



January 7, 2022

By Email

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 205499-1090
rule-comments@sec.gov

**Re: Release No. 34-93613; File No. S7-18-21
Reporting of Securities Loans**

Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”) ¹ appreciates the opportunity to comment on the U.S. Securities and Exchange Commission’s (the “SEC” or “Commission”) release on proposed Rule 10c-1 (the “Proposed Rule”) under the Securities Exchange Act of 1934 (“Exchange Act”), which would for the first time implement a regime requiring the reporting of identifying data and material negotiated terms of securities lending transactions, as well as other securities lending market information, to a registered national securities association (“RNSA”), and the subsequent public dissemination by the RNSA of select securities lending transaction terms and market information.² SIFMA is supportive of the SEC’s goal of increasing transparency in the securities lending market, and has provided herein our initial recommended alternative approaches for further consideration by the Commission. However, the Commission asked in the Proposing Release nearly 100 questions concerning the operation of the Proposed Rule and the securities lending market generally, and SIFMA feels strongly that a 30-day comment period is simply an insufficient amount of time to allow for meaningful consideration of, and comment on, the Proposed Rule, which would impose significant changes to the current securities lending market.³ In this regard, SIFMA reconfirms

¹ SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our members, we advocate on legislation, regulation, and business policy affecting retail and institutional investors, equity, and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² Reporting of Securities Loans, Exchange Act Release No. 93613 (Nov. 18, 2021), 86 FR 69802 (Dec. 8, 2021) (“Proposing Release”).

³ SIFMA and several other industry associations noted our concerns on the 30-day comment period in a letter to the Commission, and requested an extension of the comment period to allow for more fulsome consideration of the Proposed Rule; however, the Commission rejected our request. See Letter from SIFMA et al. on Reporting of Securities Loans (Nov. 23, 2021), <https://www.sec.gov/comments/s7-18-21/s71821-9402961-262828.pdf>; see also

our request that the comment period should have been extended to 90 days. In particular, we note that the range of activities and operational ramifications implicated by the Proposing Release would usually warrant a 90-day comment period, or even the usual default period of 60 days. The securities lending market is a complicated one with many different participants and a variety of transaction terms reflecting a diversity of nuanced factors and considerations. We are concerned that a 30-day comment period—which coincides with significant holidays as well as commenters’ regular year-end business obligations—means that commenters were unable to deliberate on the issues carefully and provide the quality of questions and alternatives that would be valuable for the Commission’s consideration as part of thoughtful rulemaking. SIFMA therefore welcomes the opportunity to engage in further discussions with the Commission Staff as it continues to gather information from the industry on the securities lending market and potentially viable approaches for reporting of information.

I. Introduction and Executive Summary

SIFMA acknowledges the SEC’s mandate, pursuant to Section 984(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,⁴ to promulgate rules that are designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities. However, the legislative history of the Dodd-Frank Act indicates that Congress’s focus was principally on managing the buildup of risk resulting from, and increasing regulatory oversight of, securities lending.⁵ Further to that end, despite the SEC’s stated purposes in the Proposing Release,⁶ SIFMA believes that the Proposed Rule could result

Commissioner Hester M. Peirce, Rat Farms and Rule Comments—Statement on Comment Period Lengths (Dec. 10, 2021), <https://www.sec.gov/news/statement/peirce-rat-farms-and-rule-comments-121021> (“Thirty days is typically not enough time to get feedback on a rule proposal. In fact, ‘a comment period . . . should generally be at least 60 days.’ For complicated rulemakings or at times when we have many rulemakings outstanding simultaneously, 90-day comment periods are likely more appropriate. Short comment periods are particularly problematic when they coincide with holidays, end-of-year operational obligations, or other periods in which commenters’ staff are likely to be unavailable or occupied with other time-sensitive obligations.” (citation omitted)); Letter from the Committee on Capital Markets Regulation on Reporting of Securities Loans (Dec. 6, 2021), <https://www.sec.gov/comments/s7-18-21/s71821-9420335-263469.pdf>; Letter from the American Securities Association on Comment Period Extension (Dec. 3, 2021), <https://www.sec.gov/comments/s7-18-21/s71821-9418382-263333.pdf>.

⁴ Pub. L. 111-203, § 984(b), 124 Stat. 1376 (2010) (“Dodd-Frank Act”).

⁵ Indeed, the overwhelming majority of Senate and House hearings that addressed securities lending focused on the lack of regulatory oversight and information regarding the interconnected relationships of financial institutions through interbank lending, securities lending, repurchase agreements, and derivatives contracts that led to a buildup of risk and ultimately resulted in the collapse of insurance giant American International Group (“AIG”). See, e.g., *Equipping Financial Regulators with the Tools Necessary to Monitor Systemic Risk: Hearing Before the Senate Subcommittee on Security and International Trade and Finance of the Committee on Banking, Housing, and Urban Affairs*, 111th Cong. 39 (Feb. 12, 2010) (prepared statement of Daniel K. Tarullo, Member, Board of Governors of the Federal Reserve System); *How Should the Federal Government Oversee Insurance?: Hearing Before the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services*, 111th Cong. 28–31 (May 14, 2009) (statements of Melissa L. Bean, Member, House Committee on Financial Services, Scott E. Harrington, Professor, The Wharton School, University of Pennsylvania, and Baird Webel, Specialist in Financial Economics, Congressional Research Service).

⁶ The Proposing Release states that the Proposed Rule is intended to provide investors and other market participants with greater access to pricing and other material information regarding securities lending transactions in a timely

in significant unintended negative consequences for the market, including if the Proposed Rule treated customer short positions as securities lending transactions. SIFMA is concerned that, as currently drafted, the Proposed Rule could result in the public dissemination of incomplete, inaccurate, and misleading information that could have a severe adverse impact on the securities lending market as well as the overall securities markets. The Proposed Rule would also impose significant costs on SIFMA member firms which are not commensurate with the benefits sought to be achieved.⁷ However, given the very short comment period, SIFMA and its members do not have sufficient time to fully analyze and calculate the true anticipated cost of implementing the proposed reporting regime.

SIFMA addresses these concerns below, and offers a number of suggested alternatives that we believe would foster the policy goals of the Proposed Rule while ameliorating the potential adverse consequences. Specifically, as described further in Section V below, SIFMA recommends that the SEC adjust the Proposed Rule as follows:

- A. To ensure consistent reporting and avoid confusion and misinterpretation of data by the public, define what it means to “loan a security” under the Proposed Rule to be to “enter into a transaction in which one person, on behalf of itself or another person (the lender or the lending agent), will temporarily lend to a counterparty (the borrower) certain securities (i) pursuant to a written securities lending agreement, (ii) against a transfer of collateral, and (iii) documented as a securities loan on the lender’s books and records,” and expressly exclude transactions such as short sales that do not constitute securities lending, pursuant to well established market practice, industry norms, and other regulations, as well as other transactions that would increase confusion and risk of data misinterpretation such as short arranged financing in connection with prime brokerage activities resulting in short positions.
- B. To assure that data is efficiently reported by the party best positioned to directly provide to the RNSA the transaction terms and information required under the Proposed Rule, maintain the currently-proposed requirement for lenders and Lending Agents (as defined below) to bear the reporting obligation.
- C. To achieve accurate reporting of contract terms for settled loans and eliminate “noise” caused by fails and corrections that routinely occur intraday, require securities lending transaction information to be reported to the RNSA no earlier than the end of each business day provided all required information is available, rather than within 15 minutes.
- D. To decrease the likelihood that published data will be potentially misleading or confusing, or that it could reveal short trading strategies that could prompt short sellers to exit the market, adjust the information that is provided publicly by the RNSA to be only

manner and facilitate regulatory monitoring and surveillance of securities markets. *See* Proposing Release, 86 FR at 69804.

