

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 240

[Release No. 34–98737; File No. S7–18–21]

RIN 3235–AN01

### Reporting of Securities Loans

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (“SEC” or “Commission”) is adopting a new rule under the Securities Exchange Act of 1934 (“Exchange Act”) to increase the transparency and efficiency of the securities lending market by requiring certain persons to report information about securities loans to a registered national securities association (“RNSA”). The new rule also requires certain confidential information to be reported to an RNSA to enhance an RNSA’s oversight and enforcement functions. Further, the new rule requires that an RNSA make certain information it receives, along with daily information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security, available to the public.

**DATES:**

*Effective date:* January 2, 2024.

*Compliance date:* The applicable compliance dates are discussed in Part VIII of this release.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** The Commission is adopting 17 CFR 240.10c–1a (“final Rule 10c–1a” or “final rule”) under the Exchange Act, which requires covered persons to provide to an RNSA information concerning certain securities loans, in the format and manner required by an RNSA, and within specified time periods. The final rule requires an RNSA to make publicly available certain information it receives, within specified time periods, and to keep confidential

certain information it receives. The final rule contains requirements regarding an RNSA’s data retention and availability and permits an RNSA to establish and collect reasonable fees.

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### I. Introduction

The securities lending market is opaque.<sup>1</sup> There is a general lack of comprehensive information on current market conditions in the securities lending market. Although various market participants, such as certain registered investment companies (“investment companies”), are required to periodically make certain disclosures regarding their securities lending activities,<sup>2</sup> parties to securities lending

<sup>1</sup> See *Reporting of Securities Loans*, Release No. 34–93613 (Nov. 18, 2021), 86 FR 69802 (Dec. 8, 2021) (“Proposing Release”), 86 FR 69804–21.

<sup>2</sup> See, e.g., Form N–CEN, Item C.6 (requiring general disclosures relating to an investment company’s securities lending activities); Form N–PORT, Items B.4 and C.12 (requiring disclosure by certain investment companies of certain aggregate information on borrowers of loaned securities and collateral received for loaned securities); 17 CFR 274.101; 17 CFR 274.150. See also *Investment Company Reporting Modernization*, Release No. 34–79095 (Oct. 13, 2016), 81 FR 81870 (Nov. 18, 2016) (discussing, among other things, requirements for securities lending disclosures on Form N–PORT by certain investment companies).

transactions are not currently required to report the material terms of those transactions.<sup>3</sup> 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 end borrowers and lenders alike to ascertain market conditions and to know whether the terms that they receive are consistent with market conditions. These gaps also impact the ability of the Commission, RNSAs and other self-regulatory organizations (“SROs”), and other Federal financial regulators to oversee transactions that are vital to fair, orderly, and efficient markets.<sup>4</sup> Indeed, the size of the U.S. securities lending market can only be estimated as the data currently available with respect to securities lending transactions are “spotty and incomplete.”<sup>5</sup> Further, the FSOC 2020 Annual Report noted data gaps in certain important financial markets including transaction data for securities lending arrangements.<sup>6</sup>

Private vendors have attempted to address the opacity in the securities lending market by offering systems that provide data to borrowers and lenders of securities, such as systems that are only available to those who voluntarily provide their transaction data to the

data vendor.<sup>7</sup> However, data gaps remain despite the private vendor attempts to address opacity in the securities lending market. The private systems are limited to voluntary submissions of data. Further, the data captured by these private vendors is not available to the general public without a subscription, and is not available in one centralized location. Only subscribers to the private vendor have access to such data, which only provides a limited view into securities lending activity. No single vendor has access to pricing information that reflects all securities lending transactions that take place. In addition, data from certain private vendors is limited to loans from a lending program to a broker or dealer and do not capture loans from a broker or dealer to an end borrower. There have also been calls from industry observers and market participants for the Commission to consider measures to provide additional transparency in the securities lending market.<sup>8</sup>

## II. Background

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.<sup>9</sup> A securities loan is typically a fully collateralized transaction. Securities lenders are generally large institutional investors including investment companies, central banks, sovereign wealth funds, pension funds, endowments, and insurance companies.<sup>10</sup> Owners of large, static, unleveraged portfolios, mainly pension funds, increasingly cite securities lending as an important income-enhancing strategy with minimal, or at least controlled, risk.<sup>11</sup> This incremental income not only helps defined-benefit pension funds to generate income, but also provides investment company investors with additional returns.<sup>12</sup>

Traditionally, securities lending and borrowing transactions have been conducted on a bilateral basis.<sup>13</sup> Generally, when an end investor wishes to borrow securities, it may obtain a loan from its broker or dealer from the broker’s or dealer’s inventory or through customer margin accounts, or the broker

or dealer will borrow the securities from a lending agent with whom it has a relationship and will then re-lend the securities to its customer. Loans from lending programs to brokers or dealers occur in what is referred to by market participants as the “Wholesale market,” while loans from a broker or dealer to the end borrower occur in what is referred to by market participants as the “Customer market” (sometimes also known as the “retail market”). Obtaining a securities loan often involves an extensive search for counterparties by brokers or dealers.<sup>14</sup>

Brokers and dealers are the primary borrowers of securities; they borrow for their market making activities or on behalf of their customers.<sup>15</sup> Brokers and dealers who borrow securities typically re-lend those securities or use the securities to cover fails to deliver or short sales arising from proprietary or customer transactions.<sup>16</sup> While the identities of the ultimate securities borrowers are usually unknown, anecdotally, hedge funds rank among the largest securities borrowers and access the lending market mainly through their prime brokers.<sup>17</sup> 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 or dealer), and the securities of customers who have agreed to participate in a fully paid securities lending program offered by their broker or dealer.<sup>18</sup>

Other securities lending transactions are often facilitated by a third party. Custodian banks have traditionally been the primary lending agent or intermediary<sup>19</sup> and lend securities on behalf of their customers for a fee.<sup>20</sup> 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 custodian banks.<sup>21</sup> Agent lenders provide potential borrowers with the inventory of securities available for lending on a daily basis.<sup>22</sup>

<sup>3</sup> See Proposing Release, 86 FR 69803.

<sup>4</sup> In its 2021 Annual Report, the Financial Stability Oversight Council (“FSOC”) states that “[c]entralized monitoring of securities lending activities is difficult due to the lack of comprehensive, standardized statistics on securities lending activities . . . the estimated value of securities on loan globally was \$3.1 trillion at the end of September 2021, up from \$2.5 trillion at the end of September 2020 . . . U.S. securities continue to account for the majority of global securities on loan, accounting for 58 percent of global securities on loan as of the end of September 2021.” See FSOC 2021 Annual Report, at 46, available at <https://home.treasury.gov/system/files/261/FSOC2021AnnualReport.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-andSecurities-Lending-Markets.pdf](https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-andSecurities-Lending-Markets.pdf) (“Office of Financial Research Reference Guide” or “OFR Reference Guide”).

<sup>5</sup> OFR Reference Guide, 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](https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf).

<sup>6</sup> See FSOC 2020 Annual Report, at 187. See also the FSOC 2020 Annual Report describing 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.,” at 45, available at <https://home.treasury.gov/system/files/261/FSOC2020AnnualReport.pdf>.

<sup>7</sup> See OFR Reference Guide, at 64, available at [https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17\\_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf](https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf).

<sup>8</sup> See Proposing Release, 86 FR 69803 n.11.

<sup>9</sup> See Proposing Release, 86 FR 69804.

<sup>10</sup> See Proposing Release, 86 FR 69804.

<sup>11</sup> See Proposing Release, 86 FR 69804.

<sup>12</sup> See Proposing Release, 86 FR 69804.

<sup>13</sup> See Proposing Release, 86 FR 69805.

<sup>14</sup> See Proposing Release, 86 FR 69805.

<sup>15</sup> See Proposing Release, 86 FR 69805.

<sup>16</sup> See Proposing Release, 86 FR 69805.

<sup>17</sup> See Proposing Release, 86 FR 69805.

<sup>18</sup> See Proposing Release, 86 FR 69805.

<sup>19</sup> As discussed below, in Part VII.A, the final rule defines the term “intermediary” as a person that agrees to a covered securities loan on behalf of the lender.

<sup>20</sup> See *infra* Part VII.A.

<sup>21</sup> See Proposing Release, 86 FR 69805.

<sup>22</sup> See Proposing Release, 86 FR 69805.

### III. Statutory Mandate

Section 984(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) added section 10(c) to the Exchange Act to provide the Commission with authority over securities lending.<sup>23</sup> Section 984(b) of the Dodd-Frank Act mandates that the Commission increase transparency of information available to brokers, dealers, and investors.<sup>24</sup>

On November 18, 2021, to supplement the publicly available information involving securities lending, close the data gaps in this market, and minimize information asymmetries between market participants, the Commission proposed Rule 10c–1 under the Exchange Act (“proposed Rule 10c–1” or “proposed rule”).<sup>25</sup> Proposed Rule 10c–1 was designed to provide investors and other market participants with access to pricing and other material information regarding securities lending transactions in a timely manner. The Commission stated 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.<sup>26</sup> In addition, the Commission stated its preliminary belief that the proposed rule would close securities lending data gaps, increase market efficiency, and lead to increased competition among providers of securities lending analytics services and reduced administrative costs for broker-

dealers and lending programs.<sup>27</sup> On balance, the final rule requirements are designed to achieve the objectives of the proposed rule,<sup>28</sup> as discussed below, in Parts VII and IX, and are designed to increase the transparency of information available to brokers, dealers, and investors with respect to loans or borrowing securities.

### IV. Proposed Rule 10c–1

The Commission proposed that any person that loans a security on behalf of itself or another person (a “Lender”) provide certain securities lending information (“Rule 10c–1 information”) to an RNSA<sup>29</sup> in the time periods specified by the proposed rule (*e.g.*, transaction data elements and confidential data elements would be reported within 15 minutes after each loan is effected).<sup>30</sup> As proposed, all securities would be within the scope of the rule.<sup>31</sup>

The proposed rule stated that 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 provide the Rule 10c–1 information to an RNSA on behalf of the beneficial owner within the time periods specified by the proposed rule or enter into a written agreement with a broker or dealer that agrees to provide the Rule 10c–1 information to an RNSA (reporting agent) in accordance with the proposed rule’s requirements.<sup>32</sup> The proposed rule also provided that a beneficial owner would not be required to provide 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.<sup>33</sup>

The proposed rule would have permitted persons required to report (including intermediaries) to enter into a written agreement with a reporting agent that is a broker or dealer to provide the Rule 10c–1 information to an RNSA.<sup>34</sup> Such a reporting agent would be required to establish, maintain, and enforce policies and procedures as well as preserve

records.<sup>35</sup> The reporting agent would also be required to provide an RNSA with an updated list of persons on whose behalf the reporting agent is providing information under the proposed rule.<sup>36</sup>

The proposed rule would have required that an RNSA make certain reported information publicly available as soon as practicable but no later than the next business day.<sup>37</sup> To track the securities lending transaction, the proposed rule would require an RNSA to assign each securities lending transaction with a unique transaction identifier.<sup>38</sup> Loan modifications would be provided to an RNSA if the modifications to the loan involved any of the terms required to be reported.<sup>39</sup> The terms of the loan modification, but not the parties to the loan, would be made public.<sup>40</sup> In addition, proposed Rule 10c–1 required that by the end of each business day information concerning securities “on loan” and “available to loan” would be provided to an RNSA.<sup>41</sup> Such information would be made publicly available by an RNSA on an aggregated basis per security.<sup>42</sup>

Not all information reported to an RNSA would have been made publicly available under the proposed rule. Certain information reported to an RNSA would be necessary for regulatory functions, but would not have been made publicly available due to the likelihood that it would identify market participants or reveal investment decisions.<sup>43</sup> Proposed Rule 10c–1 would have required an RNSA to keep certain information confidential, subject to the provisions of applicable law.<sup>44</sup>

The proposed rule would have allowed an RNSA to charge fees to lenders, but prohibited an RNSA from charging for or limiting the use of the publicly reported data. Specifically, the proposed rule would have required an RNSA to make the published information available without use restrictions and without charge, for at least five years.<sup>45</sup>

In response to the Proposing Release, the Commission received numerous comments expressing a diversity of

<sup>23</sup> Section 984(a) of the Dodd-Frank Act, 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 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. 15 U.S.C. 78j(c)(1). Section 10(c)(2) of the Exchange Act states that nothing in section 10(c)(1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in 12 U.S.C. 1813(q)), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk. 15 U.S.C. 78j(c)(2).

<sup>24</sup> Section 984(b) of the Dodd-Frank Act 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.” Public Law 111–203, sec. 984(b), 124 Stat. 1376 (2010).

<sup>25</sup> See Proposing Release, 86 FR 69851–53.

<sup>26</sup> Proposing Release, 86 FR 69804.

<sup>27</sup> Proposing Release, 86 FR 69804.

<sup>28</sup> See Proposing Release, 86 FR 69804.

<sup>29</sup> See proposed Rule 10c–1(a). Proposed Rule 10c–1 referred to “Rule 10c–1 information” as “the information in paragraphs (b) through (e) of this section.” These paragraphs specifically included transaction data elements, loan modification data elements, confidential data elements, and securities available to loan and securities on loan.

<sup>30</sup> See, *e.g.*, proposed Rules 10c–1(b) and (d).

<sup>31</sup> See Proposing Release, 86 FR 69807 n.60.

<sup>32</sup> See proposed Rule 10c–1(a)(1)(i)(A).

<sup>33</sup> See proposed Rule 10c–1(a)(1)(i)(B).

<sup>34</sup> See proposed Rule 10c–1(a)(1)(ii)(A).

<sup>35</sup> See proposed Rules 10c–1(a)(2)(i) and (2)(iv).

<sup>36</sup> See proposed Rule 10c–1(a)(2)(iii).

<sup>37</sup> See proposed Rule 10c–1(e).

<sup>38</sup> See proposed Rule 10c–1(b).

<sup>39</sup> See proposed Rule 10c–1(c).

<sup>40</sup> See proposed Rule 10c–1(c).

<sup>41</sup> See proposed Rule 10c–1(e).

<sup>42</sup> See proposed Rule 10c–1(e)(3).

<sup>43</sup> See Proposing Release, 86 FR 69816.

<sup>44</sup> See proposed Rules 10c–1(d) and (e)(3).

<sup>45</sup> See proposed Rule 10c–1(g)(3).

perspectives,<sup>46</sup> which are discussed in detail below. Many commenters supported enhanced transparency of information about securities loans.<sup>47</sup>

<sup>46</sup> Comment letters to the proposed rule are available at <https://www.sec.gov/comments/s7-18-21/s71821.htm>.

<sup>47</sup> See, e.g., Letter from Jaime Klima, Chief Regulatory Officer, NYSE Group, Inc. (Jan. 7, 2022) (“NYSE Letter 2”), at 1 (stating that “regulatory oversight of the securities lending market will be meaningfully enhanced if Rule 10c–1 is adopted”); Letter from Marcia E. Asquith, Executive Vice President, FINRA, (Jan. 7, 2022) (“FINRA Letter”), at 1 (stating that “the public dissemination of securities lending information under the Proposal will, among other benefits, improve price discovery in the securities lending market, reduce information asymmetries, close data gaps, and increase market efficiency”); Letter from Kevin Kennedy, Senior Vice President, Nasdaq, Inc. (Jan. 11, 2022) (“Nasdaq Letter”), at 3 (supporting the proposal to make “certain data elements publicly available, thereby increasing the transparency of the securities lending market and reducing competitive advantages that may exist in the marketplace”); Letter from Andrew Park, Americans for Financial Reform Education Fund (Jan. 7, 2022) (“AFREF Letter 1”), at 1, 3 (stating “there is an urgent need to require securities lenders to provide greater details of their loans to a registered national securities association (RNSA) . . . [m]arket participants and regulators alike will greatly benefit from the greater transparency that comes from reporting every securities lending transaction as a result of the proposed changes to Rule 10c–1 . . .”); Letter from Stephen W. Hall, Legal Director and Securities Specialist, and Jason Grimes, Senior Counsel, Better Markets, Inc. (Jan. 7, 2022) (“Better Markets Letter”), at 5 (stating that “increasing transparency into the securities lending market, as the Proposal would do, is sound public policy. It will increase the transparency that investors, other market participants, and regulators (including the SEC) have into the opaque securities lending market.”); Letter from James J. Angel, Ph.D., CFP, CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University (Jan. 4, 2022) (“James J. Angel Letter”), at 2 (stating that “increasing transparency in the securities lending market will reduce the price dispersion seen in the market. Better information about the price and availability of securities lending will allow asset owners . . . to make sure that they are getting proper value for their securities lending.”); Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P. (Jan. 31, 2022) (“Bloomberg L.P. Letter”), at 1 (stating “[w]e appreciate the Commission’s endeavor to improve the transparency and efficiency of the securities lending market by increasing the availability of information regarding securities lending transactions.”); see also Letter from Brian Lamb, CEO, Equilend Holdings, LLC (Mar. 29, 2022) (“Equilend Letter”) (expressing general support for the proposed rule); Letter from Chris Iacovella, Chief Executive Officer, American Securities Association (Jan. 7, 2022) (“ASA Letter”), at 1 (stating “investors, especially retail investors, have no idea what the cost to borrow a security in the market is at any given time. The SEC and the public need transparency into what a loan costs . . .”); Letter from Aron Szapiro, Head of Retirement Studies and Public Policy, Morningstar, Inc. (Jan. 7, 2022) (“Morningstar Letter”), at 4 (expressing general support for increasing transparency in the securities lending market and that the public will obtain a “well-informed view” of the securities lending market from the proposed data publication); Letter from Joseph P. Kamnik, Chief Regulatory Counsel, Options Clearing Corp. (Jan. 7, 2022) (“OCC Letter”); Form Letter from John Burkle, et al. (Aug. 16, 2022) (expressing support for

Other commenters did not support the rule.<sup>48</sup> Certain commenters addressed the scope of the proposed rule and the timing for reporting information to an RNSA as discussed below, in Parts VII.A through VII.G.

## V. Overview of Final Rule

The final rule requires covered persons<sup>49</sup> to provide securities loan information concerning reportable securities<sup>50</sup> to an RNSA,<sup>51</sup> in the format and manner required by an RNSA,<sup>52</sup> and within specified time periods<sup>53</sup> (“Rule 10c–1a information”).<sup>54</sup> The term “covered person” is defined to mean: (1) any person that agrees to a covered securities loan on behalf of a lender (“intermediary”); (2) any person that agrees to a covered securities loan as a lender when an intermediary is not used unless 17 CFR 240.10c–1a(j)(1)(iii) (“final Rule 10c–1a(j)(1)(iii)”) applies to a broker or dealer borrowing fully paid or excess margin securities;<sup>55</sup> or (3) a broker or dealer when borrowing fully paid or excess margin securities.<sup>56</sup> In addition, 17 CFR 240.10c–1a(a) (“final

increased transparency in the securities lending market); Letter from Aaron Swaney (Jan. 4, 2022) (“Requiring entities with significant involvement in the markets to report their activities . . . is quite reasonable and very necessary.”); Letter from Peter Antosh, Lawyer (Jan. 4, 2022) (“ . . . the information received and shared via this proposed rule would also . . . increase the public’s access to reliable pertinent market information, improving overall market efficiency”); Letter from Tim DG (Aug. 16, 2022) (“This rule is essential to give retail and more importantly, the regulators more insight to keep fraudulent behaviors at bay.”); Letter from Adam Slee (Aug. 16, 2022) (“We need greater transparency in the market to help ordinary people be able to better understand what is going on[.]; this is a good step in the right direction.”); Letter from Tim R. (Aug. 16, 2022) (“This proposal will help true price discovery.”); Letter from Don M. Cromer (Oct. 31, 2022) (“I believe strongly in the transparency of our markets, and I feel that this rule is a strong step in the right direction, and I hope to see many more like it.”).

