAs with the time needed to perform these calculations while also requiring that the information be made publicly available in a timely manner?

1. Data Elements Provided to an RNSA

As discussed, to facilitate transparency in the securities lending market, proposed Rule 10c-1(b) through (e) would require Lenders to report specified data elements to an RNSA and for the RNSA to make certain data elements publicly available. As a preliminary matter, because the RNSA would be required to implement rules regarding the format and manner to administer the collection of information,[87] proposed Rule 10c-1 lists the data elements that persons would be required to provide to an RNSA, but does not specify granular instructions for data elements or the formatting required for submission to the RNSA.

a) Initial Loan-Level Data Elements

Proposed Rule 10c-1(b) contains loan-level data elements that would be required to be provided to an RNSA within 15 minutes after a loan is effected and would be made public by an RNSA as soon as practicable. Proposed Rule 10c-1(b) also requires an RNSA to assign each loan a unique transaction identification identifier.[88] The specific data elements in paragraph (b)

[87] Proposed Rule 10c-1(f). For a further discussion of this provision of proposed Rule 10c-1, *see infra* Part III.C.

[88] This unique reference identifier would be necessary to provide an RNSA with modified loan terms under proposed Rule 10c-1(c).

generally fall into one of two categories: (1) data elements that identify each loan of securities and (2) data elements that reflect the negotiated terms for each loan of securities.

The data elements in paragraphs (b)(1) through (b)(5) contain material terms that are not negotiated between the parties. These data elements would provide important information that would allow market participants and regulators to track, understand, and perform analyses on the negotiated material terms that are discussed below. These data elements would also provide an RNSA with enough information to create a unique transaction identifier as required by proposed Rule 10c-1(b). Absent these data elements, market participants would not be able to track the time or date that loans are made or the platform where the loan was executed, or to identify which security was involved.

These data elements are (1) the legal name of the security issuer, and the Legal Entity Identifier ("LEI") of the issuer, if the issuer has an active LEI; (2) the ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier; (3) the date the loan was effected; (4) the time the loan was effected; and (5) for a loan executed on a platform or venue, the name of the platform or venue where executed.

First, paragraphs (1) and (2) of proposed Rule 10c-1 identify the particular security being lent. Paragraph (1) is designed to provide information on the issuer, and paragraph (2) is designed to provide information on the particular security. These paragraphs are designed to be flexible and comprehensive so that every security that can be loaned is able to be identified. In particular, with respect to paragraph (b)(1), the Commission preliminarily believes that an issuer that lacks an LEI would have a legal name. With respect to paragraph (b)(2), the Commission preliminarily believes that securities usually would have at least one of the items listed assigned

to it. If not, the RNSA could require an "other identifier" for further flexibility under paragraph (2).

Next, both paragraphs containing the data elements concerning time and date required to be provided to the RNSA, (b)(3) and (b)(4), require that information be reported about the time and date that the transaction was effected. Because the loan-level data elements in paragraph (b) are designed for market participants to be able to evaluate the terms of recently effected loans and any signals that these terms provide, the Commission preliminarily believes that the time and date the transaction was effected will be more useful to market participants than other times and dates because market participants will be able to have a clear picture of the signals that the parties to that transaction were considering when entering into the loan.[89]

For a loan effected on a platform or venue, paragraph (b)(5) would require the name of the platform or venue where effected. The Commission preliminarily believes that requiring the identity of a platform or venue where transactions are taking place could increase efficiency in the market by alerting investors to potential sources of securities to borrow.[90] As discussed in Part II.A, there are currently digital platforms for securities lending, which provide electronic trading in the securities lending market. There are also efforts to develop and expand peer-to-peer lending platforms involving multiple beneficial owners and borrowers, where securities lending transactions take place without the use of traditional intermediaries. The Commission is

[89] For example, the Commission could have chosen the time and date that a transaction settles. Since settlement may take a period of time to occur after agreement, however, there may be changes to market dynamics in the time period between agreement and settlement. In such a case, the information made publicly available by the RNSA may not be as useful because the conditions of the market at the time the loan was agreed to would not be known.

[90] Making information that would be provided to an RNSA under paragraph (d) about the identity of the parties lending securities publicly available would also alert investors to potential sources of securities to borrow. As stated *infra* in Part III.B.1.c), however, the Commission preliminarily believes that making this information available to the public would be detrimental because it would reveal a specific market participant's investment decisions.

not defining "platform or venue" in proposed Rule 10c-1 to provide an RNSA with the discretion to structure its rules so that different structures of platforms or venues could be accommodated.

Based on the market conventions that are discussed in Part II.A, the Commission preliminarily believes that the data elements in paragraphs (b)(6) through (b)(12) reflect the material terms that borrowers and Lenders negotiate when arranging loans of securities. Because these terms are negotiated, increasing the transparency of information will provide market participants with meaningful data that could be used when structuring, pricing, or evaluating loans of securities. Increasing transparency would also allow market participants to analyze signals obtained from the securities lending market when considering investment or trading decisions for a security. Further, increasing transparency would also permit the RNSA to perform in-depth monitoring and surveillance of securities lending transactions to identify trends and any anomalous market patterns.

These data elements are: (6) the amount of the security loaned; (7)) for a loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges ; (8) the type of collateral used to secure the loan of securities; (9) for a loan collateralized by cash, the rebate rate or any other fee or charges; (10) the percentage of collateral to value of loaned securities required to secure such loan; (11) the termination date of the loan, if applicable; and (12) whether the borrower is a broker or dealer, a customer (if the person lending securities is a broker or dealer), a clearing agency, a bank, a custodian, or other person.

With respect to the data element in paragraph (b)(6), the amount of the security loaned or borrowed, the Commission is not specifying the parameters of "the amount of the security" to allow an RNSA flexibility to propose rules that identify for different types of securities what information constitutes the "amount of the security." For example, an RNSA could propose

rules that require the number of shares be provided for equity securities and the par value of debt securities to accommodate differences in the markets for these securities. This data element would give market participants the ability to infer an estimate of the total amount of each security available to lend or on loan intraday by cross-referencing data made public the prior day by the RNSA pursuant to paragraph (e).[91] It would also give market participants the ability to observe how the size of loans affects other terms of loans.

As discussed in Part II.A, loans of securities can be collateralized in different ways and the structure of the payments depends on the type of collateral used. The data elements in proposed Rule paragraphs (b)(7) through (b)(10) would capture compensation arrangements regardless of the collateral used.[92] Accordingly, to provide context, paragraph (b)(8) would require information about the type of collateral used to secure the loan to be provided to the RNSA. For this data element, the asset class of the collateral would be provided, but the Commission is not including a list of asset classes in order to provide the RNSA with the discretion to determine a thorough list.[93] To facilitate a deeper understanding of the collateral posted, paragraph (b)(10) would require that the percentage of collateral to value of loaned securities required to secure such loan be provided to the RNSA. Paragraph (b)(7) would require

[91] For a discussion of the data elements in paragraph (e), *see infra* Part III.B.1.d).

[92] Certain of these data elements may not apply to every loan. For example, a Lender would not be able to provide data pursuant to paragraph (b)(9) if the loan is not collateralized by cash. The Commission is proposing to include each of these data elements in proposed Rule 10c-1 to capture pricing and collateral information for every loan, but the RNSA may provide Lenders with instructions about how to provide information when a data element is not applicable to a specific loan.

[93] For example, an RNSA could look to the 9 categories of collateral from the OFR Pilot Survey. These 9 categories were: 1) U.S. Treasury Securities; 2) U.S. Government Agency Securities; 3) Municipal Debt Securities; 4) Non-U.S. Sovereign or Multinational Agency Debt Securities; 5) Corporate Bonds; 6) Private Structured Debt Securities; 7) Equity Securities; 8) Cash as securities; and 9) Others. *See* Off. of Fin. Research, *Securities Lending Pilot Data Collection*, at 12 (Sep. 2015), *available at* https://www.financialresearch.gov/data/files/SecLending_Data_Collection_Instructions.pdf ("Securities Lending Pilot Data Collection").

that, for a loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges be provided to the RNSA. In contrast, for loans that are collateralized by cash, paragraph (b)(9) would require that the rebate rate or any other fees or charges be provided to the RNSA.

Paragraph (b)(11) would require that the termination date of the loan be provided to the RNSA, if applicable. As discussed above in Part II.A, it is typical market practice for securities loans to be open-ended, and, therefore, the securities may be recalled upon notice given by the Lender. In contrast, some loans are for a specific term. The Commission preliminarily believes that this information will provide market participants with an understanding of the potential future demand and supply of securities.[94]

Finally, paragraph (b)(12) requires that the borrower type for each transaction be provided. The Commission preliminarily believes that this data element will be useful to provide context for evaluating the other data elements. For example, borrowers of securities that are broker-dealers may determine that loans of securities to other broker-dealers are a more appropriate benchmark than all loans of securities. This data element, therefore, may enhance the transparency provided by the other data elements.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

24. What other data elements, if any, should be included to increase the transparency of securities lending?

[94] For further discussion about how proposed Rule 10c-1 may affect the supply and demand of securities, *see infra* Part VI.

25. Would any of the listed data elements not be informative to the public or to regulators? If not, why not? Should any of the data elements be removed or modified? If so, why?

26. Should all of the data elements in paragraph (b) be made public at the loan-level as proposed? As an alternative, should some be made public in the aggregate or only made available to regulators? Would providing aggregates of 10c-1 information provide the same or greater benefits than loan-level information as proposed? Please discuss how your response relates to the statutory objective of increasing transparency.

27. Are there sufficient data elements to allow for the identification of loans of securities and permit the creation of a unique transaction identifier by the RNSA or should additional or different data elements be required for this purpose?

28. Other than LEI, are there other issuer identifiers such as the EDGAR Central Index Key (commonly abbreviated as "CIK") that could be provided should the issuer have one? If yes, should the other identifier be required in addition to LEI or in the alternative?

29. Are any of the data elements redundant such that an RNSA can determine the information without being provided that particular data element?

30. Are the data elements in paragraphs (b)(7), (b)(8), and (b)(9) sufficient to capture the pricing terms of all loans? If not, how should the data elements be revised to capture the pricing terms of all loans?

31. Would each data element proposed to be included help to achieve the goals of proposed Rule 10c-1 that are discussed above in Part I.A.2? If so, please explain why. If not, please explain why not. If any elements are not necessary please explain the benefits and costs of excluding those data elements.

b) Loan Modification Data

Subject to terms agreed to by the parties, loans of securities may be modified after they are made. To ensure that the transaction data reported and made public pursuant to proposed Rule 10c-1(b) reflects currently outstanding loans of securities and to prevent evasion, proposed Rule 10c-1(c) would require Lenders to provide data elements concerning modifications to loans of securities to an RNSA within 15 minutes after each loan is modified. Proposed Rule 10c-1(c) would also require an RNSA to make such information available to the public as soon as practicable. Under paragraphs (c)(1) through (c)(3), Lenders would be required to provide the date and time of the modification and the unique transaction identifier of the original loan to the RNSA. The Commission preliminarily believes that this information is necessary to allow the RNSA to identify which loan is being modified, categorize the type of modification, and make information about the modification publicly available.

Under paragraph (c), the requirement to provide information about a modification to an RNSA would be contingent on the modification resulting in a change to information required to be provided to an RNSA under paragraph (b). In these instances, Lenders would be required to provide the date and time of the modification, a description of the modification[95] and the unique transaction identifier assigned to the original loan, if any. For example, termination of a loan would be a modification for which information would need to be provided to an RNSA under paragraph (c) because the termination would result in a reduction of the quantity of the securities initially provided to an RNSA for that loan under paragraph (b)(6). Another example would be

[95] The Commission is not specifying the parameters of the term "description of the modification" to allow an RNSA flexibility to propose rules about the descriptions that could be needed for different types of modifications and how such information would be reflected in the updated information made public and stored in a machine readable format as required by paragraph (g)(1).

where a loan that is collateralized by cash is modified so that the borrower pays a one-time fee to the lender without changing the rebate rate since a one-time fee would be an "other fee or charge" under paragraph (b)(9).[96]

32. Are the circumstances that would trigger an obligation to provide information to an RNSA about a modification under the proposed Rule clear? If not, please provide specific examples of circumstances where the proposed requirement to do so is unclear and explain why.

33. Are there any modifications to information provided to an RNSA pursuant to proposed Rule 10c-1(b) that should not be required to be provided to an RNSA? Why or why not? Please explain how excluding such a term from reporting would not make the data already made public by an RNSA potentially misleading.

34. Should additional data elements about modifications be provided to an RNSA? If yes, please explain why and how these data elements would increase transparency.

35. Should the Commission require a data element that would list which party initiated the termination of the loan (e.g. whether shares were recalled by the Lender or whether the borrower returned the shares without a request from the Lender)? If yes, please explain the benefits of requiring that this information be provided and how it would be used.

c) Material Transaction Data That Would Not Be Made Public

As discussed, proposed Rule 10c-1 is designed to increase the transparency of information available to market participants with respect to the loan or borrowing of securities. Proposed Rule 10c-1 is also designed to provide regulators with data that could be used to better

[96] An example of a modification that would not trigger the requirement in paragraph (c) would be when a borrower posts additional collateral in response to an increase in value of the loaned securities. Information about this change would not need to be provided under paragraph (c) because, while paragraph (b)(10) requires the Lender to provide the percentage of collateral to value of loaned securities required to secure such loan, it does not require information about the value of collateral posted in dollar terms.

understand securities trading, including interest in short selling and price discovery for securities lending.[97] The data elements in proposed Rule 10c-1(e) are necessary for these regulatory functions but the Commission preliminarily believes that making this information available to the public would identify market participants or reveal information about the internal operations of market participants. Accordingly, although proposed Rule 10c-1(d) requires certain data elements be provided to an RNSA within 15 minutes after each loan is effected, the RNSA shall keep such information confidential, subject to the provisions of applicable law.

First, paragraph (d)(1) requires the Lender to provide "[t]he legal name of each party to the transaction, CRD or IARD Number, if the party has a CRD or IARD Number, MPID, if the party has an MPID, and the LEI of each party to the transaction, if the party has an active LEI, and whether such person is the lender, the borrower, or an intermediary between the lender and the borrower."[98] The Commission preliminarily believes that the provision of this data element to the RNSA will allow regulators to understand buildups in risk at market participants.[99] Further, this data element will provide the RNSA with information that would be required to administer the collection of all data elements provided to it under paragraphs (b) through (d) of proposed Rule 10c-1, such as ensuring the completeness of submissions, contacting persons that have errors in their provided data, and troubleshooting person-specific technical issues. While

[97] Under paragraph (g)(2), an RNSA would make the information collected pursuant to paragraphs (b) through (f) available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need.

[98] Unlike borrowers who may not know the identity of the principal that has loaned them securities if a lending agent administers the lender's program, the Commission preliminarily believes that all lenders (or their lending agent) should have access to the identity of the borrower because lenders must track the parties to whom they have lent securities.

[99] To facilitate this understanding, paragraph (g)(2) would require RNSAs to make the information collected pursuant to paragraphs (b) through (e) of this section available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need.

this information is important for regulatory purposes, the Commission preliminarily believes that making this information available to the public would be detrimental because it may reveal a specific market participant's investment decisions.

If the Lender is a broker-dealer, proposed Rule 10c-1(d)(2) would require information about "[w]hether the security is loaned from a broker's or dealer's securities inventory to a customer of such broker or dealer" to be provided to an RNSA. The Commission preliminarily believes that this information would provide regulators with information on the strategies that broker-dealers use to source securities that are lent to their customers. This data element would not apply to Lenders that are not broker-dealers. The Commission preliminarily believes that making this information available to the public would be detrimental because it may reveal confidential information about the internal operations of a broker-dealer.

If a person that provides 10c-1 information knows[100] that a loan is being used to close out a fail to deliver as required by Rule 204 of Regulation SHO,[101] to close out a fail to deliver outside of Regulation SHO, proposed Rule 10c-1(d)(3) requires such information be provided to an RNSA. The Commission preliminarily believes that these data elements will provide regulators with information about short sales and the loans that broker-dealers provide to their customers with fail to deliver positions.

In particular, Regulation SHO requires brokers-dealers that are participants of a registered clearing agency to take action to close out fail to deliver positions.[102] One option for

[100] Because Lenders of securities may not be aware of the borrowers' motivations for a transaction, the data elements in paragraph (d)(3) would only need to be provided to an RNSA if known.

[101] 17 CFR 242.204.

[102] A fail to deliver occurs when a participant of a registered clearing agency fails to deliver securities to a registered clearing agency on the settlement date. *See* 17 CFR 242.204(a).

closing out a fail to deliver position is to borrow securities of like kind and quantity. Accordingly, broker-dealers may lend securities to their customers to close out the failure to deliver, which may constrain the supply of securities available to lend. Rule 204's close-out requirement is only applicable to equity securities and broker-dealers may also arrange for the borrowing of securities to cover a fail to deliver outside of Regulation SHO for all other types of securities.[103] Paragraph (d)(3) would require the provision of this information, if known, to provide regulators with insight into loans to cover fails of non-equity securities. The Commission preliminarily believes that making these data elements available to the public would be detrimental because it may reveal information about the internal operations of market participants.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

36. Would the disclosure of the data element in paragraph (d)(1) (the identities of the parties) be helpful to investors, for example, to understand proxy voting issues?

37. Should one or both of the data elements in paragraph (d)(2) or (d)(3) be made available to the public? If yes, please explain why and whether it should be at loan-level or in the aggregate.

38. Are Lenders already collecting the information required by paragraph (d)(1)? In particular, are Lenders collecting a borrower's CRD, IARD, MPID, or LEI, if applicable? If not, should proposed Rule 10c-1 only require Lenders to provide this information if the borrower

[103] *See* 17 CFR 240.15c6-1 (Commission rule containing the standard settlement cycle for most securities transactions; *See also* Securities Transaction Settlement Cycle, Exchange Act Release No. 80295, 82 FR 15564, at 7-10 (Mar. 22, 2017), *available at* https://www.sec.gov/rules/final/2017/34-80295.pdf (portion of release adopting changes to the settlement cycle discussing overview of settlement requirements).

makes it known to the Lender? Why or why not? Would Lenders be required to modify any existing agreements to provide this information to an RNSA?

39. Should any of the data elements in paragraph (d) be modified or removed? If so, which ones and why?

40. Should data elements be added to paragraph (d). If yes, please explain.

41. Given the confidential 10c-1 information that the Lender and reporting agent would provide to an RNSA should there be requirements placed on the RNSA and/or the reporting agent to protect confidential 10c-1 information?

42. Should Lenders be required to provide all of the identifying data elements listed in d(1) for every loan of securities or should only one of those data elements be required? For example, would just providing a CRD be sufficient to allow the RNSA to identify the parties to a transaction? What are the costs and benefits of either approach? Further, would the lack of an LEI make it more challenging to identify entities across different data sets? Should borrowers be required to obtain an LEI if they do not already have one?

d) Total Amount of Securities Available to Loan and Total Amount of Securities on Loan

Paragraph (e) of proposed Rule 10c-1 would require data elements concerning securities available to loan and securities on loan be provided to an RNSA. These data elements would need to be provided by the end of each business day that a person included in paragraphs (e)(1) or (e)(2) of proposed Rule 10c-1 either was required to provide information to an RNSA under paragraph (a) or had an open securities loan about which it was required provide information to an RNSA under paragraph (a).[104] For each security about which the RNSA receives information

[104] The Commission is not specifying exactly what time would be considered the "end of each business day" or what holidays should not be considered a "business day" to give the RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly.

under paragraph (e), paragraph (e)(3) would require the RNSA to make available to the public only aggregated information for that security, as well as the information required by (e)(1)(i) and (ii) and (e)(2)(i) and (ii) as soon as practicable, but not later than the next business day.[105] The Commission preliminarily believes that requiring the RNSA to make available to the public the information required by paragraph (e)(1)(i) and (e)(2)(i) (the legal name of the security issuer, and the LEI of the issuer, if the issuer has an active LEI) and (e)(1)(ii) and (e)(2)(ii) (the ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier) will provide identifying information for each security for which aggregate information would be made public. The data elements in proposed Rule 10c-1(d) are necessary for these regulatory functions but the Commission preliminarily believes that making this information available to the public would identify market participants or reveal information about the internal operations of market participants. Accordingly, under paragraph (e)(3), all identifying information about lending agents, reporting agents, and other persons using reporting agents, would not be made publicly available, and the RNSA would be required to keep such information confidential, subject to the provisions of applicable law.

To specify the information that would be required to be provided to an RNSA under paragraph (e) and to ensure that all relevant securities available to loan or on loan are included, the data elements of paragraph (e) are separated between lending agents, who would provide the data elements in paragraph (e)(1), and persons who do not employ a lending agent, who would provide the data elements in paragraph (e)(2). As fully discussed below, despite their different

[105] Releasing data as provided would identify market participants. Consistent with the reasoning for not making the information required to be provided by paragraph (d) publicly available, the Commission preliminarily believes that this information should not be made public by an RNSA. Further, as described below, the Commission preliminarily believes that the information in paragraph (e) will be used by market participants to determine a utilization rate. Information aggregated by security is the input for that calculation.

locations in the text of paragraph (e), however, the first two elements listed in paragraphs (e)(1) and (e)(2) are the same for all persons. In addition, the last two data elements require the same general information, but would provide certainty about the positions that should be included in the information that is provided to an RNSA. Further, both paragraphs would require that reporting agents provide the identity of the person on whose behalf it is providing the information to the RNSA. Identifying the person on whose behalf the information is being provided would facilitate regulatory oversight regarding compliance with the requirements of paragraph (e).

As a preliminary matter, as more thoroughly discussed in Part VI, the Commission has designed the data elements provided to the RNSA under paragraph (e) to allow for the calculation of a "utilization rate" for each particular security. The utilization rate, which would be calculated by dividing the total number of shares on loan by the total number of shares available for loan, could be used by market participants to evaluate whether the security will be difficult or costly to borrow.

The first two data elements that would be required to be provided to the RNSA by all persons under paragraph (e) would be the legal name of the security issuer; and the LEI of the issuer, if the issuer has an active LEI; and the ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier.[106] These data elements are necessary to calculate the utilization rate from the total amount of each security on loan and available to loan.

[106] Proposed Rule 10c-1(e)(1)(i) and 10c-1(e)(1)(ii) (requirements applicable to lending agents) and Proposed Rule 10c-1(e)(2)(i) and 10c-1(e)(2)(ii) (requirements applicable to all other persons). The data elements in paragraphs (i) and (ii) of proposed Rule 10c-1(e)(1) and (e)(2) mirror the same requirements under paragraph (b)(1) and (b)(2). For an explanation of the flexibility of these requirements, *see supra* Part III.B.1.a).

Next, all persons would be required to provide information about the total amount of each security that is available to lend and is on loan. The language "total amount of each security" would provide RNSAs with flexibility to accommodate market conventions of different types of securities. For example, if it chooses to do so, this language would give an RNSA the discretion to make rules that require the number of shares be provided for equity securities and par value of debt securities.[107] Further, the language is designed to require that security-specific information is provided to market participants so that a security-specific utilization rate would be able to be calculated.

All persons would be required to provide the total amount of each security that is available to lend under either paragraph (e)(1)(iii) or (e)(2)(iii). Per paragraph (e)(1)(iii), a security that is not subject to legal restrictions that would prevent it from being lent would be "available to lend."[108] For example, a lending agent that provides information on behalf of a beneficial owner should exclude any securities that the beneficial owner has specifically restricted from the lending program. Some programs may be subject to overall portfolio restrictions[109] (*e.g.*, no more than 20% of the portfolio may be lent at any time),[110] and/or

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[107] This example was previously discussed above in reference to paragraph (b)(6). *See supra* Part III.B.1.a).

[108] This definition is consistent with the approach of the OFR's General Instructions for Preparation of the Securities Lending Pilot Data Collection. *See* Securities Lending Pilot Data Collection, *supra* note 93, at 2.

[109] For example, Commission staff guidance forms the basis for investment companies' securities lending practices. *See* Investment Company Derivatives Rule, 85 FR 83228, n. 742. As a result, investment companies typically do not have more than one-third of the value of their portfolio on loan at any given point in time. *See*, *e.g.*, SEC Staff No-Action Letter, RE: The Brinson Funds, et al., *available at* https://www.sec.gov/divisions/investment/noaction/1997/brinsonfunds112597.pdf) (Nov. 25, 1997) ("One of the guidelines is that a fund may not have on loan at any given time securities representing more than one-third of its total assets."). This staff statement represents the views of the staff of the Division of Investment Management. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. The staff statement, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

[110] For example, a beneficial owner that has program limits permitting the loan of any portfolio security, up to 20% of the portfolio would include 100% of the portfolio as lendable. A beneficial owner that will only lend specified

specific counterparty restrictions (*e.g.*, counterparty rating). However, because those restrictions apply to the overall portfolio but not the specific securities held in those portfolios, those securities would be available to lend unless the securities are themselves subject to restrictions that prevent them from being lent. The Commission preliminarily believes that this approach would provide market participants with useful information because all securities that generally would be available to lend would be included.

Next, all persons would be required to provide the total amount of each security that is on loan under either paragraph (e)(1)(iv) or (e)(2)(iv). Per paragraph (e)(1)(iv), a security would be "on loan" if the loan has been contractually booked and settled.[111] Because a loan should be considered effected when it is agreed to by the parties,[112] effected loans that have not been booked and settled would not be included in the total amount of each security on loan that is provided to the RNSA. The Commission preliminarily believes this information will provide information that is more relevant for this purpose of allowing market participants to plan their borrowing activity, since loans that have been booked and settled are truly no longer able to be lent by the Lender providing the information to the RNSA.[113]

securities, which represent 25% of the portfolio, would list only those specified securities as lendable. Similarly, a beneficial owner that will lend any security in its portfolio but has program limits in place to avoid loaning more than one-third of the value of their portfolio at any time would report 100% of its securities as available to lend.