⁷ *See* Proposing Release, 86 FR at 69849 (Question 82).

aggregated securities lending data, including, among other things, a volume-weighted average borrowing fee aggregated across all firms, for each security loaned (“VWA Reporting System”).⁸

- E. To avoid a misleading impression of actual securities lending availability due to the inherent imprecision of the proposed calculation method, eliminate the requirement to report, by the end of the day, information on securities “available to lend.”⁹
- F. To provide practical clarity to the market and avoid inadvertently capturing unwanted extraterritorial activity and imposing an undue burden on the industry, define the extraterritorial scope of the Proposed Rule by expressly stipulating that it would apply only to loans of securities in which (i) the country of issue and primary trading market of the securities are the United States and (ii) the beneficial owner lender or Lending Agent is a U.S. person, under the guidelines set forth below.
- G. Given the risk that the data made available to the public could be misleading, confusing or have harmful unintended consequences to market participants, implement a staged reporting regime to allow regulators sufficient time to analyze collected data before public dissemination of any information and also provide at least an 18-month build-out period following the RNSA’s finalization of the technical specifications for reporting for lenders to comply.

SIFMA respectfully urges the SEC to consider these alternatives and solicit further public comment through another proposing release rather than proceeding straight to adoption.

II. Overview of the Proposed Rule

The Proposed Rule would require any “person,” as defined in Section 3(a)(9) of the Exchange Act,¹⁰ that loans a “security,” as defined in Section 3(a)(10) of the Exchange Act,¹¹ on behalf of itself or another person, to report to an RNSA certain material terms of those loans as well as modifications to those terms, information regarding the securities the person has on loan, and information regarding the securities the person has available to lend.¹² The Proposed Rule would also require the RNSA to make available to the public certain reported securities lending transaction data and aggregated information in respect of securities on loan and available to

⁸ The concept of a VWA Reporting System was previously proposed by SIFMA in a 2012 meeting with the Commission Staff to discuss ways to increase transparency for stock loans.

⁹ As set forth below, SIFMA does not object to the proposal to report by the end of the day information on “securities on loan.”

¹⁰ 15 U.S.C. § 3(a)(9).

¹¹ 15 U.S.C. § 3(a)(10). SIFMA understands that the Risk Management Association (“RMA”) is recommending that, at least for the initial implementation phase of the final rule, reporting should be mandated only for equity securities that are part of the national market system. SIFMA supports this recommendation.

¹² See Proposing Release, 86 FR at 69812.

lend.¹³ Specifically, the Proposed Rule would require a beneficial owner lender of securities, unless such beneficial owner has elected to lend through a “lending agent” (“Lending Agent”)¹⁴ or to employ a “reporting agent” (“Reporting Agent”),¹⁵ to provide to the RNSA, within 15 minutes after the securities loan is effected, certain detailed transaction terms for public dissemination.¹⁶ If one of the detailed transaction terms is modified during the duration of the loan, details of the modification also would have to be reported within 15 minutes.¹⁷ The Proposed Rule would further require additional information to be reported to the RNSA within 15 minutes after the securities loan is effected, but not made publicly available.¹⁸

Finally, a person that either was required to provide information to an RNSA under the Proposed Rule or had an open securities loan about which it was required provide information to an RNSA under the Proposed Rule would be required to provide the information to the RNSA by the end of each business day on the securities it has “available to lend” and the securities it has “on loan.”¹⁹ Where the person required to provide the information is a Lending Agent that is a

¹³ *Id.*

¹⁴ SIFMA understands that for purposes of proposed Rule 10c-1, the term “lending agent” would mean a third party bank, clearing agency, broker, or dealer that intermediates the loan of securities on behalf of the beneficial owner, and therefore could capture securities lending arrangements beyond traditional agency lending (*e.g.*, the borrower broker-dealer that borrows as principal in a fully paid lending arrangement could be a Lending Agent for purposes of the proposed Rule). *See id.*, 86 FR 69803 at n. 9, 69851 (Proposed Rule 10c-1(a)(1)(i)(A)).

¹⁵ SIFMA understands that for purposes of proposed Rule 10c-1, the term “reporting agent” would mean a broker-dealer that enters into a written agreement to provide Rule 10c-1 information to the RNSA on behalf of a beneficial owner lender or Lending Agent. *See id.*, 86 FR at 69809, 69851 (Proposed Rule 10c-1(a)(1)(ii)(A)).

¹⁶ The public transaction terms required to be reported would include: (i) the legal name of the security issuer, and the Legal Entity Identifier (“LEI”) of the issuer, if applicable; (ii) the ticker symbol, ISIN, CUSIP, or FIGI of the security, or other identifier; (iii) the date the loan was effected; (iv) the time the loan was effected; (v) the name of the platform or venue where effected, if applicable; (vi) the amount of the security loaned; (vii) for a loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges; (viii) the type of collateral used to secure the loan; (ix) for a loan collateralized by cash, the rebate rate or any other fee or charges; (x) the percentage of collateral to value of loaned securities required to secure such loan; (xi) the termination date of the loan, if applicable; and (xii) 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. *Id.* 86 FR at 69813–14, 69851–52 (Proposed Rule 10c-1(b)).

¹⁷ The modification information required to be reported would include: (i) the date and time of the modification; (ii) a description of the modification; and (iii) the unique transaction identifier assigned to the original loan by the RNSA. *Id.*, 86 FR at 69815, 69852 (Proposed Rule 10c-1(c)).

¹⁸ The non-public information required to be reported would include: (i) the legal name and applicable identifier(s) of each party to the transaction and whether such person is the lender, the borrower, or an intermediary between the lender and the borrower (if known); (ii) 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 (iii) if known, whether the loan is being used to close out a fail to deliver pursuant to Rule 204 of Regulation SHO (17 CFR § 242.204, “Rule 204”) or to close out a fail to deliver outside of Regulation SHO. *Id.*, 86 FR at 69815–16, 69852 (Proposed Rule 10c-1(d)).