<sup>48</sup> See, e.g., Letter from Kevin To, Data Boiler Technologies, LLC (Jan. 7, 2022) (“Data Boiler Technologies Letter”), at 4; Letter from Stephen John Berger, Managing Director, Global Head of Government & Regulatory Policy, Citadel (Apr. 4, 2022) (“Citadel Letter”).

<sup>49</sup> See *infra* Part VII.A (discussing the definition of the term “covered person”).

<sup>50</sup> See 17 CFR 240.10c–1a(j)(3) (“final Rule 10c–1a(j)(3)”).

<sup>51</sup> See 17 CFR 240.10c–1a(j)(5) (“final Rule 10c–1a(j)(5)”).

<sup>52</sup> See 17 CFR 240.10c–1a(f) (“final Rule 10c–1a(f)”).

<sup>53</sup> See 17 CFR 240.10c–1a(c) (“final Rule 10c–1a(c)”), 17 CFR 240.10c–1a(d) (“final Rule 10c–1a(d)”), 17 CFR 240.10c–1a(e) (“final Rule 10c–1a(e)”).

<sup>54</sup> The change in designation from proposed Rule 10c–1 to final Rule 10c–1a conforms with **Federal Register** requirements for rule designations.

<sup>55</sup> See Proposing Release, 86 FR 69803 n.9.

<sup>56</sup> See 17 CFR 240.10c–1a(j)(1)(i) (“final Rule 10c–1a(j)(1)(i)”), 17 CFR 240.10c–1a(j)(1)(ii) (“final Rule 10c–1a(j)(1)(ii)”), final Rule 10c–1a(j)(1)(iii).

Rule 10c–1a(a)”) specifies that any covered person that agrees to a covered securities loan must comply with the rule.<sup>57</sup>

If any person agrees to a covered securities loan on behalf of the lender (an “intermediary”), the intermediary has the obligation to provide Rule 10c–1a information to an RNSA.<sup>58</sup> If an intermediary is not used, the lender is required to provide Rule 10c–1a information to an RNSA.<sup>59</sup> If a covered securities loan consists of a broker or dealer borrowing fully paid or excess margin securities, only the broker or dealer is required to provide the Rule 10c–1a information to an RNSA, not the lender.<sup>60</sup>

However, in a change from the proposed rule, as discussed below, in Part VII.A, the final rule excludes from the definition of the term “covered person” a clearing agency when providing only the functions of a central counterparty as defined pursuant to 17 CFR 240.17Ad–22(a)(3) (“Rule 17Ad–22(a)(2)”) of the Exchange Act or a central securities depository as defined pursuant to 17 CFR 240.17Ad–22(a)(3) (“Rule 17Ad–22(a)(3)”) of the Exchange Act.<sup>61</sup> Thus, a clearing agency is not required to report Rule 10c–1a information to an RNSA for a covered securities loan when acting in the capacity or engaged in activities as a central counterparty or a central securities depository in connection with a covered securities loan.

The final rule permits a covered person to rely on a reporting agent that is a broker, dealer, or registered clearing agent to provide Rule 10c–1a information to an RNSA to fulfill such covered person’s reporting obligation.<sup>62</sup> To do so, the covered person must enter into a written agreement with a reporting agent, that agrees to provide Rule 10c–1a information to an RNSA, and provide such reporting agent with timely access to such information.<sup>63</sup> If the reporting agent receives the Rule 10c–1a information from the covered person on a timely basis, the reporting agent assumes responsibility for

<sup>57</sup> In addition, as discussed below, in Part VII.E, the use of the term “agrees to a covered securities loan” clarifies that the Rule 10c–1a information is not limited to securities loans that have been settled. If there are multiple lenders to the same loan, to avoid duplicative reporting, the parties could coordinate to file a single, combined report.

<sup>58</sup> See final Rule 10c–1a(j)(1)(i).

<sup>59</sup> See final Rule 10c–1a(j)(1)(ii).

<sup>60</sup> See final Rule 10c–1a(j)(1)(iii).

<sup>61</sup> See final Rule 10c–1a(j)(1)(i).

<sup>62</sup> See 17 CFR 240.10c–1a(a)(2) (“final Rule 10c–1a(a)(2)”).

<sup>63</sup> See 17 CFR 240.10c–1a(a)(2)(i) (“final Rule 10c–1a(a)(2)(i)”), 17 CFR 240.10c–1a(a)(2)(ii) (“final Rule 10c–1a(a)(2)(ii)”).

compliance with the reporting requirements under the final rule.

The final rule defines a “covered securities loan” as a transaction in which any person on behalf of itself or one or more other persons, lends a “reportable security” to another person (except for a position at a clearing agency that results from certain central counterparty or central securities depository services).<sup>64</sup> In addition, the use of margin securities, as defined in 17 CFR 240.15c3–3(a)(4) (“Rule 15c3–3(a)(4)”), by a broker or dealer is not a covered securities loan for purposes of the final rule unless the broker or dealer lends such margin securities to another person.<sup>65</sup>

The term “reportable security” is defined as any security or class of an issuer’s securities for which information is reported or required to be reported to the consolidated audit trail as required by Rule 613 of the Exchange Act and the CAT NMS Plan (“CAT”), the Financial Industry Regulatory Authority’s Trade Reporting and Compliance Engine (“TRACE”), or the Municipal Securities Rulemaking Board’s (“MSRB”) Real-Time Transaction Reporting System (“RTRS”), or any reporting system that replaces one of these systems.<sup>66</sup>

The final rule requires a covered person, directly or indirectly through a reporting agent, to report three types of data, which together comprise the Rule 10c–1a information. The first type of data concerns the material terms of the covered securities loan and must be provided to an RNSA by the end of the day on which the covered securities loan is effected (“data elements”).<sup>67</sup> The second type of data concerns modifications to a covered securities loan and must be provided to an RNSA by the end of the day on which a covered securities loan is modified, if the modification occurs after other information about the covered securities loan has already been provided to an RNSA, and results in a change to such information.<sup>68</sup> The third type of data concerns confidential information in connection with a covered securities loan and must be provided to an RNSA by the end of the day on which a covered securities loan is effected.<sup>69</sup> The final rule requires that an RNSA keep the third type of information

confidential subject to applicable law.<sup>70</sup> The final rule also requires an RNSA to make the Rule 10c–1a information available to the Commission; or other persons as the Commission may designate by order upon a demonstrated regulatory need.<sup>71</sup>

An RNSA is required to make publicly available the following information not later than the morning of the business day<sup>72</sup> after the covered securities loan is effected:<sup>73</sup> (1) the unique identifier assigned to a covered securities loan by an RNSA<sup>74</sup> and the security identifier;<sup>75</sup> (2) the data elements, except for loan amount;<sup>76</sup> and (3) information pertaining to the aggregate transaction activity and the distribution of rates among loans and lenders (“distribution of loan rates”)<sup>77</sup> for each reportable security and related unique identifier.<sup>78</sup> An RNSA is also required to make publicly available the loan amount on the twentieth business day after the covered securities loan is effected along with loan and security identifying information.<sup>79</sup>

In addition, an RNSA is required to make publicly available any modification to the data elements, except for modification to the loan amount, not later than the morning of the business day after the covered securities loan is modified.<sup>80</sup> An RNSA is also required to make publicly

available modifications to the loan amount on the twentieth business day after the loan amount is modified along with loan and security identifying information.<sup>81</sup>

The final rule requires an RNSA to implement rules regarding the format and manner of its collection of information and make publicly available such information in accordance with rules promulgated pursuant to 15 U.S.C. 78s(b) (“section 19(b)”) and 17 CFR 240.19b–4 (“Rule 19b–4”) of the Exchange Act.<sup>82</sup> The final rule also contains requirements regarding an RNSA’s data retention and availability.<sup>83</sup> Specifically, an RNSA must maintain the information on its website or a similar means of electronic distribution, without use restrictions, for a period of at least five years.<sup>84</sup> In addition, the final rule permits an RNSA to establish and collect reasonable fees pursuant to rules promulgated pursuant to section 19(b) and Rule 19b–4.<sup>85</sup>

Final Rule 10c–1a is designed to provide access to timely, comprehensive securities loan information to market participants, the public, and regulators, which will help provide borrowers and lenders with better tools to assess the terms of their securities loans and enhance the ability of regulators to oversee the securities lending market. In addition, the final rule will result in the public availability of new information for investors and other market participants to consider in the mix of information about the securities lending market and the securities markets generally to better inform their decisions.<sup>86</sup> The final rule will also provide regulators with information that may be used in conjunction with other

<sup>70</sup> See 17 CFR 240.10c–1a(g)(4) (“final Rule 10c–1a(g)(4)”).

<sup>71</sup> See 17 CFR 240.10c–1a(h)(2) (“final Rule 10c–1a(h)(2)”).

<sup>72</sup> Similar to the proposed rule, the final rule does not specify, for purposes of compliance with the final rule, exactly what time is the “end of the business day,” “morning of the business day,” or what holidays should not be considered a “business day,” to give an RNSA the discretion to structure its systems and processes as it sees fit and implement its rules accordingly. See, e.g., Proposing Release, 86 FR 69816 n.104. The Commission did not receive any comments addressing this point. As an example, for times set by an RNSA for other reporting regimes, an RNSA has set reporting for 6 p.m. (see, e.g., <https://www.finra.org/filing-reporting/regulatory-filing-systems/short-interest>) or times depending on whether transactions are executed during or after system hours or on non-business days (see, e.g., <https://www.finra.org/rules-guidance/rulebooks/finra-rules/6730>).

<sup>73</sup> See 17 CFR 240.10c–1a(g)(1) (“final Rule 10c–1a(g)(1)”).

<sup>74</sup> See 17 CFR 240.10c–1a(g)(1)(i)(A) (“final Rule 10c–1a(g)(1)(i)(A)”).

<sup>75</sup> See 17 CFR 240.10c–1a(g)(1)(i)(C) (“final Rule 10c–1a(g)(1)(i)(C)”) and 17 CFR 240.10c–1a(g)(5) (“final Rule 10c–1a(g)(5)”).

<sup>76</sup> See 17 CFR 240.10c–1a(g)(1)(i)(B) (“final Rule 10c–1a(g)(1)(i)(B)”).

<sup>77</sup> See *infra* Part IX.C.1 (Benefits of Increased Transparency in the Securities Lending Market).

<sup>78</sup> See final Rule 10c–1a(g)(5).

<sup>79</sup> See 17 CFR 240.10c–1a(g)(2) (“final Rule 10c–1a(g)(2)”).

<sup>80</sup> See 17 CFR 240.10c–1a(g)(3)(i) (“final Rule 10c–1a(g)(3)(i)”).

<sup>81</sup> See 17 CFR 240.10c–1a(g)(3)(ii) (“final Rule 10c–1a(g)(3)(ii)”).

<sup>82</sup> See final Rule 10c–1a(f).

<sup>83</sup> See 17 CFR 240.10c–1a(h) (“final Rule 10c–1a(h)”).

<sup>84</sup> See 17 CFR 240.10c–1a(h)(3) (“final Rule 10c–1a(h)(3)”).

<sup>85</sup> See 17 CFR 240.10c–1a(i) (“final Rule 10c–1a(i)”) and section 19(b). See also 15 U.S.C. 78o–3 (“section 15A”).

<sup>86</sup> As discussed in the Proposing Release, currently available data on the securities lending market 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 uncertain 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 vendors’ systems in order to capture as much of the currently available data as they determine to purchase, which can be expensive. See Proposing Release, 86 FR 69807 (citing Beneficial Owners Demand Independent Benchmarking, Global Inv., 2017 WLNR 5380098 (Feb. 2, 2017)).

<sup>64</sup> See 17 CFR 240.10c–1a(j)(2)(i) (“final Rule 10c–1a(j)(2)(i)”); 17 CFR 240.10c–1a(j)(2)(ii) (“final Rule 10c–1a(j)(2)(ii)”).

<sup>65</sup> See 17 CFR 240.10c–1a(j)(2)(iii) (“final Rule 10c–1a(j)(2)(iii)”).

<sup>66</sup> See final Rule 10c–1a(j)(2)(ii).

<sup>67</sup> See final Rule 10c–1a(c).

<sup>68</sup> See 17 CFR 240.10c–1a(d) (“final Rule 10c–1a(d)”).

<sup>69</sup> See final Rule 10c–1a(e).

information that is currently available to regulators to help assess market events.

## VI. Overview of Changes From Proposed Rule

The Commission is adopting final Rule 10c-1a with certain modifications from the proposed rule made in response to comments. The final rule:

- Modifies the scope of persons required to report by:

- Specifying the persons who have a reporting obligation with a new definition of “covered person” to distinguish persons who have a reporting obligation from those persons who do not;<sup>87</sup> specifically, requiring reporting by any person that agrees to a covered securities loan on behalf of the lender, any person that agrees to a covered securities loan as a lender if an intermediary is not used, or a broker or dealer when borrowing fully paid or excess margin securities, and providing that an intermediary need not be a certain type of entity;

- Excluding clearing agencies from the new definition of “covered person” when engaged only in certain central counterparty or central securities depository activities;

- Separating the requirements for covered persons and reporting agents into distinct paragraphs;<sup>88</sup> and

- Adding a new definition for “reporting agent” to specify that a covered person may rely on a reporting agent that is a broker, dealer, or registered clearing agency<sup>89</sup> provided there is a written agreement between the covered person and the reporting agent under which the reporting agent agrees to establish, maintain, and enforce policies and procedures to ensure compliance with the final rule and if the covered person provides timely information to the reporting agent.<sup>90</sup>

- Modifies the scope of securities for which loans must be reported by adding a new definition for “reportable security” to mean any security or class of an issuer’s securities for which information is reported or required to be reported to the CAT, TRACE, or RTRS, or any reporting system that replaces one of these systems;<sup>91</sup> and

- Specifies the type of loan transaction to which the final rule applies by defining a new term “covered securities loan,” which excludes the use of margin securities by a broker or

dealer (e.g., rehypothecation) other than the lending of such margin securities by a broker or dealer, as well as a position at a clearing agency that results from certain central counterparty or central securities depository services.<sup>92</sup>

- Streamlines information required to be reported by:

- Removing the requirements in paragraph (e) of the proposed rule to provide securities “available to loan” and securities “on loan” information to an RNSA and the requirement for an RNSA to make such information public;<sup>93</sup> and

- Replacing the requirement to report a description of the loan modification with a requirement to report the specific modification and the specific data element being modified.<sup>94</sup>

- Specifies that all data elements for covered securities loans that were not required to be reported on the date agreed to or on the date last modified, but which subsequently become covered securities loans, must be reported when the covered securities loan is modified.<sup>95</sup>

- Modifies the timing of reporting by:

- Replacing the requirements to report data elements and confidential data elements to an RNSA within 15 minutes after each loan is effected with requirements to report such elements by the end of the day on which a covered securities loan is effected;<sup>96</sup> and

- Replacing the requirement to report loan modification data elements to an RNSA within 15 minutes after each loan is modified with a requirement to report such elements by the end of the day on which a covered securities loan is modified.<sup>97</sup>

- Specifies the treatment of open-ended loans in existence prior to the final rule.<sup>98</sup>

- Modifies the responsibilities of an RNSA by:

- Defining the term “RNSA” to specify that such term refers to an association of brokers and dealers that is registered as a national securities association pursuant to 15 U.S.C. 78o-3 (“section 15A”) of the Exchange Act;<sup>99</sup>

- Separating an RNSA’s data publication requirements into new paragraph (g) of the final rule to more

clearly delineate an RNSA’s requirements from the reporting requirements applicable to covered persons and reporting agents;<sup>100</sup>

- Replacing the requirement for an RNSA to publish the loan amount (as well as any modifications to loan amount) as soon as practicable and instead: (1) make the loan amount public on the twentieth business day after the covered security loan is effected (or modified), and (2) make specified loan and security identifying information public on the twentieth business day after the covered security loan is effected (or modified);<sup>101</sup>

- Adding a new requirement to paragraph (g) of the final rule for an RNSA to publish, on a daily basis, information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security in order to provide market participants with timely access to loan rate information that incorporates information about loan sizes;<sup>102</sup> and

- Removing the requirement in paragraph (g) of the proposed rule that collected information be made available to the public “without charge,” and removing the requirement in paragraph (h) of the proposed rule that fees only be paid from persons who provide Rule 10c-1a information directly to an RNSA.<sup>103</sup>

In addition, the final rule includes some technical modifications, such as modifying the rule designation to conform with **Federal Register** requirements as well as additional technical or conforming modifications that are minor and not substantive. Responses to comments requesting clarification about the cross-border scope of the rule are also provided below, in Part VII.M. Further, the Commission is providing compliance dates requiring that: (1) RNSAs propose rules pursuant to final Rule 10c-1a(f) within four months of the effective date of final Rule 10c-1a; (2) the proposed RNSA rules are effective no later than 12 months after the effective date of final Rule 10c-1a; (3) covered persons report Rule 10c-1a information to an RNSA starting on the first business day 24 months after the effective date of final Rule 10c-1a (the “reporting date”); and (4) RNSAs publicly report Rule 10c-1a information pursuant to final Rules 10c-1a(g) and (h)(3) within 90 calendar days of the reporting date.

<sup>87</sup> See 17 CFR 240.10c-1a(j)(1) (“final Rule 10c-1a(j)(1)”).

<sup>88</sup> See final Rules 10c-1a(a) and 17 CFR 240.10c-1a(b) (“final Rule 10c-1a(b)”).

<sup>89</sup> See 17 CFR 240.10c-1a(j)(4) (“final Rule 10c-1a(j)(4)”).

<sup>90</sup> See final Rule 10c-1a(a)(2).

<sup>91</sup> See final Rule 10c-1a(j)(3).

<sup>92</sup> See 17 CFR 240.10c-1a(j)(2) (“final Rule 10c-1a(j)(2)”).

<sup>93</sup> See proposed Rule 10c-1(e).

<sup>94</sup> See 17 CFR 240.10c-1a(d)(1)(ii) (“final Rule 10c-1a(d)(1)(ii)”).

<sup>95</sup> See 17 CFR 240.10c-1a(d)(2) (“final Rule 10c-1a(d)(2)”).

<sup>96</sup> See final Rules 10c-1a(c) and 10c-1a(e).

<sup>97</sup> See final Rule 10c-1a(d).

<sup>98</sup> See final Rule 10c-1a(d)(2).

<sup>99</sup> See final Rule 10c-1a(j)(5).