[111] Like the interpretation of "available to loan" discussed in note 108, the interpretation of "on loan" is consistent with the approach of the OFR's General Instructions for Preparation of the Securities Lending Pilot Data Collection. *See* Securities Lending Pilot Data Collection, *supra* note 93, at 2.

[112] *See* Part III.B.

[113] Further, while it may be possible to infer a rough estimate of the amount of securities on loan from the information provided under paragraphs (b) and (c) without using any information provided under paragraph (e), the Commission preliminarily believes that the information provided under paragraph (e) should allow market participants to calculate a utilization rate that is likely to be reliable.

To illustrate when Lenders would be required to provide information under paragraph (e) and the securities that would be considered "available to loan" and "on loan" with an example: Consider a Lender that owns five shares of Issuer A, five shares of Issuer B, and five shares of Issuer C, none of which are subject to legal restrictions that prevent them from being lent. If on a business day this Lender does not have any outstanding securities loans and does not loan any securities, it would not be required to provide information about any of its securities under paragraph (e). In contrast, if on a business day this Lender loans three of its shares of issuer A, the Lender would be required to provide information to an RNSA under paragraph (e) because it would have been required to provide information about this loan to an RNSA under paragraph (a). This Lender would consider two shares of issuer A, five shares of Issuer B, and five shares of Issuer C as "available to loan" because none of these shares would be subject to legal or other restrictions that prevent them from being lent. Further, if the loan of three shares of Issuer A clears and settles on that business day, this Lender would consider the three shares of Issuer A as "on loan."

As noted above, to provide clarity about what would be required to be provided to an RNSA under paragraph (e) and to ensure that all relevant securities available to loan or on loan are included, the data elements of paragraph (e) are separated between lending agents, who would provide the data elements in paragraph (e)(1), and persons who do not employ a lending agent, who would provide the data elements in paragraph (e)(2).[114]

[114] Paragraph (a)(1)(i)(A) defines lending agent as a "bank, clearing agency, broker, or dealer that acts as an intermediary to a loan of securities … on behalf of a [beneficial owner]." Under this definition, a lending agent that is not acting as a lending agent with respect to a particular securities loan would still be a lending agent, and, therefore be subject to paragraph (e)(1) and not (e)(2).

With respect to lending agents, paragraph (e)(1) contains different requirements for lending agents that are broker-dealers and lending agents that are not broker dealers. In particular, under paragraph (e)(1)(iii), if a lending agent is a broker or dealer, the lending agent would provide to the RNSA the total amount of each security available to lend by the broker or dealer, including the securities owned by the broker or dealer, the securities owned by its customers who have agreed to participate in a fully paid lending program, and the securities in its margin customers' accounts. If the lending agent is not a broker-dealer, the lending agent would provide to the RNSA the total amount of each security available to the lending agent to lend, including any securities owned by the lending agent in the total amount of each security available to lend provided.

Similarly, under paragraph (e)(1)(iv), if a lending agent is a broker-dealer, the lending agent would provide to the RNSA the amount of each security on loan by the broker or dealer, including the securities owned by the broker or dealer, the securities owned by its customers who have agreed to participate in a fully paid lending program, and the securities that are in its margin customers' accounts in the total amount of each security on loan. If the lending agent is not a broker-dealer, the lending agent would provide to the RNSA the total amount of each security on loan where the lending agent acted as an intermediary on behalf of a beneficial owner and securities owned by the lending agent in the total amount of each security on loan provided to the RNSA.

The Commission preliminarily believes that the requirements for lending agents will provide them with specificity around which positions to include in the information that is provided to an RNSA under paragraph (e). In addition, because some lending agents are broker-

dealers, the Commission preliminarily believes that the applicable requirements should ensure that all relevant positions are included.

With respect to all other persons, paragraphs (e)(2)(iii) and (e)(2)(iv) contain the requirements for the positions that should be included in the total amount of each security available to lend and on loan. Unlike paragraph (e)(1), paragraph (e)(2) does not distinguish among different types of persons in paragraph (e)(2) because, due to the definition of lending agent in paragraph (a)(1)(i)(A), persons subject to paragraph (e)(2) would not be loaning securities on behalf of other persons. It is not necessary, therefore, to distinguish between different types of market participants because these entities would, by definition, only be loaning securities that they own. Accordingly, persons subject to paragraph (e)(2)(iii) would provide to the RNSA the total amount of each security that is owned by the person and available to lend.[115] In addition, under paragraph (e)(2)(iv), these persons would provide to the RNSA the total amount of each security on loan owned by the person.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

43. Should the RNSA make the information reported under proposed Rule 10c-1(e) public at the level it is provided (e.g., not aggregating the information by security)? Why or why not?

44. Should Rule 10c-1 require the RNSA to make the information required by paragraph (e) publicly available in a manner that identifies the Lender if that Lender volunteers to make such information public? Why or why not? If so, should only beneficial owners be

[115] Proposed Rule 10c-1(e)(2)(iii).

permitted to volunteer to make such information public and not lending agents? Why or why not?

45. Should paragraph (e) be limited to only require information about certain types of securities, such as only equity securities? If so, please explain which securities should be included and why the excluded securities should not be included.

46. Are the data elements required by paragraphs (e)(1)(i)/(e)(2)(i) (the legal name of the security issuer, and the LEI of the issuer, if the issuer has an active LEI) and (e)(1)(ii)/(e)(2)(ii) (the ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier) both necessary? Would only requiring one of these be sufficient to allow identification of the security about which the information is being provided? Would only requiring one of these reduce the utility of the data in other ways, for example, by making it more challenging to identify entities and/or securities across multiple data sets?

47. As noted above, the language "total amount of each security" is intended to provide the RNSA with flexibility to accommodate market conventions of different types of securities. For example, this language is intended to give an RNSA the discretion to make rules, if it chooses to do so, that require the number of shares be provided for equity securities and par value of debt securities. Instead of this approach, should the Commission specify the specific reporting obligations applicable to specific types of securities under paragraph (e) rather than leaving it to the discretion of an RNSA? If yes, please explain why and provide a methodology for determining the total amount of each security available for loan and on loan for various types of securities.

48. The Commission recognizes that the definition of "available to lend" may overstate the quantity of securities that could actually be lent because the data would include

securities that may become restricted if a limit is reached. Should a different definition be used? Is there another definition that would provide a better or more accurate estimate of securities available for loan than the proposed definition? In particular, please also explain how the alternative approach would operationally work and give market Lenders certainty around the securities it would classify as available to lend.

49. If the number of shares available to lend was not made publicly available, are there alternative data that market participants could use to evaluate whether the security will be difficult or costly to borrow? For example, could a market participant look to the public float of a security instead? Why or why not? Would there be other impacts on the utility of the data?

50. To avoid the provision of information about individual market participants' proprietary portfolios, should the Commission limit the requirement to provide information under paragraph (e) to lending programs that pool the securities of multiple beneficial owners? In addition or as an alternative, should the Commission remove the requirement that a reporting agent would be required to provide the identity of the person on whose behalf it is providing the information? Would this be consistent with the purpose of the proposed rule, which is to increase transparency in the securities lending market? Why or why not?

51. Do the definitions of "available to lend" or "on loan" conflict with market practice or other regulatory requirements? If yes, please explain.

52. Do you believe that any of the information in paragraph (e) of the proposed Rule should not be required to be provided or that any of the requirements of paragraph (e) should be modified? Do you believe that any information in addition to the information required to be provided in paragraph (e) of the proposed Rule should be provided? Please explain why.

53. Do you believe that the information provided pursuant to paragraph (e) of the proposed Rule should be provided more frequently or less frequently than each business day? Why or why not?

C. RNSA Rules to Administer the Collection of Information

The Commission is proposing Rule 10c-1(f), which would require the RNSA to implement rules regarding the format and manner to administer the collection of information in proposed paragraphs (b) through (e) of this section and the distribution of such information pursuant to Section 19(b) of the Exchange Act. The Commission preliminarily believes that permitting an RNSA to implement rules regarding the administration of the collection of securities lending transactions would enable the RNSA to maintain and adapt potential technological specifications and any changes that might occur in the future. Under the proposal, and consistent with Exchange Act Section 19(b), the Commission would retain oversight of the RNSA's adoption of rules to administer the collection of information under proposed Rule 10c-1.[116]

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

54. Should proposed Rule 10c-1 specify the format and manner that information should be provided to the RNSA rather than require the RNSA to adopt rules regarding such format and manner? Please discuss. Are there disadvantages to having an RNSA adopt a rule regarding the format and manner that information should be provided to the RNSA pursuant to proposed Rule 10c-1? What advantages would there be if Rule 10c-1 specified the format and manner that information should be submitted to the RNSA?

[116] 15 U.S.C. 78s(b).

D. Data Retention and Availability

The Commission is proposing Rule 10c-1(g)(1) to require that an RNSA retain the information collected pursuant to paragraphs (b) through (e) of proposed Rule 10c-1 in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years. The Commission preliminarily believes that requiring the RNSA to retain records for five years is consistent with other retention obligations of records that Exchange Act rules impose on an RNSA. For example, 17 CFR 240.17a-1, Exchange Act Rule 17a-1 requires RNSAs to keep documents for a period of not less than five years. Similarly, 17 CFR 242.613(e)(8), Rule 613(e)(8) of Regulation NMS, on which the retention period for proposed Rule 10c-1 is modeled, requires the central repository to retain information in a convenient and usable standard electronic data format that is directly available and searchable electronically without any manual intervention for a period of not less than five years. Rule 10c-1(g)(1) is using a standard for storage that is similar to Rule 613(e)(8). The standard sets forth the criteria for how information must be stored but does not specify any particular technological means of storing such information, which should provide flexibility to the RNSA to adapt to technological changes that develop in the future. As with Exchange Act Rule 17a-1, the retention period is intended to facilitate implementation of the broad inspection authority given the Commission in Section 17(a) of the Exchange Act.[117] The Commission preliminarily believes that including a retention period that is consistent with other rules applicable to RNSAs reduce the burden for an RNSA to comply with the retention requirements in proposed Rule 10c-1 because the RNSA will have developed

[117] *See*, *e.g.*, Recordkeeping and Destruction of Records, Exchange Act Release 10809 (May 17, 1974), 39 FR 18764 (May 30, 1974); *see also* Recordkeeping and Destruction of Records, Exchange Act Release 10140 (May 10, 1974), 38 FR 12937 (May 17, 1973).

experience and controls around administering record retention programs that are similar to the requirements of proposed Rule 10c-1(g)(1).

Furthermore, the Commission is proposing Rule 10c-1(g)(2), which would require the RNSA to make the information collected pursuant to paragraph (a)(2)(iii) and paragraphs (b) through (e) of this section available to the Commission or other persons, such as SROs or other regulators, as the Commission may designate by order upon a demonstrated regulatory need. The Commission preliminarily believes that stating explicitly that it would have access to the information that is being provided to the RNSA is appropriate because in times of market stress or extreme trading conditions, including spikes in volatility, the Commission will be able to quickly access and analyze activity in the market place. In addition to the Commission and the RNSA, other regulators may require access to the confidential information for regulatory purposes, for example to ensure enforcement of the regulatory requirements imposed on the entities that they oversee.

The Commission is also proposing Rule 10c-1(g)(3), which would require the RNSA to provide the information collected under paragraphs (b) and (c) of this section and the aggregate of the information provided pursuant to paragraph (e) of this section available to the public without charge and without use restrictions, for at least a five-year period. The Commission preliminarily believes that requiring the RNSA to provide certain information to the public will further the direction by Congress in Section 984(b) of the DFA for the Commission to promulgate rules that are designed to increase the transparency of information to brokers-dealers and investors, with respect to the loan or borrowing of securities because the information required to be disclosed by the RNSA will include the specified material terms of securities lending transactions.

The Commission preliminarily believes that access to the publicly available 10c-1 information as required by paragraph (g)(3) should be available on the RNSA's website or similar means of electronic distribution in the same manner such information is required to be maintained pursuant to paragraph (g)(1) of this section (specifically, "a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention"), and be free and without use restrictions. The Commission acknowledges that establishing and maintaining a system to provide public access to certain 10c-1 information is not without cost. The Commission, however, preliminarily believes that such costs should be borne by the RNSA in the first instance and permitted to be recouped by the RNSA from market participants who report securities lending transactions to the RNSA.[118] Furthermore, proposed Rule 10c-1 would require that the publicly available 10c-1 information be made available without use restrictions. The Commission preliminarily believes that any restrictions on how the publicly available 10c-1 information is used will impede the utility of such information because such restrictions may limit the ability of investors, commercial vendors, and other third parties, such as academics, from developing uses and analyses of the information.[119]

The Commission preliminarily believes that five years is the appropriate length of time for the RNSA to make information available to the public, because such a time period will provide broker-dealers and investors with an opportunity to identify trends occurring in the

[118] *See infra* Part III.E.

[119] The requirement to provide the 10c-1 information in the same manner such information is maintained pursuant to paragraph (g)(1) of this section on the RNSA's website without charge and without use restrictions is not intended to preclude the RNSA from creating alternative means to provide information to the public or subscribers. For example, an RNSA might choose to file with the Commission proposed rules to establish data feeds of the Rule 10c-1 information that vendors might subscribe to and repackage for onward distribution.

market and in individual securities based on changes to the material terms of securities lending transactions.

The Commission is also proposing Rule 10c-1(g)(4), which would require the RNSA to establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of the confidential information required by paragraphs (d) and (e)(3). As discussed above in Parts III.B.1.c) and d), Rule 10c-1 would require Lenders to provide sensitive and confidential information to the RNSA. Furthermore, paragraphs (d) and (e)(3) would require that the RNSA keep such information confidential. The Commission preliminarily believes that the RNSA needs to protect this information from intentional or inadvertent disclosure to protect investors that provide such information by establishing reasonably designed written policies and procedures because the distribution of such information would identify market participants or could reveal information about the internal operations of market participants, which could be adverse to those providing information to the RNSA. For example, the disclosure of such information could reveal the portfolio holdings, trading strategies, and activity of a Lender, which other market participants might use to disadvantage the Lender.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

55. Is the retention of information collected by the RNSA for a period of five years in proposed paragraph 10c-1(g)(1) appropriate? If not, should the period under proposed paragraph 10c-1(g)(1) to preserve records under proposed paragraph 10c-1(b) through (e) be different – 20 years, 10 years, 3 years, or some other period of time and why? Should the proposed Rule require an RNSA to maintain the information indefinitely? What would be the benefits or costs

if the proposed Rule required an RNSA to retain information for the life of the RNSA? Would investors, RNSAs, the Commission, or the public benefit from retention period that is longer than five years? Is a recordkeeping requirement in proposed Rule 10c-1(g)(1) necessary, or will an RNSA maintain the records of its own accord or pursuant to other regulatory recordkeeping obligations, such as Rule 17a-1?

56. Is the retention requirement in proposed paragraph 10c-1(g)(1) unduly burdensome on the RNSA or overly costly? If so, in what ways could modifications to the Rule as proposed reduce these burdens and costs?

57. What, if any, impact would the recordkeeping requirements in paragraph (g) have on liquidity in securities that are subject to the requirement to provide 10c-1 information?

58. Is five years the appropriate length of time for the RNSA to make information available to the public? If not, should the period of time be for 20 years, 10 years, 3 years, or some other period of time? Please explain why.

59. Are there other methods of distributing 10c-1 information that Rule 10c-1 should require besides the RNSA's website or similar means of electronic distribution? Please explain. Should Rule 10c-1 not explicitly name any type of technology currently in existence, such as a website? Should Rule 10c-1 require only that information has to be publicly available and let the RNSA determine how to best accomplish providing information to the public?

60. Should the Commission include additional requirements designed to help ensure the confidentiality of information provided to the RNSA? Please explain. Do commenters believe the confidential information is as sensitive as discussed in this release? Please explain.

E. Report and Dissemination Fees

To fund the reporting and dissemination of data provided pursuant to this Rule, the Commission is proposing paragraph 10c-1(h), which would reflect that the RNSA has authority under Exchange Act Section 15A(b)(5) to establish and collect reasonable fees from each person who provides any data in proposed paragraphs (b) through (e) of proposed Rule 10c-1 directly to the RNSA. The Exchange Act allows RNSAs to adopt rules that "provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls."[120] The Commission preliminarily believes that it is appropriate to establish and collect reasonable fees from each person who directly provides the information[121] set forth in the Rule to the RNSA. The Commission acknowledges that this might result in persons that are not members of an RNSA being required to pay fees to the RNSA for the use of the facility or system operated by FINRA, but in the absence of such a fee the RNSA and it members could be subsidizing the free riding of non-member Lenders that would be required to provide 10c-1 information to the RNSA under the proposed Rule. Such an outcome might not result in an equitable allocation of reasonable dues, fees, and other charges among "members and issuers and other persons" providing 10c-1 information to a facility or system operated or controlled by the RNSA.

The Commission has previously approved a rule that permits an RNSA to charge fees to non-members that use the RNSA's systems to comply with rules adopted by the Commission.

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[120] *See* 15 U.S.C. 78o-3(b)(5)("The rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls").

[121] For example, lending agents and reporting agents would be providing proposed Rule 10c-1 information to an RNSA on behalf of beneficial owners and using the facility or system of the RNSA. However, the beneficial owners relying on such lending agent or reporting agent would not be using the facility or system of the RNSA.

FINRA Rule 6490, which implements notice requirements of issuers for certain corporate actions pursuant to Rule 10b-17, establishes a fee schedule that issuers pay to FINRA for processing these corporate actions. The Commission exercised oversight of the fees imposed by FINRA on non-members by noticing FINRA's Rule 6490 for comment, reviewing and considering comments, and approving Rule 6490. Similarly, the Commission would oversee fees that the RNSA proposed to charge by members and non-members to administer proposed Rule 10c-1. Specifically, any such fees would have to be filed with the Commission under Section 19(b) of the Exchange Act. The proposed fees would be published for notice and public comment. Since FINRA is currently the only RNSA, the Commission understands the potential for monopolistic pricing by FINRA on Lenders that are required to provide 10c-1 information to FINRA. To the extent FINRA files a rule to charge fees for Lenders to provide 10c-1 information, the Commission would be analyzing costs to FINRA to establish the system required by proposed Rule 10c-1 consistent with the requirements under Section 15A(b).[122] For example, Section 15A(b)(5) requires an equitable allocation of reasonable fees and other charges among members and issuers and other persons using any facility or system which the association operates or controls. Accordingly, to the extent FINRA fails to meet its burden in a rule filing with the Commission that the fees meet the requirements of the Exchange Act, the fees would not be permissible.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

61. Should proposed Rule 10c-1 explicitly state that an RNSA may collect a fee from persons that provide 10c-1 information to the RNSA? If so, why ?

[122] *See NetCoalition v. SEC,* 615 F.3d 525 (D.C. Cir. 2010).

62. Are there alternative means to fund a system for providing 10c-1 information to the RNSA? If so, please explain.

IV. General Request for Comment

The Commission solicits comment on all aspects of proposed Rule 10c-1 and any other matter that might have an impact on the proposal discussed above. In particular, the Commission asks commenters to consider the following questions:

63. What, if any, impact would proposed Rule 10c-1 have on liquidity in securities that are subject to the requirement to provide 10c-1 information? Please explain.

64. Are there additional or different ways to structure the proposed Rule that would help provide additional transparency in the securities lending market? Please explain.

65. Should the Rule be limited to certain securities? Why or why not? Please explain.

66. How might the proposal positively or negatively affect investor protection, the maintenance of a fair, orderly, and efficient securities lending market, and capital formation?

67. As currently drafted the proposed Rule would require that persons whose loans are processed through any of the lending programs such as those operated by the OCC comply with the requirement to provide 10c-1 information. Please discuss whether loans cleared through OCC, or similar processes, should be exempt from the proposed Rule's requirement to provide 10c-1 information or whether such exemptions should be considered on a case-by-case basis pursuant to paragraph (i) of the proposed Rule.

68. As currently drafted paragraphs (b), (c), and (d) of the proposed Rule require that information be provided to the RNSA within 15 minutes after the loan is effected or modified. Please comment on whether the time period for providing the information in paragraphs (b), (c),

and (d) should be shorter, for example within 90 seconds, or longer, for example within 30 minutes, and explain why.

69. As currently drafted paragraphs (b) and (c) of the proposed Rule require that the RNSA make the information provided to it pursuant to those paragraphs available to the public as soon as practicable. Please comment on whether making the information provided pursuant to paragraphs (b) and (c) publicly available as soon as practicable provides sufficient transparency in the securities lending market or whether such information should be published in a shorter or longer time frame and please explain why.

70. As currently drafted the information required to be provided in paragraphs (b) and (c) of the proposed Rule would be made public by the RNSA. Please comment on whether the information provided pursuant to any of those paragraphs should not be made public and explain why. If there are any additional data elements that you believe the Commission should require to be provided, please include a description of such elements that explains why they should be added to the requirement to provide 10c-1 information and whether or not they should be made public. If there are any data elements in paragraphs (b) or (c) of the proposed Rule that should not be required to be provided, or that should be modified, please explain why.

71. Please comment on whether the proposed Rule should include a definition of ownership of securities, which would specify who owns and can lend securities. For example, should the proposed Rule define ownership as meaning that a person, or the person's agent, has title to such security, has not pledged such security, and has custody or control of such security? Please comment.

Comments are of great assistance to the Commission's rulemaking initiative when they are accompanied by supporting data and analysis of the issues addressed in those comments and if they are accompanied by alternative suggestions to the proposal where appropriate.

V. Paperwork Reduction Act Analysis

A. Background

Certain provisions of proposed Rule 10c-1 impose "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[123]

The Commission is submitting proposed Rule 10c-1 to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[124] The title for the new information collection is "Material Terms of Securities Lending Transactions." An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid control number.

As detailed above, to supplement the information available to the public involving securities lending and close the data gaps in this market, proposed Rule 10c-1 is designed to provide, in a timely manner, investors and other market participants with unrestricted and free access to material information regarding securities lending transactions. The data elements provided to an RNSA under proposed Rule 10c-1 are also designed to provide the RNSA with data that might be used for in-depth monitoring and surveillance. Further, the data elements are designed to provide regulators with information to understand: whether market participants are building up risk; the strategies that broker-dealers use to source securities that are lent to their

123 44 U.S.C. 3501, *et seq.*

124 *See* 44 U.S.C. 3507; 5 CFR 1320.11.

customers; and the loans that broker-dealers provide to their customers with fail to deliver positions.

Because the Commission has not directly addressed the provision of the material terms of securities lending transactions for purposes of the Federal securities laws, proposed Rule 10c-1 would create new information collections burdens on certain Lenders and RNSAs, as detailed below.

B. Proposed Use of Information

The information collections in Proposed Rule 10c-1 are designed to increase the transparency and efficiency of the securities lending market by requiring any person that loans a security on behalf of itself or another person to provide the material terms of those securities lending transactions to an RNSA. As discussed above, the information available on securities lending transactions is spotty and incomplete.[125] The information collections are necessary to remediate these issues by giving market participants and regulators unrestricted and free access to material information regarding securities lending transactions.

C. Information Collections

As described in detail below, the information collections burdens in proposed Rule 10c-1 are directly related to either (1) Lenders[126] capturing data elements and providing information to an RNSA and (2) an RNSA collecting the information and subsequently making certain data elements publicly available. Given the differences in the information collections applicable to these parties, the burdens applicable to Lenders are separated from those applicable to an RNSA

[125] *See supra* Part I.A, (quoting 2020 FSOC Annual Report, *supra* note 14).

[126] The Commission is proposing to limit the obligation to provide 10c-1 information to an RNSA only to the lender to avoid the potential double counting of transactions that could arise if the Rule required both sides of the securities lending transaction to provide the 10c-1 information to an RNSA.

in the analysis below for the sake of organization.

D. Information Collections Applicable to Lenders

Proposed Rule 10c-1 would apply to all Lenders. As defined above,[127] Lenders include any person who loans a security on behalf of itself or another person.[128] Proposed Rule 10c-1 would require that the data elements in paragraphs (b) through (e) within a specified time period be provided to an RNSA. In particular, paragraphs (b) through (d) contain loan-level data elements. These data elements would be required to be provided to an RNSA within 15 minutes after a loan is effected or modified, as applicable. Paragraph (e) contains data elements requiring the enumeration of total amount of each specific security available to loan and on loan. These data elements would be required to be provided to an RNSA at the end of each business day.

To reduce the potential for double counting of securities lending transactions and reduce the burden on Lenders, proposed Rule 10c-1 would provide a hierarchy of who is responsible for providing information to an RNSA. First, although the proposed Rule places an obligation on each person that loans a security on behalf of itself or another person to provide information to an RNSA, if such Lender is using a lending agent, such lending agent shall have the obligation to provide the 10c-1 information to an RNSA on behalf of the lender. Second, persons with a reporting obligation, including a lending agent, may enter into a written agreement[129] with a reporting agent. Finally, Lenders are directly required to provide the RNSA with the 10c-1

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[127] *See supra* note 9.

[128] Because Rule 10c-1 is designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities all persons engaged in the lending of securities are Lenders, including persons that are not registered with or directly regulated by the Commission.

[129] The Commission preliminarily believes it is appropriate to permit a Lender, including a lending agent, to enter into a written agreement with a reporting agent to permit the reporting agent to provide the 10c-1 information to an RNSA because such an arrangement will ease burdens on Lenders that do not have and do not want to establish connectivity to FINRA. Additionally, the written agreements will memorialize and provide proof of the contractual obligations for the reporting agent to provide the 10c-1 information to an RNSA. *See supra* Part III.A.2.b).

information if the Lender is loaning its securities without a lending agent or reporting agent.

In addition, paragraph (a)(2) would require that reporting agents also enter into a written agreement with the RNSA. Such written agreement must include terms that permit the reporting agent to provide 10c-1 information on behalf of another person. Reporting agents would also be required to provide the RNSA with a list of each person and lending agent on whose behalf the reporting agent is providing 10c-1 information to the RNSA.