¹⁹ The information required to be reported would include: (i) the legal name and LEI of the issuer, if applicable; (ii) the securities’ ticker symbol, CUSIP, ISIN, or other identifier; (iii) the total amount of each security that is not

broker-dealer, such person would be required to include in its calculation of securities “available to lend” and securities “on loan” the securities owned by the broker-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.²⁰

III. Overview of the Securities Lending Market

The securities lending market is part of the necessary “plumbing” that contributes to the healthy functioning of the U.S. securities markets. Securities lending improves global market liquidity and facilitates asset redistribution in financial markets by supporting global capital market activities and helping to ensure prompt settlement of trades.²¹ Securities lending also supports the orderly operation of capital markets by, among other things, enabling the establishment of short positions and thereby facilitating price discovery and hedging activities.²² In this regard, the Commission has previously recognized that short selling provides the market with important benefits.²³

The basic elements of securities lending are the following:

- Beneficial owners of securities (which are generally large institutions such as pension funds and mutual funds) loan securities, either directly or through the use of an intermediary (referred to in the Proposing Release as a Lending Agent), to a borrower for a fee.²⁴

subject to legal or other restrictions that prevent it from being lent; and (iv) the total amount of each security that has been contractually booked and settled. *Id.*, 86 FR at 69816–17, 69852 (Proposed Rule 10c-1(e)).

²⁰ *Id.*, 86 FR at 69818, 69852.

²¹ See Viktoria Baklanova at al., *Reference Guide to U.S. Repo and Securities Lending Markets* (Office of Financial Research Working Paper No. 15-17), 24 (Sept. 9, 2015), available at <https://financialresearch.gov/working-papers/2015/09/09/reference-guide-to-u-s-repo-and-securities-lending-markets/> (“OFR Reference Guide”).

²² See Financial Stability Oversight Council, *2020 Annual Report*, 45, available at <https://home.treasury.gov/system/files/261/FSOC2020AnnualReport.pdf> (“FSOC 2020 Annual Report”).

²³ Such benefits include: (i) market liquidity is often provided through short selling by market professionals, such as market makers and block positioners, who offset temporary imbalances in the buying and selling interest for securities; (ii) short sales effected in the market add to the selling interest of stock available to purchasers and reduce the risk that the price paid by investors is artificially high because of a temporary imbalance between buying and selling interest; and (iii) short selling can contribute to the pricing efficiency of the equities markets, *i.e.*, market participants who believe a stock is overvalued may engage in short sales in an attempt to profit from a perceived divergence of prices from true economic values. See Amendments to Regulation SHO, Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232, 11235 (March 10, 2010).

²⁴ See FSOC 2020 Annual Report at 199; OFR Reference Guide at 24; *Interim Report of the Financial Stability Board Workstream on Securities Lending and Repos, Securities Lending and Repos: Market Overview and Financial Stability Issues*, 19 (Apr. 27, 2012), available at https://www.fsb.org/wp-content/uploads/r_120427.pdf (“FSB Interim Report”).

- The borrower of the securities pledges collateral (typically cash or U.S. Treasury securities) to secure the loan.²⁵ Under certain securities lending arrangements, the cash collateral may be invested so that additional income may be earned.²⁶
- The securities loan is generally made pursuant to a written securities lending agreement (often an industry standard agreement) such as the Master Securities Loan Agreement published by SIFMA.²⁷
- The terms of the securities loan (including rates, fees and/or rebates) are generally agreed to in a bilateral manner between the beneficial owner and the borrower (as facilitated by the Lending Agent, where applicable) and are specific to that loan.²⁸
- The securities loan is temporary and is typically terminable by either party at any time (*i.e.*, it is open-ended).²⁹
- For the duration of the securities loan, the loaned securities and the collateral are valued (*i.e.*, marked to market) each business day and additional collateral is transferred as may be required to maintain sufficient collateralization of the loan.³⁰
- When the securities loan is terminated, equivalent securities (*i.e.*, securities of the same issuer, class and quantity) are returned to the beneficial owner lender and equivalent collateral is returned to the borrower.³¹

As we have described in previous comment letters,³² the U.S. securities lending market is fundamentally different from the cash markets. The cash markets feature irrevocable purchases and sales of fungible securities where there is no ongoing relationship between purchaser and seller with respect to the securities after completion of the transaction (*i.e.*, the transaction is completed and thus ripe for reporting). By contrast, securities lending transactions are revocable transactions with critical terms (such as rates and collateral, as described above) that depend on

²⁵ See OFR Reference Guide at 35; *see also* FSOC 2020 Annual Report at 199; FSB Interim Report at 19.

²⁶ See OFR Reference Guide at 35; FSB Interim Report at 19.

²⁷ See OFR Reference Guide at 36; FSB Interim Report at 20; SIFMA 2017 Master Securities Loan Agreement, available at https://www.sifma.org/wp-content/uploads/2017/06/MSLA_Master-Securities-Loan-Agreement-2017-Version.pdf.

²⁸ See OFR Reference Guide at 34, 36; FSB Interim Report at 19–20, 21; *see also* FSOC 2020 Annual Report at 199.

²⁹ See OFR Reference Guide at 34; FSB Interim Report at 20.

³⁰ See OFR Reference Guide at 34; FSB Interim Report at 19.

³¹ See FSB Interim Report at 19.

³² See, e.g., SIFMA Securities Lending Division and Risk Management Association Letter on Securities Lending and Short Sale Roundtable, Temporary Interim Final Rule 204T, and Amendments to Regulation SHO, 3 (Sept. 25, 2009), <https://www.sifma.org/wp-content/uploads/2017/05/sifma-submits-comments-to-the-sec-on-the-sec-s-securities-lending-and-short-sale-roundtable.pdf>.

considerations that are often unique to the specific lending relationship, including counterparty identity and creditworthiness and each party's underlying purpose for entering into the lending transaction.³³ The identity and nature of the counterparty (*e.g.*, the stability of the source of the borrow or the lender's history with respect to changing key terms of the loan such as rates and/or recalling loans) is relevant to pricing, fees, and other terms, considering that each securities lending transaction is an ongoing relationship (unlike a purchase or sale) that does not end with the initiation of the loan. Additionally, loan rates are subject to change on a daily basis. Moreover, securities lending transactions are ultimately intended to be unwound, and the termination is typically at the discretion of either the lender or the borrower.

Unlike buy/sell transactions, which can occur at any point during the business day, securities loan transactions contain certain transaction terms such as the identity of the beneficial owner lender (where a Lending Agent is used), specific collateral type, and the allocation of quantities amongst principals to the original transaction, that may not be finalized until the end of the business day.³⁴ Additionally, the loaned securities and the collateral often may not be transferred until the end of the business day.³⁵

Given these distinct features, SIFMA respectfully disagrees with the SEC's suggestion in the Proposing Release that securities lending transaction data can be easily and accurately captured within 15 minutes and publicly disseminated in the same manner as the Trade Reporting and Compliance Engine ("TRACE") operated by the Financial Industry Regulatory Authority, Inc. ("FINRA"), which is used to capture and publicly disseminate over-the-counter ("OTC") transactions in eligible fixed income securities. The features of the securities lending market that are different from the cash market mean that applying a TRACE-type reporting regime to the securities lending market would create fundamental challenges and potential negative consequences.³⁶ SIFMA addresses these fundamental challenges and potential negative consequences in Section IV, below. SIFMA then discusses our recommended solutions to those challenges in Section V.

IV. Potential Negative Consequences of the Proposed Rule Requirements

As noted above, SIFMA acknowledges the SEC's mandate under Section 984(b) of the Dodd-Frank Act to promulgate rules that are designed to increase the transparency of securities lending information available to market participants. However, while the SEC has stated that lack of

³³ See FSB Interim Report at 19 ("Lending fees can vary greatly depending on the nature, size and duration of the transaction, the demand to borrow the securities, and other factors.").