<sup>100</sup> See 17 CFR 240.10c-1a(g) (“final Rule 10c-1a(g)”).

<sup>101</sup> See final Rule 10c-1a(g)(2).

<sup>102</sup> See final Rule 10c-1a(g)(5).

<sup>103</sup> See proposed Rule 10c-1(h).

## VII. Discussion of the Final Rule

### A. Scope of Persons With Reporting Obligations—10c-1a(j)(1)

#### Proposed Rule

The proposed rule would have required that any person that loans a security on behalf of itself or another person shall provide Rule 10c-1 information to an RNSA.<sup>104</sup> The Proposing Release stated that the term “person,” for purposes of the Exchange Act, means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.<sup>105</sup>

The proposed rule also stated that “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 . . . provide the Rule 10c-1 information to an RNSA . . . .”<sup>106</sup> However, if a person loaned a security on behalf of itself, and an intermediary did not act on its behalf, such person would be the one required to provide the Rule 10c-1 information to an RNSA.<sup>107</sup>

The Commission proposed that when “a bank, clearing agency, broker, or dealer” acts as an intermediary (or “lending agent”) on behalf of a person that owns loaned securities the lending agent would have the reporting obligation.<sup>108</sup> When discussing the rationale for this requirement, the Commission stated that lending agents are in the best position to know when securities have been loaned from the portfolios that the lending agent represents, and that the owner may not know that the lending agent has lent securities from their portfolio until after the time prescribed by proposed Rule 10c-1 to provide Rule 10c-1 information to an RNSA.<sup>109</sup> The Proposing Release also stated that custodian banks have traditionally been the primary lending agent or intermediary and lend securities on behalf of their customers.<sup>110</sup>

The Commission proposed a single-sided approach of only applying the rule’s reporting requirements to

securities lenders and intermediaries acting on behalf of lenders, and not to borrowers. The Proposing Release explained that such an approach could avoid the potential double counting of transactions.<sup>111</sup> It also explained that lenders are more likely to have access to the Rule 10c-1 information, but a borrower may not be privy to all of the information required to be provided to an RNSA under the proposed rule.<sup>112</sup> The Commission also stated that to the extent smaller entities engage in securities lending, they generally employ lending agent intermediaries, which would relieve them from having to provide proposed Rule 10c-1 information to an RNSA.<sup>113</sup> Accordingly, the Commission stated its preliminary belief that requiring only securities lenders or intermediaries to a loan of securities to provide the proposed Rule 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.<sup>114</sup>

#### Final Rule

Many commenters requested additional clarity regarding the market participants that would be required to provide the proposed Rule 10c-1 information to an RNSA.<sup>115</sup> As

discussed below in this part, to address commenter concerns, and to specify which persons are required to provide Rule 10c-1a information to an RNSA, the final rule defines the term “covered person” to mean: (1) any person that agrees to a covered securities loan on behalf of a lender (“intermediary”) other than a clearing agency when providing only the functions of a central counterparty or central securities depository; (2) any person that agrees to a covered securities loan as a lender when an intermediary is not used, unless the borrower is a broker or dealer borrowing fully paid or excess margin securities; or (3) a broker or dealer when borrowing fully paid or excess margin securities.<sup>116</sup> Accordingly, if a person uses an intermediary, such as a lending agent that is a custodian bank, to run its lending program to lend securities to other persons on its behalf, the custodian bank is the covered person for purposes of the final rule.<sup>117</sup> If,

However, the final rule allows persons other than banks, brokers, dealers, and clearing agencies to act as intermediaries (*i.e.*, lending agents), which could increase competition among such entities. The final rule also permits covered persons to use third party vendors to help facilitate the fulfillment of their reporting obligation. These elements of the final rule should address some of the implementation costs raised by the commenter. As the Commission stated in the Proposing Release, 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 final Rule 10c-1a to provide Rule 10c-1a information to an RNSA. *See* Proposing Release, 86 FR 69809. Expanding reporting requirements further, as the commenter suggests, could reduce the timeliness of the information required to be reported.

<sup>116</sup> *See* final Rule 10c-1a(j)(1). The final rule’s approach of requiring reporting by an intermediary if one is used, and by the lender if an intermediary is not used, is comparable to one commenter’s recommendation “to include a set reporting hierarchy . . . to determine the counterparty that will be responsible to report the required information.” *See* Letter from Linklaters LLP (Apr. 1, 2022) (“Linklaters Letter”), at 5.

<sup>117</sup> One commenter recommended that “[lending] agents should not be liable for the failure to report any information that they do not control as the intermediary unless such information has been provided to them by the principal in a timely manner. The rule should also reflect that a lending agent should not be liable for the content of information provided to it by a principal unless the agent has actual knowledge that the information is inaccurate.” *See* Letter from Briget Polichene, Chief Executive Officer, Institute of International Bankers (Jan. 7, 2022) (“IIB Letter”), at 10. However, the Commission continues to believe that lending agents, as parties to the loan, are well positioned to provide the required Rule 10c-1a information and often are in possession of more information concerning the loan than the principal (or beneficial owner). *See* Proposing Release, 86 FR 69109-10 (“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”).

<sup>111</sup> *See* Proposing Release, 86 FR 69807.

<sup>112</sup> *See* Proposing Release, 86 FR 69807.

<sup>113</sup> *See* Proposing Release, 86 FR 69808.

<sup>114</sup> *See* Proposing Release, 86 FR 69808.

<sup>115</sup> *See* Letter from Susan Olson, General Counsel, and Sarah A. Bessin, Associate General Counsel, Investment Company Institute (Jan. 7, 2022) (“ICI Letter 1”), at 8 (“there is a lack of clarity in the Proposal regarding the concepts of ‘lender,’ ‘beneficial owner,’ ‘lending agent,’ and ‘reporting agent’”); Letter from Peter J. Germain, Chief Legal Officer, Federated Hermes, Inc. (Jan. 7, 2022) (“Federated Hermes Letter”), at 2; Letter from Elizabeth Kent, Managing Director, Global Public Policy Group, and Roland Villacorta, Managing Director, Securities Lending, BlackRock (Jan. 7, 2022) (“BlackRock Letter”), at 2 (“We recommend the Commission provide more clarity on the scope of lenders and loans subject to the proposed requirements.”). In addition, one commenter stated that empowering the owner of the securities to determine the manner of reporting would reduce the implementation costs for lenders and mitigate the risk of inaccurate data being reported. The commenter further stated that responsibility for reporting obligations would then be included in either the master securities lending agreement between lender and borrower or in the securities lending agent agreement between lender and lending agent, or both. *See* Letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, Managed Funds Association (Aug. 4, 2023) (“MFA Letter 3”), at 7. The final rule permits covered persons to contract with reporting agents that are brokers, dealers, or registered clearing agencies under certain conditions intended to ensure that the reporting obligations are met. A beneficial owner cannot assign the reporting obligation when an intermediary is used, as the intermediary has the reporting obligation under final Rule 10c-1a(j)(1)(i).

<sup>104</sup> *See* proposed Rule 10c-1(a). *See also* Proposing Release, 86 FR 69807.

<sup>105</sup> *See* Proposing Release, 86 FR 69807 (citing 15 U.S.C. 78c(a)(9)).

<sup>106</sup> *See* proposed Rules 10c-1(a)(1)(i)(A)(1) and 10c-1(a)(1)(i)(B) (stating that “[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”).

<sup>107</sup> *See* proposed Rule 10c-1(a)(1).

<sup>108</sup> *See* proposed Rule 10c-1(a)(1)(i)(A).

<sup>109</sup> *See* Proposing Release, 86 FR 69809.

<sup>110</sup> *See* Proposing Release, 86 FR 69805.

however, a person does not use an intermediary to lend securities on their behalf, such person is the covered person for purposes of the final rule. For example, a fund is a covered person for purposes of the final rule if that fund runs its own lending program and lends securities to other persons without the use of an intermediary, such as custodian bank. Further, a broker or dealer who borrows fully paid or excess margin securities from its customer is the covered person for purposes of the final rule, and the customer of the broker or dealer is not a covered person.

The definition of “covered person” uses the term “agrees to” instead of “loans a security” as proposed to make clear that a customer of a broker or dealer that loans a reportable security to the broker or dealer in a fully paid lending arrangement is not required to comply with the final rule. Instead, the broker or dealer that borrows the reportable security is required to comply with the final rule and must report Rule 10c–1a information on the covered securities loan. Further, as discussed below, in Part VII.E, the term “agrees to a covered securities loan” also provides that Rule 10c–1a information is not limited to covered securities loans that have been settled.

One commenter recommended that the Commission not “limit permitted ‘lending agents’ for purposes of the rule to banks, clearing agencies, brokers, or dealers, as proposed,” but instead “permit any lending agent that acts as an intermediary to a loan of securities to report on behalf of a beneficial owner.”<sup>118</sup> The commenter stated that as long as a lending agent could meet the requirements of the proposed rule, such an expansion would “reflect the variety of lending agents that funds use” and “would facilitate reporting by beneficial owners that prefer to use non-broker-dealer lending agents to report their securities loans.”<sup>119</sup> The Commission agrees, and has modified the final rule to define “covered person” to encompass “[a]ny person that agrees to a covered securities loan on behalf of the lender.”<sup>120</sup>

One commenter sought clarification of whether a “branch or the entity” would be responsible for proposed Rule 10c–1 information reporting if the branch

enters into a covered securities loan, although the commenter did not define the terms “branch” or “entity.”<sup>121</sup> Determining the “person” required to report in complex organizational structures will depend on the facts and circumstances. A branch or office of a covered person, as opposed to a subsidiary or affiliate, may not constitute a distinct covered person, but rather different parts of the same covered person.<sup>122</sup> The designation of a business unit as a branch, office, or otherwise, is not dispositive of whether such business unit has the obligation to report Rule 10c–1a information.<sup>123</sup> One commenter sought confirmation that a clearing agency’s provision of depository or central clearing services, including novation, processing, settlement, netting, and incidental services, do not make the clearing agency an intermediary to a loan of securities.<sup>124</sup> The Commission agrees that a clearing agency’s provision of depository or central clearing services<sup>125</sup> to securities lending transactions is not the type of activity that final Rule 10c–1a is designed to cover. By acting as a central counterparty, including by novating a loan, a clearing agency steps into the shoes of the parties to the loan and technically may become a person that

agrees to a loan on its own behalf or on behalf of another person. However, requiring reporting by a registered clearing agency providing such central counterparty or securities depository services would not provide additional transparency and would be duplicative of the reporting requirements that apply to the loan’s lender or intermediary prior to it being cleared. Accordingly, the final rule specifically excludes from the “covered person” definition a clearing agency when providing only the functions of a central counterparty pursuant to 17 CFR 240.17Ad–22(a)(2) (“Rule 17Ad–22(a)(2)”) or a central securities depository pursuant to 17 CFR 240.17Ad–22(a)(3) (“Rule 17Ad–22(a)(3)”).<sup>126</sup> The exclusion would not apply when the clearing agency is acting in a different capacity (e.g., as an intermediary providing the services of a lending agent).<sup>127</sup>

Certain commenters supported the proposed single-sided reporting structure (i.e., requiring reporting by any person that loans a security on behalf of itself or another person, but not requiring reporting by the borrower) to alleviate concerns about double counting loans of securities.<sup>128</sup> One

<sup>126</sup> See final Rule 10c–1a(j)(1)(i). Rule 17Ad–22(a)(2) of the Exchange Act defines “central counterparty” to mean a clearing agency that interposes itself between the counterparties to securities transactions, acting functionally as the buyer to every seller and the seller to every buyer. Rule 17Ad–22(a)(3) of the Exchange Act defines “central securities depository” to mean a clearing agency that is a securities depository as described in section 3(a)(23)(A) of the Exchange Act. Section 3(a)(23)(A) describes a securities depository as a person who: (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates; or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.

<sup>127</sup> The Commission understands that clearing agencies do not currently provide services related to securities loans beyond acting as a central counterparty or central securities depository. Registered clearing agencies that wish in the future to expand services relating to securities loans, will be required to submit rule filings under section 19(b) and Rule 19b–4 in which they will be required to describe how the proposed changes would comply with existing federal securities laws, including the final rule. Clearing agencies that are operating under an exemption from registration will be required to seek modifications to their exemptions that are compliant with the final rule in order to expand the services they provide in relation to securities loans. See section 19(b) and Rule 19b–4 of the Exchange Act.

<sup>128</sup> See, e.g., ICI Letter 1, at 5; Letter from Phoebe Papageorgiou, Vice President, Trust Policy, American Bankers Association (Jan. 7, 2023) (“ABA Letter”), at 2–3; Letter from Thomas Deinet, Executive Director, The Standards Board of

<sup>121</sup> See Letter from Mary Jane Schuessler, Canadian Securities Lending Association (Jan. 12, 2022) (“CASLA Letter”), at 3.

<sup>122</sup> See Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Release No. 34–74244 (Feb. 11, 2015), 80 FR 14564, 14652 n.813 (Mar. 19, 2015) (discussing foreign branches and stating that “because a branch or office has no separate legal existence under corporate law, the branch or office would be an integral part of the U.S. person itself”). See also *infra* Part VII.M (discussing the cross-border application of final Rule 10c–1a).

<sup>123</sup> See *infra* Part VII.M.

<sup>124</sup> See Letter from Michele Hillery, Managing Director, General Manager of Equity Clearing and DTC Settlement Service, DTCC (Jan. 7, 2022) (“DTCC Letter”), at 3–4. See also DTCC Letter, at 1 (stating that “requiring the clearing agency to assume the obligations of traditional lending agents for providing [traditional securities depository, central counterparty, or incidental services] would misplace the burden of responsibility and result in double reporting.”); OCC Letter, at 9 (recommending that a clearing agency should not assume the reporting obligations as an intermediary to a loan of securities under the proposed rule when it is not actively involved with the lending of securities of beneficial owners or for their own account, but providing only central counterparty services).

<sup>125</sup> See DTCC Letter, at 2–3 (stating that it is “a central securities depository that . . . holds securities on behalf of its participants and effects transfers between participant accounts by book entry, including to facilitate the settlement of securities lending transactions.” Also, that “depository activities and related incidental services do not affect supply or demand in the securities lending market, the pricing of securities lending transactions, or other relevant data regarding the securities lending market”).

<sup>118</sup> See ICI Letter 1, at 5.

<sup>119</sup> See ICI Letter 1, at 5.

<sup>120</sup> See final Rule 10c–1a(j)(1)(i). Although the Commission is not limiting who can act as an intermediary for the purposes of this rule, other regulatory requirements may apply to persons who intermediate transactions such as loans of securities. See, e.g., 15 U.S.C. 240.78o (section 15(b) of the Exchange Act) (registration requirements); 15 U.S.C. 240.78c (sections 3(a)(4) and (5) of the Exchange Act) (definitions of broker and dealer).

commenter stated that “we strongly support the Proposal’s approach of requiring single-sided reporting . . . the approach would reduce the potential for double counting of securities lending transactions and limit the burden on lenders. A single-sided reporting regime avoids problems with reconciling reports by each party to a transaction.”<sup>129</sup> Other commenters supported the application of the final rule’s reporting requirements to all lenders to facilitate a comprehensive view of the securities lending market.<sup>130</sup> In consideration of these comments, the final rule generally employs a single-sided approach to reporting, with the Rule 10c–1a information reporting obligations placed on either an intermediary that agrees to a covered securities loan on behalf of the lender, or any person that agrees to a covered securities loan as a lender when an intermediary is not used.<sup>131</sup> Consistent with the proposed rule, this approach is designed to avoid the potential for the double counting of transactions that could arise if both sides, borrowers and lenders, were required to report final Rule 10c–1a information to an RNSA.<sup>132</sup>

However, one commenter opposed the proposed single-sided reporting approach, and recommended that the final rule require reporting by SEC-registered brokers or dealers only and for transactions in which they act as borrowers, lenders, or lending agents.<sup>133</sup> The commenter stated that “whether

acting as borrower or lender acting in a principal or agency capacity, [requiring SEC-registered broker-dealers to report] would substantially reduce overall implementation costs, would not impose costs on a single side of the market and would still provide for sufficient market data.”<sup>134</sup> The commenter reasoned that reporting costs would be lower, due to brokers or dealers having existing reporting infrastructure and connectivity.<sup>135</sup> The commenter cited to the Office of the Financial Research Pilot Survey (“OFR Pilot Survey”)<sup>136</sup> to support the view that although such a structure would be “less comprehensive than lender reporting, the data loss entailed should not be substantial” and “would be substantially captured” and “sufficient.”<sup>137</sup> The commenter also stated that its proposed structure “would also provide better data integrity as broker-dealers are better positioned than beneficial owners and Lending Agents to evaluate whether a securities loan is made for the purpose of facilitating short sales or settlement of fails rather than some other purpose.”<sup>138</sup>

The Commission is not adopting the commenter’s recommended reporting structure. Requiring reporting by brokers or dealers acting as borrowers, lenders, or lending agents introduces the same double counting problem that the final rule’s single-sided reporting approach is designed to address.<sup>139</sup> Additionally, under the final rule brokers or dealers are permitted to act as reporting agents provided specified requirements are met. The Commission also does not agree with the commenter that the data lost if its recommended reporting structure were adopted would not be substantial. The OFR Pilot Survey cited by the commenter states that banks, credit unions, pension funds, and hedge funds, all of whom

would not be required to report covered securities loans under the commenter’s proposed structure, are the borrowers of nearly 15 percent of the value of all outstanding securities loans.<sup>140</sup> Based on the survey, the Commission estimated that brokers or dealers facilitate between 60 percent and 90 percent of transactions in the equity lending market.<sup>141</sup> Accordingly, while the Commission acknowledges that the precise percentage of broker or dealer facilitated transactions is unknown, the survey indicates that a significant percentage of transactions in the equity lending market, between 10 percent and 40 percent, are facilitated by non-brokers or dealers.<sup>142</sup> Therefore, the commenter’s recommended approach would exclude a significant percentage of securities lending transactions from being reported. Any improved “data integrity” achieved by the commenter’s proposed structure would be undermined by its exclusion of securities loans that do not involve an SEC-registered broker or dealer acting as borrower, lender, or lending agent. Additionally, excluding certain types of entities from reporting would create incentives for market participants to agree to covered securities loans through such excluded entities, which would further diminish the comprehensiveness of the reported information. Instead, the Commission agrees with one commenter’s statement that, “all lenders (or their lending or reporting agents) should be required to report, whether or not they are registered with the Commission. Otherwise, the data will be incomplete.”<sup>143</sup> As such, the final rule’s definition of “covered person” is not limited to brokers or dealers.

One possible alternative to address double counting under the commenter’s

Alternative Investments (Jan. 21, 2022) (“SBAI Letter”), at 1 (“We support single-sided reporting, *i.e.*, requiring the lenders (or their agents) to report, but not duplicating the framework by requiring borrowers to report as well.”); Letter from Joseph J. Barry, Senior Vice President and Global Head of Regulatory Affairs, State Street Corp. (Apr. 1, 2022) (“State Street Letter”), at 3 (stating that “we do not object to the imposition of a single-sided reporting obligation on the lender of a security (or its agent)”).

<sup>129</sup> See ICI Letter 1, at 5.