For the purpose of organizing the below analysis, the Commission has separated Lenders into three categories based on who would actually provide the required data elements to the RNSA.[130] These categories are (1) lending agents; (2) reporting agents, and (3) Lenders that would not employ a lending agent.[131] The Commission preliminarily believes that Lenders that employ a lending agent would not be subject to any burdens because they would not be responsible for providing information to an RNSA.

As a preliminary matter, the opacity of the securities lending market makes estimating the number of respondents difficult. Indeed, the objective of proposed Rule 10c-1 is to close the data gaps in this market.[132] Despite these data gaps the Commission has made estimates of the number of Lenders in each category.

First, the Commission estimates that there would be 37 lending agents. This estimate is based on a review of N-CEN reports filed with the Commission that identify the lending agents

[130] While, as more fully discussed below, there would be some variation between Lenders that are in the same category, the Commission is organizing the analysis so that the discussion of Lenders who share commonalities allows for a logical presentation and discussion of burdens.

[131] As an example of variability between Lenders in the same category, the parties within the (1) lending agent category and the (3) lenders that would not employ a lending agent category may choose to employ a reporting agent. As discussed below, this choice will result in information collection burdens being different for Lenders within the same category.

[132] *See supra* Part I.A.2.

used by investment companies. Of these 37 lending agents, the Commission estimates that 3 would provide information directly to an RNSA and 34 would provide information to a reporting agent.[133]

Next, the Commission estimates that there would be 94 reporting agents. This estimate is based on the number of broker-dealers that lent securities in 2020. The Commission estimates that these persons would be reporting agents because they would likely have experience providing RNSAs with information through other trade-reporting requirements and have experience with securities lending.[134]

Finally, the Commission estimates that there would be 278 Lenders that would not employ a lending agent. This estimate is based on the number of investment companies that do not employ a lending agent based on a review of N-CEN reports filed with the Commission. Of these 278 Lenders, the Commission estimates that 139 will provide information to an RNSA and 139 will provide information to a reporting agent.

1. Lending Agents

Under proposed Rule 10c-1(a)(1), lending agents would be required to provide 10c-1 information to an RNSA (a "providing lending agent") or enter into a written agreement with a reporting agent to provide information to an RNSA (a "non-providing lending agent"). In both cases, lending agents would face information collection burdens to comply with the rule.

[133] Of the 37 lending agents identified, three are broker-dealers. Broker-dealers have experience providing information directly to RNSAs, so the Commission estimates that they would provide information directly to an RNSA. The other 34 lending agents are not broker-dealers, so the Commission estimates that they would provide information to a reporting agent rather than establishing connectivity directly to an RNSA.

[134] It is possible that some of these broker-dealers may choose not to be a reporting agent and that other persons may choose to be a reporting agent. Given uncertainty regarding future reactions to proposed Rule 10c-1 and a lack of granular data about the current market, however, the Commission preliminarily believes that the broker-dealers that lent securities in 2020 is a reasonable estimate of the number of reporting agents.

a) Providing Lending Agents

(i) Initial Burden

Providing lending agents would incur initial burden to develop and reconfigure their current systems to capture the required data elements.[135] Providing lending agents would also be subject to initial burden to establish connections that would allow it to provide the information to a RNSA.[136]

The Commission preliminarily believes that burden for this requirement is similar to that of establishing the appropriate systems and processes required for collection and transmission of the required information under the under 17 CFR 242.613, Exchange Act Rule 613 (commonly referred to as the "Consolidated Audit Trail" or the "CAT")[137] because of the general similarity between the systems established under that rule and the systems that would be required to be established under proposed Rule 10c-1. [138] While similar enough to use as the basis for the estimate, the Commission preliminarily believes that systems that comply with proposed Rule 10c-1 will be significantly less complex than those required by the CAT because they will need to capture less information overall.[139] Despite this difference, for the purposes of this analysis,

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[135] While providing lending agents are likely already tracking the data elements as a part of the regular course of business, capturing this information would be a new regulatory requirement.

[136] In particular, they would be required to establish connections with the RNSA and the persons on whose behalf they are lending securities.

[137] *See* Joint Industry Plan, Order Approving the National Market System Plan Governing the Consolidated Audit Trail, Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696, 84921 (Nov. 23, 2016) ("CAT Approval Order").

[138] Both the CAT and proposed Rule 10c-1 would require the provision of trade information to a third-party information repository. The burden estimates in the CAT Approval Order are based on a study of cost estimate calculations. *See id.* at 84857 (describing overview and methodology of the study).

[139] Exchange Act Rule 613(c)(1) requires the CAT NMS Plan to provide for an accurate, time-sequenced record of certain orders beginning with the receipt or origination of an order by a broker-dealer, and further documenting the life of the order through the process of routing, modification, cancellation and execution (in whole or in part) of the order. Proposed Rule 10c-1, on the other hand, does not require order information be provided to an RNSA.

out of an abundance of caution, the Commission is using certain specific estimates of internal burden from the CAT Approval Order, as detailed below. Unlike the burden in the CAT Approval Order, however, the Commission preliminarily believes that each party that would face PRA burdens under proposed Rule 10c-1 will have internal staff[140] that can handle this task.[141]

More specifically, the Commission is basing its estimates for systems development and monitoring on the burdens applicable to non-OATS[142] reporters under the CAT.[143] The Commission chose this estimate because of the factors that were considered by the Commission in the CAT Approval Order when it categorized firms and estimated burdens. In particular, non-OATS reporters were estimated to be subject to the smallest burdens under the CAT NMS because of the limited scope of their reportable activity.[144] Based on the overall size of the securities lending market and the number that would be providing information to an RNSA, the Commission preliminarily believes that the volume of securities lending transactions for

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Further, more trades that are reportable to CAT are executed than securities lending transactions. The Commission preliminarily estimates that these two differences will result in fewer data items under proposed Rule 10c-1 than the CAT. Accordingly, the systems required to comply with proposed Rule 10c-1 would be substantially less complex than the systems required to comply with the CAT.

[140] In the CAT NMS Plan Release, the Commission estimated that external costs may consist of, for example, the use of service bureaus, technology consulting, and legal services. *See*, *e.g.*, CAT Approval Order, *supra* note 137, at 84935.

[141] The Commission preliminarily believes that, because of the sophisticated services associated with third-party providers' business, third-party providers would employ internal staff with the expertise required to comply with proposed Rule 10c-1.

[142] The FINRA website states: "FINRA has established the Order Audit Trail System (OATS), as an integrated audit trail of order, quote, and trade information for all NMS stocks and OTC equity securities. FINRA uses this audit trail system to recreate events in the life cycle of orders and more completely monitor the trading practices of member firms." FINRA, Order Audit Trail System (OATS), *available at* http://www.finra.org/industry/oats (listing further information on OATS).

[143] CAT NMS Plan Release at 756 (discussing the burdens applicable to these broker-dealers).

[144] The CAT NMS Plan Release estimated that non-OATS reporters would have fewer than 350,000 reportable events each month. CAT Approval Order, *supra* note 137, at 84928.

providing lending agents will be, on average, of a similar scope to the volume of reports estimated by non-OATS reporters under the CAT NMS Plan Release.

The Commission, therefore, estimates that each providing lending agent would incur 3,600 hours of initial burden to develop and reconfigure their current systems to capture the required data elements.[145] Accordingly, the total industry-wide burden for this requirement would be 10,800 hours.[146]

(ii) Ongoing annual burden

Once a providing lending agent has established the appropriate systems and processes required for collection and provision of the required information to the RNSA,[147] the Commission preliminarily estimates that proposed Rule 10c-1 would impose ongoing annual burdens associated with, among other things, providing the data to the RNSA, monitoring systems, implementing changes, and troubleshooting errors. The Commission estimates that the ongoing burden will be equivalent to the ongoing burden estimated for non-OATS reporters in the CAT Approval Order for the same reasons discussed with respect to initial burden.

The Commission, therefore, estimates that it would take 1,350 burden hours per year to comply with the rule per providing lending agent,[148] leading to a total industry-wide ongoing

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[145] In the CAT Approval Order, the Commission estimated that, on average, the initial burden for non-OATS reporters would be two full-time-equivalent ("FTE") employees working for one year (2 FTEs x 1800 working hours per year = 3600 burden hours). *See* CAT Approval Order, *supra* note 137, at 84938. The Commission is using this estimate because of the similarities between the requirements applicable to providing lending agents under proposed Rule 10c-1 and the requirements applicable to non-OATS reporters under the CAT.

[146] 3,600 hours x 3 providing lending agents = 10,800 hours.

[147] The Commission expects that the process of providing information to an RNSA will be highly automated so it is including the burden for doing so in this category.

[148] In the CAT NMS Plan Release, the Commission estimated that, on average, the ongoing annual burden non-OATS reporters would be .75 FTE employees (.75 FTEs x 1800 working hours per year = 1350 burden hours). *See* CAT Approval Order, *supra* note 137, at 84938. The Commission is using this estimate because of the similarities

annual burden of 4,050 hours.[149]

b) Non-Providing Lending Agents

Instead of providing information to an RNSA, paragraph (a)(1)(ii) would permit non-providing lending agents to enter into a written agreement with a reporting agent that would provide the required information to the RNSA. These non-providing lending agents would be subject to distinct information collection burdens from those applicable to providing lending agents. First, because they would not have to establish connectivity to an RNSA and may have flexibility in the format of the information that it provides the reporting agent, non-providing lending agents would be subject to less initial and ongoing burden for systems development and monitoring. Second, non-providing lending agents would be subject to initial burden to negotiate and execute a written agreement with the reporting agent.

(i) Systems Development and Monitoring

(a) Initial Burden

Like providing lending agents, non-providing lending agents would incur initial burden to develop and reconfigure their current systems to capture the required data elements. The Commission preliminarily believes that non-providing lending agents would be subject to less burden than providing lending agents, however, because they would likely have the flexibility to collaborate with a reporting agent to determine the most efficient means of establishing systems that comply with the proposed Rule. For example, if agreed to by both parties, the non-providing lending agent could have the flexibility to provide information that does not meet the specific format requirements of an RNSA to the reporting agent if the reporting agent is able to

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between the requirements applicable to providing lending agents under proposed Rule 10c-1 and the requirements applicable to non-OATS reporters under the CAT NMS Plan.

[149] 1,350 hours x 3 providing lending agents = 4,050 hours.

reformat the information once received.

Given potential efficiencies, the Commission preliminarily estimates that a non-providing lending agent would be subject to half the initial burden of a providing lending agent to develop and reconfigure their current systems to capture the required data elements as a providing lending agent. The Commission, therefore, estimates that each non-providing lending agent would be subject to an initial burden of 1,800 hours, leading to a total industry-wide initial burden for this requirement of 61,200 hours.[150]

(b) Ongoing Annual Burden

Once a non-providing lending agent has established the appropriate systems and processes required for collection and provision of the required information to the reporting agent, the Commission preliminarily estimates that the proposed Rule would impose ongoing annual burdens associated with, among other things, providing the data to the reporting agent, monitoring systems, implementing changes, and troubleshooting errors. As with initial burden for this requirement, the Commission preliminarily believes that non-providing lending agents would be subject to less burden than providing lending agents because they would likely have the flexibility to collaborate with a reporting agent to determine the most efficient means of establishing systems that comply with the proposed Rule. For example, the reporting agent could design programs that create direct links to a non-providing lending agent's systems to facilitate the gathering of information such that ongoing intervention would not be required by the non-providing lending agent. In addition, non-providing lending agents and reporting agents could negotiate terms that may allow it to avoid providing certain 10c-1 information that can be gleaned from another data element, such as not requiring the provision of a securities issuer's

[150] 1,800 hours x 34 non-providing lending agents = 61,200 hours.

name if a security has a valid CUSIP.

Given the potential efficiencies, the Commission estimates that a non-providing lending agent would be subject to roughly half of the ongoing annual burden of a providing lending agent to develop and reconfigure their current systems to capture the required data elements as a providing lending agent. The Commission, therefore, estimates that each non-providing lending agent would be subject to an annual burden of 675 hours,[151] leading to a total industry-wide annual burden for this requirement of 22,950 hours.[152]

(ii) Entering into Written Agreement with Reporting Agent

Paragraph (a)(1)(ii) of proposed Rule 10c-1 would require a non-providing lending agent to enter into a written agreement with a reporting agent. This requirement would subject non-providing lending agents to initial burden to draft, negotiate, and execute the agreements required by this paragraph. The Commission preliminarily believes that this requirement would not subject non-providing lending agents to ongoing annual burden once the agreement is signed because there would be no need to modify the written agreement or take additional action after it is executed.

The Commission preliminarily believes that these agreements would likely be standardized across the industry since the data elements would be consistent for all persons. The Commission preliminarily estimates that the only terms that may require negotiation are price and the format of the information that would be required to be provided. To account for negotiation and any administrative tasks that would go into processing and executing

[151] 1,350 hours (ongoing burden applicable to providing agents) x 50% = 675 hours.

[152] 675 hours x 34 non-providing lending agents == 22,950 hours.

agreements, the Commission is estimating non-providing lending agents would spend 30 hours on this task.[153] Accordingly, the Commission estimates that the total industry-wide initial burden attributed to this proposed requirement would be 1,020 hours.[154]

2. Reporting Agents

Three requirements of proposed Rule 10c-1 would subject reporting agents to initial and ongoing annual PRA burdens. The first requirement would be related to the development and monitoring of systems that would facilitate the provision of information to an RNSA. Because reporting agents would provide the same information as a providing lending agent, the Commission preliminarily estimates that the initial and ongoing annual burden for this task would be equivalent to the initial burden attributable to the same task for providing lending agents, as fully described below. The second would be related to the written agreements with the persons who would be providing the reporting agent information. Finally, the third would be related to entering into an agreement with a RNSA to provide 10c-1 information.

a) Systems Development and Monitoring

(i) Initial Burden

Under paragraph (a), reporting agents would provide 10c-1 information to an RNSA on behalf of another person. The Commission preliminarily believes that a reporting agent would be subject to initial burden to develop and reconfigure their current systems to capture the required data elements because the Commission preliminarily believes that they would need to change internal systems to collect the required information. Additionally, the reporting agent

[153] The Commission preliminarily believes that each lending agent would execute one such agreement because of the efficiencies gained from only having one reporting agent and the commoditized information that would be provided. Accordingly, the estimate of 30 hours would be the initial burden required for one agreement.

[154] 30 hours x 34 non-providing lending agents = 1,020 hours.

would need to establish, maintain, and enforce reasonably designed written policies and procedures to provide 10c-1 information to an RNSA on behalf of another person in the manner, format, and time consistent with Rule 10c-1.[155]

Reporting agents would provide the same information to the RNSA as a providing lending agent, [156] so the Commission preliminarily believes that the burden estimates should be consistent. The Commission, therefore, estimates that each reporting agent would incur 3,600 hours of initial burden to develop and reconfigure their current systems to capture the required data elements.[157] Accordingly, the industry-wide initial burden would be 338,400 hours.[158]

(ii) Ongoing Annual Burden

Once a reporting agent has established the appropriate systems and processes required for collection and provision of the required information to the RNSA, the proposed Rule 10c-1 would impose ongoing annual burdens associated with providing the data to the RNSA (including an updated list of persons on whose behalf they are providing information, as needed), monitoring systems, implementing changes, and troubleshooting errors.

As with the initial burden for this requirement, reporting agents would provide the same

[155] Proposed Rule 10c-1(a)(2)(i).

[156] While the information provided to the RNSA would be the same, certain aspects of the requirements applicable to reporting agents would be slightly different than those applicable to providing lending agents. For example, unlike providing lending agents, reporting agents would need to design systems to establish connectivity with the persons on whose behalf they are providing information to an RNSA. In addition, unlike providing lending agents, reporting agents would be required to provide to the RNSA the identity of the person on whose behalf it is providing the information under paragraph (e). Further, unlike any type of lending agent, reporting agents would be required to establish, maintain, and enforce reasonably designed written policies and procedures to provide information to an RNSA. Despite these differences, the Commission preliminarily believes that the estimates used in the CAT approval order are an appropriate basis from which to estimate the burdens for reporting agents in addition to providing lending agents because both provide the same information to the RNSA. Accordingly, this burden estimates for reporting agents is not being adjusted incrementally from the estimate for providing lending agents.

[157] *See supra* Part V.D.1.a)(i).

[158] 3,600 hours x 94 reporting agents = 338,400 hours.

information to the RNSA as a providing lending agent, so the Commission preliminarily believes that the burden estimates should be consistent. The Commission, therefore, estimates that each reporting agent would incur 1,350 hours of ongoing annual burden on this requirement.[159] Accordingly, the industry-wide ongoing annual burden would be 126,900 hours.[160]

b) Entering into Written Agreements with Persons on whose Behalf the Reporting Agent would be Providing Information

Paragraph (a)(1)(ii) of proposed Rule 10c-1 would require reporting agents to enter into written agreements with the persons on whose behalf they are providing information to an RNSA. This requirement would subject reporting agents to initial burden to draft, negotiate, and execute these agreements. The Commission preliminarily believes that this requirement would not subject reporting agents to ongoing annual burden once the agreement is signed because there would be no need to modify the written agreement or take additional action after it is executed.

As discussed above, the Commission preliminarily believes that these agreements would likely be standardized across the industry since the data elements would be consistent for all persons.[161] The Commission preliminarily estimates that the only terms that may require negotiation are price and the format of the information that would be required to be provided. As discussed above, however, the Commission preliminarily believes that this process would be highly automated. The Commission, therefore, preliminarily believes that it would take reporting agents the same amount of time to comply with this requirement of time as non-

[159] *See supra* Part V.D.1.a)(ii).

[160] 1,350 hours x 94 reporting agents = 126,900 total hours.

[161] *See supra* Part V.D.1.b)(ii).

providing lending agents. Accordingly, the Commission estimates that each reporting agent would spend 30 hours on this task. As a result, the total industry-wide initial burden attributed to this proposed requirement would be 2,820 hours.[162]

c) Entering into Written Agreement with RNSA

In addition to written agreements with persons on whose behalf they would be providing information, paragraph (a)(2)(ii) of proposed Rule 10c-1 would require reporting agents to enter into written agreements the RNSA. Since all reporting agents would be providing the same information to the RNSA, the Commission preliminarily believes that no terms of these agreements would not be negotiated. Instead, the RNSA would create a form agreement that would be consistent for all reporting agents.

While it is possible that the burden may be very small since these agreements would likely be standardized, the Commission is conservatively estimating one hour of initial burden for each reporting agent to account for any administrative tasks that would go into processing and executing agreements.[163] The Commission preliminarily believes that reporting agents that enter into written agreements with RNSAs would not incur any ongoing annual burden to comply with this requirement once the agreement is signed because there will be no need to modify the written agreement or take additional action because the information will not vary.[164]

Accordingly, the Commission estimates that the industry-wide initial burden for this requirement would be 94 hours.[165]

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[162] 30 hours x 94 reporting agents = 2,820 hours.

[163] For example, a reporting agent may need to enter the written agreement into a contract management system or scan an executed paper agreement into an electronic format.

[164] The data elements that will need to be reported will not change and will be consistent across the industry. Therefore, there will be no need to modify or update agreements in any way.

[165] 1 hour x 94 reporting agents = 94 hours.

d) Recordkeeping Requirement

Paragraph (a)(2)(iv) of proposed Rule 10c-1 would require reporting agents to preserve for a period of not less than three years, the first two years in an easily accessible place, the 10c-1 information that it obtained from any person pursuant to paragraph (a)(1)(ii), including the time of receipt, and the corresponding 10c-1 information provided by the reporting agent to the RNSA, including the time of transmission to the RNSA, and the written agreements that the reporting agent entered into with the persons on whose behalf it was providing information and the RNSA. The Commission preliminarily believes that the initial burden associated with retaining the collected information is associated with reporting agent's burden to develop and reconfigure their current systems to capture the required data elements. Accordingly, the Commission is not assessing an initial burden associated with the recordkeeping of information required by proposed Rule 10c-1(a)(2)(iv).

The Commission preliminarily believes that this recordkeeping requirement will be highly automated. The Commission, therefore, estimates that reporting agents will spend one hour per week on upkeep and testing of records to ensure accuracy to comply with this requirement, for a total of 52 hours per year of annual burden per reporting agent. Accordingly, the estimates that the total ongoing annual burden for this requirement would be 4,888 hours.[166]

3. Lenders that Would Not Employ a Lending Agent

As discussed in Part II.A, some Lenders run their own securities lending program rather than employing a lending agent. Under proposed Rule 10c-1, these persons would be required to either (1) provide 10c-1 information directly to an RNSA (a "self-providing lender") or (2) use a reporting agent to provide 10c-1 information to an RNSA (a "lender that directly employs a

[166] 52 hours x 94 reporting agents = 4,888 hours.

reporting agent"). The Commission preliminarily believes that the initial and ongoing annual burden would vary between these two types of lenders.

a) Self-Providing Lenders

Self-providing lenders would be subject to initial and ongoing annual burden to develop and reconfigure their current systems to capture the required data elements. Because the information that would be provided to an RNSA would be the same information as the information provided by a providing lending agent and a reporting agent, the Commission preliminarily believes that the initial and ongoing annual burden for this task would be equivalent to the initial burden attributable to the same task for providing lending agents and reporting agents, as more fully discussed below.

(i) ***Initial Burden***

Self-providing lenders would be subject to initial burden to develop and reconfigure their current systems to capture the required data elements because the Commission preliminarily believes that they would need to change internal order routing and execution management systems to collect the required information.

Self-providing lenders would provide the same information to the RNSA as a providing lending agent and reporting agent, so the Commission preliminarily believes that the burden estimates should be consistent. The Commission, therefore, estimates that each self-providing lender would incur 3,600 hours of initial burden to develop and reconfigure their current systems to capture the required data elements.[167] Accordingly, the industry-wide initial burden would be 500,400 hours.[168]

[167] *See supra* Part V.D.1.a)(i); *see also supra* Part V.D.2.a)(i).

[168] 3600 hours x 139 self-providing lenders = 500,400 hours.

(ii) *Ongoing Annual Burden*

Once a self-providing lender has established the appropriate systems and processes required for collection and provision of the required information to the RNSA, the Commission preliminarily estimates that the proposed Rule 10c-1 would impose ongoing annual burdens associated with, among other things, providing the data to the RNSA, monitoring systems, implementing changes, and troubleshooting errors.

As with the initial burden for this requirement, the Commission estimates that the ongoing annual burden for this task would be the same as providing lending agents and reporting agents because each would be providing the same information to the RNSA so the Commission preliminarily believes that the burden estimates should be consistent. The Commission, therefore, estimates that each reporting agent would incur 1,350 hours of ongoing annual burden on this requirement.[169] Accordingly, the industry-wide ongoing annual burden would be 187,650 hours.[170]

b) Lenders that Would Directly Employ a Reporting Agent

Lenders that directly employ a reporting agent would be subject to distinct information collection burdens from those applicable to self-providing lenders. First, because they would not have to establish connectivity to an RNSA and may have flexibility in the format of the information that it provides the reporting agent, lenders that directly employ a reporting agent would be subject to less initial and ongoing burden for systems development and monitoring. Second, unlike self-providing lenders, lenders that would directly employ a reporting agent would be subject to initial burden to negotiate and execute a written agreement with the reporting

[169] *See supra* Part V.D.1.a)(ii); *see also supra* Part V.D.2.a)(ii).

[170] 1350 hours x 139 self-providing lenders = 187,650 total hours.

agent as required by paragraph (a)(1)(ii).

(i) *Systems Development and Monitoring*

(a) *Initial Burden*

The Commission preliminarily believes that lenders that would directly employ a reporting agent would incur initial burden to develop and reconfigure their current systems to capture the required data elements and provide them to a reporting agent.

Lenders that would directly employ a reporting agent would provide the same information to a reporting agent as a non-providing lending agent, so the Commission preliminarily believes that the burden estimates should be consistent. [171] The Commission, therefore, preliminarily estimates that a lender that directly employs a reporting agent would be subject to an initial burden of 1,800 hours, leading to a total industry-wide initial burden for this requirement of 250,200 hours.[172]

(b) Ongoing Annual Burden

Once a lender that directly employs a reporting agent has established the appropriate systems and processes required for collection and provision of the required information to the reporting agent, the proposed Rule would impose ongoing annual burden associated with, among other things, providing the data to the reporting agent, monitoring systems, implementing changes, and troubleshooting errors.

As with the initial burden for this requirement, the Commission estimates that the ongoing annual burden for this task would be the same as a non-providing lending agent, so the

[171] *See supra* Part V.D.1.b)(i)(a).

[172] 1,800 hours x 139 lenders that directly employ a reporting agent = 250,200 hours.

Commission preliminarily believes that the burden estimates should be consistent.[173] The Commission, therefore, estimates that each lender that directly employs a reporting agent would be subject to an ongoing annual burden of 675 hours, leading to a total industry-wide burden for this requirement of 93,825 hours. [174]

(ii) *Entering Into a Written Agreement with a Reporting Agent*

Paragraph (a)(1)(ii) of proposed Rule 10c-1 would require lenders that directly employ a reporting agent to enter into a written agreement with the reporting agent. This requirement would subject lenders that directly employ a reporting agent to initial burden to draft, negotiate, and execute these agreements. The Commission preliminarily believes that lenders that directly employ a reporting agent would not incur any ongoing burden to comply with this requirement once the agreement is signed because there will be no need to modify the written agreement or take additional action because the information will not vary.[175]

Lenders that directly employ a reporting agent would largely provide the same information to the reporting agent as a non-providing lending agent,[176] so the Commission preliminarily believes that the burden estimates for entering into the agreements should be consistent.[177] The Commission, therefore, estimates that each lender that directly employs a

[173] *See supra* Part V.D.1.b)(i)(b).

[174] 675 hours x 139 lenders that directly employ a reporting agent = 93,825 hours.

[175] The data elements that will need to be reported will not change and will be consistent across the industry. Therefore, there will be no need to modify or update agreements in any way.