³⁴ For example, firms that utilize an Agency Lending Disclosure ("ALD") process typically run it at the end of the business day. Thus, an agent lender broker-dealer's principal-level loan and collateral allocation may not occur until the end of the day when the ALD process runs.

³⁵ See, *e.g.*, SIFMA Master Securities Loan Agreement Guidance Notes (2000 Version), 6, available at https://www.sifma.org/wp-content/uploads/2017/08/MSLA_Guidance-Notes-2000-Version.pdf ("... Collateral must be delivered to Lender prior to or concurrently with the transfer of Loaned Securities to Borrower, but in no case later than the Close of Business on the day Lender transfers the Loaned Securities to Borrower.")

³⁶ Proposing Release, 86 FR at 69837, 69846.

public information and data gaps make it “difficult for borrowers and lenders alike to ascertain market conditions,”³⁷ SIFMA believes the “official” publication of incomplete, inaccurate, or misleading information on securities lending transactions and other securities lending data by an RNSA could make it even more difficult to ascertain true market conditions. In addition, without proper contextualization, even accurately reported data may be misconstrued. As set forth more fully below, there are factual, operational, and commercial aspects of the securities lending market that SIFMA believes the Commission may not have appreciated when drafting the Proposed Rule.

A. The Proposed Rule Should Not Capture Transactions and Activities that are Not Part of the Securities Lending Market

Securities lending transactions are generally recognized in the marketplace as those that are (i) documented under securities lending agreements, (ii) booked as securities loans, and (iii) treated as securities loans for financial reporting purposes (including under SEC public company reporting guidance and on Financial and Operational Combined Uniform Single (“FOCUS”) Reports).³⁸ SIFMA believes that the Commission should clarify that the Proposed Rule would only capture activity that is synonymous with traditional securities lending activity—and not activity outside of that—as discussed in greater detail below. SIFMA notes that the Commission is not intending to include within the scope of the Proposed Rule the entry into repurchase agreements, which we believe is the proper approach.³⁹

1. Short Positions Should Be Excluded From Any Securities Lending Reporting Regime

a. Short Positions are Not Documented or Recognized as Securities Loans

³⁷ *Id.*, 86 FR at 69803–04.

³⁸ *See, e.g.*, FOCUS Report Part II Instructions, U.S. Securities and Exchange Commission, Line Item 536, available at https://www.sec.gov/files/formx-17a-5_22.pdf (“Securities held as collateral for stock loan transactions are recognized as both an asset (Securities accepted under ASC 860 (Line Item 536)) and as a liability (Obligation to return securities (Line Item 1686)).

Example: A firm loans 100 shares of stock valued at \$1050 and receives stock collateral valued at \$1000. The market value of the collateral received should be reported on the FOCUS as follows:

Debit	FOCUS Item 536	Securities accepted under ASC 860	\$1000
Credit	FOCUS Item 1686	Obligation to return securities	\$1000”)

On the other hand, when a customer effects a short sale of securities, it is reflected as a margin account transaction where the carrying firm reflects short sale proceeds owed/payable (cash liability) to the customer versus a receivable from the customer’s securities (margin/secured or partially secured) account reflecting the customer’s obligation to close out the short sale transaction and return the securities to the carrying firm.

³⁹ Proposing Release, 86 FR 69803 at n. 2. SIFMA also reads the Proposing Release as excluding rehypothecation of a customer’s margin securities as it is documented under a margin or prime brokerage agreement with the customer in connection with broader margin financing of the customer.

As a threshold matter, SIFMA believes that only securities lending transactions between counterparties that are made pursuant to a written securities lending agreement and recorded on a firm's books and records as a borrow/loan should be reportable under the Proposed Rule. In that regard, since short sales settled by a broker-dealer are not documented or booked as a securities loan between the parties (*i.e.*, the terms governing any resulting short positions are typically governed by a brokerage account agreement and the U.S. margin rules as opposed to being governed by or subject to a written securities lending agreement), they should not be included as part of any securities lending reporting under the Proposed Rule. Short positions are neither carried on a firm's books and records as securities loans, nor treated as securities loans for financial reporting purposes. In fact, U.S. Generally Accepted Accounting Principles (GAAP) and the SEC's own reporting requirements (*e.g.*, the FOCUS Report, as described above) distinguish between how short sales and securities loans are treated for financial reporting.

In addition to the above-described recordkeeping and reporting practices, for decades there has been a clearly understood distinction under established securities laws and regulations—including under the Dodd-Frank Act itself—between a securities loan entered into under a securities loan agreement and a short position established by a broker-dealer governed by a broker's account agreement. Indeed, the very existence of Section 929X (Short Sale Reforms) under the Dodd-Frank Act demonstrates that Congress did not intend Section 984 to be used to regulate short selling. The separate treatment of these different types of transactions under the Dodd-Frank Act is also consistent with their distinct treatment under existing securities regulations; for example, short sales and short positions historically have been governed by regulations such as Regulation T of the Board of Governors of the Federal Reserve System,⁴⁰ Regulation SHO, FINRA 4210 (Margin Requirements), FINRA Rule 4320 (Short Sale Delivery Requirements), and FINRA Rule 4560 (Short-Interest Reporting), whereas securities lending transactions have historically been governed by regulations such as FINRA Rule 4314 (Securities Loans and Borrowings) and FINRA Rule 4330 (Customer Protection—Permissible Use of Customers' Securities). Moreover, SEC Rule 15c3-3 (Customer Protection—Reserves and Custody of Securities)⁴¹ bifurcates the treatment of short positions and securities loans: for example, Rule 15c3-3(b)(1) and Exhibit A thereto (customer reserve formula) address the ability of a broker-dealer to deliver customers' "margin securities" (as defined in Rule 15c3-3(a)(4)) for settlement of a short sale whereas securities lending transactions of "fully paid securities" (as defined in Rule 15c3-3(a)(3)) (as well as "excess margin securities," as defined in Rule 15c3-3(a)(5)) are governed, separately, by Rule 15c3-3(b)(3) (and without impact to the customer reserve formula). Therefore, SIFMA is concerned that the Proposing Release does not make sufficiently clear that short positions were not intended to be covered by Section 984 of Dodd-Frank and therefore are outside the scope of the Rule proposal.

b. Difficulty to Apply/Potential to Mislead

⁴⁰ 12 CFR § 220 ("Regulation T").

⁴¹ 17 CFR § 240.15c3-3.

Many of the granular reporting elements for securities loan transactions proposed by the SEC are not applicable to short positions, or do not apply to short positions in the same way as they apply to securities loans, and would necessarily lead to incomplete, inaccurate, and misleading data (e.g., percentage of collateral to value of loaned securities required to secure the loan, type of collateral, and lending fee/rebate rate). The SEC's goal of increasing transparency in the securities lending market would not be achieved by reporting data that commingles (i) individual stock loans by agent lenders and inter-broker-dealers, where essentially all of the data elements proposed to be disclosed are individually negotiated, and (ii) customer short positions, where margin levels, rates, and other key elements are interdependent with multiple factors not feasibly captured in the data. Indeed, certain of the proposed data fields are simply incompatible with short position reporting. For example, the collateral amount and type for short positions will be a commingled pool of collateral supporting the aggregate extension of credit in the customer's account by the broker-dealer, inclusive of the client's other positions, rather than calculated solely on a single short position. Thus, treating short positions as being in the same data pool as securities lending transactions could lead to significant confusion and misinterpretation by the public. Additionally, financing rates, including short position rates, are a primary way in which prime brokers charge clients for the overall suite of services they provide (e.g., clearing, settlement, custody, asset servicing, and financing) and do not reflect just the cost of the borrow. Short position rates also can vary based on credit counterparty risk assessments of the customer. These differences would make it extremely difficult for an end consumer to normalize the data.