<sup>130</sup> See Morningstar Letter, at 3–4 (stating that “we recommend that all persons who lend should be required to report. As some lenders may not be registrants, the public will not have a comprehensive picture of securities lending transactions if only those registered with the Commission are required to report to an RNSA.”); Nasdaq Letter, at 2 (stating that “the inclusion of all market participants who lend provides investors with comprehensive information from which to formulate investing strategies”).

<sup>131</sup> See final Rules 10c–1a(j)(1)(i) and (ii). Final Rule 10c–1a(j)(1)(ii) includes a technical change from the proposed rule to add the phrase “unless paragraph (j)(1)(iii) of this section applies” to clarify that only the broker or dealer when borrowing fully paid or excess margin securities, and not the lender, has the obligation to report in that instance.

<sup>132</sup> See Proposing Release, 86 FR 69808.

<sup>133</sup> See Letter from Fran Garritt, Director, Securities Lending & Market Risk, and Mark Whipple, Chairman, Committee on Securities Lending, Risk Management Association (Jan. 7, 2022) (“RMA Letter”), at 3.

<sup>134</sup> See RMA Letter, at 3.

<sup>135</sup> See RMA Letter, at 13 n.19.

<sup>136</sup> See *A Pilot Survey of Agent Securities Lending Activity*, Off. Of Fin. Research, Working Paper No. 16–08, 2016 at 7–8, available at <https://www.financialresearch.gov/working-papers/2016/08/23/pilot-survey-of-agent-securities-lending-activity/> (In its annual reports, the FSOC identified a lack of data about securities lending activity as a priority for the Council. This pilot data collection was a step toward addressing this critical data need. The voluntary pilot collection included end-of-day loan-level data for three non-consecutive business days from seven securities lending agents. Most but not all participating lending agents were subsidiaries of banks.)

<sup>137</sup> See RMA Letter, at 13 (stating that “roughly 85% of loans made by Lending Agents are to registered broker-dealer borrowers”) (citing the OFR Pilot Survey, at 8).

<sup>138</sup> See RMA Letter, at 14.

<sup>139</sup> See Proposing Release, 86 FR 69807.

<sup>140</sup> See OFR Pilot Survey, at 7–8.

<sup>141</sup> See Proposing Release, 86 FR 69807 n.68.

<sup>142</sup> See Proposing Release, 86 FR 69807 n.68 (stating that, “[w]hile 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 stated that it estimated that broker-dealers facilitate between 60% and 90% of transactions in the equity lending market.”), citing the OFR Pilot Survey, at 7–8. Further, custodian banks have traditionally been the primary lending agent or intermediary and lend securities on behalf of their customers for a fee. See, e.g., Proposing Release, 86 FR 69805 (citing *Comptroller’s Handbook: Custody Services/Asset Management*, Off. Of the Comptroller of the Currency, at 27 (Jan. 2002), available at <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/custody-services/index-custody-services.html>).

<sup>143</sup> See Letter from Howard Myerson, Managing Director, Financial Information Forum (Jan. 19, 2022) (“FIF Letter”), at 7. See also Letter from JD Cumpson (Mar. 14, 2022).

suggestion of requiring only brokers or dealers to report as lenders and borrowers would be to require identification (such as using a flag) of loans reported by borrowers and loans reported by lenders. However, this would not address the lack of securities loan data from persons that are not brokers or dealers, or the incentives to avoid reporting by migrating to such persons. Further, expanding the reporting obligation generally to all lenders and borrowers, and requiring each to identify whether they are reporting as a lender or borrower, would increase burdens unnecessarily, resulting in the collection of duplicative (albeit identified) data by more persons.

One commenter suggested that “it would be appropriate for the borrower broker-dealer (not the lender customer) to provide the Rule 10c–1 information to an RNSA where such broker-dealer borrows a customer’s fully paid securities.”<sup>144</sup> The Commission agrees with this recommendation. Such an approach would help avoid placing a reporting obligation on customers who, upon lending fully paid or excess margin securities, may not have timely access to the required information and less familiarity with reporting information to RNSAs than their broker or dealer.<sup>145</sup> Therefore, the definition of the term “covered person” under the final rule generally does not apply to a borrower,<sup>146</sup> except in the instance of a broker or dealer borrowing fully paid or excess margin securities from a customer.<sup>147</sup> The definition specifically includes a broker or dealer when borrowing fully paid or excess margin securities pursuant to 17 CFR 240.15c3–3(b)(3) (“Rule 15c3–3(b)(3)”).<sup>148</sup> This

definition will result in a broker or dealer (as opposed to the customer) being responsible for reporting Rule 10c–1a information to an RNSA if it borrows fully paid or excess margin shares from one of its customers. Pursuant to final Rule 10c–1a, the broker or dealer would also be responsible for reporting Rule 10c–1a information to an RNSA should the broker or dealer act as a lender of those shares to a third-party.<sup>149</sup>

### B. Reporting Agent Overview

#### 1. Use of a Reporting Agent—Rule 10c–1a(2)

##### Proposed Rule

The Commission proposed that “[a] person required to provide Rule 10c–1 information . . . 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).”<sup>150</sup> The proposed rule stated that a “reporting agent is required to provide the Rule 10c–1 information to an RNSA if it has entered into [the required] written agreement . . . and is provided timely access to the Rule 10c–1 information.”<sup>151</sup> The proposed rule also stated that “[a]ny person that enters into [the required] written agreement . . . 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.”<sup>152</sup> Therefore, under the proposed rule, only when a person fulfilled the requirements of: (i) entering into a written agreement with a broker or dealer that agrees to provide the Rule 10c–1 information;<sup>153</sup> and (ii)

providing the reporting agent with timely access to the Rule 10c–1 information,<sup>154</sup> would the person shift its Rule 10c–1 information reporting obligation for a loan of securities from itself to a reporting agent.

The Commission in the Proposing Release stated its preliminary belief that it is appropriate that lenders, including a lending agent, be able to enter into a written agreement with a broker or dealer acting as a reporting agent to provide Rule 10c–1 information to an RNSA on behalf of the lender because such an arrangement would ease burdens on lenders, including lending agents, that do not have and do not want to establish connectivity to an RNSA.<sup>155</sup> The Commission also stated that the use of reporting agents could reduce the costs for non-RNSA-members, because rather than incurring the costs associated with directly reporting Rule 10c–1 information, such persons would have the option to use a third-party to provide the Rule 10c–1 information to an RNSA.<sup>156</sup>

##### Final Rule

The Commission received broad support from commenters for the proposed rule’s provisions permitting covered persons to use a reporting agent if certain conditions are met.<sup>157</sup> One commenter stated that it “agree[s] with the Commission that permitting the use of reporting agents to report 10c–1 information will ‘ease burdens on Lenders, including lending agents, that do not have or do not want to establish connectivity to an RNSA.’”<sup>158</sup> The Commission continues to believe it is appropriate to permit a covered person to use a reporting agent to help fulfill Rule 10c–1a information reporting obligations. Furthermore, many entities that may act as reporting agents may have existing RNSA connectivity, experience with reporting information to an RNSA, and economies of scale that could benefit covered persons with final Rule 10c–1a reporting obligations.

Thus, consistent with the proposed rule, the final rule requires that, in order to use a reporting agent to fulfill its Rule 10c–1a information reporting obligations, a covered person must: (1) enter into a written agreement with the reporting agent, and (2) provide the reporting agent with timely access to the

<sup>144</sup> See Letter from Kenneth E. Bentsen, Jr., President and CEO, SIFMA (Jan. 7, 2022) (“SIFMA Letter 1”), at 18 n.66 (stating that it “understands this would apply where a broker-dealer borrows securities it carries in a customer’s account”).

<sup>145</sup> For example, a lender may not necessarily know when a broker or dealer has borrowed securities from its fully paid or excess margin account if it has not reviewed the schedule of borrowed securities provided to it pursuant to 17 CFR 240.15c3–3(b)(3)(ii) (“Rule 15c3–3(b)(3)(ii)”) or if the collateral for the securities loan is not provided to the lender before the close of the business day pursuant to 17 CFR 240.15c3–3(b)(3)(iii)(A) (“Rule 15c3–3(b)(3)(iii)(A)”), whereas the broker or dealer will know that such securities have been lent by the customer upon the broker or dealer borrowing them. See 17 CFR 240.15c3–3 (“Rule 15c3–3”). See also SIFMA Letter 1, at 13 (stating that “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”).

<sup>146</sup> See final Rules 10c–1a(f)(1)(i) and (ii).

<sup>147</sup> See final Rule 10c–1a(f)(1)(iii).

<sup>148</sup> See final Rule 10c–1a(f)(1)(iii). Paragraph (b)(3) of Rule 15c3–3 under the Exchange Act addresses a broker-dealer’s borrowing of fully paid or excess margin securities of a customer. This rule

requires, among other things, that a broker-dealer borrowing fully paid or excess margin securities from a customer to enter into a written agreement with the customer that, among other things, specifies that the broker-dealer must undertake to: (1) provide the lender collateral that fully secures the loan consisting of cash, U.S. Treasuries, an irrevocable letter of credit issued by a bank, or such other collateral as the Commission designates as permissible; (2) mark the loan to market not less than daily and provide additional collateral as necessary to fully collateralize the loan; and (3) notify the lender that the provisions of the Securities Investor Protection Act may not protect the lender and that, therefore, the collateral delivered to the lender may constitute the only source of satisfaction of the broker-dealer’s obligation to return the securities. In the adopting release for these requirements, the Commission stated that the rule will “compel the firm to turn over the collateral physically to the lender.” See *Net Capital Requirements for Brokers and Dealers*, Release No. 34–18737 (May 13, 1982), 47 FR 21759, 21768 (May 20, 1982).

<sup>149</sup> See final Rule 10c–1a(f)(1)(ii).

<sup>150</sup> See proposed Rule 10c–1a(1)(ii)(A).

<sup>151</sup> See proposed Rule 10c–1a(1)(ii)(B).

<sup>152</sup> See proposed Rule 10c–1a(1)(ii)(C).

<sup>153</sup> See proposed Rule 10c–1a(1)(ii)(C).

<sup>154</sup> See proposed Rule 10c–1a(1)(ii)(C).

<sup>155</sup> See Proposing Release, 86 FR 69810.

<sup>156</sup> See Proposing Release, 86 FR 69809.

<sup>157</sup> See, e.g., *infra* note 173 (listing commenters that requested an expansion of the types of entities that could act as reporting agents under the final rule).

<sup>158</sup> See DTCC Letter, at 4.

required Rule 10c–1a information.<sup>159</sup> Requiring a written agreement between the covered person and the reporting agent will memorialize the contractual obligations for the reporting agent to provide the Rule 10c–1a information to an RNSA.<sup>160</sup> Consistent with the Proposing Release, for purposes of final Rule 10c–1a, “timely access” means that the reporting agent has access to the Rule 10c–1a information with sufficient time to provide such information to an RNSA (*i.e.*, in the format and manner required by the rules of an RNSA and within the time periods specified in paragraphs (c) through (e) of the final rule). However, this definition of “timely access” differs from the Proposing Release in that the timing of the required reporting of certain securities loan information to an RNSA has changed (*i.e.*, to no longer require reporting “within the fifteen minutes after the securities loan is effected or the terms of the loan are modified”).<sup>161</sup> As discussed below, in Part VII.G, the required timing for the reporting of data elements pursuant to final Rules 10c–1a(c), (d), and (e) is now by the end of the day on which a covered securities loan is effected or modified.<sup>162</sup>

If the reporting agent is unable to provide Rule 10c–1a information to an RNSA because it lacks timely access to it, the covered person who enters into the written agreement with the reporting agent is responsible for providing such information to an RNSA.<sup>163</sup> Ultimately, responsibility for non-compliance will be a facts and circumstances determination. For instance, if the covered person fails to provide the reporting agent with access to accurate Rule 10c–1a information, then the covered person remains responsible for compliance with Rule 10c–1a.<sup>164</sup> However, if the reporting agent that receives timely and accurate information from the covered person provides late or inaccurate information to an RNSA, as discussed below in Part VII.C.1, the reporting agent is

responsible for compliance with final Rule 10c–1a.<sup>165</sup>

## 2. Reporting Agent Definition—Rule 10c–1a(j)(4)

### Proposed Rule

The Commission proposed that, “[a] person required to provide Rule 10c–1 information . . . 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.”<sup>166</sup> The Proposing Release stated that limiting who can act as a reporting agent to a broker or dealer that is regulated directly by the Commission, would aid the Commission in overseeing compliance with proposed Rule 10c–1 and provide RNSAs with the ability to oversee the activity of its members that perform a reporting agent function.<sup>167</sup> The Proposing Release also stated that if reporting agents were to include other, non-broker or dealer entities, the Commission might lack an efficient way to oversee how the entity is complying with its responsibility to provide Rule 10c–1 information to an RNSA.<sup>168</sup>

### Final Rule

The Commission received numerous comments discussing what types of entities should be permitted to act as a reporting agent, including differing views on the proposed rule’s restriction to only brokers or dealers.<sup>169</sup> The Commission also received comment stating that there was a lack of clarity in the Proposing Release around the term “reporting agent.”<sup>170</sup>

The Commission received a comment supporting the requirement that reporting agents be registered brokers or dealers and stating that it “would allow an RNSA to oversee the activity of reporting agents and enable it to fulfill an essential regulatory function that promotes just and equitable principles of trade.”<sup>171</sup> Another commenter

expressed support for permitting brokers or dealers to act as reporting agents.<sup>172</sup> However, other commenters recommended that entities other than brokers or dealers should be eligible to act as reporting agents.<sup>173</sup>

One commenter recommended that registered clearing agencies should be eligible to serve as a reporting agent because such agencies are subject to regulation and examination by the Commission and have experience providing the infrastructure that would be used by, and function as, a reporting agent.<sup>174</sup> Another commenter suggested that reporting agents should include clearing agencies that operate stock lending platforms.<sup>175</sup> Having considered the commenters’ recommendations, the Commission agrees that registered clearing agencies should be permitted to act as reporting agents on behalf of covered persons, and therefore be included under the final rule’s definition of the term “reporting agent.”<sup>176</sup> Allowing registered clearing agencies to act as reporting agents will facilitate cost-effective and efficient reporting.<sup>177</sup> Additionally, like brokers and dealers, registered clearing agencies are subject to the Commission’s direct oversight and examination functions.<sup>178</sup>

<sup>172</sup> See Equilend Letter, at 1 (stating that it “maintains two FINRA registered and SEC registered broker-dealers . . . and welcomes the opportunity to act as a reporting agent for the Proposed Rule”).

<sup>173</sup> See, e.g., FIF Letter, at 7 (stating that “[f]or other reporting systems established by the Commission (such as CAT), vendors that are not broker-dealers are permitted to submit reports on behalf of reporting parties. The same approach should apply for the proposed securities loan reporting system”); James J. Angel Letter, at 6; IIB Letter, at 10; IHS Markit Letter, at 4–5; Sharegain Letter, at 2 (stating that “the qualification criteria and application process to become a broker-dealer go far beyond the scope of reporting services under the proposed Rule and would unfairly restrict the market”); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association (Mar. 2, 2022) (“HMA Letter”), at 8 (stating that “by opening up the reporting agent role to non-broker entities, the Proposal could promote more competition amongst intermediaries—including lending agents—in the securities lending marketplace”); DTCC Letter, at 4 (“we do not believe it is necessary to limit the scope of entities that may be reporting agents exclusively to broker-dealers”).

<sup>174</sup> See DTCC Letter, at 4.

<sup>175</sup> See James J. Angel Letter, at 6 (stating that lending platforms operated by clearing agencies “could provide low-cost reporting solutions to market participants”).

<sup>176</sup> See final Rule 10c–1a(j)(4).

<sup>177</sup> See IHS Markit Letter, at 15 (stating that “[a]llowing entities other than FINRA-registered broker-dealers to facilitate reporting is a cost-effective and efficient way to achieve the SEC’s objectives . . . . The Commission should encourage a variety of organizations to provide innovative and cost-effective solutions to meet this regulation.”)

<sup>178</sup> See, e.g., 15 U.S.C. 240.78q(b) (section 17(b) of the Exchange Act).

<sup>159</sup> See final Rule 10c–1a(a)(2).

<sup>160</sup> See Proposing Release, 86 FR 69822 n.129.

<sup>161</sup> See Proposing Release, 86 FR 69810.

<sup>162</sup> See final Rules 10c–1a(c), (d), and (e).

<sup>163</sup> For example, if a reporting agent establishes an automated system that pulls Rule 10c–1a 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 Rule 10c–1a information. As a result, the beneficial owner is required to provide Rule 10c–1a information to an RNSA under final Rule 10c–1a(a)(2).

<sup>164</sup> See 17 CFR 240.10c–1a(a)(1) (“final Rule 10c–1a(a)(1)”).

<sup>165</sup> See 17 CFR 240.10c–1a(b) (“final Rule 10c–1a(b)”).

<sup>166</sup> See proposed Rule 10c–1(a)(1)(ii)(A).

<sup>167</sup> See Proposing Release, 86 FR 69810–11.

<sup>168</sup> See Proposing Release, 86 FR 69811.

<sup>169</sup> See, e.g., ICI Letter 1, at 4–5; DTCC Letter, at 4; FIF Letter, at 7; James J. Angel Letter, at 6; IIB Letter, at 10; Letter from Edward M. Marhefka, Managing Director, Global Head of Equities Data and Analytics, IHS Markit (Jan. 4, 2022) (“IHS Markit Letter”), at 4; Letter from Robert Zekraus, COO & Head of Americas, Pirum Systems Limited (Jan. 7, 2022) (“Pirum Letter”), at 4–5; Letter from Robert Sloan, Managing Partner, S3 Partners, LLC (Apr. 1, 2022) (“S3 Partners Letter”), at 12; Letter from Boaz Yaari, CEO, Sharegain Ltd. (Jan. 7, 2022) (“Sharegain Letter”), at 2. *But see* RMA Letter, at 13.

<sup>170</sup> See ICI Letter 1, at 8.

<sup>171</sup> See Nasdaq Letter, at 2.