[176] *See supra* Part V.D.1.b)(ii).

[177] Further, as with non-providing lending agents, because of the efficiencies gained from only having one reporting agent and the commoditized information that would be provided, each lender that directly employs a reporting agent would enter into an agreement with only one reporting agent.

reporting agent would spend 30 hours of initial burden on this task. As a result, the total industry-wide initial burden attributed to this proposed requirement would be 4,170 hours.[178]

PRA Table 1: Summary of Estimated Burdens for Lenders				
Requirement	**Type of Burden**	**Number of Entities Impacted**	**Total Initial Industry Burden**	**Total Annual Industry Burden**
Providing Lending Agents: Systems Development and Monitoring	Third-Party Disclosure	3	10,800	4,050
Non-Providing Lending Agents: Systems Development and Monitoring	Third-Party Disclosure	34	61,200	22,950
Non-Providing Lending Agents: Entering into Agreement with Reporting Agent	Third-Party Disclosure	34	1,020	0
Reporting Agents: Systems Development and Monitoring	Third-Party Disclosure	94	338,400	126,900
Reporting Agents: Entering into Agreement with Person who Provides 10c-1 Information	Third-Party Disclosure	94	2,820	0
Reporting Agents: Entering into Agreement with RNSA	Third-Party Disclosure	94	94	0

[178] 30 hours x 139 lenders that directly employ a reporting agent = 4,170 hours.

Reporting Agents: Recordkeeping Requirement	Recordkeeping	94	0	4,888
Self-Providing Lenders: Systems Development and Monitoring	Third-Party Disclosure	139	500,400	187,650
Lenders that Would Directly Employ a Reporting Agent: Systems Development and Monitoring	Third-Party Disclosure	139	250,200	93,825
Lenders that Would Directly Employ a Reporting Agent: Entering Into a Written Agreement with a Reporting Agent	Third-Party Disclosure	139	4,170	0

E. Information Collection Applicable to RNSAs

Proposed Rule 10c-1 places new burdens on RNSAs. Proposed Rule 10c-1(b) – 10c-1(e) would require RNSAs to collect the 10c-1 information provided to the RNSA by Lenders and make this information publicly available as soon as practicable. The collection of 10c-1 information might cause an RNSA to exercise authority under proposed Rule 10c-1(f) and implement rules regarding the format and manner to administer the collection of information required by proposed Rule 10c-1.[179] Rule 10c-1(b) also requires the RNSA to create a unique transaction identifier and assign it to each loan reported to the RNSA under 10c-1. Furthermore,

[179] The burden of filing any proposed rule changes by the RNSA is already included under the collection of information requirements contained in Rule 19b-4 under the Exchange Act. *See* Securities Exchange Act Release No. 50486 (Oct. 5, 2004), 69 FR 60287, 60293 (Oct. 8, 2004) (File No. S7-18-04) (describing the collection of information requirements contained in Rule 19b-4 under the Exchange Act).

for each security about which the RNSA receives information pursuant to 10c-1(e)(1) and (e)(2), the RNSA would be required by Rule 10c-1(e)(3) to make available to the public only aggregated information for that security, including information required by (e)(1)(i) and (ii) and (e)(2)(i) and (ii), as soon as practicable, but not later than the next business day. Additionally, proposed Rule 10c-1(g)(1) would also require RNSAs to retain the information collected pursuant to paragraphs (b) through (e) of proposed Rule 10c-1 in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years; and proposed Rule 10c-1(g)(3) would require the RNSA to provide information collected under paragraphs (b) and (c) and the aggregate of the information provided pursuant to paragraph (e) available to the public, for a least a five-year period. Proposed Rule 10c-1(g)(2) would require the RNSA to make 10c-1 information available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need.

1. RNSA Collection of Information from Lenders and Providing Information to the Public and the Commission

As discussed above, Lenders would be required to provide information to an RNSA pursuant to Rule 10c-1(a) and the RNSA would be required to make certain information publicly available on its website or similar means of electronic distribution, without charge and without use restrictions as soon as practicable. Accordingly, an RNSA would be required to create, implement and maintain the infrastructure to enable Lenders to provide the RNSA with the 10c-1 information, which would include establishing technical requirements and specifications for such infrastructure, creating a system that would generate unique identifiers, meeting with industry participants to gather feedback on the proposed infrastructure, drafting written policies and procedures to protect the confidentiality of certain information, and entering into written

agreements with Lenders – including lending agents and reporting agents – for such information to be provided to the RNSA. Additionally, the infrastructure would need to comply with proposed Rule 10c-1(g)(2), which would require the RNSA to make the information collected pursuant to paragraphs (b) through (e) available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need.

The Commission preliminarily believes that the initial burden for the RNSA to create and implement the infrastructure for Lenders to provide the required information to the RNSA and for the RNSA to provide such information to the public is similar to the requirement for National Securities Exchanges and RNSAs to establish the appropriate systems and processes required for collection and transmission of the required information under the CAT NMS Plan[180] submitted by SROs under Exchange Act Rule 613. While similar enough to use as the basis for the estimate, the Commission preliminarily believes that systems that comply with proposed Rule 10c-1 will be significantly less complex than those that comply with the CAT because they will need to capture less information overall.[181] Additionally, there is currently only one RNSA, rather than the multiple National Securities Exchanges, that will have the burden to create and implement the infrastructure for Lenders to provide information to the RNSA. Accordingly, the burden hour estimates for this collection of information will be substantially reduced from the CAT estimates, as detailed below. Further, the Commission preliminarily believes that the RNSA will have internal staff that can handle this task, so unlike the tasks under the CAT NMS Plan, the tasks under proposed Rule 10c-1 would not require any outsourcing.

[180] *See* CAT Approval Order, *supra* note 137.

[181] *See supra* note 139.

a) Initial Burden

The Commission estimates that it would take an RNSA approximately 10,924 hours of internal legal, compliance, information technology, and business operations time to develop the infrastructure to enable Lenders to provide the information required by Rule 10c-1 to the RNSA and for the RNSA to provide such information to the public.[182] The Commission preliminarily believes that the RNSA would not incur external costs for the implementation of the infrastructure to enable Lenders to provide the information required by the Rule to the RNSA and make such information publicly available because the sole RNSA, FINRA, has experience implementing systems to collect information from its members.[183] Therefore, the Commission preliminarily estimates that the average one-time initial burden of developing the infrastructure to enable Lenders to provide the information required by proposed Rule 10c-1 would be 10,924 burden hours for the RNSA.

b) Ongoing Annual Burden

Once the RNSA has developed the infrastructure to enable Lenders to provide the 10c-1 information to the RNSA and for the RNSA to provide such information to the public, the

[182] This estimate is based on the Commission's initial burden estimate for national securities exchanges and RNSAs regarding the data collection and reporting for the consolidated audit trail which was approximately 43,696.8 burden hours in total. *See* CAT Approval Order, *supra* note 137, at 84921. Given the size of the overall equity market vs. the size of the securities lending market the Commission preliminarily believes the CAT burden hours would overestimate the burden hours to develop the infrastructure to provide information required by Rule 10c-1 to the RNSA and for the RNSA to provide such information to the public. Accordingly, the Commission preliminarily believes that the initial burden should be calculated based on the size of the securities lending market in comparison to the size of the equities market. The Commission estimates that the average daily dollar value of securities lending transactions is approximately $120 billion dollars compared to the average daily equity trading volume of $475 billion. Accordingly, the size of the securities lending market is approximately 25% of the U.S. equity market. Therefore the Commission estimates that the initial burden to develop and implement the needed systems changes to capture and publish the 10c-1 information is 25% of the burden hours for CAT, which would be 10,924 burden hours.

[183] *See supra* note 73.

Commission preliminarily estimates that Rule 10c-1 would impose on the RNSA ongoing annual burdens of 7,739.5 hours to ensure that the infrastructure is up to date and remains in compliance with the proposed Rule,[184] for an estimated annual burden of 7,739.5 hours.

2. RNSA Retention of Collected Information

Proposed Rule 10c-1(g)(1) requires that the RNSA retain the information collected pursuant to paragraphs (b) through (e) of this section in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years. The Commission preliminarily believes that the initial burden associated with retaining the collected information is associated with RNSA's burden to implement and maintain the infrastructure for Lenders to report information to the RNSA. Accordingly, the Commission is not assessing an initial burden associated with the retention of information required to be reported under the proposed Rule.

The Commission, however, preliminarily estimates that Rule 10c-1 would impose on the RNSA ongoing annual burdens of 52 hours to retain the collected information required by the proposed Rule,[185] for an estimated annual burden of 52 hours. The Commission preliminarily

[184] This estimate is similar to the Commission's ongoing annual burden estimate for national securities exchanges and RNSAs regarding the data collection and reporting for the consolidated audit trail which was approximately 30,958.20burden hours in total. *See* CAT Approval Order, *supra* note 137, at 84922. Given the size of the overall equity market vs. the size of the securities lending market the Commission preliminarily believes the CAT burden hours would overestimate the burden hours to develop the infrastructure to provide information required by Rule 10c-1 to the RNSA and for the RNSA to provide such information to the public. Accordingly, the Commission preliminarily believes that the initial burden should be calculated based on the size of the securities lending market in comparison to the size of the equities market. The Commission estimates that the average daily dollar value of securities lending transactions is approximately $120 billion dollars compared to the average daily equity trading volume of $475 billion. Accordingly, the size of the securities lending market is approximately 25% of the U.S. equity market. Therefore the Commission estimates that the initial burden to develop and implement the needed systems changes to capture and publish the 10c-1 information is 25% of the burden hours for CAT, which would be 7,739.5 burden hours

[185] This estimate is similar to the Commission's ongoing annual burden estimate for national securities exchanges and RNSAs regarding the data collection and reporting for Rule 17a-1, which requires that every national securities exchange, national securities association, registered clearing agency, and the Municipal Securities Rulemaking Board keep on file for a period of not less than five years, the first two years in an easily accessible place, at least

believes it is appropriate to add burden hours that already exist for 17a-1 because the RNSA will have to retain records involving 10c-1 information for Lenders that are not FINRA members.

PRA Table 2: Summary of Estimated Burdens for RNSA				
Requirement	**Type of Burden**	**Number of Entities Impacted**	**Total Initial Industry Burden**	**Total Annual Industry Burden**
Implement and maintain the infrastructure for Lenders to report information to the RNSA including written policies and procedures	Reporting and Third Party Disclosure	1	10,924	7,739.5
RNSA retain the information collected pursuant to paragraphs (b) through (f) of proposed Rule 10c-1	Recordkeeping	1	0	52

F. Collection of Information is Mandatory

Each collection of information discussed above would be a mandatory collection of information.

G. Confidentiality

The Commission could receive confidential information as a result of this collection of information, such as the identity of Lenders. The proposed Rule does not permit the RNSA to make such information public. Aside from this information, the collection of information is expected to be, for the most part, publicly available information. To the extent that the

one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records made or received by it in the course of its business as such and in the conduct of its self-regulatory activity. *See* Paperwork Reduction Act Extension Notice for Exchange Act Rule 17a-1, 84 FR 57920 (Oct. 29, 2019).

Commission does receive confidential information pursuant to this collection of information, such information will be kept confidential, subject to the provisions of applicable law.

H. Retention Period of Recordkeeping Requirement

Pursuant to proposed Rule 10c-1(g)(1), an RNSA would be required to retain the information collected pursuant to paragraphs (b) through (e) of proposed Rule 10c-1 in a convenient and usable standard electronic data format that is directly available and searchable electronically without any manual intervention for a period of five years. Pursuant to proposed Rule 10c-1(a)(2)(iv) a reporting agent would be required to retain information for a period of not less than three years, the first two years in an easily accessible place.

I. Request for Comment

The Commission requests comment on whether the estimates for burden hours and costs are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) determine whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. The Commission also requests that commenters provide data to support their discussion of the burden estimates.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

72. Is the Commission adequately capturing the respondents that would be subject to the burdens under the proposed Rule? Specifically, would more or fewer than 37 lending agents, 94 reporting agents, and 278 Lenders that would not employ a lending agent be required by proposed Rule 10c-1 to provide information to an RNSA?

73. Are there any additional factors that the Commission should consider when estimating whether a Lender would employ a reporting agent?

74. Are there any other hourly burdens associated with complying with the proposed Rule 10c-1? If so, what are the other hourly burdens associated with complying with the proposed Rule?

75. Would any aspects of the proposed Rule that are not discussed in this PRA Analysis impact the burden associated with the collection of information?

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov, and send a copy to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-1090, with reference to File No. S7-18-21. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-18-21, and be submitted to

the Securities and Exchange Commission, Office of FOIA Services, 100 F Street, NE, Washington, D.C. 20549-2736.

VI. Economic Analysis

A. Introduction and Market Failure

1. Introduction

The Commission has considered the economic effects of the proposed Rule and wherever possible, the Commission has quantified the likely economic effects of the proposed Rule.[186] The Commission is providing both a qualitative assessment and quantified estimates of the potential economic effects of the proposed Rule where feasible. The Commission has incorporated data and other information to assist it in the analysis of the economic effects of the proposed Rule. However, as explained in more detail below, because the Commission does not have, and in certain cases does not believe it can reasonably obtain, data that may inform the Commission on certain economic effects, the Commission is unable to quantify certain economic effects. Further, even in cases where the Commission has some data, it is not practicable due to the number and type of assumptions necessary to quantify certain economic effects, which render any such quantification unreliable. Our inability to quantify certain costs, benefits, and effects does not imply that such costs, benefits, or effects are less significant. The Commission requests

[186] Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. Additionally, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition. Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

that commenters provide relevant data and information to assist the Commission in quantifying the economic consequences of the proposed Rule.

The Commission preliminarily believes that the proposed Rule would result in increased transparency in the securities lending market by making available the public portion of new 10c-1 information, which is more comprehensive than existing data, and by making such data available to a wider range of market participants and other interested persons than currently access existing data. This effect could be similar to what was observed with the implementation of TRACE in corporate bonds.[187]

The subsequent benefits include a reduction of the information disadvantage faced by end borrowers and beneficial owners in the securities lending market, improved price discovery in the securities lending market, increased competition among providers of securities lending analytics services, reduced administrative costs for broker-dealers and lending programs, and improved balance sheet management for financial institutions. The Commission preliminarily believes the proposed Rule would also likely reduce the cost of short selling, leading to improved price discovery and liquidity in the underlying security markets. The Commission also preliminarily believes the proposed Rule would also benefit investors by increasing the ability of regulators to surveil, study, and provide oversight of both the securities lending market and also individual market participants.

The Commission preliminarily believes that there will be costs that would result from the proposed Rule. The proposed Rule would lead to direct compliance costs as entities providing the 10c-1 information to an RNSA would have to build or adjust systems to meet the requirements of the proposed Rule. Further, the RNSA managing the collection of data may

[187] *See infra* Section IV.C.1.(a) for a discussion of TRACE.

impose fees on entities that provide 10c-1 information to an RNSA. These costs may be absorbed by the entities that provide 10c-1 information to an RNSA in the form of lower profits, or they may be passed on to the end customer in the form of increased fees for broker-dealer services or lending program services. The proposal would also impose direct costs on the RNSA responsible for collecting, maintaining, and distributing the data. Additionally, the Commission preliminarily believes that the proposed Rule would render existing securities lending data less valuable, leading to less revenue for the firms currently compiling and distributing this data. Also, broker-dealers and lending programs would have costs in the form of lost information advantage when dealing with beneficial owners and end borrowers in the securities lending market. Lastly, making public securities lending data that is currently either not reported, or where access to the data is limited, may affect the profitability of certain trading strategies as investors use the data in the proposal to learn about market sentiment and adjust their trading strategies accordingly.

2. Market Failures

The securities lending market is characterized by asymmetric information between market participants and a general lack of information on current market conditions,[188] which can lead to inefficient prices for securities loans (including equity lending and fixed income lending).[189] These information frictions stem from the fact that access to timely lending market data is very limited for some market participants. The current "give-to-get" model of commercial data for securities lending means that only those market entities with data to report for themselves are able to get access to the data. Furthermore, participation in the give-to-get

[188] *See infra* Part VI.B.2.

[189] The Commission preliminarily believes that the issues discussed in this part apply to all securities. The Commission requests comment on this belief.

data product is purely voluntary, meaning that the data could be missing observations in a systematic fashion, thus biasing the impression it creates of the lending market.

The Commission preliminarily believes that opacity in the lending market is unlikely to be solved by market forces. Firstly, the primary source for data about the securities lending market comes from commercial data vendors who operate under a give-to-get model where entities who wish to obtain securities lending are typically required to: (1), be participants in the lending market themselves with data that they could provide; and (2), provide their data to the commercial vendor in order to access the full dataset provided by the vendor.[190] Data vendors may see restricting access to the data as necessary to persuade current contributors to participate, and thus may be unable to change their current practice. If the data vendors expand who has access to their data then some of the entities that contribute data may choose to no longer contribute their data because they no longer have an incentive to do so, making the data less comprehensive than it currently is. By keeping access to the data somewhat restrictive data vendors enhance the comprehensiveness of the data, but they limit who has access.

Secondly, those market participants who choose not to contribute data to existing private data products likely do so because they believe it is in their interest to keep their own data out of public view, making it unlikely that an entity will be able to produce a comprehensive lending data product.

[190] As discussed in Part VI.B.5, while the primary sources for lending market data come from the main commercial data vendors operating on a give-to-get system, some firms obtain and distribute securities lending data by surveying some fund managers about their lending experience.

B. Baseline

1. Securities Lending

A securities loan is typically a fully collateralized transaction whereby the lender, also known as the beneficial owner, temporarily transfers legal right to a security to the borrower, the counterparty, in exchange for compensation. The form of compensation depends on the type of collateral used to secure the transaction. There are two general types of collateral: cash and non-cash.

In the United States, the most common form of collateral for equity security loans is cash. The borrower of the security deposits typically 102% or 105% of the current value of the asset being loaned as collateral. The lender then reinvests this collateral, usually in low-risk interest-bearing securities, then rebates a portion of the interest earned back to the borrower. The difference between the interest earned and what is rebated to the borrower is the lending fee earned by the lender. The portion of the interest earned on the reinvested collateral that is returned to the borrower is called the rebate rate, and is a guaranteed amount set forth in the terms of the loan. It is possible for the lender to lose money on the loan if the interest earned on the reinvestment of the collateral does not exceed the rebate rate. If the security is in high demand in the borrowing market, the rebate rate may be negative, indicating that the borrower does not receive any rebate and must also provide additional compensation to the lender.

Lending fees are influenced by factors including: the current demand for the given security, the potential difficulty a particular broker dealer may face finding an alternative source of loans, the length of the loan, the collateral used, the credit worthiness of the counterparty, and the relative bargaining power of the parties involved, among others. Consequently there is

usually a significant range of fees charged for loans of the same security on the same day to different entities.[191]

Securities loans are most commonly obtained through bilateral negotiations between lending programs and broker-dealers, often with a phone call.[192] Generally, when an end investor wishes to borrow a share, and its broker-dealer does not have the share available in their own inventory or through customer margin accounts to loan, its broker-dealer will borrow a share from a lending agent with whom it has a relationship. The broker-dealer will then re-lend the share to its customer. As previously noted, loans from lending programs to broker-dealers occur in the Wholesale Market and loans from a broker-dealer to the end borrower occur in what is referred to as the Retail Market. Obtaining a securities loan often involves extensive search for counterparties by broker-dealers.[193]

Investors borrow securities for a variety of reasons. A primary reason for borrowing equity shares is to facilitate a short sale. Investors use short sales to take a directional position in a security, or to hedge existing positions.[194] When investors execute a short sale, they do not borrow the shares on the day of the short sale. Rather, because the stock market settles at T+2 and the lending market has same day settlement, the loan actually occurs on the settlement day, two trading days after the stock market transaction took place.

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[191] *See* Part VI.B.3 for statistics on the range of fees.

[192] Most broker dealers are regulated by FINRA and are subject to securities lending rules such as FINRA rules 4314, 4320, and 4330.

[193] *See e.g.*, Adam C. Kolasinski, Adam V. Reed & Matthew C. Ringgenberg, *A Multiple Lender Approach to Understanding Supply and Search in the Equity Lending Market*, 68 J. FIN. 559-95 (2013).

[194] Market makers in the equity market also use short selling to facilitate liquidity provision in the absence of sufficient inventory. However, these short sales are not considered here because they are almost always reversed intraday and thus do not result in a securities loan.

Option market activity can also be a source of demand for security loans as short selling is a critical component of delta hedging. Delta hedging occurs when options market participants, particularly options market makers, holding directional positions hedge their inventory exposure by taking offsetting positions in the underlying stock. [195] Equity options markets are often significantly less liquid than the markets for their underlying securities. Delta hedging a long call or short put position requires short selling, which in turn requires borrowing the underlying asset.

Equity security loans can also occur to close out a failure to deliver (FTD). FTDs occur when one party of a transaction is unable to deliver at settlement the security that they previously sold. FTDs can occur for multiple reasons.[196] Regulation SHO Rule 204 states that a party needing to close out an FTD can borrow shares in the lending market and deliver the borrowed share to settle the transaction. Doing so allows more time for the individual to source the shares or purchase them in the open market.

The financial management activity of banks also drives securities loans, particularly in fixed income securities. It is the Commission's understanding that a significant fraction of debt security loans occur as banks manage liquidity on their balance sheet. Securities loans help banks manage liquidity on their balance sheets because when a security is on loan, legal claim to the security transfers to the borrower.[197] Thus banks lacking sufficient high-quality liquid assets

[195] For a given option contract, a quantity known as the "delta" captures the sensitivity of the option's price to a $1 increase in the price of the underlying security. When hedging inventory, the market maker determines the appropriate position size in the underlying stock according to the delta.

[196] *See e.g.*, Amendments to Regulation SHO at note 8, 61691, available at https://www.sec.gov/rules/final/2008/34-58775fr.pdf.

[197] *See e.g.*, *Concept Release on the U.S. Proxy System,* Exchange Act Release No. 62495 (July 13, 2010), 75 FR 42982, 42994 (July 22, 2010) ("When an institution lends out its portfolio securities, all incidents of ownership

on their balance sheet may borrow such assets to bolster their liquidity ratios.[198] Consequently, the most common securities to be lent are US Treasury/Agency bonds.[199]

Also, the Commission understands that some financial entities may use securities loans to obtain the type of collateral required by other agreements they are trying to enter into. For example, if a contract requires a certain kind of fixed income security as collateral, a firm may borrow that security to collateralize the contract.

Additionally, because dividends and substitute dividends are sometimes taxed differently, an investor for whom a substitute dividend is taxed lower than a dividend may loan its shares to an investor for whom dividends are taxed less than substitute dividends.[200]

While a security is on loan, the borrower is the legal owner of the security and receives any dividends, interest payments, and, in the case of equity security loans, holds the voting rights associated with the shares.[201] Usually the terms of the loan stipulate that dividends and interest payments must be passed back to the beneficial owner in the form of substitute payments. Voting rights cannot be transferred and remain with the borrower until the loan is returned.

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relating to the loaned securities, including voting rights, generally transfer to the borrower for the duration of the loan.").

[198] To ensure that the balance sheet is actually improved by the transaction, such loans are collateralized with securities instead of cash.

[199] *See OFR Pilot Survey*, *supra* note 24.

[200] This is known as dividend arbitrage. While the IRS has passed regulations to try to combat this type of dividend arbitrage, there is evidence that it still occurs. *See* Peter N. Dixon, Corbin A. Fox & Eric K. Kelley, *To Own or Not to Own: Stock Loans around Dividend Payments*, 140 J. FIN. ECON. 539-59 (2021).

[201] *See e.g.*, OFR Reference Guide, *supra* note 14, at 36. *See also* Viktoria Baklanova, Adam M. Copeland, and Rebecca McCaughrin, "Reference Guide to US Repo and Securities Lending Markets," 740 *FRB of New York Staff Report* (2015).

2. Current State of Transparency in Securities Lending

As described above,[202] data on securities lending are incomplete, and, may be unavailable to certain market participants. The available data are produced by commercial vendors. Data from commercial vendors are based on voluntary data contributions, largely from lending programs. Consequently, these data by and large only cover the Wholesale Market. Because the primary data providers to the commercial vendors are lending programs, which primarily lend to broker dealers in the Wholesale Market, the data have limited coverage of the Retail Market. Moreover, even in the Wholesale Market the data are incomplete as it is unlikely that the full universe of lending programs contribute all data to any given data provider. The voluntary nature of the submissions may mean that some data will be withheld. Market participants that choose not to disclose their data to the commercial providers likely do so because it is in their strategic interest not to do so, resulting in nonrandom omissions. These omissions likely insert bias into the commercial databases. Because the data are missing, the extent of the biases cannot be determined.

As mentioned above, these data lack significant coverage of the Retail Market. This omission has been noted by industry participants who have stated that even with the commercial data they still feel unable to benchmark the performance of their lending programs because they have very little insight in to the retail portion of the lending market.[203]

Access to data provided by the commercial vendors is also restricted, as only certain entities can purchase the data. The Commission understands that these entities access the data using various means such as an application programming interface (API), spreadsheet add-in

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[202] *See supra* Part VI.A.2.

[203] *See*, *e.g.*, Bob Currie, *The Power of Reinvention*, SEC. FIN. TIMES, Aug. 31, 2021, at 20, *available at* https://www.securitiesfinancetimes.com/sltimes/SFT_issue_285.pdf (interviewing Matthew Chessum).

applications, file downloads, or directly from the distributor's website. However, it is the Commission's understanding that some large institutional investors who would like the data, such as hedge funds, cannot access it, even for a fee, because they do not provide lending data to the commercial vendors and distributing the data to them may discourage other market participants from contributing their data to the data vendors. Expanding access to the commercial data may discourage some participants from contributing data because securities loans are often entered into to facilitate various trading and hedging strategies. Consequently, if sophisticated traders such as hedge funds can access the data, then some market participants may be leery of contributing data to the commercial data vendors for fear of hedge funds learning about their trading or hedging strategies. Additionally, while some data vendors do allow non-lending market participants, such as academics and regulators, to access the data for a fee, they sometimes place usage restrictions on the data that make it unusable for regulatory and some academic functions.