Simply put, short positions are fundamentally unsuited to a trade-by-trade reporting regime. It is therefore SIFMA's strong view that incorporating short positions in the reporting regime with traditional securities loans would not only be inappropriate from a technical standpoint but also create confusion in the market given the many critical differences between short positions and securities lending transactions.

c. "Double Counting" Risk

If the short positions of a broker-dealer's customers were to be included as "stock loans," the Proposed Rule would essentially result in almost all external borrows by broker-dealers (from agent lenders or other broker-dealers) being "double counted" (i.e., the agent lender would be required to report the securities loan to the broker-dealer, and then the broker-dealer would also be required to report a "stock loan" to its customer who has a short position). While the construct of the Proposed Rule will, in the ordinary course, lead to a certain amount of double counting (i.e., where there is a loan of securities reported by the lender, and the borrower then on-lends those securities to a third party pursuant to a securities lending agreement, which would also be reported), including short positions as stock loans would, *per se*, result in gross double counting in that the broker-dealer would be borrowing from a lender for the specific purpose of settling such customer or proprietary short positions and other delivery obligations. This would be an untenable outcome under the Proposed Rule given that the Commission is expressly trying to avoid the double counting of transactions.⁴²

⁴² See, e.g., Proposing Release, 86 FR at 69807 ("The Commission proposes to limit the obligation to provide the specified material terms to an RNA only to the Lender to avoid the potential double counting of transactions that

d. Short Position Reporting is Already Covered by Other Rules

For all of the above reasons, SIFMA feels strongly that short positions should not be captured as “stock loans” for purposes of the Proposed Rule. In addition, short positions are already properly included as part of “short position reporting,” under either the existing FINRA short interest reporting requirements (reporting by clearing brokers of gross settled firm and customer short positions), for which FINRA has requested comment on expanding,⁴³ or the short position reporting regime to be considered under Section 929X of the Dodd-Frank Act. As SIFMA has previously noted in our comment letter to FINRA in connection with short interest reporting, information on an individual client’s short positions should not be reportable, and the reporting of short transactions as “stock loans” under the Proposed Rule should equally not be a conduit for possible leakage of trading strategies.⁴⁴ Risk of leakage of trading strategies could result in informational imbalances that also could negatively impact liquidity and price discovery. As a result, the benefits to the market that result from short selling—including that of serving as an important counterbalance to the almost uniformly bullish voices of issuers—would be severely undermined by a concern about trading strategy leakage if information on individual short transactions were to be publicly disseminated.⁴⁵

2. Short Arranged Financing in Connection with Prime Brokerage Activities Should Be Excluded From Any Securities Lending Reporting Regime

SIFMA believes that while short positions arranged by broker-dealers in connection with short arranged financing are typically documented as “loans of securities” to the prime brokerage customer using a written securities lending agreement, they are not comparable to securities loans to broker-dealers (referred to as the “Wholesale Market” in the Proposing Release), but more comparable in purpose and terms to other short positions established by customers (but with a different margin treatment than short positions established by the arranging broker-dealer). While arranged financing short positions may provide certain margin, funding, or other regulatory benefits, they essentially are similar to other short positions in that the broker-dealer will use the shares to cover short sales by its customers. Moreover, like short positions, these

could arise if the Rule required both sides of the securities lending transaction to provide the material terms.”); *id.*, 86 FR at 69822 (“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.”).

⁴³ See FINRA Regulatory Notice 21-19 (June 4, 2021), available at <https://www.finra.org/sites/default/files/2021-06/Regulatory-Notice-21-19.pdf>.

⁴⁴ Letter from SIFMA on Short Interest Position Reporting Enhancements and Other Changes Related to Short Sale Reporting (Sept. 30, 2021), <https://www.sifma.org/wp-content/uploads/2021/10/SIFMA-Comments-on-FINRA-RN-21-19-Final.pdf>.

⁴⁵ Although the Commission acknowledged the market benefits associated with short selling, it then incorrectly asserts that the Proposed Rule would reduce the cost to short sell due to a reduction in the cost to borrow securities (see Proposing Release, 86 FR at 69839), SIFMA believes the Commission has not properly demonstrated the bases for such cost reduction and has failed to consider the many negative impacts the Proposed Rule would have on short selling (as described herein).

loans could be captured in other data required to be reported to regulators through the SEC's current short sale reporting initiative pursuant to Section 929X of the Dodd-Frank Act (which specifically refers to short positions as opposed to securities loans) and the FINRA short interest data reporting effort, as discussed above. In particular, FINRA has proposed to expand short interest reporting to include arranged financing short positions because the customer's "exposure from this loan obligation is substantially equivalent to a short position[.]"⁴⁶

B. Reporting of Transaction and Modification Information Within 15 Minutes Would Result in Publication of Incomplete and Inaccurate Data

SIFMA does not object to the proposed requirement to report securities lending transaction information to the RNSA; however, SIFMA strongly believes that, given the nature and granularity of the terms that would be required to be reported under the Proposed Rule, intraday reporting of securities lending transaction information and modifications within 15 minutes would result in the publication of incomplete and inaccurate data that would not be useful—and indeed could be harmful—to market participants. As described above in Section III, with cash markets such as the OTC fixed income securities market captured by TRACE (which the Proposing Release references in support of the Proposed Rule's 15-minute timing requirement⁴⁷), the reported transactions are purchases and sales—the terms are set at the time of the trade and there is no ongoing relationship between the purchaser and seller with respect to those securities after the transaction is completed. Accurate intraday reporting of such OTC trades is therefore entirely feasible. By contrast, the securities lending market would not lend itself well to a TRACE-type reporting regime. As noted above, under a securities loan transaction, the loaned securities and the collateral may not be transferred until the end of the business day (*e.g.*, in fully paid lending arrangements, collateral is not required to be delivered until the end of the business day on which the loan is entered into).⁴⁸ Additionally, some transaction terms, such as the identity of the beneficial owner lender (where a Lending Agent is used), the specific type of collateral to be pledged, or the allocation of quantities amongst principals to the original transaction, may not be finalized between the parties until the end of the business day when the relevant operational processes (*e.g.*, the ALD process) are run. Moreover, fails are not reconciled until end of day and, therefore, if a loan doesn't settle it has not been effected. Thus, the time a securities loan is "effected" is not "when it is agreed to by the parties" as the Proposed Rule suggests.⁴⁹ Rather, a securities loan is considered "effected" when it is "contractually booked and settled," consistent with the description of when a security is "on loan" for purposes of the Proposed Rule.⁵⁰

⁴⁶ See FINRA Regulatory Notice 21-19, 10 (June 4, 2021), available at <https://www.finra.org/sites/default/files/2021-06/Regulatory-Notice-21-19.pdf>.