Some commenters stated that allowing non-brokers or dealers to act as reporting agents could facilitate low-cost service providers.<sup>179</sup> Another commenter stated that “by opening up the reporting agent role to non-broker entities, the Proposal could promote more competition amongst intermediaries—including lending agents—in the securities lending marketplace.”<sup>180</sup> One commenter stated that limiting the reporting agents to only brokers or dealers would unfairly restrict the market for such services.<sup>181</sup> Other commenters specifically stated that certain non-brokers or dealers have existing technological capability to be able to act as a reporting agent (e.g., data vendors and entities that report information for other regulatory purposes).<sup>182</sup> One such commenter supported leveraging the existing technology of non-broker-dealers to reduce implementation time and staff training costs relating to the implementation of proposed Rule 10c–1.<sup>183</sup>

Allowing clearing agencies, as well as brokers or dealers, to act as reporting agents should help facilitate low-cost service providers, introduce more competition, and not unduly restrict the market for reporting agent services to only brokers or dealers.<sup>184</sup> Expanding the definition of reporting agent to include registered clearing agencies strikes a balance between increasing participation and competition in the marketplace for such services, while only applying the definition to entities over which the Commission has direct oversight.<sup>185</sup> Limiting who can act as a

reporting agent to brokers, dealers, and registered clearing agencies, all of which are regulated directly by the Commission, will assist the Commission in overseeing compliance with final Rule 10c–1a. Including other entities would leave the Commission without an efficient way to oversee how the entity is complying with its responsibility to provide Rule 10c–1a information to an RNSA on behalf of a covered person. Two commenters stated that some non-brokers or dealers should be eligible to serve as reporting agents because they are already permitted to report information in connection with other Commission reporting regimes and have experience doing so.<sup>186</sup> The commenters identified the CAT, TRACE, and FINRA’s Large Options Positions Report (“LOPR”) as examples of reporting regimes that allow brokers or dealers to use non-brokers or dealers as reporting agents. In each of the reporting regimes identified by the commenters, the reporting requirements apply to entities that are registered with the Commission or are a member of an RNSA or an exchange,<sup>187</sup> and that retain legal liability for compliance notwithstanding the existence of an agreement for a third party to provide connectivity services on behalf of the registrant.<sup>188</sup>

The Commission is also clarifying that the ability to use a reporting agent does not prevent covered persons from contracting privately with third-party vendors to assist in reporting. The

regulatory organizations (“SROs”) and on-site examinations by Commission staff. The Commission also oversees registered clearing agencies through regular contact, including onsite visits, by Commission staff with clearing agency senior management and other personnel and ongoing interactions of Commission staff with the registered clearing agencies regarding current and expected proposed rule changes under section 19(b) of the Exchange Act.”)

<sup>186</sup> See FIF Letter, at 7–8; S3 Partners Letter, at 12.

<sup>187</sup> See FINRA Rule 6810(u) (“‘Industry Member’ means a member of a national securities exchange or a member of a national securities association that is required to record and report information pursuant to the CAT NMS Plan and this Rule 6800 Series”); FINRA Rule 6730(a) (applying the TRACE reporting obligations to FINRA members); FINRA Rule 2360(b)(5)(A)(i)b (“FINRA member firms that conduct a business in standardized options but are not themselves members of the options exchange on which such options are listed and traded . . . are required under FINRA Rule 2360(b)(5)(A)(i)b to report to the LOPR system positions in standardized options covering the same underlying security or index that meet the 200 contract reporting threshold.”)

<sup>188</sup> See, e.g., Nasdaq Rulebook, General Equity and Options Rules—General 7: Consolidated Audit Trail Compliance, at section 8(c)(3), available at, <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>. See also FINRA Regulatory Notice 21–29 (Aug. 13, 2021), available at, <https://www.finra.org/rules-guidance/notices/21-29> (FINRA guidance on outsourcing to third party vendors and the retention of responsibility by the FINRA member).

proposed rule required that “[a]ny person that loans a security on behalf of itself . . . shall provide to a [RNSA] the [Rule 10c–1 information].”<sup>189</sup> However, the proposed rule did not address the use of a third-party vendor by a lender to help facilitate its reporting obligations. The rule as adopted does not prohibit the use of third-party vendors by covered persons. The use of third-party vendors by covered persons to help facilitate the reporting of Rule 10c–1a information should allow covered persons flexibility and decrease costs,<sup>190</sup> and help address a commenter’s concerns with the ability of certain covered persons to report.<sup>191</sup> The difference between a covered person relying on a reporting agent to fulfill its Rule 10c–1a reporting requirements and using a third-party vendor to help facilitate its Rule 10c–1a reporting is solely with respect to liability and responsibility under final Rule 10c–1a. When a covered person uses a reporting agent and meets the conditions of the rule, the covered person may rely on a reporting agent to fulfill its reporting obligations.<sup>192</sup> However, the use of other third-party vendors that are not reporting agents would not relieve a covered person of its obligation to report Rule 10c–1a information to an RNSA, as reliance on a reporting agent would.<sup>193</sup>

Some commenters stated that providing the proposed Rule 10c–1 information to a reporting agent that is a broker or dealer could reveal confidential information to such broker or dealer relating to covered securities loans.<sup>194</sup> One such commenter stated that “[w]ithout an alternative, beneficial owners would either be forced to build their own direct reporting to RNSAs to mitigate these concerns, thereby significantly increasing their costs, or to exit the market entirely, thereby

<sup>189</sup> See proposed Rule 10c–1(a)(1). See also Proposing Release, 86 FR 69809 (stating that a lender that did not use a lending agent or reporting agent to provide Rule 10c–1 information to an RNSA must directly provide such information to an RNSA).

<sup>190</sup> See *infra* Parts IX.C.3 and IX.E.6. Additionally, the use of third party vendors by covered persons could enable the innovation and development of novel reporting services, such as the data trusts described by one commenter. See Advanced Securities Consulting Letter, at 1–3.

<sup>191</sup> See ICI Letter 1, at 12 (stating that “beneficial owners will not have the infrastructure to report”).

<sup>192</sup> See final Rule 10c–1a(a)(1).

<sup>193</sup> See final Rule 10c–1a(a)(2) (stating that “a covered person may rely on a reporting agent to fulfill its reporting obligations under paragraph (a)(1)” of the final rule, if certain conditions are met)

<sup>194</sup> See S3 Partners Letter, at 12; IHS Markit Letter, at 4; Advanced Securities Consulting Letter, at 1–3.

<sup>179</sup> See IIB Letter, at 10 (stating that many lenders already rely on non-broker or dealer third-party vendors to “perform similar functions, and such vendors would likely be willing to provide securities lending reporting services and be low-cost providers”). See also Letter from Edmon Blount, Executive Director, Advanced Securities Consulting (Jan. 7, 2022) (“Advanced Securities Consulting Letter”), at 1.

<sup>180</sup> See HMA Letter, at 8.

<sup>181</sup> See Sharegain Letter, at 2.

<sup>182</sup> See S3 Partners Letter, at 12; Sharegain Letter, at 2; IIB Letter, at 10.

<sup>183</sup> See S3 Partners Letter, at 12.

<sup>184</sup> See *infra* Part IX.E.6 (stating that “expanding reporting agents to entities other than broker-dealers would serve to increase the number of entities that would compete to provide lenders and lending agents with reporting services. Thus, expanding the eligibility of reporting agents would serve to promote more competition in this market, potentially leading to lower fees for lenders and lending agents that would rely on these reporting agents for these services.”)

<sup>185</sup> See *Standards for Covered Clearing Agencies*, Release No. 34–71699 (Mar. 12, 2014), 79 FR 29508, 29510 (May 22, 2014) (“If the Commission registers a clearing agency, the Commission oversees the clearing agency to facilitate compliance with the Exchange Act using various tools that include, among other things, the rule filing process for self-

reducing overall liquidity.”<sup>195</sup> Another commenter mentioned operational and confidentiality considerations involved with appointing a reporting agent.<sup>196</sup>

Brokers, dealers, and clearing agencies, like all persons, are subject to prohibitions on misuse of material non-public information. Brokers, dealers, and clearing agencies are subject to Commission examination for compliance with this,<sup>197</sup> and other, requirements. To the extent that a covered person may, nonetheless, be concerned about providing sensitive information to another person, it may elect to hire third party vendors for specific tasks to help with compliance obligations. As noted above, the covered person would retain legal responsibility for reporting.

One commenter appeared to believe that all reporting required by the proposed rule must be done through members of FINRA (the only currently existing RNSA).<sup>198</sup> The final rule does not require that all covered persons that are required to report Rule 10c-1a information to an RNSA be members of that RNSA.<sup>199</sup> The final rule requires only that reporting agents, if relied upon by a covered person to fulfill its reporting obligations, must be a broker, dealer, or registered clearing agency.<sup>200</sup> Covered persons, including persons that are not RNSA members, that elect not to use a reporting agent, are responsible for providing the Rule 10c-1a information to an RNSA directly and may do so without becoming RNSA members.<sup>201</sup>

Having considered the commenters' recommendations discussed above, in this part, and for the foregoing reasons, the final rule defines the term “reporting agent” to mean “a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under paragraph (a)(2) of [the final rule].”<sup>202</sup> Therefore, the final rule adds “registered clearing agencies” to the proposed rule's scope of entities that are permitted to act as reporting agents, which was limited to brokers or dealers.<sup>203</sup>

### C. Reporting Agent Requirements—Rule 10c-1a(b)

#### 1. Reporting Agent Reporting Requirements—Rule 10c-1a(b)

##### Proposed Rule

As discussed above, in Part VII.B, paragraph (a)(1)(ii)(B) of the proposed rule required the reporting agent to provide the Rule 10c-1 information to an RNSA if the reporting agent had entered into a written agreement (with the covered person) to provide the Rule 10c-1 information to an RNSA pursuant to paragraph (a)(1)(ii)(A)<sup>204</sup> of the proposed rule and the reporting agent had been provided timely access to such Rule 10c-1 information by the covered person. The proposed rule, in paragraphs (a)(2)(i) through (a)(2)(iv),<sup>205</sup> also included requirements for the reporting agent to assist both an RNSA and the Commission with surveillance and compliance with RNSA requirements and proposed Rule 10c-1.<sup>206</sup> In proposing the specific requirements for reporting agents, the Commission preliminarily believed it was appropriate for a reporting agent to be responsible for providing Rule 10c-1 information to an RNSA, provided the reporting agent has contractually agreed to provide such information to an RNSA and the reporting agent has also been provided with timely access to such information.<sup>207</sup>

In addition, the proposed rule's requirement that the reporting agent enter into a written agreement with an RNSA was intended to evidence the explicit permission the reporting agent has to provide Rule 10c-1 information on behalf of the covered person.<sup>208</sup> Similarly, the reporting agent would also have been required to provide an RNSA with a list of each covered person on whose behalf the reporting agent would be providing the Rule 10c-1 information (and also to update the list by the end of the day when the list

changes).<sup>209</sup> As the Commission explained in the Proposing Release, requiring the reporting agent to provide the identities of each covered person on whose behalf the reporting agent is providing Rule 10c-1 information to an RNSA is intended to provide the Commission with the ability to obtain the identities of the covered persons from an RNSA in order to aid the Commission with its oversight of the covered persons that have entered into agreements with reporting agents, including with their compliance with the proposed rule.<sup>210</sup> In addition, the proposed requirement for a reporting agent to have written policies and procedures was intended to provide regulators with a means to examine and enforce a reporting agent's compliance with proposed Rule 10c-1. Moreover, the proposed recordkeeping requirements were intended to help facilitate the Commission's oversight of reporting agents and to review the reporting agents' compliance with the requirements to provide the Rule 10c-1 information to an RNSA.<sup>211</sup>

##### Final Rule

The Commission sought specific comment regarding the role and requirements of a reporting agent. The Commission received a number of reporting agent-related comments in response; however, most of these comments focused primarily on a covered person's use of a reporting agent or the eligibility requirements for a reporting agent, as discussed above, in Part VII.B.2, rather than the requirements of an already eligible reporting agent, as relevant here.<sup>212</sup> The Commission is adopting the specific reporting agent requirements, substantially as proposed, but with some non-substantive modifications.

First, the requirements are relocated into a separate paragraph (b) under the final rule.<sup>213</sup> This non-substantive, technical modification is intended to streamline and simplify the proposed rule text, by combining into one paragraph, the requirements specific to a reporting agent (as distinguished from the requirements applicable to the covered person) in order to help clarify which party is ultimately responsible

<sup>204</sup> See Proposing Release, 86 FR 69810 (stating “[s]uch 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 Rule 10c-1 information to an RNSA.”).

<sup>205</sup> The reporting-related requirements specific to the reporting agent, as proposed, included: paragraph (a)(2)(i) of the proposed rule's policies and procedures requirement; paragraph (a)(2)(ii) of the proposed rule's written agreement with an RNSA requirement; and, paragraph (a)(2)(iii) of the proposed rule's list of names requirement. See proposed Rules 10c-1(a)(2)(i) through (a)(2)(iii). Proposed paragraph (a)(2)(iv) is discussed below, in Part VII.C.2, regarding a reporting agent's recordkeeping requirements.

<sup>206</sup> See Proposing Release, 86 FR 69809.

<sup>207</sup> See Proposing Release, 86 FR 69810.

<sup>208</sup> See Proposing Release, 86 FR 69810.

<sup>209</sup> See Proposing Release, 86 FR 69810.

<sup>210</sup> See Proposing Release, 86 FR 69810–11.

<sup>211</sup> See Proposing Release, 86 FR 69811.

<sup>212</sup> One commenter, however, stated that it is clearer and more efficient to impose the obligation directly on the lending and reporting entities when the conditions of the proposed rule are satisfied. See ICI Letter 1, at 4 (discussing a reporting agent's role in terms of its obligation to report for purposes of compliance with the requirements of the proposed rule).

<sup>213</sup> See final Rules 10c-1a(b) through (b)(5).

<sup>195</sup> See Pirum Letter, at 5.

<sup>196</sup> See BlackRock Letter, at 3, 9.

<sup>197</sup> See, e.g., 15 U.S.C. 240.78q(b) (section 17(b) of the Exchange Act).

<sup>198</sup> See James J. Angel Letter, at 6.

<sup>199</sup> See final Rule 10c-1a(j)(1).

<sup>200</sup> See final Rule 10c-1a(j)(4).

<sup>201</sup> See final Rule 10c-1a(a)(1).

<sup>202</sup> See final Rule 10c-1a(j)(4).

<sup>203</sup> See proposed Rule 10c-1(a)(1)(ii)(A).

for providing the Rule 10c–1a information to an RNSA.

Second, to reduce redundancy and complexity in the proposed rule text, paragraph (b) of the final rule requires that “any reporting agent” that assumes the reporting obligation on behalf of the covered person, pursuant to paragraph (a)(2) of the final rule, comply with the specific requirements in paragraph (b) of the final rule.<sup>214</sup> A covered person that enters into a written agreement with a reporting agent to provide the Rule 10c–1a information to an RNSA on behalf of the covered person as required by the final rule, and that provides the reporting agent with timely access to the Rule 10c–1a information, may rely on the reporting agent to fulfill the covered person’s reporting obligations under paragraph (a)(1) of the final rule.

Lastly, the final rule combines the reporting-related requirements that were previously located in paragraphs (a)(1)(ii)(B) and (a)(2) of the proposed rule with the proposed reporting agent recordkeeping requirements in paragraphs (a)(1)(ii)(A) and (a)(1)(ii)(B), into paragraph (b) in the final rule.<sup>215</sup>

Paragraph (b) of the final rule’s specific inclusion of the term “reporting agent,” which is defined in final Rule 10c–1a(j)(4) to mean a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under paragraph (a)(2) of the final rule, as well as inclusion of the “assumes the reporting obligation” language, sets forth the reporting agent’s ultimate responsibility for reporting Rule 10c–1a information to an RNSA. The final rule provides that a reporting agent will be required to provide the Rule 10c–1a information to an RNSA under the new reporting regime only when the covered person has both: (1) entered into the required written agreement with the reporting agent, and (2) provided the reporting agent with timely access to the Rule 10c–1a information.<sup>216</sup> Thus, if a reporting agent is unable to provide the Rule 10c–1a information to an RNSA because it lacks timely access to it, the covered person who enters into the written agreement with the reporting agent

<sup>214</sup> See final Rule 10c–1a(j)(4), defining “reporting agent” to mean a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under paragraph (a)(2) of final Rule 10c–1a.

<sup>215</sup> See final Rule 10c–1a(b). Paragraph (b)(1) of the final rule clarifies that the reporting agent is required to comply with the rules of an RNSA in terms of the format and manner of reporting the required information to an RNSA and comply with the specific time periods set forth in paragraphs (c) through (e) of final Rule 10c–1a.

<sup>216</sup> See final Rule 10c–1a(b)(1). See also final Rule 10c–1a(a)(2).

under paragraph (a)(2)(i) of the final rule remains responsible for providing the required Rule 10c–1a information to an RNSA, consistent with the proposed rule.

Additionally, the Commission is adopting: 17 CFR 240.10c–1a(b)(1) (“final Rule 10c–1a(b)(1)”); 17 CFR 240.10c–1a(b)(2) (“final Rule 10c–1a(b)(2)”); and 17 CFR 240.10c–1a(b)(3) (“final Rule 10c–1a(b)(3)”) as new paragraphs (b)(1) through (b)(3) of the final rule, the specific reporting-related requirements<sup>217</sup> of a reporting agent, substantially as they were proposed in paragraphs (a)(2)(i) through (a)(2)(iii) of the proposed rule.<sup>218</sup> Paragraph (b)(2) of final Rule 10c–1a will require a reporting agent to establish, maintain, and enforce written policies and procedures that are reasonably designed to provide Rule 10c–1a information to an RNSA. However, in the final rule, as modified with non-substantive, technical, or clarifying changes to the rule text consistent with the other changes made to the overall final rule text, such Rule 10c–1a information is provided (by the reporting agent) to an RNSA on behalf of a “covered person” (which is a newly defined term in the final rule, rather than the term “another person,” as was used in the proposed rule); and, also consistent with the proposed rule, such information is to be provided “in the format and manner required by the applicable rule(s) of an RNSA, and within the time periods specified in paragraphs (c) through (e)”<sup>219</sup> (which is designed to clarify the proposed rule text, “in the manner, format, and time consistent with Rule 10c–1”<sup>220</sup>). Apart from the aforementioned changes, the policies and procedures requirement of the reporting agent remains unchanged from the proposed rule.

Additionally, consistent with the proposed rule, paragraph (b)(3) of the final rule requires the reporting agent to enter into a written agreement with an

<sup>217</sup> See *supra* note 205 regarding paragraph (a)(2)(i) of the proposed rule’s policies and procedures requirement; paragraph (a)(2)(ii) of the proposed rule’s written agreement with an RNSA requirement; and paragraph (a)(2)(iii) of the proposed rule’s list of names requirement.

<sup>218</sup> Specifically, once the covered person enters into the required written agreement with the reporting agent, and the covered person provides the reporting agent with timely access to the Rule 10c–1a information, paragraph (b)(1) of the final rule specifically requires the reporting agent to provide the Rule 10c–1a information to an RNSA on behalf of a covered person (in the format and manner required by the rule(s) of such RNSA and within the time periods specified in paragraphs (c) through (e) of final Rule 10c–1a). See final Rule 10c–1a(b)(1).

<sup>219</sup> See final Rule 10c–1a(b)(2).

<sup>220</sup> See proposed Rule 10c–1(a)(2)(i).

RNSA that permits the reporting agent to provide the required Rule 10c–1a information to an RNSA (e.g., establish the required connectivity with such RNSA) on behalf of a covered person. More specifically, the final rule provides that a reporting agent shall “[e]nter into a written agreement with an RNSA that permits the reporting agent to provide Rule 10c–1a information to an RNSA on behalf of a covered person.”<sup>221</sup> Other than replacing the proposed term “another person” with the newly defined term “covered person” in the final rule, the written agreement requirement of the reporting agent remains unchanged from the proposed rule.