The Commission preliminary believes, based on conversations with industry participants and our staff's use of some of the data, that the coverage and timeliness of the three biggest commercial data vendors are roughly comparable. Other firms provide a different approach to securities lending data by surveying fund managers about their borrowing experience, such as the fees they paid to borrow, from which they provide estimates of lending fees.[204]

The current state of data availability, combined with the need for extensive search to facilitate security loans in the bilateral market,[205] means that the largest and most centrally

[204] *See* Garango Antonio, *Short Selling Activity and Future Returns: Evidence from FinTech Data* (2020), at 1 and 3, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775338.

[205] *See e.g.* Adam C. Kolasinski, Adam C., Adam V. Reed, and Matthew C. Ringgenberg. "A multiple lender approach to understanding supply and search in the equity lending market. "*The Journal of Finance* 68, no. 2 (2013): 559-595. For a discussion of search costs in the securities lending market.

connected broker-dealers and lending programs likely have access to better information about the current state of the lending market than other participants, including their customers, the beneficial owners and end borrowers. This asymmetric information between those in the center of the lending market and those on the periphery may lead to inferior terms for those on the periphery, in the form of lower performance and less favorable prices for beneficial owners and end borrowers.[206]

Furthermore, because of the limited insight of existing commercial data into the retail market and the limits on access under the give-to-get model used by these data vendors, the commercially available data products for the securities lending market do not alleviate this information asymmetry.

In addition to the specific problem of information asymmetry, the lack of comprehensive and widely available data on securities lending activity likely means that the prices at which securities loans take place are not efficient, relative to the hypothetical case where complete information about securities lending activity were widely available. Asymmetric information deters outsiders from entering the market, as they anticipate not being able to transact on the same terms. This limits both liquidity (because fewer participants enter to transact) and price discovery (because not all information enters prices). Moreover, even connected participants lack a complete picture of the lending market, implying that the prices that they quote may not be as efficient as they otherwise would be.

[206] For example, broker-dealers acting on behalf of customers have an incentive to lend from their own inventory, even if lower cost borrowing options exists, because they keep the whole lending fee in this case. The lack of data available to the end borrower about the state of the lending market makes it difficult for the end borrower to monitor the performance of its broker-dealer for situations like this.

3. Characteristics of the Securities Lending Market

The value of securities available to be loaned generally far exceeds the total value on loan. The OFR Pilot Survey documented that in 2015 only about 10% of the value of securities available for lending were on loan.[207] However, for a specific security it is not always true that shares available to loan far exceeds shares on loan. For some securities, particularly highly shorted securities, it can be extremely difficult and expensive to find securities to borrow. Securities that are difficult to borrow are said to be "on special" and can have average lending fees many times higher than a security that is not on special. In addition to significant variation in fees across different securities, there can also be a wide range of fees charged to borrow the same security on the same day.

Table [1] provides descriptive statistics illustrating these characteristics of the securities lending market. The data come from FIS (a/k/a Fidelity National Information Services, Inc.) and so reflect conditions in the wholesale lending market for the sample of lenders for which FIS obtains data. The data cover US equities on the same days as the OFR Pilot Study.[208] Panel A of Table[1] provides the distribution of utilization rates (defined as the percent of shares

[207] *See* Viktoria Baklanova, Cecilia Caglio, Frank M. Keane & R. Burt Porter, *A Pilot Survey of Agent Securities Lending Activity* (Off. of Fin. Research, Working Paper No. 16-08, 2016). Also, the number of shares available for loan must be interpreted carefully. It is the Commission's preliminary understanding that some beneficial owners may report a supply of shares available that, if borrowed, would exceed the total amount of securities lending they are willing to engage in, so that not all shares reported as available could in fact be borrowed at once. Investment companies that engage in securities lending consistent with SEC staff's current guidance generally limit securities lending to no more than one third of the value of their portfolio on loan at a given point in time. Some investment companies may set individual portfolio limits lower. *See supra* note 109.

[208] We limited our sample to these dates for comparison to the OFR study. Additionally, while the data presented here is limited to equities, the proposal applies to all securities and the Commission preliminarily believes that given that there exists the same lack of transparency for fixed income loans and equity loans, the same economic structure likely applies to both fixed income and equities.

currently on loan relative to the total number of shares available for lending).[209] This panel highlights that utilization rates are highly positively skewed. For most stocks supply significantly outstrips demand with median utilization rates of approximately 12%. For stocks at the 90th percentile, utilization rates are near 70%, implying that an investor seeking to find shares of such a stock to borrow may have a difficult time doing so.

Panel B of Table [1] shows that the lending fees paid for securities loans exhibit a wide range. [210] Some stocks, i.e. those on special, can have fees many times higher than the median stock. Specifically, stocks at the 90th percentile of lending fees have an average lending fee of 7% per year while the median stock has a lending fee of about 0.6% per year. Even when loans involve the same stock, and on the same day, there can be a significant range in fees paid to borrow securities.

Panel C of Table [1] highlights the range of fees charged for the same stock on the same day. The range in fees is defined as the difference in the maximum and minimum fees reported to FIS for loans of the same stock on that day. This range can be quite substantial. For the median stock the range is about 3 percentage points, or approximately five time the median fee charged for securities lending transactions.

The level of average fees is affected by the overall demand for the security while the range of fees for the same security can be influenced by a number of characteristics: the credit

[209] The statistics in Table 1 derive from data obtained from FIS for U.S. common stocks. The table includes data from the same period of time as the OFR Pilot Survey (October 9, 2015, November 10, 2015, and December 31, 2015).

[210] This result is consistent with the academic literature *See e.g*. Peter N Dixon, Corbin A. Fox, and Eric K. Kelley. "To Own or Not to Own: Stock Loans Around Dividend Payments," *Journal of Financial Economics*, 140, 2 (2021), 539-559. Also consistent with the academic literature, average fees for each stock each day are computed by FIS as the share weighted average fee across all loans outstanding reported to FIS for a given stock on a given day. Stocks are sorted by average fee and percentiles are determined.

worthiness of the borrower, the type of collateral used, and the term of the loan. The range in fees may also represent asymmetric information between the parties to the loan negotiation, such that one party is able to charge a higher fee than would be possible if the other party were more aware of the current rates for the security to be loaned. It may also represent a general lack of price efficiency, as market participants operate without a clear view of the market as a whole.

Table [1] Distribution of lending fees for US Common stocks. *

Panel A: Distribution of Utilization Rates

	p10	p20	p30	p40	Median	Mean	p60	p70	p80	p90	N
9-Oct-15	1.02	2.94	5.42	8.28	12.06	22.70	17.21	24.83	39.35	68.98	3638
10-Nov-15	0.94	2.82	5.18	8.19	11.72	22.51	16.87	24.59	38.59	68.10	3638
31-Dec-15	0.75	2.35	4.52	7.31	11.17	22.25	16.49	25.02	40.42	67.64	3639

Panel B: Distribution of Average Lending Fees

	p10	p20	p30	p40	Median	Mean	p60	p70	p80	p90	N
9-Oct-15	0.48	0.56	0.58	0.6	0.65	3.76	0.76	1.24	2.62	7.07	3727
10-Nov-15	0.47	0.56	0.59	0.61	0.66	3.77	0.77	1.32	2.76	7.36	3725
31-Dec-15	0.37	0.46	0.5	0.54	0.58	3.86	0.66	1.12	2.77	7.51	3725

Panel C: Distribution of Range of Lending Fees

	p10	p20	p30	p40	Median	Mean	p60	p70	p80	p90	N
9-Oct-15	1.01	1.35	1.85	2.27	2.85	8.42	3.57	5.21	7.76	10.41	3727
10-Nov-15	0.93	1.31	1.81	2.36	2.98	8.39	3.78	5.51	7.73	11.16	3725
31-Dec-15	1.15	1.48	1.84	2.25	2.68	8.20	3.43	4.20	6.36	11.41	3725

* This table provides descriptive statistics using data from FIS on securities lending fees for US Common stocks. Panel A provides estimates of the distribution of average fee for each stock. For loans collateralized by cash, rebate rates are converted to fees using the conventional method of subtracting the rebate rate from the Federal funds rate. The sample matches the OFR Pilot Survey's sample dates and provides percentile thresholds for lending fees. Panel A shows the distribution of average fees. Since there is a distribution of fees levied for the same stock on the same day, the average fee is computed as the value weighted average fee across all loans for a given stock on a given day. Panel B shows statistics for the range of fees levied for the same stock on the same day defined as the maximum fee minus the minimum fee. Fees are converted to annual percent. Panel C shows the distribution of utilization rates for US common stock where the utilization rate is computed as the percent of shares on loan relative to total shares available for lending. N reports the number of observations from which FIS has reported the relevant statistics.

4. Structure of the Securities Lending Market

The securities lending market is made up of a market for borrowing and borrowing services, and a market for lending services. End borrowers can borrow securities either through their broker-dealer, or by themselves if they maintain their own relationships with lending programs. If they borrow through their broker-dealer, then they transact in the Retail Market. If they maintain their own relationships and borrow directly from lending programs, then they transact in the Wholesale Market. Beneficial owners can either supply shares to the lending market by contracting with a lending program, or they can run their own lending program and lend directly to entities such as large hedge funds with which they maintain relationships. In either case, such a transaction occurs in the Wholesale Market. Lenders can also be broker-dealers who lend to end borrowers either from their own account or from customer margin accounts. These lenders transact in the Retail Market. The following sections discuss the structure of the market for borrowing and borrowing services and the market for lending services.

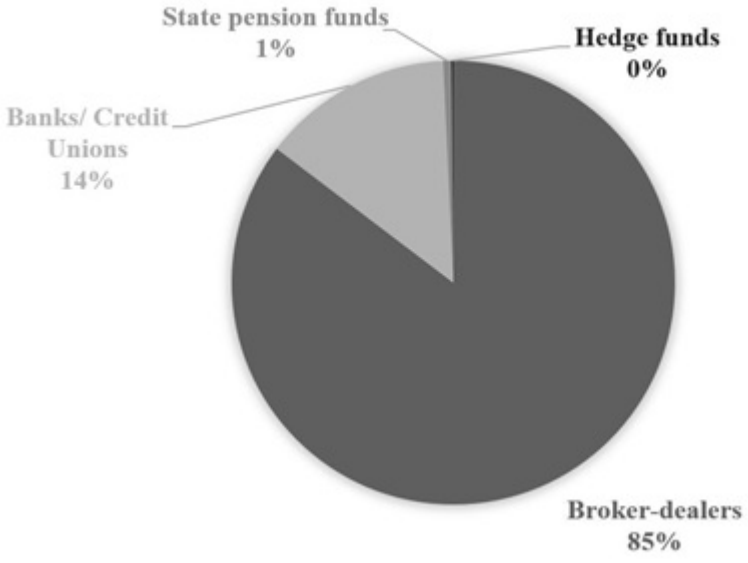
a) Market for Borrowing and Borrowing Services

A market participant wishing to borrow shares usually does so through its broker-dealer, who offers to find shares to borrow as part of its suite of services offered to customers. A broker-dealer may start by providing a security loan to its customer with shares from its own inventory or out of another customer's margin account. The Commission understands that in order to facilitate the amount of borrowing customers wish to do, a broker-dealer will typically have to find external sources of shares. To that end, broker-dealers maintain relationships with various lending programs.

Additionally, some large institutions, such as banks, credit unions, pension funds, and hedge funds, choose to maintain their own relationships with lending programs. These entities bypass broker-dealers to search for borrowable shares themselves. This option is not feasible for smaller institutions, who lack both the scale to make it cost effective, and the creditworthiness to be an acceptable counterparty for the lending programs in the absence of an intermediary, e.g., a broker-dealer.

The OFR Pilot Survey estimated that there were approximately $1 trillion of shares on loan. The OFR primarily focuses on the Wholesale Market, consequently the overwhelming majority of borrowers were broker-dealers, who are generally arranging the loan on behalf of a customer (such as a hedge fund) that wishes to borrow shares, typically to deliver shares to settle a short transaction. Consequently the OFR Pilot Survey does not provide much insight into who the end borrowers are for the trades facilitated by broker-dealers. Figure [1] provides the fraction of total securities on loan by type of borrower based on the OFR Pilot Survey.

Figure [1] Fraction of shares on loan by borrower type



Source: OFR Pilot Survey of Agent Securities Lending Activity

There is currently no common source that those seeking security loans can use to determine where to find shares available to lend, which is why broker-dealers rely on relationships with lending programs to secure loans. This situation has contributed to high search costs in this market.[211] High search costs imply that transactions cannot take place without a costly effort to find a favorable counterparty. The need for such costly effort can inhibit market efficiency.

Broker-dealers possess some market power over their customers. Generally, broker-dealers assist investors in finding shares to borrow as part of a suite of services and switching costs to selecting a new broker dealer can be high. This relationship can make it difficult for investors to change broker-dealers if they underperform in one area because it is not just a securities lending relationship that would be changed, but the whole suite of broker-dealer services would be affected.[212] Additionally, the relationship nature of the lending market favors larger broker-dealers who can maintain high-volume relationships with more lending programs. Finally, the lack of data make it difficult for customers to evaluate the performance of broker-dealers. Customers as well as lenders thus rely on relationships and reputation, a situation that also leads to market power.

b) Market for Lending Services

The primary sources of shares to loan are long term investors such as investment firms, pension and endowment funds, governmental entities, and insurance companies. These entities generally make their shares available to lend either through a lending program run by a lending

[211] Kolasinski, Reed & Ringgenberg, *supra* note 193.

[212] Some entities, such as some hedge funds, have multiple prime-brokers. For such institutions it would be less difficult to switch between broker-dealers if one is performing poorly as they could redirect securities lending business to their top performing prime-broker.

agent or by running their own lending program. Additionally, broker-dealers may lend shares from their own inventory, from fully paid shares, and from customer margin accounts.

As described above, a beneficial owner seeking to lend shares will generally provide those shares to a lending agent, which runs a lending program. There are two broad categories of lending programs: custodian banks and third-party lending programs. In the case of custodian banks, the lending program is generally offered as part of their general custodian services.

Both types of lending programs will generally pool shares across accounts with which they have lending agreements to create a common pool of shares available to lend. As shares are lent out the revenue earned from the pool of shares is generally distributed across all accounts contributing shares to the pool of shares on loan on a pro-rata basis. In pooled lending programs the lending program generally splits the fees generated from lending with the beneficial owners. Based on the staff's experience, the Commission preliminarily believes that the lending program will usually take about a third of the fees earned. In the case of custodian banks, the custodian bank may, rather than return the lending revenue directly to the beneficial owner, instead apply the beneficial owner's portion of the lending revenue to other fees charged by the custodian bank for other services.

Lending programs typically indemnify the beneficial owner from default by the borrower. This indemnity gives the lending program an incentive to ensure the creditworthiness of the borrower, and a lending program may assess higher fees to borrowers it deems as less creditworthy.

Lastly, over the past two decades, auction-based security lending has become an alternative for lender-borrower interactions. In this setting, unlike the directed lending programs, positions of different beneficial owners are not pooled to cater to security-specific demand from

borrowers. Instead, after determining the desired income streams, the lender's entire portfolio, or its segments, are offered via blind single-bid auctions.

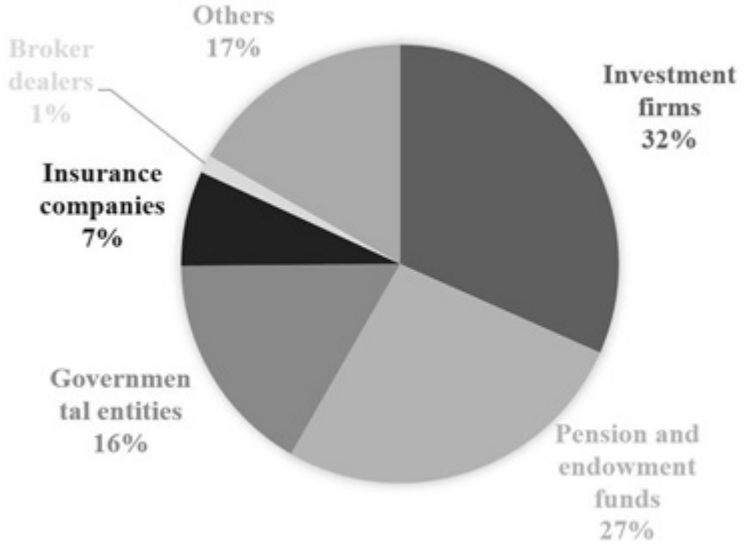
In some cases, a beneficial owner may choose to set up its own lending program. This course is more common among very large funds that have the resources to build up the expertise necessary to operate a lending program.

The Commission preliminarily believes that the current relationship and network structure of lending programs and broker-dealers favors larger lending programs that have the resources to maintain relationships with more and larger lending broker-dealers. Thus, the Commission preliminarily believes that the market for lending services is likely dominated by a few large lending programs, including those run by the large custodian banks.

The OFR Pilot Survey estimated that as of the latter part of 2015 there were approximately $9.5 trillion worth of shares available for lending.[213] Figure [2] provides a breakout of the percent of shares available for lending provided by the various entities.

[213] Commercial vendors typically report a value for securities available to loan that is larger than what is reported in the OFR study. This difference is likely due to sample construction. The commercial vendors likely have a larger sample of lending programs to draw from, particularly the lending programs based outside of the United States.

Figure [2]: Sources of lendable shares (2015)



Source: OFR Pilot Survey of Agent Securities Lending Activity

5. Market for Securities Lending Data and Analytics

The market to collect and disseminate securities lending data is an outgrowth of the market for securities lending market analytics.[214] This market consists of a few established vendors that specialize in geographic areas (US and non-US) but seek to compete in all geographic areas. Most vendors collect the data to support the analysis business in which they provide data-based service to institutions and other lending programs. Others collect data through their facilitation of security loans. As such, the data vendor business is often an outgrowth of another business.

[214] *See* the business model descriptions in IHS Markit's comment letter responding to FINRA's Regulatory Notice 21-19, *available at* https://www.finra.org/sites/default/files/NoticeComment/IHS%20Markit_Paul%20Wilson_21-19_9.30.2021%20-%20IHSM%20Cmt%20Ltr%20re%20FINRA%20RFC%20Short%20Interest%20Position%20Reporting.pdf.

The Commission preliminarily believes that the data provided by the various data vendors are largely comparable.[215] However the entities providing data to the vendors are also their customers. This relationship limits the market power of the vendors with respect to their clients who provide data but results in the clients' incentives limiting the competitiveness of the market.[216] This results in the market being largely inaccessible for many entities that could use the data for their own benefit or the benefit of the market as a whole.[217]

The give-to-get model for securities lending data is a significant barrier to entry to any firm seeking to provide analytics services. Firms cannot provide analytics services without data, and the biggest three data vendors have established relationships with data contributors to collect data. Such data contributors have an incentive to also control who can access that data. Consequently, the Commission understands that the market for securities lending data and securities lending analytics is largely concentrated among the three biggest data vendors.

C. Economic Effects of the Proposed Rule

1. Effects of Increased Transparency in the Lending Market

The Commission preliminarily believes that the primary impact of the proposed Rule would be to increase transparency in the securities lending market. The proposed Rule would improve transparency through increased completeness, accuracy, accessibility, and timeliness of securities lending data. Due to uncertainties about existing data discussed in IV.B.2, the Commission has some uncertainty in describing how much more complete, accurate, and timely

[215] *See* Truong X. Duong, Zsuzsa R. Huszár, Ruth SK Tan, and Weina Zhang. "The Information Value of Stock Lending Fees: Are Lenders Price Takers?" *Review of Finance* 21, no. 6 (2017): 2353-2377 (who provide a comparative analysis of the datasets of two of the main commercial data vendors and find very high correlations between the values presented in the different datasets).

[216] *See supra* Part VI.A.2.

[217] *See supra* Part VI.B.4.b).

the data provided by the proposal will be. However, the Commission preliminarily believes that the data provided by the proposal will improve upon existing data in each of these areas. While commercial data vendors collect data only from a segment of the market, the proposed Rule would seek to collect all security loan transactions. In addition, unlike the often voluntary data reporting of subscribers to commercial data vendors, the proposed Rule mandates reporting. As such, the data provided by the proposed Rule would be more comprehensive than the data offered by any individual data vendor.

The data provided by the proposed Rule would encompass more data fields than those offered by individual existing commercial data vendors, improving the breadth of the available securities lending data. While both commercial data and the data provided by the proposal will provide information on fees (rebate rates) and the dollar value of the loan, the proposed rule requires reporting of additional information relevant to the loan including: the name of the platform or venue where the security loan transaction was executed, the security loan's termination date, type of collateral, and borrower type. In addition, as described in Part III.B.1.b), the proposed Rule would collect detailed security loan modification data while existing commercially available data often fails to cover such information.

Commercial data vendors restrict data access via usage restrictions. In contrast, the proposed Rule expands accessibility of the data by allowing all market participants to access data.[218] While the Commission preliminarily believes that the lack of such usage restrictions would expand access, the Commission is uncertain as to whether the RNSA would develop systems to facilitate access with a degree of convenience comparable to current data vendors. Nevertheless, the Commission preliminarily believes that the commercial vendors may process

[218] *See* Part VI.C.3 for estimated compliance costs.

the data available through the RNSA to provide conveniently accessible comprehensive securities lending data, along with the other relevant products, to clients. [219]

Lastly, the proposed Rule would likely improve the timeliness of data available to the public. While the Commission understands that most of the major data vendors provide some data on transactions intraday, it is unclear if all do. These vendors make intraday data available in 15 minute increments. However it is not clear whether these data vendors require their data contributors to report transactions within 15 minutes thus the Commission is uncertain about the comprehensiveness of existing intraday data offerings.[220] Consequently, the proposed Rule's 15 minute reporting window will in the extreme case likely result in data that is at least as timely as some existing data and will likely be more timely.

While the Proposal provides improvements in many areas as discussed above, and the Commission preliminarily believes that the Proposal will lead to an overall increase in transparency, the Commission preliminarily believes that in some areas, the Proposal will produce data that that may be less timely than existing commercial data. For example the Proposal requires the RNSA to report end of day quantities of securities available for lending and loans outstanding. These data will be made available to the public as soon as practicable, but not later than the next business day. The Commission preliminarily understands that the current

[219] The Commission understands that there are different ways that market participants currently access data as discussed in Part VI.B.1, and that these ways may be different from how market participants access the data created by the Proposal. However, the Commission preliminarily believes that how market participants access the data will likely have a significantly smaller impact on the economic effects of the rule relative to the effects of the content of the data, its accessibility, and its timeliness. The Commission preliminarily believes that market participants will relatively easily adapt to optimally use the data generated by the proposal. These adaptations will likely be relatively small given the similarity of the structure of the current data with the data generated by the Proposal. Thus the Commission's discussion of economic effects in this section focus on the content of the data.

[220] Fifteen-minute reporting frequency is currently implemented in corporate bond markets, where reporting is often handled manually. Hence, in any market with a degree of automation, e.g., security lending markets, a 15-minute reporting frequency would be unlikely to present technological challenges.

practice by market participants is to provide preliminary statistics on the same day based on the intraday data collected by the vendors – potentially one day sooner than the Proposal – while the main data are disseminated one day later. Thus while the Commission preliminarily expects that the data for shares on loan and shares available to loan could be more comprehensive than existing commercial data, it may also be disseminated one day later than the preliminary statistics produced by the commercial vendors.

Despite this potential reduction in the timeliness of one data element, increased transparency from the proposed Rule would have several notable economic effects. First, it reduces information asymmetries, which would be beneficial to some and costly to others. The improvements in the information available to various participants could affect revenues from borrowing securities, lending securities, intermediating loans and selling data. Third, the improvements in efficiency in the securities lending market would reduce the costs of short selling, potentially affecting markets more broadly. Finally, improvements in transparency in the securities lending market can assist financial institutions in managing collateral and their balance sheets more broadly.

As discussed below, the Commission preliminarily believes that the data provided by the proposal may decrease the cost of lending. Consequently, some investors may see returns decrease due to more competitive fee pricing which may lower securities lending revenue for some lenders. On the other hand, other investors may see returns increase if the cost of borrowing securities decreases as it will facilitate investment, hedging, and potentially market making strategies. Many investors may experience both effects. In general, the Commission believes that reductions in transaction costs ultimately benefit investors.

a) Reduction in Information Asymmetry

The Commission preliminarily believes that the transparency created by the proposed Rule would reduce information asymmetries between various market participants. Specifically, it would reduce the information asymmetries between dealers and end borrowers and between beneficial owners and lending programs, resulting in lower costs for end borrowers but reduced revenues for some broker-dealers and lending programs. In addition, beneficial owners could benefit from better terms but could also experience reduced revenues from their lending activities.

The Commission preliminarily believes that the transparency created by the proposed Rule would benefit end borrowers by reducing the information disadvantage they have with a broker when borrowing shares, leading to lower prices for end borrowers. Because most security loans are facilitated through broker-dealers, the data would allow end borrowers to determine the extent to which their broker-dealer is obtaining terms that are better, worse, or consistent with current market conditions for loans with similar characteristics. If a particular broker-dealer is consistently underperforming relative to the rest of the market, an investor would have the tools to identify such underperformance and address it with his or her broker dealer, or to find a new broker dealer.[221] Such improvements are consistent with the experience in other markets. For example, the implementation of TRACE in the corporate bond markets improved transparency in that market and has been studied extensively. Research has shown that TRACE lowered both the average cost of transacting as well as the dispersion of transaction costs – largely by reducing the

[221] The costs associated with switching broker dealers may be high, particularly for smaller borrowers. Switching broker-dealers may not be cost effective for these borrowers, however, the data would provide benchmark statistics that may enable smaller borrowers to select higher performing broker-dealers initially.

information asymmetries between customers and their broker-dealers.[222] Additionally, recent research from Brazil has shown that improving securities lending transparency led to lower fees, increased liquidity, and increased price efficiency.[223]

The Commission preliminarily believes that the proposed Rule would benefit beneficial owners by reducing their information disadvantage with respect to their lending programs. By allowing beneficial owners to more easily benchmark their lending programs through access to data on lending fees and other characteristics of recently transacted security loans, the proposed Rule would provide these lenders with an improved ability to determine the quality of the loans that their lending program executes on their behalf relative to other loans with similar characteristics and to discuss performance with their lending program, find a different lending program, or find a new route to market.