⁴⁷ Proposing Release, 86 FR at 69846.

⁴⁸ See, *e.g.*, SIFMA Master Securities Loan Agreement Guidance Notes (2000 Version) at 6.

⁴⁹ Proposing Release, 86 FR at 69812.

⁵⁰ *Id.*, 86 FR at 69817.

Given these core characteristics of the securities lending market, SIFMA believes that the reporting and subsequent public dissemination of securities lending transaction data intraday would not, as the Commission indicated in the Proposing Release, “provid[e] access to timely, granular information about certain material terms of securities lending transactions [that] would allow investors . . . to evaluate . . . the rates for such transactions [and] any signals that rates provide,”⁵¹ but could instead result in inadvertently misleading information—particularly from reporting of large numbers of modifications and/or cancellations of loans that did not end up being effected pursuant to the original terms. SIFMA is therefore concerned that such data, if relied upon in making investment decisions, might harm investors and the broader market.

Moreover, SIFMA notes that while certain securities lending transaction information is reported to data vendors intraday, as the Proposing Release acknowledges, the terms that are currently provided to vendors are not as granular as those that the Proposed Rule would require.⁵² Additionally—and significantly—the information shared with securities lending data vendors is based on currently-available data and it is well understood by the reporting persons, data vendors, and end users that such data may be subject to change. As such, the data is typically viewed as a source of general market color only. Relatedly, market participants that elect to share information with data vendors are not monitored, nor are they subject to potential penalties, by such data vendors based on the accuracy of the intraday information that they provide—a critical distinction, in SIFMA’s view, from the Commission’s proposed reporting regime.

C. Public Dissemination of Loan-by-Loan Transaction Data Would Not Benefit the Market and Would Expose Reporting Persons to Heightened Risk

In addition to the above-described concerns with the timing of transaction reporting under the Proposed Rule, SIFMA is concerned that public reporting of negotiated transaction terms on a loan-by-loan basis would not benefit the market and, to the contrary, could confuse or mislead market participants. Indeed, the proposal to create “a ‘consolidated tape’ or public data feed”⁵³ of transaction data suggests a misunderstanding of the securities lending market. Unfiltered intraday loan-by-loan data can be misleading based on circumstances unique to certain securities loan transactions. For example, as noted above in Section III and acknowledged in the Proposing Release,⁵⁴ fees/rates paid on securities lending transactions are not fungible and therefore cannot be easily compared. They are calculated differently by different firms, and may

⁵¹ *Id.*, 86 FR at 69804.

⁵² *Id.*, 86 FR at 69807 (the Proposing Release states that “[c]ommonly collected data elements include CUSIP identifiers for securities on loan, quantity, borrowing cost, utilization of available supply, owner domicile, and type of collateral held.” (citation omitted)); *see also id.*, 86 FR at 69836 (The data provided by the proposed Rule would encompass more data fields than those offered by individual existing commercial data vendors . . .”).

⁵³ *Id.*, 86 FR at 69803.

⁵⁴ *Id.*, 86 FR at 69831 (“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.” (citation omitted)).

be based on a variety of considerations including, but not limited to, supply and demand, perceived stability of loans and rates (based on historical interactions with the counterparty), loan size, and supply concentration. Additionally, transactions such as funding trades (where the securities borrower does not have a “permitted purpose” for the loan, and such “loan” of securities resembles a borrowing of cash against the “pledge” of securities as collateral therefor⁵⁵), as well as loans between a broker-dealer and its affiliates, may not represent the actual rates available in the securities lending market and therefore could cause confusion and lead to misinterpretation if published.

Furthermore, as noted above, the public dissemination of information on securities lending transactions that is too granular could potentially reveal short selling trading strategies and could therefore cause short sellers to exit the market, resulting in a loss of the many benefits to the market that result from short selling.

D. The Proposed Daily Reporting of Securities “Available to Lend” Would Grossly Overestimate the Securities Available in the Securities Lending Market

SIFMA acknowledges the Proposed Rule’s stated goal of collecting information daily to allow the RNSA to calculate a “utilization rate” for each security lent in the securities lending market.⁵⁶ SIFMA does not object to the proposed requirement to report, at the end of each business day, the total amount of each security that a beneficial owner lender or Lending Agent has “on loan.” However, SIFMA is concerned that the SEC’s proposal to require a broker-dealer serving as a Lending Agent to include in its calculation of securities “available to lend” the number of securities in accounts of customers who have agreed to participate in a fully paid lending program and margin customer accounts will lead to a gross over-inflation of the number of securities available to lend. Customer margin inventory can be impacted due to volatility of customers (*e.g.*, market makers and hedge funds) who often move positions in and out quickly. Customer balances often change and can also swing between debits/credits, resulting in positions being locked/released. Indeed, the Commission acknowledged in the Proposing Release that the proposed definition of “available to lend” would overstate the quantity of securities that are actually available to lend in the market.⁵⁷ SIFMA agrees, and believes that the output of information would paint a wholly inaccurate and unhelpful picture of what is actually available

⁵⁵ See 12 CFR 220.10(a) (defining “permitted purpose” for the purposes of Regulation T as a loan of securities for the purpose of “making delivery of the securities in the case of short sales, failure to receive securities required to be delivered, or other similar situations”); *see also* FINRA Guide to Financial and Operational Rules at SEC Rule 15c3-1(c)(2)(iv)(B)/093, available at <https://www.finra.org/sites/default/files/sea-rule-15c3-1-interpretations.pdf> (addressing non-purpose equity securities borrowed transactions between broker-dealers).

⁵⁶ See Proposing Release, 86 FR at 69817.

⁵⁷ See *id.* (“Some programs may be subject to overall portfolio restrictions (*e.g.*, no more than 20% of the portfolio may be lent at any time), and/or 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 [reportable as] available to lend unless the securities are themselves subject to restrictions that prevent them from being lent.” (citation omitted)); *id.*, 86 FR at 69818 (Question 48 commences by stating, “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.”).

in the market. Additionally, trading or investment strategies based on such inaccurate data could be fundamentally flawed, potentially exposing market participants (and, depending on the size and/or number of such market participants, the entire market) to heightened risk.

E. The Lack of Definition as to Extraterritorial Scope of the Proposed Rule Could Lead to Overinclusive Application and Regulatory Duplication

SIFMA notes that the Commission did not define the extraterritorial scope of the Proposed Rule. As currently proposed, the Proposed Rule would apply to any “person,” as defined under Section 3(a)(9) of the Exchange Act,⁵⁸ that loans a “security,” as defined in Section 3(a)(10) of the Exchange Act,⁵⁹ on behalf of itself or another person. However, as described above in Section III, the securities lending market is a global market wherein borrowers and lenders are often domiciled in non-U.S. jurisdictions. In turn, the parties may enter into loans of non-U.S. securities. SIFMA believes the lack of a defined extraterritorial scope could result in, among other things, persons currently required to report securities lending transactions under another regime (e.g., the European Union’s Securities Financing Transaction Regulation (SFTR)⁶⁰) also having a requirement to report those same transactions to the SEC.