Moreover, the Commission is adopting 17 CFR 240.10c–1a(b)(4) (“final Rule 10c–1a(b)(4)”), which requires the reporting agent to “provide an RNSA with a list naming each covered person on whose behalf the reporting agent is providing Rule 10c–1a information to an RNSA,” consistent with the proposed rule, although paragraph (b)(4) of final Rule 10c–1a adds the term “naming” to replace the less-descriptive term “of,” as was used in the proposed rule. For consistency, the final rule also includes the newly defined term “covered person” in place of “person and lending agent,” as was used in paragraph (a)(2)(iii) of the proposed rule. Moreover, paragraph (b)(4) of the final rule clarifies the proposed rule by streamlining the text, “provide an RNSA with any updates to the list of such persons by the end of the day such list changes,” by removing the extra “on the day” in the sentence. Also, the final rule slightly modifies the rule text “an updated list” to read instead “any updates to the list” to clarify that any updates (or changes) to the list (and the updated list itself) must be provided to an RNSA “by the end of the day such list changes.”<sup>222</sup> A reporting agent’s written policies and procedures will need to address the above requirements.

## 2. Recordkeeping Requirements of a Reporting Agent—Rule 10c–1a(b)(5)

### Proposed Rule

Paragraph (a)(2)(iv) of the proposed rule would have required that the reporting agent maintain certain information for a period of three years, the first two in an easily accessible place.<sup>223</sup> The information required to be maintained included the Rule 10c–1 information provided by the covered

<sup>221</sup> See final Rule 10c–1a(b)(3) (replacing term “another person” from paragraph (a)(2)(ii) of the proposed rule with the term “covered person”).

<sup>222</sup> See final Rule 10c–1a(b)(4).

<sup>223</sup> See proposed Rule 10c–1(a)(2)(iv).

person to the reporting agent, including the time of receipt, as well as the Rule 10c-1 information that the reporting agent provided to an RNSA, and time of transmission. Additionally, under the proposed rule, the reporting agent would have to retain the written agreements between the reporting agents and beneficial owners, lending agents, and an RNSA.<sup>224</sup> As the Commission explained, the proposed recordkeeping requirements were designed to help facilitate the Commission's oversight of reporting agents and review the reporting agents' compliance with the requirement to provide the Rule 10c-1 information to an RNSA.<sup>225</sup>

#### Final Rule

One commenter stated that it was redundant and unnecessary for the reporting agent to retain data, as FINRA already has the data.<sup>226</sup> However, pursuant to 17 CFR 240.10c-1a(b)(5) ("final Rule 10c-1a(b)(5)"), the reporting agent would not only be required to retain data that it submitted to an RNSA (including time of transmission), but would also be required to retain the data it received from the covered person (including time of receipt), which would demonstrate compliance with the timeliness requirements of the rule or whether the reporting agent itself received the data in an untimely manner from the covered person, as well as the written agreements required in order to be eligible as a reporting agent. Such records would be helpful to regulators in identifying and reconstructing the reasons for missing, incomplete, or untimely data (e.g., whether it was the result of untimely receipt by the reporting agent or issues with the reporting agent's operations). The data would also help reporting agents respond to Commission inquiries as to whether the reporting agent or the covered person appropriately complied with the final rule. The records of data submitted to an RNSA would provide context for such inquiries, as well as allow for a comparison of data received (by the reporting agent) and submitted to an RNSA, to the data published by an RNSA, allowing regulators to determine whether there are issues with an RNSA's processing of data received.

Accordingly, the Commission is adopting, in paragraph (b)(5) of final Rule 10c-1a without substantive changes, the proposed recordkeeping requirements contained in paragraphs (a)(2)(iv)(A) and (B) of the proposed rule

that provide for the reporting agent to preserve for a period of not less than three years, the first two years in an easily accessible place, both the Rule 10c-1a information obtained by the reporting agent from the covered person pursuant to paragraph (a)(2) of the final rule, including the time of receipt, and the corresponding Rule 10c-1a information provided by the reporting agent to an RNSA, including the time of transmission to an RNSA<sup>227</sup>; and, the written agreements as required under paragraphs (a)(2) and (b)(3) of the final rule.<sup>228</sup>

#### *D. Scope of Securities Required To Be Reported—Rule 10c-1a(j)(3)*

##### Proposed Rule

In the Proposing Release, the Commission stated its preliminary belief 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."<sup>229</sup> Accordingly, the proposed rule would have required the reporting of loans of any security (e.g., both equity and debt).<sup>230</sup>

Specifically, the Commission stated that, "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."<sup>231</sup>

##### Final Rule

In response to proposed Rule 10c-1, some commenters expressed general support for increased transparency and price discovery in the securities lending market by increasing the amount and availability of data in the market.<sup>232</sup>

<sup>227</sup> See final Rule 10c-1a(b)(5); 17 CFR 240.10c-1a(b)(5)(i) ("final Rule 10c-1a(b)(5)(i)"); 17 CFR 240.10c-1a(b)(5)(ii) ("final Rule 10c-1a(b)(5)(ii)").

<sup>228</sup> While the term "Rule 10c-1a information" has stayed the same in the final rule, as also explained below, in Part VII.F, the scope of the information required by the final rule has been modified with the deletion of the proposed requirement to provide information regarding the total amount of "securities on loan" and "available to lend" data, as was originally proposed.

<sup>229</sup> See Proposing Release, 86 FR 69808.

<sup>230</sup> See proposed Rule 10c-1(a)(1). See also Proposing Release, 86 FR 69808. See, e.g., 17 CFR 230.902 (defining "Debt securities" as "any security other than an equity security" and an "equity security" as defined in 17 CFR 230.405).

<sup>231</sup> See Proposing Release, 86 FR 69808 (citing *A Pilot Survey of Agent Securities Lending Activity*, Off. of Fin. Research, Working Paper No. 16-08, 2016, at 8, available at [https://www.financialresearch.gov/working-papers/files/OFRwp-2016-08\\_Pilot-Survey-of-Securities-Lending.pdf](https://www.financialresearch.gov/working-papers/files/OFRwp-2016-08_Pilot-Survey-of-Securities-Lending.pdf)).

<sup>232</sup> See *supra* note 47.

Other commenters offered support for the inclusion of all loans of securities.<sup>233</sup> Another commenter expressed the view that "[t]here is an urgent need to require securities lenders to provide greater details of their loans to a RNSA as outlined by the proposed changes to Rule 10c-1. . . . [m]arket participants and regulators alike will greatly benefit from the greater transparency that comes from reporting every securities lending transaction as a result of the proposed changes to Rule 10c-1, just as they have from the trade-by-trade reporting that was instituted in the corporate bond market since TRACE was introduced."<sup>234</sup>

One commenter recommended that the Commission make explicit "the types of securities loans to which Rule 10c-1 applies so that market participants have clarity as to which types of securities loans must be reported."<sup>235</sup> The final rule makes explicit the types of transactions to which the final rule applies and the securities that are within the scope of the final rule through two newly defined terms: "covered securities loan" and "reportable security." The definition of the term "covered securities loan" in paragraph (j)(2) of the final rule makes explicit the types of loans to which the final rule applies, as discussed below, in Part VII.E. The definition of the term "covered securities loan" refers to a transaction in which any person on behalf of itself or one or more other persons, lends a "reportable security" to another person.<sup>236</sup> The final rule defines the term "reportable security" as "any security or class of an issuer's securities for which information is reported or required to be reported to the consolidated audit trail as required by § 242.613 ("Rule 613") of the Exchange Act and the CAT NMS Plan ("CAT"), the Financial Industry Regulatory Authority's Trade Reporting and Compliance Engine ("TRACE"), or the Municipal Securities Rulemaking Board's Real Time Reporting System ("RTRS"), or any reporting system that replaces one of these systems."<sup>237</sup> The definition of the term "reportable security" aligns the securities for which loans must be reported with securities for which transactions are currently being reported to existing reporting regimes, specifically, the CAT, TRACE, and RTRS. At this time, data on

<sup>233</sup> See Nasdaq Letter, at 2; Morningstar Letter, at 4.

<sup>234</sup> See AFREF Letter 1, at 3.

<sup>235</sup> ICI Letter 1, at 7.

<sup>236</sup> Final Rule 10c-1a(j)(2).

<sup>237</sup> Final Rule 10c-1a(j)(3).

<sup>224</sup> See Proposing Release, 86 FR 69811.

<sup>225</sup> See Proposing Release, 86 FR 69811.

<sup>226</sup> See James J. Angel Letter, at 7.

securities loans should be consistent with existing reporting regimes for other transactions in the same securities.

Aligning the scope of securities for covered securities loans with existing transaction reporting systems will provide a number of benefits. For instance, such alignment will allow regulators to obtain a more complete view across the different types of transactions for the same securities. In addition, many market participants are already familiar with the existing systems, either as reporting entities or, in the case of TRACE and RTRS, as users of the data.

Presently, securities that fall outside of the existing reporting regimes include: (1) for TRACE: fixed-income transactions in securities with a maturity of one calendar year or less, such as money market instruments,<sup>238</sup> and non-U.S. dollar-denominated debt are excluded from reporting requirements in TRACE;<sup>239</sup> (2) for the CAT: equity transactions in “restricted securities,” as that term is defined in 17 CFR 230.144(a)(3) (“Rule 144”) of the Securities Act,<sup>240</sup> are generally not reportable to the CAT because they are not subject to prompt last sale reporting rules;<sup>241</sup> and (3) for RTRS: municipal securities transactions excepted under

MSRB Rule G–14,<sup>242</sup> including a small number of transactions for securities without assigned Committee on Uniform Securities Identification Procedure (“CUSIP”) numbers, municipal fund securities (*i.e.*, 529 Plans, ABLE programs, local government investment pools), and inter-dealer transactions ineligible for comparison of trade settlement date at a clearing agency.<sup>243</sup> To provide consistency with existing reporting regimes, final Rule 10c–1a also incorporates these exclusions.

The Commission also received comments with suggestions to limit the scope of securities for which loans must be reported under the proposed rule.<sup>244</sup> One commenter favored narrowing the proposed scope of securities to only equity securities that transact in significant volume in the U.S., namely equity securities listed or traded on a national securities exchange “to avoid uncertainty for non-U.S. borrowers and lenders transacting in securities that are primarily relevant in non-U.S. markets and to provide for a measured approach in introducing data reporting and dissemination into the marketplace.”<sup>245</sup> Investors will also benefit from the increased transparency into loans of equity securities that are not listed or

traded on a national securities exchange (*i.e.*, loans of equities that are traded over-the-counter (“OTC”)) provided by the final rule. The Commission understands that existing lending transparency systems currently include information about loans of exchange-listed and OTC securities. Thus, lenders should generally already be accustomed to providing and receiving such data. Further, OTC securities tend to be less liquid and publicly available information about an issuer of an OTC security may be limited or nonexistent,<sup>246</sup> and thus such securities may be harder to borrow. Accordingly, data concerning loans of less liquid securities, such as OTC securities, will be beneficial to market participants by reducing information asymmetries and improving pricing efficiency by facilitating benchmarking for the loans of less liquid securities.<sup>247</sup>

Commenters also requested clarification regarding which types of securities would be reportable,<sup>248</sup> and some suggested limiting the scope of reportable securities. For example, one commenter suggested limiting the scope to equities for a period of time while the Commission evaluates whether to expand the scope of reporting to additional asset classes.<sup>249</sup> Another commenter stated that the final rule should “capture the most relevant and appropriate securities for the reporting regime [referring to equity securities] while not precluding the inclusion of other securities over time as the SEC and market participants gain more experience with the reporting regime.”<sup>250</sup> The definition of the term “reportable security” in the final rule is not limited to equities for the reasons discussed below, in this part. The definition of the term “reportable

<sup>238</sup> See, e.g., FAQ 3.1.43, available at <https://www.finra.org/filing-reporting/trace/faq> (“[a]s stated in Rule 6710(a), the definition of TRACE-Eligible Security does not include a Money Market Instrument. Under recent amendments to Rule 6710(o) pertaining to discount notes, “Money Market Instrument” means a debt security that at issuance has a maturity of one calendar year or less, or, if a discount note issued by an Agency, as defined in Rule 6710(k), or a Government-Sponsored Enterprise, as defined in Rule 6710(n), a maturity of one calendar year and one day or less (*i.e.*, not later than 366 days from the date of issuance, or if a leap year, not later than 367 days from the date of issuance).”).

<sup>239</sup> See, e.g., <https://www.finra.org/filing-reporting/trace/trace-foreign-sovereign-debt>.

<sup>240</sup> See, e.g., <https://www.catnmsplan.com/faq> (see FAQ B11 describing the types of products in scope for reporting to the CAT).

<sup>241</sup> Under the CAT NMS Plan, “Eligible Security” includes: (i) all NMS Securities, meaning “any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in Listed Options,” and (ii) all OTC Equity Securities, meaning “any equity security, other than an NMS Security, subject to prompt last sale reporting rules of a registered national securities association and reported to one of such association’s equity trade reporting facilities.” Further, while the CAT NMS Plan does not define “prompt last sale reporting rules,” the Operating Committee has determined that transactions in “restricted securities” (as defined by Rule 144(a)(3)) are not reportable to the CAT because they are not subject to prompt last sale reporting rules. However, transactions in direct participation programs must be reported to the CAT in Phase 2c of Industry Member reporting.

<sup>242</sup> Brokers, dealers, and municipal securities dealers (“municipal dealers”) must report transactions in municipal securities pursuant to MSRB Rule G–14. Pursuant to Rule G–14, each municipal dealer reports to the MSRB or its designee information about each purchase and sale transaction effected in municipal securities to RTRS in the manner prescribed by Rule G–14, available at <https://www.sec.gov/rules/sro/msrb/2018/34-83038-ex5.pdf>.

<sup>243</sup> See, e.g., Specifications for Real-Time Reporting of Municipal Securities Transactions (Nov. 2022), at 15 (“1.2.1 Securities that Must be Reported:[] In the real-time environment, all customer trades in municipal securities issues that have CUSIP numbers assigned by the CUSIP Service Bureau of Standard & Poor’s must be reported, except municipal fund securities. Dealers should not report (a) customer transactions in issues ineligible for CUSIP number assignment and (b) municipal fund securities. For inter-dealer trades, transactions must be reported in all municipal securities issues eligible for comparison in RTTM [the National Securities Clearing Corporation’s (“NSCC”) Real-Time Trade Matching (“RTTM”) web-based trade input method]. In addition, Rule G–14 requires that the role of a clearing broker in RTTM-eligible agency transactions effected by an introducing broker against the principal positions of the clearing broker shall be reported. . . . If an issue is not RTTM-eligible (because of the lack of a CUSIP number for the security or other reasons), inter-dealer trades in the issue are not subject to the reporting requirement.”) (footnotes omitted), available at <https://www.msrb.org/sites/default/files/RTRS-Specifications.pdf>.

<sup>244</sup> See, e.g., Federated Hermes Letter, at 2; Letter from Jiří Křol, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association (Jan. 7, 2022) (“AIMA Letter 1”), at 5; RMA Letter, at 5; ICI Letter 1, at 7; ABA Letter, at 4.

<sup>245</sup> See, e.g., RMA Letter, at 15.

<sup>246</sup> See, e.g., *Publication or Submission of Quotations Without Specified Information*, Release No. 34–89891 (Sept. 16, 2020), 85 FR 68124 at 68125 (Oct. 27, 2020) (Adopting Release) (“However, in other cases, there is no or limited current public information available about certain issuers of quoted OTC securities to allow investors or other market participants to make informed investment decisions.”).

<sup>247</sup> See *infra* Part IX.C.1 (discussing the benefits of increased transparency in less liquid lending markets).

<sup>248</sup> See, e.g., BlackRock Letter, at 2 (“as securities lending market dynamics differ by the asset class, we recommend the Commission provide further clarity on which asset classes are in scope”); ICI Letter 1, at 6.

<sup>249</sup> See ICI Letter 1, at 7.

<sup>250</sup> See RMA Letter, at 17 (supporting an initial definition of “securities” to include “equity securities that are part of the national market system” because that definition “captures the most relevant and appropriate securities for the reporting regime while not precluding the inclusion of other securities over time as the SEC and market participants gain more experience with the reporting regime”).

security” in paragraph (j)(3) of the final rule will help provide certainty to non-U.S. borrowers and lenders regarding the securities that are within the scope of the final rule (*i.e.*, securities or any class of an issuer’s securities for which information is reported or required to be reported to the CAT, TRACE, or RTRS, or any reporting system that replaces one of these systems). In addition, Part VII.M below discusses the domestic application of the final rule, which should also help provide certainty to non-U.S. borrowers and lenders transacting in securities that are primarily relevant in non-U.S. markets about the application of the final rule. With respect to taking a measured approach in introducing data reporting and dissemination into the marketplace, the Commission is establishing the specific compliance dates discussed below in Part VIII. Such compliance dates should provide adequate time for covered persons to implement systems for data reporting and for RNSAs to implement data dissemination systems. Another commenter recommended that the Commission begin with reporting requirements for loans of U.S. equity securities because such loans “mostly occur on electronic trading platforms, making the generation of trade data for these loans more straightforward than loans of other asset classes.”<sup>251</sup> As discussed above, the Commission has provided a compliance date that will provide adequate time for covered persons to comply with the final rule, even for loans of securities that may not occur on an electronic trading platform, and will not further delay transparency for OTC investors, which are primarily retail.<sup>252</sup>

Some commenters requested a phased approach to the overall implementation of the final rule, which is discussed below, in Part VIII, including a recommendation that implementation of the final rule begin with loans of equity securities.<sup>253</sup> However, current lending systems include data on loans of fixed income securities.<sup>254</sup> Thus, lenders should generally be accustomed to providing and analyzing data on loans of fixed income securities. Further, as discussed below, in Part VIII, such a phased approach is not provided for in

the final rule because it would unduly delay the public availability of Rule 10c–1a information and limit the initial benefits of the final rule.

One commenter suggested excluding debt from the proposed rule, particularly corporate debt and asset-backed securities, which the commenter described as having small issuance sizes, diverse characteristics, and a small number of lending transactions.<sup>255</sup> However, information about loans on such securities will be beneficial to lenders, investors, and regulators precisely because of such characteristics. Data on such loans may be useful for lenders to assess rates and for regulators and investors to understand the lending market for such securities. For example, market participants will be able to use the information made publicly available by the final rule and pool such information across debt securities to help market participants compare the terms of a loan of one debt security with loans of other debt securities that have similar characteristics or time horizons. Thus, including debt securities in the final rule will help improve the ability of market participants to benchmark their loans of debt securities.

The Commission also received comment regarding the size of the debt market. One commenter stated that “[w]hile the number of publicly traded equity securities of U.S. issuers is around 3,600, there are over two million unique issuances of corporate and government bonds and asset-backed securities in circulation.”<sup>256</sup> The same commenter stated that utilization rates decrease as products become more individualized and there is only a small market for shorting bonds.<sup>257</sup> Less liquid markets should benefit from the increased transparency provided by the final rule because improving securities lending transparency, even in the debt market, can lead to reduced information asymmetry and increased pricing efficiency.<sup>258</sup>

One commenter suggested excluding government securities from the proposed rule because “there is sufficient liquidity and demand for these securities on platforms and venues that have a high degree of transparency,” but did not provide details regarding the transparency of the platforms and venues.<sup>259</sup> As discussed below, in Part IX.B.2, there is some

transparency in the government securities lending market, but some information may not be as timely or as robust (*i.e.*, the data may contain aggregated volume information) as under the final rule. The final rule includes loans of U.S. Government securities between market participants to help ensure that comprehensive and timely information about these loans is made publicly available so that market participants in the government securities lending market benefit from increased transparency.