Reduction in information asymmetry could result in reduced revenue for some broker-dealers and lending programs. Because end borrowers and beneficial owners would have more information about the state of the lending market, broker dealers and lending programs who consistently underperform the market may lose customers to better performing broker-dealers and lending programs, or begin offering better terms to their customers. Both possibilities

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[222] *See e.g.*, Amy K. Edwards, Lawrence E. Harris, and Michael S. Piwowar. "Corporate Bond Market Transaction Costs and Transparency." *The Journal of Finance* 62.3 (2007): 1421-1451, Michael Goldstein, Edith S. Hotchkiss, and Erik R. Sirri. "Transparency and Liquidity: A Controlled Experiment on Corporate Bonds." *The Review of Financial Studies* 20.2 (2007): 235-273, Hendrik Bessembinder, William Maxwell, and Kumar Venkataraman. "Market Transparency, Liquidity Externalities, and Institutional Trading Costs in Corporate Bonds." *Journal of Financial Economics* 82.2 (2006): 251-288, Michael A. Goldstein, and Edith S. Hotchkiss. "Dealer Behavior and the Trading of Newly issued Corporate Bonds." *AFA 2009 San Francisco meetings paper*. 2007, and Hendrik Bessembinder and William Maxwell. "Markets: Transparency and the Corporate Bond Market." *Journal of economic perspectives* 22.2 (2008): 217-234.

[223] *See* Fábio Cereda, Fernando Chague, Rodrigo De-Losso, Alan Genaro, and Bruno Giovannetti. "Price transparency in OTC equity lending markets: Evidence from a loan fee benchmark." *Journal of Financial Economics* (Forthcoming).

represent a reduction in revenue for broker-dealers and lending programs. It is possible some broker-dealers and lending programs may choose to exit some or all of the market for lending services as a result of this loss of revenue.[224] The loss of revenue will in part be a transfer to end borrowers, beneficial owners, better performing lending programs, and better performing broker-dealers.

Lending programs may also experience reduced revenues through the change in terms offered by broker-dealers to their customers. If a given lending program has become skilled in cultivating relationships with broker-dealers willing currently to pay higher fees, then the increased competition that broker-dealers face as a result of the rule may lead to lower overall fees being charged for security loans – lowering the total lending revenue produced by securities lending.[225] Lower overall lending fees may reduce the revenue earned by beneficial owners and would represent a partial transfer to the end borrowers who may receive better terms on average as a result of decreased information asymmetries.[226]

b) Improved Information for Participants in the Securities Lending Market

The Commission preliminarily believes that the increased transparency that would result from the proposed Rule would increase the information about the state of and activity in the securities lending markets that is available to market participants generally. This would result in benefits in the form of increased trading profits for investors and beneficial owners, reduced costs of business for broker-dealers, improved performance and reduced costs for lending programs, improved price discovery in the securities lending market, and new business

[224] *See infra* Part VI.D.

[225] For a discussion of the potential for broker-dealers to face increased competition, *see supra* Part VI.D.2.

[226] *See supra* Part VI.B.

opportunities for data vendors. The increase in securities lending information would also result in costs in the form of lost revenue for current providers of commercial securities lending data.

The Commission preliminarily believes the improved information that would result from the proposed Rule would lead to increased profits for certain investors by increasing their certainty regarding investment strategies that require borrowing securities. Prior to a short sale transaction, the end borrower will be able to get a better sense of the likely costs associated with such an investment strategy, using the information that would be provided under the proposed Rule. This increase in certainty regarding the costs of borrowing a security may decrease risk, and thereby increase risk-adjusted profits, of pursuing investment strategies that require short sales.

The improved information access would lead to the benefit of improved price discovery in the security lending market itself. As all participants in the securities lending market obtain better data on that market, utilize the insights contained in the data, and then improve their decisions based on it, the price discovery process would improve. This would lead to more efficient prices for securities loans.

Access to the information that would be made available by this proposal would benefit investors by potentially enabling them to make more informed decisions about whether to buy, hold, or sell a given security. Extant research has demonstrated that securities lending data has information relevant to the prices of the underlying security.[227] This information may therefore enable more informed investment decisions by those investors who utilize the insights into the

[227] *See* Truong X. Duong, Zsuzsa R. Huszár, Ruth S. K. Tan & Weina Zhang, *The Information Value of Stock Lending Fees: Are Lenders Price Takers?* 21 REV. FIN. 2353-77 (2017). This study shows that after controlling for the level of short selling, securities lending fees are predictive of future stock returns with higher fees associated with lower future returns. These result imply that, all things equal, lenders charge higher fees to lend their shares when they have negative information about a company. And *See* Kaitlin Hendrix & Gavin Crabb, *Borrowing Fees and Expected Stock Returns* (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3726227.

underlying market available from the lending market. More informed investment decisions facilitated by the proposal may also improve market stability by allowing investors to better manage risk.

Furthermore, this improved information access may also improve price discovery in the market for the securities underlying the security loans. Because these data currently are not widely observed, [228] it is possible that the information about the underlying securities contained in security lending market data are not incorporated in those underlying securities' prices. For example, existing research shows that lending fees themselves contain information that is relevant to prices.[229] Additionally, a more accurate estimation of shares on loan can provide a clearer view into daily changes in short interest which can provide market participants with improved information about bearish sentiment. Consequently, by publicly disseminating securities lending data, the proposal may increase price efficiency by allowing a broader section of investors to learn from and trade based on signals obtained from the securities lending market.

Additionally, an improved view of current lending market conditions for various securities could help inform beneficial owners in making decisions concerning which shares to make available for lending, potentially leading to more profitable lending. For instance, to the extent that beneficial owners do not currently have a way of determining which securities are in high demand, the new information may be able to alert them about securities with high lending fees, which would enable them to better optimize which shares in their portfolio they make available for lending.[230]

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[228] *See supra* Part VI.B.2.

[229] *See, e.g.*, Duong, Huszár, Tan, and Zhang *supra* note 215.

[230] This decision can be important because beneficial owners that engage in securities lending activities consistent with the SEC staff's current guidance limit the portion of their portfolios that can be on loan at any point in time.

A clearer understanding of lending market conditions facilitated by the dissemination of new 10c-1 information may benefit broker-dealers by decreasing the cost incurred to obtain a locate in order to facilitate a short sale on behalf of a customer. The increased information that would be created by the proposed Rule would allow a broker-dealer to better ascertain current market conditions for security loans with certain characteristics prior to calling lending programs to get competing quotes. As described in Part VI.B.4., broker-dealers tend to find loans for their customers through their network of lending programs with which they have relationships, after they have exhausted their own inventory and customer margin accounts.[231] The data from the proposed Rule would enable them to determine whether or not a quote from a lending program is competitive with greater ease. It is possible new broker-dealers may choose to enter this market as a result of this reduction in cost.[232]

The proposed Rule would benefit lending programs by providing a means by which they may improve the performance of their lending. New 10c-1 data will provide lending programs with a source of more comprehensive data on the securities lending market than existing commercial data. With this data the lending programs would have an improved ability to determine prevailing market conditions as they compete to lend shares, which may improve their lending performance.

The Commission preliminarily believes that the proposed Rule may cause a loss in revenue for the commercial vendors of securities lending data. The proposed Rule would create data that are similar to, but more comprehensive than the data currently available from private

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See supra note 109. This additional information may help a beneficial owner that is close to its program limit to optimally choose which shares to make available.

[231] *See also supra* Part VI.B.1 (discussing the role of broker-dealers in facilitating borrowing by customers).

[232] *See infra* Part VI.D.

data vendors. Consequently, for many users the data provided by the proposal may supplant the data currently provided by the commercial vendors, and these users would then drop their subscriptions to the data vendors.

The Commission preliminarily believes that a potential mitigating factor that could reduce the severity of this loss in revenue would be that commercial data vendors could offset some of the impact of lowered demand for their data by enhancing their related businesses[233] using the data in the proposed Rule. As discussed in Part VI.B.5, commercial data vendors also provide analytics to their customers, and would be able to support these analytics data with the data provided by the proposed Rule. Further, because the commercial vendors would not need to protect their relationship with their current data vendors, they could provide analytics to more market participants. However, as discussed below in Part VI.D.2, the data vendors may see increased competition for data analytics services as the barriers to entry for providing analytics services decline and new entrants compete to provide analytics services. This effect would lower what the data vendors can charge for analytics services. Additionally, to the extent that the commercial data vendors offer their customers other securities lending services, such as execution services, the proposal may enhance their other business lines by providing more comprehensive data to support other securities lending market services.

The Commission recognizes that these benefits are somewhat limited because the data will not contain all information necessary to perfectly compare the fees on different loans, though the Commission preliminarily believes that the proposed Rule improves the ability to compare loans. For example, as discussed in Part IV.B.1, loan fees are determined by a variety

[233] The proposal would also lower barriers to entry for new entrants desiring to offer analytics solutions for the equity lending market. This outcome is discussed in Part VI.D.2.

of factors including counterparty creditworthiness – which is not captured in the proposal's data. As such, two loans could appear to be similar in the information the proposed Rule would provide, but the counterparty risk differences could result in different fees. While recognizing this limitation, the Commission does not believe this limitation could be solved by adding information on counterparty risk. In particular, the Commission is unaware of reliable measures for counterparty risk that would be informative when attached to transaction information. However, the Commission requests comment on whether commenters believe any such measures exist.

c) Improved Market Function Through Effects on Short Selling

As described in Parts VI.C.1.a) and VI.C.1.b), the Commission preliminarily believes that the proposed Rule would likely reduce the cost to borrow securities. This would have a number of effects through the impact on short selling. Because maintaining a short position requires borrowing the security, reducing the cost to borrow securities would reduce the cost to short sell. Reduced costs for short selling would result in benefits in the form of enabling investors to profitably engage in more fundamental research, improving price discovery in securities markets, providing more discipline for corporate managers, and increasing liquidity in the stock and options markets.

The reduced costs to short selling would benefit investors by enabling them to profitably engage in more fundamental research. Indeed, academic research indicates that when short selling costs diminish, investors will do more fundamental research because it is easier to trade

on their information if they uncover negative information.[234] This new fundamental research may in turn lead to better investment decisions for these investors.

Additionally, by facilitating more short selling and more research, the proposed Rule would benefit market participants by improving price discovery. Academic research shows that short sellers, through their research, contribute to price efficiency by gathering and trading on relevant private information.[235]

Short sellers also serve as valuable monitors of management. Extant research has demonstrated that when management knows that short sellers may be studying their firms, they are less likely to engage in inappropriate and/or value-destroying behavior.[236] Research also indicates that when short selling becomes easier the effectiveness of short sellers as monitors increases.[237]

Reducing the costs of short selling may also have the benefit of increasing the liquidity in the underlying securities. Short sellers are key contributors to liquidity in both equity and options markets and existing research shows that when short selling is constrained by tightness in

[234] *See* Dixon, Fox & Kelly, *supra* note 200. It is not necessary that the information uncovered by this research be negative in nature for this to be true. The possibility of easier securities borrowing ensures that if the information happens to be negative, it will still be profitable. Thus, the risk of engaging in costly research decreases and more information, both positive and negative, is uncovered as a result.

[235] *See e.g*. Jesse Blocher, Adam V. Reed, and Edward D. Van Wesep. "Connecting Two Markets: An Equilibrium Framework for Shorts, Longs, and Stock Loans." *Journal of Financial Economics* 108, no. 2 (2013): 302-322 and Peter Dixon, *Why Do Short Selling Bans Increase Adverse Selection and Decrease Price Efficiency?* Review of Asset Pricing Studies *1*(1), 122-168.

[236] *See e.g*. Eric C. Chang, Tse-Chun Lin, and Xiaorong Ma. "Does Short-Selling Threat Discipline Managers in Mergers and Acquisitions Decisions?" *Journal of Accounting and Economics* 68, no. 1 (2019): 101223. See also Massimo Massa, Bohui Zhang, and Hong Zhang. "The Invisible Hand of Short Selling: Does Short Selling Discipline Earnings Management?" *The Review of Financial Studies* 28, no. 6 (2015): 1701-1736.

[237] *See e.g.* Vivian W. Fang, Allen H. Huang, and Jonathan M. Karpoff. "Short Selling and Earnings Management: A Controlled Experiment." *The Journal of Finance* 71, no. 3 (2016): 1251-1294.

the securities lending market, the stock market is less liquid.[238] Also, lower costs to short selling would have potential benefits in the options markets in the form of increased liquidity. As discussed in Part VI.B.1, securities lending affects liquidity in the options market through its impact on how easily options market makers can delta hedge. Less costly delta hedging may therefore increase liquidity in the options market.

Also, since some price discovery occurs in the options market, to the extent that the rule increases the ease with which investors can trade in options, the proposal may further enhance price efficiency in the spot market.[239]

However, the proposal may somewhat diminish the value of collecting and trading on negative information. Specifically, the proposal would provide information that may provide a more timely view into short selling activity than currently exists. Increasing short selling transparency may make it more costly for short sellers to implement their positions as other market participants would more quickly learn about and react to short sellers' activities. These dynamics decrease the profitability of short selling and may mitigate some of the benefits discussed in the preceding paragraphs. [240]

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[238] *See* Dixon, Fox & Kelley, *supra* note 200. 18.6 (2014): , 18, 6, 2153-2195.

[239] *See*, *e.g.*, David Easley, Maureen O'Hara & Pulle Subrahmanya Srinivas, *Option Volume and Stock Prices: Evidence on Where Informed Traders Trade*, 53 J. FIN. 431-65 (1998); Jun Pan & Allen M. Poteshman, *The Information in Option Volume for Future Stock Prices*, 19 REV. FIN. STUD. 871-908 (2006); Sophie Ni, Neil D. Pearson & Allen M. Poteshman, *Stock Price Clustering on Option Expiration Dates*, 78 J. FIN. ECON. 49-87 (2005).

[240] While the literature examining the effects of short selling on financial markets is overwhelming positive, it is not uniformly so. Two theoretical studies posit that in certain circumstances short selling can lead to stock price manipulation with adverse effects for the firms whose stock prices are manipulated. *See* Markus K. Brunnermeier and Martin Oehmke, *Predatory Short Selling Review of Finance*, 18, 6 (2014), 2153-2195. *See also* Itay Goldstein and Alexander Guembel, *Manipulation and the Allocational Role of Prices*, *The Review of Economic Studies*,75, 1 (2008), 133-164. However, there has yet to be strong empirical evidence supporting these studies. One study shows using international empirical data that the markets that allow short selling tend to exhibit more negative skewness, implying an increase in risk for extremely negative return events. It is unclear whether this pattern indicates that short sellers exacerbate crash risk, or whether this pattern simply reflects short sellers quickly incorporate negative information into stock prices (a behavior that enhances price efficiency). *See* Arturo Bris, William N. Goetzmann,

d) Improved Financial Management for Financial Institutions

As discussed in Part VI.B.1, financial institutions such as banks and broker-dealers use the securities lending market in order to manage collateral needed for other transactions. These entities can face the same opacity concerns as do end borrowers and beneficial owners, and thus an increase in market transparency may lead to improved ability to manage collateral.

Also, as discussed in Part VI.B.1, banks borrow securities to manage their balance sheets, and the Commission expects that this too may become easier to do as a result of the proposed Rule, leading to the benefit of improved balance sheet management by banks.

2. Regulatory Benefits

The proposed Rule would improve upon current data sources by providing an RNSA (FINRA is the only RNSA) and the Commission access to securities lending information that identifies the parties to the loans, indicates when a broker-dealer loans its own securities to its customers, and indicates whether the purpose of such a loan was to close out a failure to deliver. Further, the improved access and comprehensiveness and reduced bias of the publicly available data would also accrue to FINRA and the Commission, as well as any other regulators using this data. This access would benefit investors by enhancing regulatory tools employed to promote fair and orderly securities transactions. In particular, benefits to investors could result from improved surveillance and enforcement uses, market reconstruction uses, and market research uses.

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and Ning Zhu, *Efficiency and the Bear: Short Sales and Markets around the World*, *The Journal of* Finance, 62, 3 (2007), 1029-1079.

a) Surveillance and Enforcement Uses

The party identities and purpose information could facilitate better surveillance by FINRA for regulatory compliance by its members, and could improve its ability to enforce such regulations. Additionally, FINRA would be able to notify another regulator as appropriate.

For example, for FINRA, the information on whether the security is loaned from a broker-dealer's securities inventory to its customer could assist FINRA in determining whether the broker-dealer was charging lending fees or paying rebates commensurate with the market. Thus, beneficial owners and end borrowers, who engage in securities lending transactions, would be protected against potential unfair pricing of securities by broker-dealers. In addition, FINRA can use the data more generally to assist in its surveillance of FINRA Rules 4314, 4320, and 4330 regarding securities lending and short selling that primarily intend to reduce information asymmetry in the securities lending markets. For instance, the proposed Rule could help FINRA identify broker-dealers who tend to lend to or borrow from non-FINRA members to examine compliance with provisions of FINRA rules 4314 and 4330 that entail agreement, disclosure, and other requirements for this activity. In addition, the information on how much borrowing particular FINRA members engage in can assist FINRA in identifying which broker-dealers to examine for compliance with FINRA rule 4320 – which contains short sale delivery requirements. These types of activities would better protect investors by helping to ensure that entities engaging in certain securities lending transactions are authorized to do so and are in compliance with applicable regulations. FINRA can also use the information to monitor when broker-dealers are building up risk, thereby protecting broker-dealers' customers against potential instabilities. FINRA could use data on the identity and activity of its members to provide an early warning with regard to the behavior of its members during a short squeeze.

Additionally, the securities lending data would facilitate the Commission's oversight of compliance with Regulation SHO, such as the locate requirement and the close out requirement. In particular, the information on shares available and shares on loan would provide the Commission with a way to identify securities for which obtaining a locate would be more difficult because securities with little difference between shares available and shares on loan would be harder to locate and borrow. Coupled with other data, the Commission could identify short sale orders, short sellers, and their broker-dealers who are active in such securities, which would allow the Commission to more efficiently target broker-dealers for locate examinations. In addition, the information on whether the loan is being used to close out a fail to deliver could assist in examinations for Rule 204 compliance. Importantly, being able to estimate the securities lending revenues and costs of particular participants could help to fine tune disgorgement estimations. The Commission could also use the data to oversee broker-dealer compliance with Exchange Act rule 15c3-3.[241]

b) Market Reconstruction Uses

The data provided by the Proposal may help regulators reconstruct market events. For example, in January 2021 trading in so called 'meme' stocks led to many questions about securities lending being asked by law makers, investors, and the media as well as calls by some for increased regulation in some areas.[242] The data provided by the proposal would allow for more detailed evaluations of such events in the future than was possible with existing data during January 2021. For example, January 2021 information on market participants' securities lending activity would have provided FINRA and Commission staff a more timely and fulsome view of

[241] *See* 17 CFR 240.15c3-3.

[242] *See, e.g., supra* note 11.

who was entering into new loans and who was no longer borrowing securities. This would have facilitated a deeper understanding of how the events were or were not impacting market participants. Such analysis can help determine if further regulatory intervention in markets is warranted, and can inform the nature of any intervention.

c) Market Research Uses

Greater access and more comprehensive data on the securities lending market would improve the quality and expand the scope of research by both academics and regulators, which would better inform the regulators. In particular, improving the information available for their policy decisions would promote fair, orderly, and efficient markets and the protection of investors. For example, the data could facilitate research on the effectiveness of regulations such as Regulation SHO or FINRA Rules 4320 and 4330. Additionally, research conducted by academic researchers and market participants could also improve the value of public comment letters on Commission and FINRA proposals, which would also better inform policy decisions.

3. Direct Compliance Costs

The Proposal will require various entities to enter into contracts and develop recording and reporting systems to comply with the proposal. This section provides estimates of those costs.

Table [2]: Total Quantified Compliance Costs

	#	Total Initial Industry Cost	Total Annual Industry Cost
Lenders and Reporting Agents	409	$375,000,000[a]	$140,000,000[b]
RNSA	1	$3,500,000[c]	$2,480,000[d]

[a] $375,000,000 ≈ sum of figures estimated in *infra* Table [3] note p and Table [4] note h. The Commission estimates the wage rate associated with these burden hours based on salary information for the securities information compiled by SIFMA. The estimated wage figure for attorneys, for example, is based on published rates for attorneys, modified to account for a 1,800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead yielding an effective hourly rate for 2013 of $380 for attorneys. *See* Securities Industry and Financial Markets Association, Management & Professional Earnings in the Securities Industry—2013, available at

https://www.sifma.org/resources/research/management-and-professional-earnings-in-the-securities-industry-2013/. These estimates are adjusted for an inflation rate of 16.83 percent based on the Bureau of Labor Statistics data on CPI-U between September 2013 and August 2021. Therefore, the current inflation adjusted effective hourly wage rates for attorneys are estimated at $444 ($380 x 1.1683), $365 ($315 x 1.1683) for compliance managers, $304 ($260 x 1.1683) for senior systems analysts, and $75 ($64 x 1.1683) for compliance clerks.

[b] $140,000,000 = figure estimated in *infra* Table [3] note q.

[c] 10,924 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $3,500,000. *See supra* notes 182 and note a.

[d] 7739.5 hours x (0.75 x $304/hour + 0.25 x $368/hour) + 52 hours x $75/hour ≈ $2,480,000. *See supra* notes 184, 185, and note a.

Table [2] shows that the Commission preliminary believes that the proposed requirements would impose a one-time cost of $3.50 million and ongoing expenses of $2.48 million on FINRA, the only RNSA. As discussed in Part V, the RNSA would incur these costs to develop systems to take and disseminate data required by the proposal. These include larger costs associated with creating and maintaining the infrastructure to enable Lenders to provide the RNSA with the 10c-1 information and entering into written agreements with Lenders, as well as smaller costs associated with providing such information to the public.

Table [2] also shows that Lenders and reporting agents would, in aggregate, incur roughly $375 million in initial costs and $140 million annually in ongoing costs to comply with the proposal. These costs come from costs to develop and maintain systems and from costs to enter into agreements. Tables [3] and [4] break these costs down by those incurred by Lenders and reporting agents based on the decision by Lenders to self-report or use a reporting agent.

Table [3] Quantified Compliance Costs for Systems Development and Maintenance Incurred by Lenders and Reporting Agents

	#	Total Initial Industry Cost (millions)	Total Annual Industry Cost (millions)
Providing Lending Agents[a]	3	$3.46[b]	$1.30[c]
Non-Providing Lending Agents[d]	34	$19.6[e]	$7.34[f]
Reporting Agents[g]	94	$108[h]	$41.0[i]
Self-Providing Lenders[j]	139	$160[k]	$60.0[l]
Lenders that Would Directly Employ a Reporting Agent[m]	139	$80.1[n]	$30.0[o]
Total	409	$371[p]	$140[q]

[a] Providing Lending Agents would provide information directly to an RNSA.
[b] 10,800 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $3,460,000. *See supra* notes 146 and Table [2] note a.
[c] 4,050 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $1,300,000. *See supra* notes 149 and Table [2] note a.
[d] Non-Providing Lending Agents would use a reporting agent to provide information to an RNSA.
[e] 61,200 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $19,600,000. *See supra* notes 150 and Table [2] note a.
[f] 22,950 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $7,340,000. *See supra* notes 152 and Table [2] note a.
[g] Reporting Agents would provide information directly to an RNSA.
[h] 338,400 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $108,000,000. *See supra* notes 158 and Table [2] note a.
[i] 126,900 hours x (0.75 x $304/hour + 0.25 x $368/hour) + 4888 hours x $75/hour ≈ $41,000,000. *See supra* notes 160, 166, and Table [2] note a.
[j] Self-Providing Lenders run their own securities lending program and would report information directly to an RNSA.
[k] 500,400 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $160,000,000. *See supra* notes 168 and Table [2] note a.
[l] 187,650 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $60,000,000. *See supra* notes 170 and Table [2] note a.
[m] Lenders that Would Directly Employ a Reporting Agent run their own securities lending program and would use a reporting agent to provide information to an RNSA.
[n] 250,200 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $80,100,000. *See supra* notes 172 and Table [2] note a.
[o] 93,825 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $30,000,000. *See supra* notes 174 and Table [2] note a.
[p] $371 million ≈ sum of figures estimated in *supra* notes b, e, h, k, and n.
[q] $140 million ≈ sum of figures estimated in *supra* notes c, f, i, l, and o.

Table [3] shows that Lenders and reporting agents would incur an aggregate of roughly $371 million in initial costs and $140 million annually in ongoing costs to develop and maintain systems for reporting securities lending information. These include larger costs associated with developing and reconfiguring their current systems to capture the required data elements, as well as smaller costs associated with implementing changes and monitoring systems, most of which would be incurred by Self-Providing Lenders.