V. Potential Ways to Resolve These Unintended Consequences

A. Define What it Means to “Loan a Security” Under the Proposed Rule and Expressly Exclude Transactions (Like Establishment of Short Positions) that Do Not Constitute Securities Lending

In response to the SEC’s request for comment,⁶¹ SIFMA recommends that the SEC consider revising the Proposed Rule to include a definition of what it means to “loan a security,” as suggested in the Proposing Release. SIFMA believes the definition should be consistent with the commonly understood and applied definitions under established regulatory contexts.⁶² For example, a definition could be added stating that to “loan a security” for the purposes of the Proposed Rule means to “enter into a transaction in which one person, on behalf of itself or another person (the lender or the lending agent), will temporarily lend to a counterparty (the borrower) certain securities (i) pursuant to a written securities lending agreement, (ii) against a transfer of collateral, and (iii) documented as a securities loan on the lender’s books and records.” Such a definition would be consistent with the types of transactions that SIFMA members designate as securities lending transactions on their books and records and on their FOCUS Reports, for example. Additionally, consistent with industry practice for securities lending, SIFMA recommends that the definition should expressly exclude: (i) short positions and

⁵⁸ 15 U.S.C. § 3(a)(9).

⁵⁹ 15 U.S.C. § 3(a)(10).

⁶⁰ Regulation (EU) 2015/2365 of the European Parliament and of the Council on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (Nov. 25, 2015), as amended.

⁶¹ See Proposing Release, 86 FR at 69808, 69849 (Questions 8, 81, and 83).

⁶² See *supra* Section IV.A.1.a.

(ii) short arranged financing in connection with prime brokerage client short activities. SIFMA further believes that, consistent with the SEC's statements in the Proposing Release,⁶³ and because Section 984 of the Dodd-Frank Act focuses on the lending and borrowing of securities, it would be advisable to expressly exclude repurchase agreements from the definition.

SIFMA believes that defining a "loan of securities" in a manner that accurately reflects the categories of transactions that are recognized as securities lending activity in the market place would yield far more sound data. As described in detail in Section IV, SIFMA further believes that the numerous fundamental market differences between securities lending transactions and short positions strongly support that these distinct categories of transactions be handled through separate reporting regimes. Moreover, short positions, as well as short arranged financing, would be captured in other data required to be reported to regulators through the SEC's current short sale reporting initiative pursuant to Section 929X of the Dodd-Frank Act and the FINRA short interest data reporting effort (for which FINRA has requested comment on expanding).

B. Maintain the Currently-Proposed Requirement for Lenders and Lending Agents to Bear the Reporting Obligation

SIFMA agrees with the Commission that the lender (or agent lender, as applicable) is generally best positioned to provide Rule 10c-1 information to the RNSA and recommends that the Commission maintain the current proposed structure requiring that they bear the reporting obligation.⁶⁴ As the Proposing Release correctly notes, the borrower generally will not be directly privy to some of the information required to be provided to the RNSA. SIFMA believes that the agent lenders that lend securities on behalf of beneficial owners (which loans make up the significant majority of the overall securities lending market) already have direct access to, and established books and records systems in place to capture, the securities lending transaction details that the Proposed Rule seeks to capture. For example, agent lenders are generally responsible for initiating securities loan pricing, allocating bulk securities loans and collateral among principal lenders, and creating and providing the data feeds that are used by borrowing broker-dealers.⁶⁵ Accordingly, were borrowers to have the reporting obligation instead of lenders, the borrower would still be obliged to obtain from the agent lenders certain data elements, and would not have direct access to the source records for such loans to verify the data in response to a request from the RNSA. In sum, SIFMA believes that requiring the reporting of loan information from lenders and Lending Agents (much of which would come from a fairly small subset of agent lenders), as opposed to requiring reporting by the many different borrower broker-dealers to whom the securities are loaned, is an efficient means for the RNSA and the Commission to receive the information in which it is interested, while also helping to minimize

⁶³ See Proposing Release, 86 FR 69803 at n. 2.

⁶⁴ *Id.*, 86 FR at 69807, 69808 (Question 4).

⁶⁵ This is also precisely why agent lenders currently are data vendors' principal source of securities lending transaction information. See generally, RMA and SIFMA Agency Lending Disclosure Task Force, *The A – Z Guide to ALD: A Comprehensive Set of Guidelines for Broker-Dealers and Agent Lenders Participating in Securities Lending on an Agency Basis* (Dec. 7, 2006), available at <https://www.sifma.org/resources/general/agency-lending-disclosure/>.

the possibility of operational glitches. However, SIFMA further agrees that as an exception to this general rule, it would be appropriate for the borrower broker-dealer (not the lender customer) to provide the Rule 10c-1 information to the RNSA where such broker-dealer borrows a customer's fully paid securities.⁶⁶

C. Require Securities Lending Transaction Information to be Reported to the RNSA No Earlier than the End of Each Business Day, Rather than Within 15 Minutes

In response to the SEC's request for comment,⁶⁷ SIFMA recommends that the SEC consider revising the securities loan transaction reporting regime under the Proposed Rule to require that securities lending transaction data be reported to the RNSA *no earlier than* the end of each business day. Because certain key securities loan transaction terms may not be settled until end of day, such an adjustment would result in the reporting of contract terms for settled loans and would eliminate "noise" in the data caused by fails and corrections that routinely occur intraday before the loan commences. This adjustment therefore would not "reduce the price discovery and price efficiency benefits associated with an increase in transparency"⁶⁸ but instead would yield far more accurate and useful transactional data by affording the opportunity for settlement and reconciliation and facilitating the most accurate opportunity for transaction reporting and benchmarking.

SIFMA further notes that, if ultimately the transactions that are covered, and/or the transaction terms that are required to be reported, under the final rule go beyond the scope of what is proposed in this comment letter, even more time may be necessary (*e.g.*, until the following business day) to provide accurate, complete, and reconciled data to the RNSA.

D. Adjust the Information that is Provided Publicly by the RNSA to Only be Aggregated Securities Lending Data, Including a VWA Reporting System

As previously noted, even with the aforementioned adjustment to require reporting of securities lending transaction information no earlier than the end of the business day, SIFMA is concerned that publicizing transaction-specific data would be misleading and could result in confusion and, ultimately, have adverse effects on the securities lending market and the broader securities markets. In response to the SEC's request for comment,⁶⁹ SIFMA therefore recommends that the SEC consider revising the Proposed Rule to require that transaction-by-transaction data be reported to the RNSA and made available to regulators, but not be made publicly available. SIFMA instead proposes that the RNSA analyze and normalize the reported transaction data to provide aggregated and, where appropriate, averaged transaction terms that better reflect the transaction terms available to lenders and borrowers in the securities lending market. Such

⁶⁶ Proposing Release, 86 FR at 69810, 69811. SIFMA understands this would apply where a broker-dealer borrows securities it carries in a customer's account.

⁶⁷ *Id.*, 86 FR at 69821, 69849 (Questions 68, 81, and 83).

⁶⁸ *Id.*, 86 FR at 69846.