Some commenters requested clarification on whether “crypto assets” or as some commenters referred to them, “cryptocurrencies” would be covered by proposed Rule 10c–1.<sup>260</sup> A crypto asset, which is also sometimes referred to as a “digital asset,” may meet the definition of a “security” under the federal securities laws.<sup>261</sup> As defined in the final rule, paragraph 10c–1a(j)(3) applies to reportable securities, which are securities for which transactions are reported to the CAT, TRACE, and RTRS. Accordingly, if a crypto asset is a security that meets one of these same criteria, the crypto asset is a reportable security.

One commenter believed that infrequent lending of debt securities could result in a “far greater risk of loss of anonymity and the use of such data to anticipate or reverse engineer the trading of competitors.”<sup>262</sup> The final rule’s requirements for end-of-day reporting of data elements and loan modification data elements in paragraphs (c) and (d) and delaying the publication of loan amount and modifications to loan amount in paragraph (g) should help reduce the potential to anticipate and reverse engineer the trading of competitors. In addition, paragraph (g)(4) of the final rule requires that following the receipt of confidential information pursuant to paragraph (e) “an RNSA shall keep such information confidential, in accordance with the provisions of paragraph (h) of this section and applicable law.”<sup>263</sup> Further, 17 CFR 240.10c–1a(h)(4) (“final Rule 10c–1a(h)(4)”) requires that an RNSA “[e]stablish, maintain, and enforce reasonably designed written

<sup>251</sup> BlackRock Letter, at 9.

<sup>252</sup> See Andrew Ang et al., *Asset Pricing in the Dark: The Cross-Section of OTC Stocks*, 26 Rev. Fin. Stud. 2985–3028 (2013).

<sup>253</sup> See *infra* note 688 and accompanying text.

<sup>254</sup> See Equilend Letter, at 1 (Data Explorers was acquired by S&P Global and manages a dataset of over \$37 trillion of global securities from 20,000 institutional funds, and over three million intraday transactions), available at <https://www.spglobal.com/marketintelligence/en/mi/products/securities-finance.html>.

<sup>255</sup> See RMA Letter, at 16.

<sup>256</sup> RMA Letter, at 16.

<sup>257</sup> See RMA Letter, at 16.

<sup>258</sup> See *infra* Part IX.C.1 (discussing how the final rule will affect markets with low lending volume such as corporate bonds).

<sup>259</sup> RMA Letter, at 16.

<sup>260</sup> See, e.g., James J. Angel Letter, at 5; Letter from Jay Rivera (Mar. 2, 2022); Letter from Treveri Capital LLC (Dec. 22, 2021) (“Treveri Capital Letter”), at 1.

<sup>261</sup> See, e.g., *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO*, Release No. 34–81207 (July 25, 2017) (“DAO 21(a) Report”), available at <https://www.sec.gov/litigation/investreport/34-81207.pdf>. See also *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

<sup>262</sup> RMA Letter, at 16.

<sup>263</sup> Final Rule 10c–1a(g)(4).

policies and procedures to maintain the security and confidentiality of confidential information required by paragraph (e) of this section.”<sup>264</sup> Thus, the only existing RNSA’s experience with managing nonpublic information, coupled with the explicit requirements for protecting confidential information in paragraphs (g)(4) and (h)(4) of the final rule, will help ensure that an RNSA implements data security measures that will protect anonymity.

#### *E. Scope of Transactions Required To Be Reported—Rule 10c-1a(j)(2)*

##### Proposed Rule

The Commission proposed that any person that “loans a security” on behalf of itself or another person shall provide Rule 10c-1 information to an RNSA.<sup>265</sup> The Commission did not define the term “loans a security,” but requested comment on whether a definition was necessary.<sup>266</sup> In the Proposing Release, the Commission stated its preliminary belief that any person that loans a security on behalf of itself or another person should be required to provide the material terms to an RNSA 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.”<sup>267</sup>

##### Final Rule

Many commenters requested clarification of the scope of securities loan transactions to which the rule’s reporting requirements would apply.<sup>268</sup> One commenter stated that the proposed rule sought to regulate “a host of transactions that do not involve the ‘loan or borrowing of securities.’”<sup>269</sup> Other commenters recommended that a definition of the term “loans a security” refer only to lending for a particular purpose.<sup>270</sup> Some of those commenters expressed concerns about including data for loans that were not considered traditional loans in the industry, particularly loans for which the parties did not enter into a written contract or transfer collateral, and that such loans

might “skew the data and negatively impact the utility of the information provided.”<sup>271</sup> Other commenters recommended that the final rule include a defined term for the types of transactions that are covered by the rule.<sup>272</sup>

To address commenters seeking greater clarity and commenters recommending a definition as to what types of transactions are required to be reported, the final rule includes a definition of the term “covered securities loan” to mean “a transaction in which any person on behalf of itself or one or more other persons, lends a reportable security to another person,” with certain exceptions.<sup>273</sup> As discussed below, in this part, the exceptions remove from the scope of the final rule’s reporting requirements certain clearing agency positions<sup>274</sup> and certain uses of margin securities by a broker or dealer<sup>275</sup> that are not consistent with, or traditionally recognized as, securities lending transactions.

The Commission received a comment recommending that the term “loans a security” be limited to lending to unaffiliated borrowers.<sup>276</sup> Other commenters suggested that information on securities lending transactions between affiliates not be disseminated under the rule,<sup>277</sup> with one stating that, “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.”<sup>278</sup> The Commission does not agree that it would be appropriate to exclude loans to affiliated borrowers from the scope of the final rule. Inter-affiliate loans may be arms-length transactions and excepting such loans

would result in the loss of data relevant to the lending market.<sup>279</sup>

In addition, an exclusion for inter-affiliate loans could result in market practices to circumvent reporting obligations. For instance, in arranged financing, a broker or dealer “may offer arranged financing programs (sometimes called ‘enhanced lending’ or ‘short arranging products’) through which a customer can borrow shares from the firm’s domestic or foreign affiliate and use those shares to close out a short position in the customer’s account.”<sup>280</sup> In describing arranged financing, a market participant has stated that “[w]ith respect to . . . arranged financing/enhanced lending models at member firms, certain ones may involve the loan of shares to customers from domestic affiliates and others may involve the loan of shares to customers from foreign affiliates.”<sup>281</sup> Thus, if the broker or dealer agrees to provide a customer the covered securities loan through an affiliate, such as a foreign affiliate, an exclusion for inter-affiliate loans could exclude the securities loan entirely. Moreover, one researcher has observed that “owners of large portfolios . . . often conduct their own lending programs with an affiliated agent lender . . . .”<sup>282</sup> An exclusion for inter-affiliate loans would not capture such loans. Therefore, under the final rule a covered person is required to report covered securities loans with affiliates.

Certain commenters recommended that a definition of the term “loans a security” refer only to transactions made pursuant to a written lending agreement<sup>283</sup> or documented as a securities loan on the lender’s books

<sup>271</sup> See, e.g., BlackRock Letter, at 6–7.

<sup>272</sup> See, e.g., Fidelity Letter, at 2; Sharegain Letter, at 3; Letter from Kenneth E. Bentsen, Jr., President and CEO, SIFMA (Apr. 1, 2022) (“SIFMA Letter 2”), at 3; Letter from Lindsey Weber Keljo, Asset Management Group—Acting Head, SIFMA Asset Management Group (Jan. 7, 2022) (“SIFMA AMG Letter”), at 9; CASLA Letter, at 2; EBF Letter, at 1; RMA Letter, at 14–15; IIB Letter, at 9; FIF Letter, at 2–3.

<sup>273</sup> See final Rule 10c-1a(j)(2).

<sup>274</sup> See final Rule 10c-1a(j)(2)(ii).

<sup>275</sup> See final Rule 10c-1a(j)(2)(iii).

<sup>276</sup> See SIFMA AMG Letter, at 9 (recommending a definition of the term “loans a security” to mean to “enter into a transaction in which one person, on behalf of itself or another person . . . will temporarily lend to an unaffiliated person,” among other things).

<sup>277</sup> See, e.g., SIFMA Letter 1, at 15; RMA Letter, at 15; CASLA Letter, at 2; IIB Letter, at 10.

<sup>278</sup> See SIFMA Letter 1, at 15. See also RMA Letter, at 15 (stating that “inter-affiliate loans frequently do not represent market prices and should be excluded from such dissemination”).

<sup>279</sup> To reduce any potential confusion and misinterpretation of the data, an RNSA could determine to, if it is able, develop methodologies to separate or identify such loans.

<sup>280</sup> See FINRA Regulatory Notice 21-19 (June 4, 2021), available at <https://www.finra.org/rules-guidance/notices/21-19>.

<sup>281</sup> See, e.g., Robert Toomey, Managing Director, and Joseph Corcoran, Managing Director, SIFMA, SIFMA Comment on Short Interest Position Reporting Enhancements and Other Changes Related to Short Sale Reporting (FINRA Regulatory Notice 21-19) (Sept. 30, 2010), available at <https://www.sifma.org/wp-content/uploads/2021/10/SIFMA-Comments-on-FINRA-RN-21-19-Final.pdf>.

<sup>282</sup> See, e.g., BIS Working Papers No. 768: *Over-the-Counter Market Liquidity and Securities Lending*, Nathan Foley-Fisher, et al., Bank of International Settlement (Feb. 2019), available at <https://www.bis.org/publ/work768.pdf>.

<sup>283</sup> See, e.g., SIFMA Letter 1, at 10; SIFMA AMG Letter, at 9; RMA Letter, at 15; Federated Hermes Letter, at 2 (recommending to “limit reporting only to traditional lending agreements made pursuant to the Master Securities Loan Agreement”); S3 Partners Letter, at 10–11.

<sup>264</sup> Final Rule 10c-1a(h)(4).

<sup>265</sup> See proposed Rule 10c-1(a).

<sup>266</sup> See Proposing Release, 86 FR 69808 (Question 8).

<sup>267</sup> See Proposing Release, 86 FR 69807. See also Public Law 111-203, sec. 984(b), 124 Stat. 1376 (2010).

<sup>268</sup> See, e.g., Fidelity Letter, at 2; SIFMA Letter 1, at 9; Letter from Wim Mijs, CEO, European Banking Federation (Jan. 17, 2022) (“EBF Letter”), at 1; Citadel Letter, at 4.

<sup>269</sup> See Citadel Letter, at 12.

<sup>270</sup> See, e.g., CASLA Letter, at 2 (recommending “a definition of ‘securities loan’ . . . based on the purpose of a loan”).

and records.<sup>284</sup> One commenter stated that such an approach would “ensure consistent reporting and avoid confusion and misinterpretation of data by the public.”<sup>285</sup> Another commenter stated that it could avoid “the public dissemination of incomplete, inaccurate, and misleading information that could have an adverse impact on the securities lending market.”<sup>286</sup> The Commission disagrees that the definition of the term “covered securities loan” should require that the transaction be agreed to pursuant to a written securities lending agreement such as the Master Securities Loan Agreement, or a transaction documented as a securities loan on a lender’s books and records. Such a requirement could provide an easy way to avoid the requirement, particularly for unregulated entities not otherwise subject to documentation and books and records requirements. Moreover, such a requirement could cause competitive harm to entities that are subject to such requirements or who follow such practices as risk management tools. Requiring the reporting of only securities loans made pursuant to a written agreement or subject to a covered person’s books and records requirements would create confusion by introducing such distinctions, which may be interpreted or applied differently across the different types of persons that meet the definition of “covered person.” Additionally, such requirements would result in data that excludes reporting by covered persons that do not use written agreements or have books and records requirements. Such gaps in the data could contribute to the misinterpretation of data by the public, instead of ameliorating it as the commenter suggests.<sup>287</sup> Thus, the final rule covers a wide variety of loans without limitation as to a particular loan’s design or structure by including all loans that occur when a covered person “agrees to a covered securities loan.”<sup>288</sup>

<sup>284</sup> See, e.g., SIFMA Letter 1, at 3; SIFMA AMG Letter, at 9.

<sup>285</sup> See SIFMA Letter 1, at 3.

<sup>286</sup> SIFMA AMG Letter, at 2.

<sup>287</sup> See SIFMA Letter 1, at 3.

<sup>288</sup> See final Rule 10c–1a(a). The final rule’s requirement that a covered person who “agrees to” a covered securities loan must report Rule 10c–1a information to an RNSA (or rely on a reporting agent to do so) is designed to be broad regarding when a securities loan is required to be reported. This is designed to ensure that differently structured securities loans are captured by the final rule to prevent evasion (e.g., by not including specific characteristics, like a written agreement, that can be easily avoided), and to prevent undue delay of reporting (e.g., by not requiring that the loan be settled, which may take days or longer after

Some commenters recommended that the term “loans a security” specifically refer to the temporary lending of securities against a transfer of collateral.<sup>289</sup> One of the commenters stated that such a provision would help “ensure consistent reporting and avoid confusion and misinterpretation of data by the public.”<sup>290</sup> Another stated that defining the term “loan of securities” to include a transfer of collateral would “better achieve the Commission’s goals” by avoiding “the public dissemination of incomplete, inaccurate, and misleading information.”<sup>291</sup> Such a definition would have been consistent with the Proposing Release’s statement that a securities loan is typically a fully collateralized transaction.<sup>292</sup> However, the proposed rule did not limit the application of its reporting requirements to securities loans that were fully collateralized, as it was designed to capture all loans of securities and provide a more complete and timely picture of trading for securities loans.<sup>293</sup> While the provision of collateral is currently a common industry practice for securities loans, it is not necessarily a characteristic of all securities loans. For example, some lenders may structure securities loans to include a bank guaranty, insurance policy, or other credit enhancement in lieu of collateral.<sup>294</sup> Therefore, limiting the scope of loans covered by the final rule to only include lending against a transfer of collateral could leave certain loans out of the scope of the final rule’s reporting requirements. The exclusion of uncollateralized loans could decrease the availability of pricing and activity information in the securities lending market, resulting in the reporting and dissemination of incomplete, inaccurate, and misleading information for which the commenters voiced concern.<sup>295</sup> Furthermore, the reporting of uncollateralized loans would provide additional data to market participants,

the material terms of a securities loan have been agreed to).

<sup>289</sup> See, e.g., SIFMA Letter 1, at 16; SIFMA AMG Letter, at 9; RMA Letter, at 15.

<sup>290</sup> See SIFMA Letter 1, at 3.

<sup>291</sup> See SIFMA AMG Letter, at 2.

<sup>292</sup> See Proposing Release, 86 FR 69804.

<sup>293</sup> See Proposing Release, 86 FR 69812.

<sup>294</sup> See, e.g., 17 CFR 240.15c3–3(b)(3)(iii) (“Rule 15c3–3(b)(3)(iii)”) (stating that a broker or dealer borrowing fully paid or excess margin securities “[m]ust provide to the lender, upon the execution of the agreement or by the close of the business day of the loan if the loan occurs subsequent to the execution of the agreement, collateral, which fully secures the loan of securities, consisting exclusively of cash or United States Treasury bills and Treasury notes or an irrevocable letter of credit issued by a bank”).

<sup>295</sup> See SIFMA AMG Letter, at 2; SIFMA Letter 1, at 3.

and would not result in misleading duplicative information like other types of transactions that are discussed below in this part (e.g., loans arising from certain clearing agency services). Additionally, such a restriction could incentivize market participants to use credit enhancement mechanisms that differ from collateral (e.g., bank guaranties or insurance policies) in order to avoid the final rule’s reporting requirements. Therefore, the scope of final Rule 10c–1a’s reporting requirements is not limited to only include loans against a transfer of collateral.<sup>296</sup>

One commenter recommended that the Commission limit the scope of the rule’s reporting requirements to securities loans where a lender seeks to earn compensation or a return from the transaction.<sup>297</sup> The commenter stated that, “[l]imiting the scope in such a way would help focus reporting on primary transactions of interest, where the borrower is seeking to ‘gain access to the security itself,’ and distinguish it from repurchase and other agreements, which are ‘typically used for short-term financing.’”<sup>298</sup> Another commenter proposed limiting the scope of securities loans to transactions in which a borrower obtains use of the securities for a fee.<sup>299</sup> However, a limitation of the final rule’s reporting requirements to only securities loans made by a lender seeking to earn compensation or a return from the transaction, or for a fee could potentially result in evasion, as securities loans could be structured (e.g., via over-collateralization, haircuts, or use of non-cash collateral with varying maturities, credit ratings, or income characteristics) to avoid the identification of a fee. At the very least, such a requirement could result in confusion or inconsistent reporting as market participants may interpret differently the loan structures that incorporate a fee or are made by lenders

<sup>296</sup> But see *supra* note 148 (discussing requirements for the provision of collateral by borrowers in the instance of fully paid and excess margin securities).

<sup>297</sup> See, e.g., ABA Letter, at 3 (recommending “[t]he SEC should define covered securities lending transactions to those where the lender is seeking to earn compensation from the transaction”).

<sup>298</sup> See ABA Letter, at 3–4 (quoting the Proposing Release, 86 FR 69844 n.246). See also *infra* in this part, a discussion of final Rules 10c–1a(f)(2)(iii) and (j)(2)(iii)(A) and the exclusion from the final rule’s reporting requirements of certain uses of margin securities by a broker or dealer, which can include “funding trades,” repurchase agreements, and uses of margin securities that are not a loan to another person (e.g., rehypothecation).

<sup>299</sup> See BlackRock Letter, at 7 (recommending “the SEC should limit the scope to traditional securities lending transactions where the parties have entered into the loan transaction in order for a borrower to obtain use of the securities for a fee”).

seeking to earn compensation or a return from the transaction. If the final rule only applied to securities loans agreed to for compensation, a fee, or for the purpose of earning a return, securities loans made to affiliates could be structured to fall outside the final rule's reporting requirement (*i.e.*, made without an expectation of return or for no fee), while a loan still would have occurred, and the affiliate would still benefit from possession of the loaned securities. Further, the final rule does not exclude securities loans based on the purpose or duration of the loan, such as for "short-term financing," in order to capture a wide variety of loans regardless of purpose or duration. Finally, the final rule provides that a covered securities loan is a transaction in which a person *lends* a reportable security, which distinguishes covered securities loans from other agreements.