Table [4]: Quantified Compliance Costs of Entering into Agreements

	#	Agreement Counterparty	Total Initial Industry Cost	Total Annual Industry Cost

Non-Providing Lending Agents[a]	34	Reporting Agent	$453,000[b]	$0
Reporting Agents[c]	94	Person who Provides 10c-1 Information	$1,250,000[d]	$0
		RNSA	$7,050[e]	$0
Lenders that Would Directly Employ a Reporting Agent[f]	139	Reporting Agent	$1,850,000[g]	$0
Total	267		$3,560,000[h]	$0

[a] *See supra* note Table [3] note d.
[b] 1020 hours x $444/hour ≈ $453,000. *See supra* notes 154 and Table [2] note a.
[c] *See supra* note Table [3] note g.
[d] 2,820 hours x $444/hour ≈ $1,250,000. *See supra* notes 162 and Table [2] note a.
[e] 94 hours x $75/hour ≈ $7,050. *See supra* notes 165 and Table [2] note a.
[f] *See supra* Table [3] note m.
[g] 4,170 hours x $444/hour ≈ $1,850,000. *See supra* notes 178 and Table [2] note a.
[h] $3,560,000 ≈ sum of figures estimated in *supra* notes b, d, e, and g.

Table [4] shows that Lenders and reporting agents would incur an aggregate of $3.56 million in initial costs and $0 annually in ongoing costs to enter into agreements for reporting securities lending information. These include costs associated with drafting, negotiating, and executing agreements with counterparties, most of which would be incurred by Lenders that would directly employ a reporting agent, but there would not be ongoing costs because once an agreement is signed, there would be no need to modify the written agreement or take additional action after it is executed.

In addition to the above enumerated costs, the estimated 409 reporting entities would also be required to pay reporting fees to the RNSA. The Commission estimates these costs would be reasonably related to the cost that the RNSA would incur to administer and distribute the data.[243]

[243] SRO rule filings are subject to notice, comment and Commission review pursuant to Section 19 of the Exchange Act. The SRO must demonstrate that proposed fees satisfy Exchange Act requirements, including that such proposed fees equitably allocate reasonable dues, fees and other charges among members and issuers and other persons using the SRO's facilities. Further, such proposed fees cannot not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. When competitive forces do not constrain costs, such as with data products such as TRACE or the data provided by this Proposal, SROs can satisfy Exchange Act requirements by demonstrating that fees are reasonably related to costs. *See infra* Part V.E.

As shown in Table [2], the Commission expects the RNSA to incur ongoing costs of $2.48 million per year. Consequently, dividing the cost incurred by the RNSA by the 409 reporting entities to estimate the fees for the reporting entities results in an annual fee per reporting entity of approximately $6,000, or approximately $500 per month. This estimate represents a lower bound on the estimated fees levied by the RNSA as the RNSA likely would need to recoup some of the initial fixed costs associated with administering the data.[244]

4. Indirect Costs

Given the fixed costs associated with establishing and maintaining systems to report data, or the costs associated with having another entity report data, the Commission preliminarily believes that the proposed Rule may cause some smaller lending programs and broker-dealers to exit the market for lending services, potentially leading to slightly more consolidation in the lending program and broker-dealer space.[245]

This may pose indirect costs on these broker-dealers' and lending programs' customers. Such costs would include the cost of switching to a new broker-dealer or lending program, the loss of potentially more suitable options for such services if the exiting entity was highly specialized, and potentially higher prices associated with reduced competitive pressures.

In the discussion of competition in Part VI.D.2, the Commission further discusses the possibility of exit by broker-dealers and lending programs from the securities lending market,

[244] The numbers provided in this section are estimates. To the extent the Commission has over- or underestimated burden hours or hourly costs, or the number of entities subject to each reporting requirement, the actual compliance costs may be higher or lower. However, the Commission views the estimates provided herein as best guess estimates based on the information currently available to the Commission.

[245] *See infra* Part VI.D.2 (discussing possible entry and exit from the market for broker-dealer and lending program services).

along with a mitigating factor which the Commission preliminarily believes would reduce the chance of such exits.

5. Risk of Circumvention through Repurchase Agreements

The Commission recognizes a risk that the comprehensiveness of the data, and hence the benefits that accrue due to the comprehensive nature of the data, would be diminished if the proposal induces market participants to substitute repurchase agreements ("repo") for securities lending agreements.[246] This substitution may occur because a cash collateralized securities loan is economically very similar to a repo. While the Commission is unaware of short sales of equities currently being facilitated by repo contracts, the Commission understands that in fixed income it is fairly common for entities wishing to short sell a bond to facilitate that transaction with a repo instead of a securities loan.

The Commission preliminarily believes that this risk varies across asset classes. In equities, the Commission preliminarily believes that the current risk of such migration may be minimal because of the lack of a well-developed repo market for equities. However, this risk may increase if the market for equity repos becomes more developed in the future.[247] Among

[246] In a repurchase agreement, one party sells an asset, usually a Treasury security or other fixed income security, to another party with an agreement to repurchase the asset at a later date at a slightly higher price. Repo contracts are a common form of short-term corporate financing. In a repo, the party selling the security is similar to the lender in a securities lending agreement; the party purchasing the security is similar to a borrower in cash collateralized securities lending. In both cases, the transaction is facilitated by cash transferring from the purchaser (borrower) to the seller (lender). In a securities loan, the cash is in the form of collateral while in a repo transaction the cash is payment for the security. In both cases, the purchaser or borrower becomes the legal owner of the security. To unwind the repurchase agreement or securities loan, cash transfers back to the purchaser in terms of the repurchase cost for a repo or in the form of returned collateral in a securities loan. Repos and securities loans differ in that repos typically are primarily used for short-term financing while securities loans typically are used to gain access to the security itself. Also loans generally allow the lender to recall the security on demand while repos do not. Additionally, the cash received by the seller of a repo is often not re-invested but is used to finance the operations of a company whereas the cash received in a securities loan is generally re-invested in low risk fixed income securities for the life of the loan. *See e.g.* Gary Gorton & Andrew Metrick, "Securitized Banking and the Run on Repo," 104 *J. Fin. Econ.* 425 (2012).

[247] The Commission preliminarily views it as unlikely that the equity repo market will develop to a similar extent as the fixed income repo market in the near future. Repos are primarily used for short term finance and due to the

fixed income securities the risk is substantially greater due to a well-developed repo market for fixed income securities and the established practice of using both securities loans and repo transactions to facilitate short sales of fixed income securities. In all asset classes, if the Proposal leads to improvements in the functioning of the securities lending market, then the risk of migration may diminish as improved efficiency in the securities lending market may diminish the incentive to transfer activity to the relatively less developed equity repo market.

Should this substitution affect a significant volume of securities lending, certain benefits and costs discussed above would decline. The less comprehensive data could reduce the extent to which the proposal reduces any bias in the data. For instance, market participants who use the data to price securities loans would have a less accurate and potentially biased view of the market, which would limit the improvements to efficiency. Additionally, regulators using the data to determine lending market conditions at the time of, for example, a Reg SHO violation would be using less precise data – limiting the benefits of Reg SHO enforcement. On the other hand, such substitution could reduce compliance costs for some. Obviously, those substituting into repo would incur lower compliance costs from the proposed Rule, including one-time implementation costs if they replaced all securities lending with repo. Further, a significant substitution would reduce the ongoing costs of the RNSA because the RNSA would not have to collect and process as many transaction reports.

volatility of equities relative to fixed income securities, equities are a significantly riskier collateral type, limiting their appeal as "collateral" for short term finance.

D. Impact on Efficiency, Competition, and Capital Formation

1. Efficiency

In the securities lending market, the availability of new 10c-1 information for market participants would lead to more efficient prices for securities loans.[248] The reduction in asymmetric information in the market for lending programs and broker-dealers may also make those markets more efficient.[249] Additionally, the Commission preliminary believes that the proposal may have secondary effects that could increase price efficiency in the stock and options market.[250] Also, the increased ease with which banks and other financial institutions would be able to manage collateral and balance sheets as a result of the proposed Rule could lead to increased efficiency in their functioning and in those markets in which they play a role.

2. Competition

The Commission preliminarily believes that the net impact of the proposal on competition is difficult to predict, in that some aspects would likely increase competition and some aspects would likely reduce competition. The markets in which competition would likely be impacted are the markets for broker-dealer services, lending programs and securities lending data vendors.

The Commission preliminarily believes that the increased access to securities lending information would increase competition between lending programs, and between broker-dealers. The new 10c-1 information would allow all participants in the securities lending markets to observe data that could serve as benchmarks for performance of both lending programs and

[248] *See supra* Part VI.C.1.b).

[249] *See supra* Part VI.C.1.a).

[250] *See supra* Part VI.C.1.c).

broker-dealers when they act on behalf of their respective customers in the market.[251] This would permit better monitoring of the performance of these entities by their respective customers, and would likely force these entities to do more to match the performance of their competitors, to the extent that they do not already do so.

Also, the increased ability for broker-dealers to monitor conditions in the lending market may encourage new broker-dealers to enter the market, further increasing competition for broker-dealer services. This same argument may be true for platforms that engage in securities lending. Improved data may allow for better evaluation of the performance of such platforms and may also lower barriers to entry for new platforms – enhancing competition among securities lending platforms.

At the same time, the reduction in asymmetric information in the securities lending market that would result from the proposed Rule would diminish broker-dealer and lending program profits to the extent that it reduces their current information advantage over their customers.[252] To this end, some broker-dealers and lending programs whose profitability primarily depends on economic inefficiencies associated with asymmetric information may exit the market for facilitating securities loans.

The Commission also preliminarily believes that given the significant fixed costs of implementing the systems required by the proposed Rule for lending programs to report to an RNSA, smaller[253] lending programs and broker-dealers may be forced to consolidate or exit the

[251] *See supra* Part VI.C.1.b).

[252] *See supra* Part VI.C.1.a).

[253] The term "smaller" in the Economic Analysis does not mean that these are "small businesses" or "small entities" for purposes of the Regulatory Flexibility Act. *See infra* Part VII. Rather, smaller is meant to convey the size of these entities in relation to larger market participants engaged in securities lending transactions.

lending market. The Commission preliminarily believes that a mitigating factor leading to less consolidation is that the current relationship and network structure of lending programs and broker dealers already favors larger lending programs and broker-dealers who have the resources to maintain relationships with more and larger securities lending counterparties. Consequently, the Commission preliminarily believes that the market for lending programs and broker-dealer security borrowing services is already likely dominated by larger lending programs and broker-dealers that the Commission does not believe would cease operating as a result of these fixed costs.[254]

The Commission preliminarily believes that the new information provided in the Rule would change the competitive landscape for analytics services by increasing opportunities for enhancing products and services that depend on securities lending data and lowering barriers to entry concerning who can provide those services. Increased competition in this space will likely lead to more options for consumers of analytics services, lower prices, and improved analytics services. The new information available through the RNSA as a result of this proposal would produce an alternative to the existing data vendor products. The Commission preliminarily believes that it would be hard for a vendor to offer value with data not derived from the proposed new information, since data not based on proposed new information would be unlikely to be as comprehensive.[255]

[254] An additional mitigating factor in the case of broker-dealers is that the Commission views it as likely that smaller broker-dealers currently contract with larger broker-dealers to help facilitate securities loans for their customers, and thus, may be able to easily contract with these larger broker-dealers to also act as a reporting agent on their behalf. This dynamic may limit the potential for new entrants the broker-dealer space to compete with established broker dealers.

[255] *See supra* Part VI.B.2

3. Capital Formation

The Commission preliminarily believes that the impact of the proposal on capital formation would be small, but positive. In particular, improved price discovery in securities markets[256] and improved balance sheet management by financial institutions[257] could facilitate improvements in the provision of capital. In addition, the proposed Rule would reduce the costs of short selling. To the extent that this effect would enhance short selling activity, it may facilitate more effective discovery of negative information that in turn could lead to more efficient allocation of capital.

E. Alternatives

1. Broker-Dealer Reporting

The Commission could require only broker-dealers, rather than all participants, to report securities lending transactions to the RNSA. The Commission preliminarily believes that this alternative would be less costly overall than the proposal. Specifically, non-broker-dealer Lenders would not incur any of the costs of reporting. As a result, fewer entities would incur costs. Further, most broker-dealers already have connections to FINRA so the overall implementation costs associated with connecting to FINRA would be lower.

In addition, because most broker dealers currently have relationships with FINRA, the Commission preliminarily believes that this alternative could be implemented sooner, allowing the market and market participants to internalize the benefits of securities lending transparency sooner.

[256] *See supra* Parts VI.C.1.b), VI.C.1.c).

[257] *See supra* Part VI.C.1.d).

However, the reported transaction data would not provide a comprehensive view into the securities lending market. Even though broker-dealer activity makes up a significant majority of securities lending transactions, the alternative would exclude other significant players such as lending programs. Thus, the alternative would obscure a large swath of the Wholesale Market, making it more difficult for lending institutions, for example, to benefit from securities lending transparency because the included data would provide a less relevant benchmark.

Requiring only broker dealers to report data could also create a competitive advantage for non-broker dealer entities that engage in securities lending. Such entities would not be required to report their transactions and thus would have lower costs. They would also be in a position to attract business from entities seeking to keep their transactions out of the public view, further tilting the economic landscape in their favor. This effect both could create an uneven playing field for entities engaged in the securities lending market and could also further dilute the value of the data provided by the proposed Rule, diminishing the benefits of the rule.

2. Publicly Releasing the Information in 10c-1(d)

As an alternative to the proposal, the Commission could consider publicly disclosing the information in 10c-1(d), namely available identifiers for each party to the transaction, whether the security is loaned from a broker's or dealer's securities inventory to a customer of such broker or dealer, and if known whether the loan is being used to close out a fail to deliver.

Information on who the parties to the transaction are and whether a broker or dealer is lending to its own customer could refine the context around the data elements in 10c-1(b) and (c), which are proposed to be public. Such refinement would be likely to alter trading strategies, which could have both positive and negative effects on market quality. For example, this information could allow the market to identify the positions of large short sellers. Empirical

studies support the idea that short sellers are informed, suggesting that additional information about short selling could help investors better value securities.[258] Professional traders, might seek to profit by developing trading strategies based on signals from the identities of those borrowing securities, particularly those borrowing a high volume. In addition, the information could be used to reduce the search costs in the securities lending market.

However, the information on whether the security loan is being used to close out a fail to deliver may be of little use to anyone other than regulators. At this time, the Commission is unaware of potential non-regulatory uses of such information that would be beneficial to the market.

The alternative would result in higher costs to the RNSA, to those who access the data, and to participants in the securities lending market. The RNSA would incur higher costs to release the greater volume of data and those who access the data would incur higher costs to import and process the data. Trading strategies incorporating the identities of borrowers and lenders could negatively impact those borrowers and lenders in ways that could ultimately degrade price efficiency. In particular, identifying large short sellers could facilitate "copycat strategies" that seek to profit by copying the activity of others believed to have better information or by trading ahead of them.[259] If it facilitates such trading strategies, releasing the identities of short sellers could act as a constraint on fundamental short selling, reducing the

[258] *See*, *e.g.*, Joseph E. Engleberg, Adam V. Reed & Matthew C. Ringgenberg, *How are Shorts Informed?: Short Sellers, News, and Information Processing*, 105 J. FIN. ECON. 260-78 (2012); David E. Rapach, Matthew C. Ringgenberg & Guofu Zhou, *Short Interest and Aggregate Stock Returns*, 121 J. FIN. ECON. 46-65 (2016). However, one academic study finds that prices react to short sales even when short sales are not transparent to the market. *See* Michael J. Aitken, Alex Frino, Michael S. McCorry & Peter L. Swan, *Short Sales Are Almost Instantaneously Bad News: Evidence from the Australian Stock Exchange*, 53(6) J. FIN. 2205-2223 (Dec. 1998).

[259] *See* Congressional Study, "Short Sale Position and Transaction Reporting," at available at https://www.sec.gov/files/short-sale-position-and-transaction-reporting%2C0.pdf at 52 and 53.

incentives to conduct fundamental research.[260] Less fundamental research could potentially result in over- or under-pricing, because prices would not incorporate information short sellers would have otherwise collected and traded on. Revealing the identities of participants and when they are borrowing to close failures to deliver in the securities lending market could also result in pressure on lenders to recall loans or negative campaigns against short sellers.

3. Additional Information in the Reported or Disseminated Information

The Commission could consider alternatives that would add additional fields to the reported information or to require the RNSA to compute derived fields for public dissemination. For example, the Commission could require the RNSA to calculate and disseminate the utilization rate calculated from the shares on loan and the shares available to loan. The utilization rate is a commonly used measure for determining the availability of shares to borrow, which could be useful for market participants in complying with the locate requirement of regulation SHO and for broker-dealer back offices in planning their borrowing activity. However, because shares on loan and shares available are an end-of-day measure, to the alternative would not provide benefits from real time utilization rates. Further, individual users may prefer to calculate utilization rates themselves with bespoke adjustments. The calculation would require additional processing resources of the RNSA. While the alternative would require the RNSA to calculate and disseminate utilization rate, the proposal does not preclude the RNSA from doing so if users demand the measure.

The Commission could add required data elements to 10c-1(e) to indicate the extent to which volume of shares available to lend that comes from sources that are less accessible to

[260] *See* Sanford J. Grossman & Joseph E. Stiglitz, On the Impossibility of Informationally Efficient Markets, 70(2) AM. ECON. REV. 393-408 (1980).

acquire or that could be restricted. Securities, such as securities owned by broker-dealer customers who have agreed to participate in a fully paid lending program, and the securities in broker-dealers' margin customers' accounts, may be readily available to the broker-dealer managing the accounts, but may not be available for others. Further, because beneficial owners that engage in securities lending consistent with the SEC staff's current guidance may restrict the portion of their portfolios that can be on loan at any point in time,[261] they, or their lending agents, may report more shares available to lend than they could lend out all at once, particularly when they are far from their limit. Therefore, these two additional fields can facilitate estimating refined measures of the utilization rate that exclude shares that market participants might not be able to reach. As such, these alternative measures could improve the accuracy of the data provided by 10c-1(e). On the other hand, these additional fields would increase the complexity and the costs of reporting, processing and disseminating the securities lending information.

The Commission could also include in 10c-1(d) information on whether, if the lender is a broker or dealer, the securities are borrowed from customers who have agreed to participate in fully paid lending programs or from securities owned in its margin customers' accounts. Such information would improve the efficiency of surveillance of, for example, compliance with Rule 15c3-3(b)(3) related to providing the lender collateral to secure the loans of securities when broker-dealers lend shares from fully paid or excess margin securities from customers. As such, this information would help protect investors. Including this data would likely increase initial costs associated with the rule for broker-dealers as it would require expanding systems beyond the current proposal to capture the data. However, the Commission preliminarily believes that broker-dealers likely already have ready access to this data, thus the Commission does not expect

[261] *See supra* note 109.

that including such data would significantly affect broker-dealer operations after the initial set-up costs.

The Commission could also require entities to report in their lending transactions whether a given loan was transacted on their own behalf, or on behalf of a customer. That is, is the loan transacted on a principal or agent basis? This alternative would allow FINRA and the Commission to oversee compliance with various regulations. This data could allow examiners at the Commission and FINRA to review transactions that occur by an entity on a principal and agent basis to look for systematically different terms between the two different types of transactions by the same broker dealer. Such differences may flag to regulators that broker-dealers are not fulfilling their obligations and may be in violation of existing rules. Requiring such data would add complexity and additional cost to the rule. However, these costs may be minimal for broker-dealers, who are FINRA members, as the Commission understands that FINRA members already collect much of this information.[262] However, the Commission is unaware of any regulation or rule requiring non-FINRA members to collect this information, consequently this alternative may significantly increase costs for non-FINRA members who would be required to build out systems to collect and report such information.

4. Alternative Timeframes for Reporting or Dissemination

The Commission could consider alternative delays for reporting or disseminating the securities lending transaction information. For example, the Commission could require reporting timeframes of less than fifteen minutes as well as more than fifteen minutes. The Commission also could require reporting transactions at the end of the day only. Further, the Commission

[262] *See, e.g.,* FINRA Rule 4314.

could require the RNSA to delay the dissemination of transaction reports instead of disseminating as soon as practicable.

Because trades cannot be disseminated until after they are reported, alternative reporting timeframes reflect different tradeoffs between the value of disseminating security loan terms close to the time of a trade and the cost of reporting trades at shorter time horizons. Alternatives requiring reporting timeframes of less than 15 minutes may be more costly to implement. Currently, 15 minute reporting is used in various settings. For instance, TRACE requires reporting trades at the 15 minute time horizon, and some of the data vendors release data at 15 minute intervals. These facts suggest that the industry has experience with reporting information to regulators and data vendors at 15 minute horizons. Consequently, the Commission preliminarily expects that deviating from this time horizon to require a shorter timeframe may significantly increase costs associated with complying with the rule. In contrast, alternatives allowing a longer time to report would also delay the dissemination, which could reduce the price discovery and price efficiency benefits associated with an increase in transparency if securities lending transactions occur frequently enough. Additionally, the Commission preliminarily believes that longer reporting horizons would likely not decrease the cost substantially due to the automated nature of the securities lending transactions and the need to build out systems regardless.

Alternative dissemination timeframes reflect different tradeoffs between price discovery and price efficiency benefits on one hand and harmful information leakage on the other, as well as the cost of reporting at a faster or slower horizon. An alternative dissemination timeline could require a later dissemination time for large trades. However, intermediaries in the securities lending market do not generally take on risk the way dealers do in other markets where dealers

have argued for delays, such as the corporate bond market.[263] For instance, intermediaries in the corporate bond market frequently hold large inventories and buy, sell, and facilitate trades out of their own inventory – assuming significant inventory risk in the process. This is not true in the securities lending market where broker-dealers are more likely to facilitate transactions between lending programs and end borrowers.

The current Proposal requires the RNSA to disseminate transaction-level information as soon as practicable. Alternatively, the Commission could limit the proposal by requiring the RNSA to aggregate the transaction–level information prior to disseminating. Specifically, the RNSA could aggregate the data in items identified in 10c-1(b) and (c) and make it public at the end of the day it is reported. Given the need to build out systems regardless and the automated nature of securities lending transactions, the Commission preliminarily believes that this alternative would likely be nearly as costly to implement as the current proposal for entities reporting data to the RNSA. It would, however, likely lower costs to the RNSA as they would not be required to build out systems capable of intraday dissemination. Additionally, daily aggregate data would not provide the same price discovery benefits as the current proposal. Specifically, market participants could not use intraday trends in the securities lending market to make investment decisions. Also, without a comprehensive transaction tape, it would be more difficult for market participants to study and understand pricing dynamics in the securities lending market. The alternative would also make it more difficult for end investors to determine

[263] In the corporate fixed income market, some participants argued for the delay in the dissemination of information on large trades. Specifically, they argue that immediate dissemination coupled with 15-minute reporting times harms institutional investors because dealers are either less willing to trade with them or dealers charge them higher markups to offset the costs of offsetting large transactions *See, e.g.,* comments from JPMorgan & Co. on the Fixed Income Market Structure Advisory Committee (FIMSAC), available at https://www.sec.gov/comments/265-30/26530-3974442-167144.pdf. The Commission notes that we are unaware of any empirical data in support of these arguments.

if the terms that their broker-dealer offers are consistent with current market prices – rendering it more difficult for investors to evaluate the performance of their broker-dealer. Similarly, without transaction data beneficial owners would be hampered in their ability to determine whether the terms for loans secured by their lending agents were consistent with market conditions for loans with similar characteristics – rendering it more difficult for beneficial owners to evaluate the performance of their lending agents – reducing the benefits of improved competition. The lack of a lending tape may also hinder broker-dealers from determining if the terms being offered by a lending agent for a loan are consistent with market conditions for similar loans. The diminished transparency of this alternative relative to the Proposal may also lead to less improvement in the efficiency of the securities lending market leading to fewer short selling benefits described above in Part IV.C.1.c) This alternative would also hamper research into the securities lending market by academics, regulators, and other market participants as they would be prevented from performing intraday and event study analysis on the securities lending market.

The Commission could also require alternative time frames for reporting the data required in paragraph (e) of the proposed rule regarding shares on loan and shares available to the RNSA. The Commission preliminarily believes that time horizons longer than what is required in the current proposal would diminish the usefulness of the data by making it less timely. Additionally, due to the automated nature of the industry, the Commission preliminarily does not believe that longer reporting horizons would significantly decrease the cost of compliance. Moreover the Commission could require reporting at time horizons that are shorter than what is currently required in the proposal. Such data may be somewhat more timely, but the

Commission preliminarily believes that shorter requirements would be a deviation from current industry standard and thus may significantly increase the cost of implementation.

Finally, the Commission could require the RNSA to distribute the collected data required in paragraph (c) at different horizons, such as by the following morning instead of by the end of the following day. This alternative would allow market participants to benefit from the data a business day earlier than currently proposed. Given the automated nature of the data, this alternative may not be significantly costlier than the current proposal, although it would not allow the RNSA to process the data during regular business hours potentially limiting the amount of data validation the RNSA could perform prior to distributing the data.

5. Allow an RNSA to charge fees to distribute the data

The Commission could consider allowing the RNSA to charge fees to access the securities lending data, similar to the model currently employed with TRACE data.

The effect on costs of this alternative would follow from allowing the RNSA an additional way to obtain revenue from providing new 10c-1 information. This additional revenue could help pay for costs to collect and disseminate the data. It may also allow the RNSA to reduce the reporting fees it would charge under the proposed Rule.

As discussed in Part VI.C.3, the Commission preliminarily believes that fees levied by the RNSA would be reasonably related to cost.[264] Thus, the estimates provided in that section could be either entirely applied to entities purchasing data, or they could be split between providers and purchasers of data. In the case that fees were applied primarily to subscribers of data, and if all 409 entities providing data were the only entities to subscribe to the data, then as

[264] *See infra* note 243.

discussed in Part VI.C.3, estimated annual fees to subscribe to the data would be approximately $6,000 per year. This estimate would go down if the RNSA chose to split the fees between data subscribers and data providers. It would also go down if more than the 409 estimated entities providing data chose to subscribe the data. This estimate is similar to the fees currently charged for a TRACE enterprise license. As discussed in part VI.C.1, TRACE has been successful in mitigating inefficiencies in the corporate bond market. Consequently, given the experience with TRACE and the expectation that most of the entities likely in a position to effect the securities lending market or to use information from the securities lending market to affect other markets would subscribe to the data even if there was a cost to subscribing, the Commission preliminarily believes that allowing the RNSA to charge for data would likely still result in significant benefits to the securities lending market.