⁶⁹ *Id.*, 86 FR at 69814, 69821, 69849 (Questions 26, 69, 70, 81, and 83).

aggregated terms could include, for example, the quantity of new loans established for that reporting date and a volume-weighted average borrowing fee of a securities loan, aggregated across all firms, for each security loaned (*i.e.*, a VWA Reporting System), based on end of day open securities loans.

By providing data points that take into consideration the numerous, varying factors underlying the borrowing rates, fees and/or rebates of each individual securities lending transaction, a VWA Reporting System would provide truly meaningful and useful information to the market. This would, for example, help avoid confusion concerning why different individual securities loans have different borrowing fees and should minimize the possible misrepresentation that any one borrowing fee should be applicable to all of the intended beneficiaries of the data.

E. Eliminate the Requirement to Report by the End of the Day Information on Securities “Available to Lend”

In response to the SEC’s request for comment,⁷⁰ SIFMA recommends the SEC consider eliminating the proposed requirement to report end of day information on securities “available to lend.” As noted above, SIFMA does not object to the proposed end of day reporting of securities that are “on loan.” However, SIFMA believes the high potential for the resulting data to mislead market participants discussed above in Section IV weighs heavily in favor of this requirement being removed from the Proposed Rule altogether. If the Commission is unwilling to accept SIFMA’s recommendation in spite of these significant concerns, SIFMA recommends that, at a minimum, the SEC should (i) modify the proposed requirement to specify that the reported information is only intended to be an indication of potential availability rather than an affirmative report of available supply and (ii) meet with the industry prior to issuing its next proposing release for the Proposed Rule (or proceeding to adoption) to better understand the impact on the reliability of the aggregated data that would ultimately be made publicly available by the RNSA due to the existing restrictions that may apply to accounts of customers who have agreed to participate in a fully paid lending program and margin customer accounts.

F. Define the Extraterritorial Scope of the Proposed Rule

In response to the SEC’s request for comment,⁷¹ SIFMA recommends that the SEC consider revising the Proposed Rule 10c-1 to clearly define its extraterritorial scope. To avoid inadvertently capturing unwanted extraterritorial activity and imposing an undue burden on the industry, SIFMA believes it would be beneficial for the SEC to expressly stipulate in the Proposed Rule that it would apply only to loans of securities where (i) the country of issue and primary trading market of the securities are the United States⁷² and (ii) the beneficial owner

⁷⁰ *Id.*, 86 FR at 69818, 69819, 69849 (Questions 48, 51, 52, 81, and 83).

⁷¹ *E.g., id.*, 86 FR at 69808, 69849 (Questions 3, 6, 7, 81, and 83).

⁷² SIFMA believes that only when the country of issue and primary trading market of the securities are the United States is there a compelling justification for the Proposed Rule’s reporting requirements, given the SEC’s role in ensuring the functioning of the U.S. securities markets. As indicated in footnote 11 above, SIFMA separately

lender or Lending Agent is a U.S. person, *i.e.*, is (a) a natural person resident in the United States; (b) a partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States; (c) an account (whether discretionary or non-discretionary) of a U.S. person; or (d) an estate of a decedent who was a resident of the United States at the time of death, where principal place of business means the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person. With respect to an externally managed investment vehicle, this location is the office from which the manager of the vehicle primarily directs, controls, and coordinates the investment activities of the vehicle.⁷³

G. Implement a Staged Reporting Regime to Allow Regulators Sufficient Time to Analyze Collected Data and Also Provide at Least an 18-Month Build-Out Period for Lenders

Given the risk that the data made available to the public could be misleading, confusing, or have harmful unintended consequences to market participants (such as revealing perceived credit assessments of broker dealers or sensitive short selling strategies), SIFMA recommends that the SEC implement its rulemaking for the Proposed Rule as a staged process. Specifically, SIFMA believes that the SEC should first finalize the reporting regime for regulatory oversight before proceeding to implement the public dissemination requirements applicable to the RNSA. Once the SEC and the RNSA have become familiar with the data they are receiving and assessed the data's potential utility to the market, the SEC could then impose appropriate rules to make data available to the public. SIFMA notes that such an approach would be consistent with, for example, FINRA's approach in implementing TRACE.⁷⁴

Furthermore, SIFMA recommends that market participants that will have a reporting obligation as a beneficial owner lender, Lending Agent, or Reporting Agent be given a minimum of 18 months following the RNSA's finalization of the technical specifications for reporting to build out the necessary systems and establish and implement the policies and procedures necessary to comply with the Proposed Rule. Even with SIFMA's above-requested changes, the Proposed Rule's reporting regime would not fit cleanly within the SIFMA member firms' existing reporting structures and, therefore, would require considerable time and cost to build out. At present, SIFMA member firms are already undertaking numerous operational and compliance

supports the limitation to equity securities that are part of the national market system, which would go a long way to address this concern.

⁷³ This proposed definition of "U.S. person" is based on concepts set forth in similar definitions in other SEC rules. SIFMA does not believe that other rules are fully relevant for the purposes of proposed Rule 10c-1; however, they do offer general concepts/guidance as to jurisdictional boundaries for triggering loan data reporting. In addition, we suggest, similar to other rules, that a U.S. person should not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.

⁷⁴ FINRA, 2020 TRACE Fact Book (2021), 5, available at https://www.finra.org/sites/default/files/2021-03/Trace_Factbook_2020.pdf ("Public dissemination of [TRACE] transaction information was implemented in three phases. This allowed FINRA to study the impact of transparency on liquidity in the U.S. corporate bond market.").

Ms. Vanessa A. Countryman

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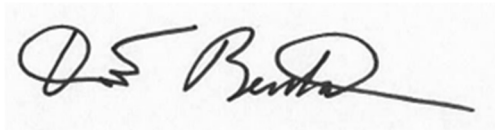
January 7, 2022

buildout efforts in connection with new SEC and FINRA regulatory requirements including, but not limited to, the impending stand-up of FINRA short interest reporting, transition to T+1 settlement, commencement of the security-based swap reporting regime, and updates to electronic recordkeeping requirements for broker-dealers. While the Proposing Release's very short comment period does not provide sufficient time to fully analyze and estimate the amount of time that would be required, SIFMA believes that at least 18 months would be necessary to afford members adequate time to meet the requirements of the final rule.

* * *

SIFMA appreciates the opportunity to respond to the Proposing Release and also your consideration of our recommendations as set forth herein. SIFMA would welcome the opportunity to meet with the Commission Staff to discuss our recommendations and any other aspects of the Proposed Rule. If you have any questions or require additional information, please do not hesitate to contact us by calling Rob Toomey at (212) 313-1124 or Joe Corcoran at (202) 962-7383.

With kindest personal regards,

A handwritten signature in black ink, appearing to read "Ken Bentsen", with a long horizontal flourish extending to the right.

Kenneth E. Bentsen, Jr.
President and CEO

Cc: The Hon. Gary Gensler, Chair
The Hon. Hester M. Peirce, Commissioner
The Hon. Elad L. Roisman, Commissioner
The Hon. Allison Herren Lee, Commissioner
The Hon. Caroline A. Crenshaw, Commissioner
Mr. Haoxiang Zhu, Director, Division of Trading and Markets
Mr. David Saltiel, Deputy Director, Division of Trading and Markets