This alternative would also reduce benefits relative to the proposed Rule, in that charging for access to the new 10c-1 information may reduce the number of market participants who access it, to the extent that any market participant would find such fees cost-prohibitive. A reduction in access to the data may reduce many of the benefits that would otherwise accrue to the proposed Rule, such as increased price discovery and security market efficiency. The Commission preliminarily believes that many of the market participants providing data to the RNSA under the proposed Rule would also be consumers of the data; for these market participants it is unclear how much difference this shift in fees would make.

6. Longer holding period requirement

The Commission could also require the RNSA to retain and make publicly available the data for a period longer than the 5 years specified – e.g. 10 or 20 years. This alternative would ensure that the data are available to regulators and market participants at longer horizons. For

instance, if regulators or market participants wanted to evaluate how the lending market reacts to different market events, such as across the business cycle, then five years of data may not be sufficient. The average business cycle is 3-5 years, and so to study the dynamics of the lending market across the business cycle would require at least 10 years, if not more, of data. Additionally, because there is likely persistence in conditions in the securities lending market a five year time horizon may not be sufficient for certain statistical analyses.[265] Improved understanding of the dynamics of the securities lending market across various market conditions may benefit both regulators and investors by providing more precise information with which to make regulatory and investment decisions – enhancing many of the benefits described in Parts VI.C.1 and VI.C.2. For example, longer term data may enable superior statistical analysis by market participants of the dynamics of the securities lending market in various environments, which in turn may lead to better investment decisions and thus improved market performance. Additionally, the Commission could use longer term data to provide more precise estimates of damages in, for example Reg SHO violations or violations of Exchange Act rule 15c3-3 (Customer Protection Rule), to calculate disgorgement.

The Commission preliminarily believes that the alternative would impose additional costs on the RNSA not required by the current proposal in terms of storing and maintaining historical data. However, since the current proposal already requires the RNSA to build systems to collect and disseminate 5-years of data, these costs would likely be relatively small because the Commission understands that the cost of storing data is relatively small compared to the cost of producing and maintaining the systems needed to collect, process, and disseminate the data.

[265] Persistence in conditions implies that observations are not independent. When this is the case even relatively large datasets may lack statistical power for some modeling applications, such as factor models. The solution in such cases is to significantly increase the sample size.

While the current proposal allows FINRA to destroy the data after 5-years, the Commission preliminarily believes that it is unlikely that FINRA would do so. This is because the cost of retaining the data is likely relatively small and may have commercial value. For instance, while the proposal requires the most recent 5-years of data to be made publicly available free of charge, there is no requirement to make data beyond 5-years available to the public free of charge. Consequently an RNSA could determine to offset some of the cost of implementing the proposal through fees levied on historical data. If this is the case, and the RNSA chooses to keep the historical data under the current proposal, then the cost difference to an RNSA between the current proposal and this alternative would likely be minimal given that this alternative would require the RNSA to comply with a requirement that they may already choose to do on their own.

7. Report to the Commission Rather Than to an RNSA

The Commission could propose to have Lenders disclose the 10c-1 information directly to the Commission – for example, through EDGAR, rather than to an RNSA. Such an alternative could alter who incurs costs and would likely increase overall costs relative to the proposal because, for example, many entities who possess reporting capabilities to an RNSA, *e.g.*, members of FINRA, would need to establish comparable reporting relationships with the Commission. In particular, many broker- dealers already have connectivity to FINRA systems that support the kind of intraday submission process required for providing new 10c-1 information.[266] Establishing similar connectivity with EDGAR may require additional effort for Lenders compared to the proposal. Finally, FINRA has expertise creating repositories similar to

[266] For example, FINRA's TRACE system.

that called for in the proposal, suggesting that the proposal would likely be more efficient than the alternative.

The Commission is uncertain of how the benefits of this alternative would compare to the benefits of the proposal. While the alternative would not alter the content of the data in the proposal, the accessibility and timeliness depend on how the Commission would develop the functionality for distributing the data. In particular, we cannot at this time assess whether the alternative would result in more or less timely or accessible data or if the differences would be meaningful. For example, data obtained from the Commission could be less accessible if the Commission could not develop functionality allowing market participants to access the data with the same ease as the RNSA could do given the RNSA has more experience collecting and disseminating similar data (e.g. TRACE).

Additionally, the regulatory benefits of the alternative relative to the proposal would depend on whether the Commission chooses to grant SROs direct access to the confidential data. If the Commission chose to do so, then the regulatory benefits of this alternative would be the same as the current proposal. If the Commission chose not to grant SROs access to the confidential data, then the regulatory benefits would decline significantly as many of the regulatory benefits, such as improved monitoring of broker-dealers for compliance with various legal requirements, require access to the confidential data. Thus, the regulatory benefits of the rule would be severely diminished.

8. Report through an NMS Plan

Because the nature of securities lending data is similar to the transaction data governed by the NMS data plans, such as the CT Plan,[267] the Commission could propose to require a new NMS Plan to set up a reporting and dissemination process that mirrors the CT Plan. Specifically, reporting entities could report the data to a Transaction Reporting Facility operated by an SRO. The data would then be purchased by competing consolidators[268] to consolidate and distribute for a fee. The NMS Plan would set the fee for competing consolidators as well as for those who purchase and consolidate the data for internal use.

This alternative could provide for the public dissemination of securities lending transaction information without the reliance on the RNSA alone. It could also leverage the processes of the NMS Plan, but would require compliance costs by one or more SROs who choose to set up and operate a Transaction Reporting Facility. Fees for reporting transactions could offset such compliance costs. While we can't be sure how these fees would compare to the fees paid under the proposal, the alternative provides for the opportunity for a reporting facility that could be more efficient than that of an RNSA.

This alternative is more likely than the proposal to improve the competitiveness of the market for securities lending data in ways that could be less costly to incumbents than the proposal would be. Specifically, the alternative would not result in a situation in which existing

[267] Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data, Exchange Act Rel. No. 92586, 86 FR.44,142 (Aug. 11, 2021) available at: https://www.sec.gov/rules/sro/nms/2021/34-92586.pdf, *appeal filed*, *Nasdaq Stock Market LLC v. SEC*, No. 21-1167 (D.C. Cir. Aug. 9, 2021).

[268] A competing consolidator is a "securities information processor required to be registered pursuant to [17 CFR] 242.614 (Rule 614) or a national securities exchange or national securities association that receives information with respect to quotations for and transactions in NMS stocks and generates a consolidated market data product for dissemination to any person." 17 CFR 242.600(b)(16).

data vendors had to compete with an RNSA that had superior data access. Instead, the current data vendors, who all have experience collecting and disseminating such information, could compete as competing consolidators for equity lending data and have the same access to the supply of consolidated data as any other competing consolidator, including an RNSA or SRO. It would also reduce the barriers to entry in selling securities lending data because all new entrants would have access to the same data for consolidation and distribution.

While the alternative is unlikely to affect the content or timeliness of securities lending data relative to the proposal, the improvements in access to securities lending data under this alternative could be less than the improvements to access under the proposal. As in the proposal, the data vendors would not be as dependent on market participants providing data, consequently these market participants could not exert power over the data vendors to limit access. However, under this alternative, both the new NMS Plan and the competing consolidators under that Plan would be able to charge for access to the data, whereas under the proposal, the RNSA is not permitted to charge for access. Thus, the cost of data access under the alternative would be greater. This could mean some market participants, who could potentially have access to data under the proposal, could determine it was not cost-effective for them to purchase securities lending data under the alternative.

F. Request for Comment

The Commission is sensitive to the potential economic effects, including costs and benefits, of the proposed Rule. The Commission has identified certain costs and benefits associated with the proposal and requests comment on all aspects of its preliminary economic analysis, including with respect to the specific questions below. The Commission encourages

commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits.

76. Do you agree with the Commission's assessment of the market failures? Are there additional market failures or other economic justifications related to these issues that are not described in this release?
77. Do you believe the Commission has sufficiently described the baseline for its economic analysis concerning the securities lending market, its characteristics and structure? Are there additional relevant market features or participants that are not discussed in the baseline which relate to this release? If so, please describe. Do you agree with the Commission's description of the competitive landscape of the securities lending market? Please explain.
78. Do you agree that the securities lending market is opaque? If not, what sources of insight into the securities lending market activity do you believe provide transparency in the lending market? How do those sources compare to the transparency that would be provided by the proposed Rule?
79. Do you agree with the Commission's assessment of the causes and effects of opacity in the securities lending market? Why or why not? What are the consequences of the current level of opacity in the securities lending market? Please provide details. Does opacity in the lending market inhibit some market participants from engaging in fundamental research? Why or why not? To what extent does the opacity in the lending market contribute to the wide variation in rebate rates or lending fees? Do you agree that the opacity results in high search costs or other costs in the securities lending market? Do you agree that this inhibits the securities lending market's efficiency? Why or why not?

80. Do you believe the Commission has adequately described the baseline for the market for securities lending data and analytics? Are there elements of this market that are relevant to the proposed Rule that are not discussed in the release? If so, please describe what information you believe is missing. Do you agree that the data provision services are an outgrowth of other businesses such as the analytics business? Please explain.
81. Do you agree with the Commission's assessment that the proposed Rule will improve transparency of the securities lending market? Why, or why not? Do you agree that the proposed Rule would increase transparency by providing information about the securities lending market that is more complete than current information? Do you agree that the increased completeness would improve the accuracy of information on securities lending? Do you agree that the proposed Rule would result in information that is more accessible than current information? Do you agree that the proposed Rule would result in loan-level information that is at least as timely as current information? Would the information on shares on loan and shares available be more or less timely than current information? Please explain.
82. Do you agree with the Commission's assessment of the economic effects of the proposed rule, including the effects from improvements to transparency, the regulatory benefits, the compliance costs, and the indirect effects? Why or why not? If not, please provide the details that you believe are missing.
83. Do you agree that the proposed Rule will ameliorate information asymmetry in the securities lending market? Do you agree that this effect is sufficient to make security loan terms more competitive that they currently are? Would the public information in the proposed Rule have an impact on the risk of market instability? Would the public

information in the proposed Rule have an impact on the efficiency of the securities lending market or the underlying market? Please explain.

84. How do the lending markets in equities differ significantly from lending markets for other securities? Do these markets have problems similar to those documented in the baseline for stocks? Please explain and provide data and analysis, if available. How would the economic effects of the proposed Rule differ across the different types of securities covered? Please explain.

85. Do you believe that the Commission has accurately quantified the compliance costs that the proposed Rule imposes on various market participants? If not, please provide alternative estimates. Are there any sources of compliance costs not included in the Commission's estimates? If so, please describe the activity that generates the cost and provide estimates.

86. Do you agree with the Commission's characterization of the effects of the proposed Rule on the commercial providers of security lending data? If not, please provide the details you believe are missing.

87. Do you agree with the Commission's assessment of both the risk and the economic effects associated with potential substitution of repurchase agreements for securities lending? Why or why not? Is there anything missing from the Commission's analysis of this issue that should be considered? Please provide details. How does the counterparty risk and other differences between securities lending and repo affect this risk?

88. Do you agree with the Commission's assessment of the likely impacts on efficiency, competition and capital formation? Why or why not? Do commenters agree that the proposed Rule would improve competition? Please explain.

89. Do you agree with the Commission's assessment of the effects of the alternative whereby only broker-dealers would be required to report to the RNSA? Why or why not? How would the alternative compare to the proposed Rule – would it be any more or less information or would it be any more or less biased? Please explain.

90. Do you agree with the Commission's assessment of the effects of the alternative whereby some data would be made public that the proposed Rule indicates would only be accessible by the RNSA and the Commission? Why or why not? Are there any data elements that the proposed Rule does not make public that should be made public? If so, please identify the specific data elements and articulate their benefits and costs relative to the proposed Rule.

91. Do you agree with the Commission's assessment of the effects of the alternative whereby additional data may be required to be reported to the RNSA? Why or why not? Should the Commission include any other additional data elements? Are there any additional data elements that could feasibly measure counterparty risk that could help explain variations in lending fees and rebate rates? Are there other factors that could help compare lending fees and rebate rates that could be including in Rule 10c-1? If so, what data elements and what are the costs and benefits of including those data elements relative to the proposed Rule?

92. Do you agree with the Commission's assessment of the effects of the alternative discussing different reporting or dissemination timeframes? Why or why not? Do securities lending transactions occur often enough during the day for intraday reporting to be beneficial? Would a shorter or longer time for reporting be more beneficial or less costly? Please explain.

93. Do you agree with the Commission's assessment of the effects of the alternative whereby the RNSA could charge to distribute the data delivered on the RNSA website? Why or why not? Based on other data sold by an RNSA, would the ability to sell the data materially reduce the costs to those who report the information?
94. Do you agree with the Commission's assessment of the effects of the alternative requiring the RNSA to keep and publicly disseminate the data for a longer time horizon? Why or why not? Are there additional benefits or costs to this approach not considered in this economic analysis? Please explain and provide details.
95. Do you agree with the Commission's assessment of the effects of the alternative whereby reporting would be to the Commission rather than to an RNSA? Why or why not? How many entities who would have to report under the proposed Rule do not current file reports with the Commission and would, therefore, have to establish connections? Would reporting to the Commission significantly affect the regulatory benefits or any other benefits? Please explain.
96. Do you agree with the Commission's assessment of the effects of the alternative whereby reporting would take place through an NMS plan? Why or why not? Would reporting through an NMS Plan be any more or less efficient than the proposed Rule? Would reporting through an NMS Plan create a more or less competitive environment for the sale of securities lending data than the proposed Rule? Please explain.
97. Are there any other reasonable alternatives that the Commission should consider? If so, how would the potential costs and benefits of the alternative compare to the Proposed Rule? Please provide quantification, if possible.

VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")[269] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small businesses. Section 603(a)[270] of the Administrative Procedure Act,[271] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small businesses"[272] unless the Commission certifies that the rule, if adopted, would not have a significant impact on a substantial number of "small entities."[273]

As discussed above in the PRA above, first, the Commission preliminarily believes that the proposed Rule would impact 94 reporting agents. The Commission estimates that all reporting agents would be broker-dealers. A broker-dealer is a small entity if it has total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a-5(d), and it is not affiliated with any person (other than a natural person) that is not a small business or small organization.[274]

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[269] 5 U.S.C. 601 *et seq*.

[270] *Id*.

[271] 5 U.S.C. 551 *et seq*.

[272] Although Section 601(b) of the RFA defines the term "small business," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term small business for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10 under the Exchange Act. Exchange Act Rule 0-10 ("Rule 0-10").

[273] 5 U.S.C. 605(b).

[274] Exchange Act Rule 0-10(c).

Second, the Commission preliminarily believes that the proposed Rule would impact 278 investment companies that do not employ a lending agent. For purposes of Commission rulemaking in connection with the Regulatory Flexibility Act, an investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of $50 million or less as of the end of its most recent fiscal year.[275]

Third, the Commission preliminarily believes that the proposed Rule would impact 37 lending agents, which would include broker-dealers and banks.[276] For purposes of Commission rulemaking in connection with the Regulatory Flexibility Act, lending agents that are not broker-dealers, such as a bank, would be a small entity if on the last day of its most recent fiscal year, such issuer or person had total assets of $5 million or less.[277] Furthermore, clearing agencies could also be lending agents for purposes of proposed Rule 10c-1. A clearing agency is a "small entity" if such clearing agency: (i) compared, cleared, and settled less than $500 million in securities transactions during the preceding fiscal year, (ii) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter), and (iii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[278]

Based on a review of data, the Commission does not believe that any of the persons impacted by the proposed Rule are small entities under the above definitions.[279] It is possible that in the future a small entity may become impacted by the Rule. Based on experience with

[275] *See* 17 CFR 270.0-10(a).

[276] For example, some investment companies report using a bank as a lending agent on Form N-CEN.

[277] *See* 17 CFR 240.0-10(a).

[278] See 17 CFR 240.0-10(d).

[279] *See supra* Parts V and VI.

persons who participate in this market, however, the Commission preliminarily believes that this scenario will be unlikely since firms that enter the market are unlikely to meet the criteria to be a small entity.

For the foregoing reason, the Commission certifies that proposed Rule 10c-1 would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission encourages written comments regarding this certification, and requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate the extent of the impact.

VIII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission is also requesting information regarding the potential impact of the proposed amendments on the economy on an annual basis. In particular, comments should address whether the proposed changes, if adopted, would have a $100,000,000 annual effect on the economy, cause a major increase in costs or prices, or have a significant adverse effect on competition, investment, or innovations. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

IX. Statutory Authority

Proposed Rule 10c-1 is being proposed pursuant to Sections 3, 10(b), 10(c), 15(c), 15(h), 15A, 17(a), 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78c, 78j(b), 78j(c), 78k-1, 78o(c), 78o(g), 78o-3, 78q(a), and 78w(a), and Pub. L. 111-203, 984(b), 124 Stat. 1376 (2010).

List of Subjects in 17 CFR Parts 240

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

TEXT OF RULE AMENDMENTS

For the reasons set out in the preamble, the Commission is proposing to amend title 17, chapter II of the Code of the Federal Regulations as follows.

PART 240-GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for part 240 continues to read, and sectional authority for §240.10c-1 is added to read, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

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Section 240.10c-1 also issued under 15 U.S.C. 78j(c), and Pub. L. 111-203, 984(b), 124 Stat. 1376 (2010).

* * * * *

2. Add §240.10c-1 to read as follows:

§ 240.10c-1 Securities lending transparency.

(a) *Reporting*. (1) Any person that loans a security on behalf of itself or another person shall provide to a registered national securities association (RNSA) the information in paragraphs (b) through (e) of this section (Rule 10c-1 information), in the format and manner required by the rules of an RNSA; *provided however*,

(i)(A) A bank, clearing agency, broker, or dealer that acts as an intermediary to a loan of securities (lending agent) on behalf of a person that owns the loaned securities (beneficial owner) shall:

(*1*) Provide the 10c-1 information to an RNSA on behalf of the beneficial owner within the time periods specified by Rule 10c-1; or

(*2*) Enter into a written agreement that meets the requirements of paragraph (a)(1)(ii)(A) of this section.

(B) A beneficial owner is not required to provide the Rule 10c-1 information to an RNSA if a lending agent acts as an intermediary to the loan of securities on behalf of the beneficial owner.

(ii)(A) A person required to provide Rule 10c-1 information under paragraph (a) of this section, including a lending agent, may enter into a written agreement with a broker or dealer that agrees to provide the Rule 10c-1 information to an RNSA (reporting agent) within the time periods specified in Rule 10c-1.

(B) A reporting agent is required to provide the Rule 10c-1 information to an RNSA if it has entered into a written agreement under paragraph (a)(1)(ii)(A) of this section and is provided timely access to the Rule 10c-1 information.

(C) Any person that enters into a written agreement under paragraph (a)(1)(ii) of this section with a reporting agent is not required to provide the Rule 10c-1 information to an RNSA if the reporting agent is provided timely access to the Rule 10c-1 information.

(2) Any reporting agent that enters into a written agreement under paragraph (a)(1)(ii)(A) of this section shall:

(i) Establish, maintain, and enforce reasonably designed written policies and procedures to provide Rule 10c-1 information to an RNSA on behalf of another person in the manner, format, and time consistent with Rule 10c-1;

(ii) Enter into a written agreement with an RNSA that permits the reporting agent to provide Rule 10c-1 information to the RNSA on behalf of another person;

(iii) Provide the RNSA a list of each person and lending agent on whose behalf the reporting agent is providing Rule 10c-1 information to the RNSA and provides the RNSA an updated list of such persons by the end of the day on the day such list changes; and

(iv) Preserve for a period of not less than three years, the first two years in an easily accessible place:

(A) The Rule 10c-1 information obtained by the reporting agent from any person pursuant to paragraph (a)(1)(ii) of this section, including the time of receipt, and the corresponding Rule 10c-1 information provided by the reporting agent to the RNSA, including the time of transmission to the RNSA; and

(B) The written agreements under paragraphs (a)(1)(ii)(A) and (a)(2)(ii) of this section.

(b) *Transaction data elements*. If required by paragraph (a) of this section, a person shall provide the following information to an RNSA within 15 minutes after each loan is effected, and the RNSA shall assign each loan a unique transaction identifier and make such information public as soon as practicable:

(1) The legal name of the security issuer, and the Legal Entity Identifier (LEI) of the issuer, if the issuer has an active LEI;

(2) The ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier;

(3) The date the loan was effected;

(4) The time the loan was effected;

(5) For a loan effected on a platform or venue, the name of the platform or venue where effected;

(6) The amount of the security loaned;

(7) For a loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges;

(8) The type of collateral used to secure the loan of securities;

(9) For a loan collateralized by cash, the rebate rate or any other fee or charges;

(10) The percentage of collateral to value of loaned securities required to secure such loan;

(11) The termination date of the loan, if applicable; and

(12) Whether the borrower is a broker or dealer, a customer (if the person lending securities is a broker or dealer), a clearing agency, a bank, a custodian, or other person.

(c) *Loan modification data elements*. If required by paragraph (a) of this section, a person shall provide the following information to an RNSA within 15 minutes after each loan is modified if the modification results in a change to information required to be provided to an RNSA under paragraph (b) of this section, and the RNSA shall make such information public as soon as practicable:

(1) The date and time of the modification;

(2) A description of the modification; and

(3) The unique transaction identifier assigned to the original loan.

(d) *Confidential data elements*. If required by paragraph (a), a person shall provide the following information to an RNSA within 15 minutes after each loan is effected, however, the RNSA shall keep such information confidential, subject to the provisions of applicable law:

(1) The legal name of each party to the transaction, CRD or IARD Number, if the party has a CRD or IARD Number, market participant identification ("MPID"), if the party has an MPID, and the LEI of each party to the transaction, if the party has an active LEI, and whether such person is the lender, the borrower, or an intermediary between the lender and the borrower (if known);

(2) If the person lending securities is a broker or dealer and the borrower is its customer, whether the security is loaned from a broker's or dealer's securities inventory to a customer of such broker or dealer; and

(3) If known, whether the loan is being used to close out a fail to deliver pursuant to 242.204 of this chapter (Rule 204 of Regulation SHO) or to close out a fail to deliver outside of Regulation SHO.

(e) *Securities available to loan and securities on loan*. The following information shall be provided to an RNSA by the end of each business day that a person included in paragraphs (e)(1) or (e)(2) of this section either was required to provide information to an RNSA under paragraph (a) of this section or had an open securities loan about which it was required provide information to an RNSA under paragraph (a) of this section:

(1) A lending agent shall provide the following information directly to an RNSA or to a reporting agent who shall provide such information and the identity of the person on whose behalf it is providing the information to an RNSA:

(i) The legal name of the security issuer, and the LEI of the issuer, if the issuer has an active LEI;

(ii) The ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier;

(iii) The total amount of each security that is not subject to legal or other restrictions that prevent it from being lent ("available to lend"):

(A) If the lending agent is a broker or dealer, the total amount of each security available to lend by the broker or dealer, including the securities owned by the broker or dealer, the securities owned by its customers who have agreed to participate in a fully paid lending program, and the securities in its margin customers' accounts;

(B) If the lending agent is not a broker or dealer, the total amount of each security available to the lending agent to lend, including any securities owned by the lending agent;

(iv) The total amount of each security on loan that has been contractually booked and settled ("security on loan"):

(A) If the lending agent is a broker or dealer, the total amount of each security on loan by the broker or dealer, including the securities owned by the broker or dealer, the securities owned by its customers who have agreed to participate in a fully paid lending program, and the securities in its margin customers' accounts;

(B) If the lending agent is not a broker or dealer, the total amount of each security on loan where the lending agent acted as an intermediary on behalf of a beneficial owner and securities owned by the lending agent.

(2) Any person that does not employ a lending agent shall provide the following information directly to an RNSA or to a reporting agent who shall provide such information and the identity of the person on whose behalf it is providing the information to the RNSA:

(i) The legal name of the security issuer, and the LEI of the issuer, if the issuer has an active LEI;

(ii) The ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier;

(iii) The total amount of each specific security that is owned by the person and available to lend;

(iv) The total amount of each specific security on loan owned by the person.

(3) For each security about which the RNSA receives information pursuant to paragraphs (e)(1) or (e)(2) of this section, the RNSA shall make available to the public only aggregated information for that security, including information required by (e)(1)(i) and (ii) and (e)(2)(i) and (ii) of this section. All identifying information about lending agents, reporting agents, and other persons using reporting agents, shall not be made publicly available, and the RNSA shall keep such information confidential, subject to the provisions of applicable law. For information that is required to be made publicly available, the RNSA shall make it available as soon as practicable, but not later than the next business day.

(f) *RNSA rules*. The RNSA shall implement rules regarding the format and manner to administer the collection of information in paragraphs (b) through (e) of this section and distribute such information in accordance with rules approved by the Commission pursuant to section 19(b) of the Exchange Act and Rule 19b-4 thereunder.

(g) *Data retention and availability*. The RNSA shall:

(1) Retain the information collected pursuant to paragraphs (b) through (e) of this section in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years;

(2) Make the information collected pursuant to paragraph (a)(2)(iii) and paragraphs (b) through (e) of this section available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need;

(3) Provide the information collected under paragraphs (b) and (c) of this section and the aggregate of the information provided pursuant to paragraph (e) of this section available to the public in the same manner such information is maintained pursuant to paragraph (g)(1) of this section on the RNSA's website or similar means of electronic distribution, without charge and without use restrictions, for at least a five-year period; and

(4) Establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of confidential information required by paragraphs (d) and (e)(3).

(h) *RNSA fees*. The RNSA may establish and collect reasonable fees, pursuant to rules that are effective pursuant to section 19(b) of the Exchange Act and Rule 19b-4 thereunder, from each person who provides any data set forth in paragraphs (b) through (e) of this section directly to the RNSA.

By the Commission.

Date: November 18, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.