Multiple commenters were concerned that the proposed rule would require that short sales or short positions be reported as securities loans. Such commenters requested clarification of whether the proposed rule would treat short sales as loans of securities.<sup>300</sup> To provide such clarification, under the final rule covered persons will not be required to report short sales as defined

<sup>300</sup> See Citadel Letter, at 4 (stating that "[t]he scope of the Commission's proposal is unclear" and that "[c]ustomer short sales . . . are not typically documented under securities lending agreements, booked as securities loans, or treated as securities loans for financial reporting purposes"); See also Fidelity Letter, at 3 (stating that "inclusion of short positions in the required reporting . . . would be inappropriate from a securities lending market perspective, as well as potentially misleading, as it could result in inaccurate double counting of loans"); IHS Markit Letter, at 3 (stating that securities loans and short sales "are two separate and distinct markets with different drivers, participants, and data points and should not be conflated"); SIFMA Letter 1, at 9–12 (recommending that the Commission exclude short positions from the scope of loans required to be reported to an RNSA); AIMA Letter 1, at 3–4; Letter from Jiří Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association (Apr. 1, 2022) ("AIMA Letter 2"), at 3 (short positions would be reported under the rule proposed by the Commission pursuant to section 929X of the Dodd-Frank Act); Letter from Richard Karoly, Managing Director, Legal, Charles Schwab & Co., Inc. (Jan. 7, 2022) ("Charles Schwab Letter"), at 1–2 (short positions are already reported under other reporting regimes such as FINRA's Rule 4560. Short-Interest Reporting); MFA Letter 3, at 4 (stating that the Commission should "distinguish short positions from stock loans"). The Commission agrees with commenters who stated that short positions are not subject to a written securities lending agreement, nor carried on a firm's books and records as securities loans, nor treated as securities loans for financial reporting purposes. See, *e.g.*, FIF Letter, at 2–3; See also SIFMA AMG Letter, at 5 (stating that short positions are "similar in some respects but are outside of the securities lending activity" targeted by the proposed rule).

by 17 CFR 242.200(a) ("Rule 200(a)"),<sup>301</sup> but will be required to report loans that are used for short sales.

The Commission stated in the Proposing Release that it was not proposing to include repurchase and sale agreements (commonly known as "repos") within the scope of the proposed rule because section 984 of the Dodd-Frank Act focuses on the loan or borrowing of securities.<sup>302</sup> The Proposing Release detailed distinctions between the typical securities lending and repo markets, including that repos typically are primarily used for short-term financing while other securities loans typically are used to gain access to the security itself, and that loans generally allow the lender to recall the security on demand while repos do not.<sup>303</sup> Some commenters agreed with the Commission, recommending that repos should not fall within the meaning of the term "loans a security" in the proposed rule.<sup>304</sup> One commenter suggested that loans of a security should be distinguished from repos.<sup>305</sup> However, one commenter stated that there is "significant overlap in the functionality between repos and securities lending transactions."<sup>306</sup> The commenter also suggested "a broad anti-evasion provision that prohibits any person from engaging in any practice intended to evade the rule's reporting requirements."<sup>307</sup> The same commenter recommended defining the term "securities loan" to include repos.<sup>308</sup>

<sup>301</sup> Rule 200(a) provides, "The term short sale shall mean any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller."

<sup>302</sup> See Proposing Release, 86 FR 69803 n.2.

<sup>303</sup> See Proposing Release, 86 FR 69843 n.246.

<sup>304</sup> See, *e.g.*, SIFMA Letter 1, at 9 (noting 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"); SIFMA Letter 2, at 3; BlackRock Letter, at 2 (describing securities lending market trades as "transactions whereby a lender lends securities to a borrower in exchange for collateral but excluding repurchase transactions where the purpose of the trade is to provide cash financing in exchange for non-cash collateral").

<sup>305</sup> See ABA Letter, at 3–4 (stating that "[t]he SEC should define covered securities lending transactions . . . and distinguish it from repurchase and other agreements").

<sup>306</sup> See Better Markets Letter, at 10. See also James J. Angel Letter, at 6–7.

<sup>307</sup> See Better Markets Letter, at 10. See also S3 Partners Letter, at 11 (expressing concern with securities lending transactions being repurchased as repos); James J. Angel Letter, at 7 (stating that "[t]he final rule needs to define securities lending in such a way that it deters such evasion, while not ensnaring normal repo in the reporting requirements").

<sup>308</sup> See Better Markets Letter, at 10 ("Accordingly the SEC should consider . . . a definition of 'securities loan' or 'securities lending' that will ensure sufficient coverage of relevant transactions,

The Office of Financial Research ("OFR") recently proposed a rule to collect data on repos.<sup>309</sup> Accordingly, at this time, it is not necessary to include repos within the scope of the final rule's information reporting requirements, as a potential OFR rule, if adopted, could address any potential reporting gaps, thereby reducing the incentives to evade final Rule 10c–1a.

The Commission also received comment requesting that the final rule "make clear that the novation and processing of a securities lending transaction by a registered clearing agency does not give rise to a new loan or the modification of an existing loan subject to reporting under Rule 10c–1."<sup>310</sup> The same commenter also stated that "[n]ovation is . . . the legal mechanism through which NSCC guarantees to each counterparty the performance of the obligations under a transaction that the counterparties already negotiated and executed away from the NSCC and that was already subject to a reporting obligation."<sup>311</sup> Another commenter directly responded to the Proposing Release's request for comment asking whether the Commission should define what it means to "loan a security."<sup>312</sup> The commenter stated that the definition should "expressly exclude loan positions that result from the central counterparty novation function that a clearing agency like OCC provides to securities loans."<sup>313</sup> The commenter, which is an SEC-registered clearing agency, also stated that it "does not have access to the majority of information sought under proposed Rule 10c–1 . . . and, therefore could not report such information to an RNSA."<sup>314</sup> The Commission agrees with the commenters' recommendations that positions that result from central counterparty services by a clearing agency, including the novation and processing of a securities lending transaction, should not give rise to any

*i.e.*, those where securities are temporarily transferred from one party to another, for compensation, with a commitment to return those securities in the future").

<sup>309</sup> See, *e.g.*, OFR Factsheet: OFR's Proposed Data Collection (Mar. 2023), available at [https://www.financialresearch.gov/data/files/NCCBR\\_factsheet.pdf](https://www.financialresearch.gov/data/files/NCCBR_factsheet.pdf); Office of Financial Research Releases Proposal to Collect Data on Certain Repo Transactions (Jan. 5, 2023), available at <https://www.financialresearch.gov/press-releases/2023/01/05/office-of-financial-research-releases-proposal-to-collect-data-on-certain-repo-transactions>.

<sup>310</sup> See DTCC Letter, at 3; See also OCC Letter, at 10.

<sup>311</sup> See DTCC Letter, at 4.

<sup>312</sup> See Proposing Release, 86 FR 69808 (Question 8).

<sup>313</sup> See OCC Letter, at 12.

<sup>314</sup> See OCC Letter, at 12.

reporting obligation under the final rule, including the requirement to report loan modification data elements under paragraph (d) of the final rule. As discussed above, in Part VII.A, clearing agencies providing the functions of a central counterparty or central securities depository do not lend or borrow shares on their own behalf, but instead novate or process the loans of lenders and borrowers (*i.e.*, central counterparty or central securities depository services) for the purpose of efficient clearance and settlement.<sup>315</sup> Although novation of the loan by the clearing agency technically creates a new loan in which the clearing agency would step into the shoes of the counterparties,<sup>316</sup> the clearing agency would not be modifying the key terms of the loan (other than changing the identities of the counterparties to that of the clearing agency), such as the rate or size, and requiring clearing agencies to report such loans would result in the misleading appearance of additional loan volume containing otherwise duplicative loan information.<sup>317</sup> Therefore, the final rule excludes from the “covered securities loan” definition “a position at a clearing agency that results from central counterparty services pursuant to Rule 17Ad-22(a)(2) of the Exchange Act or central securities depository services pursuant to Rule 17Ad-22(a)(3) of the Exchange Act.”<sup>318</sup>

The Commission also received a comment stating that “it is not uncommon for a lending agent to pool together available supply of a given security across multiple lenders in their lending program” to satisfy a large loan of securities and reallocate such loan among the lenders in the program, as the inventory of individual lenders changes, to avoid recalling a loan.<sup>319</sup>

<sup>315</sup> See DTCC Letter, at 1 (stating that the “processing of a securities loan transaction, including through novation and netting, does not constitute a modification or a new transaction for reporting purposes. Such processing does not constitute new market activity or modify the material economic terms of the transaction, which the parties will have already reported” and that “[n]ovation is simply the legal mechanism through which NSCC guarantees to each counterparty the performance of the obligations under a transaction that the counterparties already negotiated and executed away from NSCC and that was already subject to a reporting obligation”).

<sup>316</sup> Under Rule 17Ad-22(a)(2), a clearing agency performs the functions of a central counterparty when it interposes itself between the counterparties to securities transactions, acting functionally as the buyer to every seller and the seller to every buyer.

<sup>317</sup> See final Rule 10c-1a(j)(2)(ii). If a clearing agency acted on behalf of the beneficial owner of the loaned security to effect a covered securities loan, then the clearing agency would be a “covered person” under paragraph (j)(1)(i) of the final rule.

<sup>318</sup> See final Rule 10c-1a(j)(2)(ii).

<sup>319</sup> See BlackRock Letter, at 7. See also, SIFMA AMG Letter, at 10 (stating that “for bulk loans,

The commenter also stated that, in such instances, “[g]iven no change in the economics of the trade or any physical movement of securities, these intraday record entries are not market trades and should not be reported as such.”<sup>320</sup> However, the proposed rule did not limit its information reporting requirements to securities loans arising from “market trades” or the “physical movement of securities,” neither of which the commenter has defined or described in the context of the securities lending market. Changing the party or parties to a covered securities loan, which is required to be confidentially reported under 17 CFR 240.10c-1(e)(1) (“final Rule 10c-1a(e)(1)”), creates a new covered securities loan that would require reporting as a new covered securities loan to an RNSA under final Rule 10c-1a(a)(1), and not as a modification under final Rule 10c-1a(d). The identity of the lender or lenders is a material term of a covered securities loan.<sup>321</sup> The identity of the lender is not made public, but is important information for regulatory purposes, such as surveillance of activity pertaining to the individual loan.<sup>322</sup> Whether the parties to a covered securities loan change for purposes of the reporting requirements under final Rule 10c-1a(e)(1) depends on how a pool<sup>323</sup> or lending program is structured (*e.g.*, whether the pool or lending program itself or the individual underlying participants are the party or parties identified as the lender for the loan). For example, if a lending program as an individual entity is the party that is the lender of the covered securities loan, changes to the underlying participants, inventory providers, or customers of that lending program will not constitute a change to the parties of the covered securities loan. In that instance, unlike the lending program, the individual participants will not be

reporting at the lending agent level rather than the beneficial owner would reflect the actual market loan and would avoid the reporting of loan components which may shift throughout the allocation process”).

<sup>320</sup> BlackRock Letter, at 7.

<sup>321</sup> See final Rule 10c-1a(e)(1).

<sup>322</sup> If the covered person is a pool (and thus is a lender of covered securities), it is the pool that is required to be confidentially reported as the party to the covered securities loan pursuant to final Rule 10c-1a(e)(1). See also Proposing Release, 86 FR 69804 (“The data elements provided to an RNSA . . . 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.”).

<sup>323</sup> The term “pool” is used here in the same manner it is described by the commenter quoted above in this paragraph. See BlackRock Letter, at 6–7 (also using the term “pooled pass-through account”).

lenders directly to the borrower of the covered securities loan. In that case, where a covered securities loan remains open and the only change that occurs is a reallocation among the pool’s underlying constituents, that is not a change that will require reporting as a new covered securities loan or as a modification under paragraph (d) because there will be no change to a data element in paragraph (c) of the final rule.

However, if the multiple, individual participants are all parties identified as lenders to the loan, with no lending program or other entity interposed between them and the borrower, a change in their composition (the removal or addition of a lender) would constitute an assignment of the loan and therefore would require reporting as a new loan pursuant to final Rule 10c-1a(a)(1). Whether a reallocation of a loan among participants in a lending program requires the reporting of a new covered securities loan depends upon the facts and circumstances, including the structure of such lending program.

One commenter recommended a definition of the term “loans a security” that would apply at a minimum “any time the lender loses the right to vote the securities during the time of the loan.”<sup>324</sup> Voting rights do not provide an adequate criterion to define what a securities loan is because not all reportable securities necessarily carry voting rights (*e.g.*, some preferred stock, options, fixed-income securities, and treasuries). However, the facts and circumstances, including the loss of voting rights, may be an indicator as to whether a transaction is a loan.

The Commission also received comment letters expressing support for limiting the reporting required under the proposed rule to the Wholesale market<sup>325</sup> of the securities lending market.<sup>326</sup> Some commenters

<sup>324</sup> See Morningstar Letter, at 4.

<sup>325</sup> Traditionally, securities lending and borrowing transactions have been conducted on a bilateral basis. 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 by market participants as the Wholesale market, while loans from a broker-dealer to the end borrower occur in what is referred to by market participants as the Customer market (also known as the “retail market”). See Proposing Release, 86 FR 69805. For purposes of this release, this market is referred to as the Customer market. See *supra* Part II.

<sup>326</sup> See AIMA Letter 1, at 2; AIMA Letter 2, at 3; Citadel Letter, at 11; SBAI Letter, at 2; Letter from John L. Thornton, Co-Chair, Hal S. Scott, President,

recommended narrowing the scope of loans to the Wholesale market due to what they characterized as potential negative effects on short selling from data that could be revealed through loans in the Customer market.<sup>327</sup> One of the commenters stated that “immediately publicly disclosing short selling activity would signal to all other market participants that a short position is being established.”<sup>328</sup> Such concerns are largely addressed by requiring that an RNSA delay public disclosure of the loan amount by 20 business days. This modification should significantly reduce the novelty of the information disseminated under the final rule regarding short sellers’ positions, such that it is less timely than pre-existing sources of short selling transparency, such as FINRA’s bimonthly short interest data.

Another commenter suggested that retail loans may not be structured as securities lending, but rather structured as brokerage agreements, and thus may not be suitable for standardized data collection.<sup>329</sup> This commenter may be referring to the use of margin securities by a broker or dealer in which the broker or dealer does not lend such margin securities to another person (e.g., a rehypothecation).<sup>330</sup> The final rule’s exclusion of such uses from the definition of “covered securities loan,” as discussed below, in this part, should address the commenter’s concern.

A commenter stated that the Commission had not fully explained why greater transparency, or transaction-by-transaction data, in the Customer market would be valuable.<sup>331</sup>

R. Glenn Hubbard, Co-Chair, Committee on Capital Markets Regulation (Jan. 6, 2022) (“CCMR Letter”), at 2.

<sup>327</sup> See CCMR Letter, at 2; AIMA Letter 1, at 2.

<sup>328</sup> See AIMA Letter 1, at 2. See also Letter from Jiří Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association (Aug. 11, 2023) (“AIMA Letter 3”), at 4 (stating that “[b]y including loans used to effect short sales in the Securities Lending Proposal, the Commission will be making it more expensive to engage in short selling”).

<sup>329</sup> See SBAI Letter, at 2.

<sup>330</sup> See also James J. Angel Letter, at 4 (asking “when and how are loans from customer margin accounts to be reported?”).

<sup>331</sup> See Citadel Letter, at 9 (using the term “Retail Market” in place of Customer market). But see Better Markets Letter, at 4 (stating that “high short interest can lead to a destabilizing short squeeze, which can in turn lead to significant volatility in the price of the shorted stock, if not the broader markets . . . If regulators and the public had better and more timely information about the amount of shares of . . . meme stocks that had been lent and borrowed, they may have been able to proactively head off or mitigate the impact of the destabilizing events of January 2021 before they occurred”). See also *infra* Part IX.C.2 (discussing the potential implications of the provision of securities lending activity to market participants in and around the market events of January 2021).

More broadly, limiting data to Wholesale market loans would significantly reduce the benefits of the rule stemming from increased transparency into the securities lending market. In the Proposing Release, the Commission stated that the rule “is designed to address . . . 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.”<sup>332</sup> Data regarding Customer market loans will, for example, provide end-borrowers with valuable information as to the competitiveness of the rates they are being charged for their loans. Such data will also provide information to customers that have agreed to loan their fully paid securities as to the competitiveness of the rates they are receiving from brokers or dealers borrowing such securities. Excluding such a fundamental part of the securities lending market from the scope of transactions to which the rule’s reporting requirements apply is inconsistent with the Commission’s stated goal of making comprehensive information regarding securities loans publicly available. Therefore, the definition of “covered securities loan” in the final rule does not distinguish between the Wholesale market and Customer market and is not limited to Wholesale market transactions.

One commenter recommended that the term “loans a security” specifically refer to securities loaned “for a permitted purpose pursuant to Regulation T of the Board of Governors of the Federal Reserve System.”<sup>333</sup> However, limiting the final rule’s reporting requirements to only securities loans made for permitted purposes pursuant to Regulation T of the Board of Governors of the Federal Reserve System, would be overly narrow as the principal purpose of Regulation T is to regulate extensions of credit by brokers and dealers.<sup>334</sup> As the commenter states, the “permitted purposes” contemplated under section 220.10(a) of Regulation T are limited to “allowing the borrower to make delivery of the borrowed securities in the case of short sales, failure to receive securities required to be delivered, or other similar situations.”<sup>335</sup> Regulation T states that “[i]ts principal purpose is to regulate

extensions of credit by brokers and dealers; it also covers related transactions within the Board’s authority under the Act. It imposes, among other obligations, initial margin requirements and payment rules on certain securities transactions.”<sup>336</sup> However, the securities loan market includes lenders other than brokers and dealers and may involve loans of securities for purposes other than short sales, failures to receive securities required to be delivered, and similar situations.<sup>337</sup> Furthermore, the purpose of final Rule 10c–1a is to increase the transparency of information available to broker, dealers, and investors, with respect to the loan and borrowing of securities without limitation to the purpose of the loan or borrow, whereas the stated purpose of Regulation T is regulating extensions of credit. Thus, Regulation T does not provide an appropriate framework to limit final Rule 10c–1a’s information reporting requirements.

The Commission also received comment expressing support for a de minimis threshold for reporting loans of securities.<sup>338</sup> In some contexts, reporting thresholds may be useful to reduce burdens on persons required to report, or to reduce the possibility that strategies or identities of reporters will be revealed. However, a de minimis reporting threshold is not necessary in light of modifications from the proposed rule to require end-of-day<sup>339</sup> (versus 15 minute) reporting, as well as the delay<sup>340</sup> in publication of size information,<sup>341</sup> which are expected to reduce the possibility that strategies or identities of reporting entities will be revealed. Including a de minimis threshold, which would primarily affect data for smaller securities loans, could provide the public with a distorted view of securities loan activity. For example, a large volume of relatively small securities loans could constitute a significant amount of the overall lending activity for an individual security. Alternatively, a single, small securities loan could constitute the only outstanding loan for an issuer, and its

<sup>336</sup> 12 CFR 220.10(a).

<sup>337</sup> For example, it is the Commission’s understanding that securities are borrowed by banks managing liquidity on their balance sheet and financial entities obtaining the type of collateral required by other agreements they are trying to enter into, and that some investors may lend and borrow securities to obtain certain tax treatment for dividends and dividend substitutes. See Proposing Release, 86 FR 69831.

<sup>338</sup> See Federated Hermes Letter, at 2.

<sup>339</sup> See, e.g., 17 CFR 240.10c–1a(c)(6) (“final Rule 10c–1a(c)(6)”).

<sup>340</sup> See final Rule 10c–1a(g)(2).

<sup>341</sup> See final Rule 10c–1a(c).

<sup>332</sup> See Proposing Release, 86 FR 69807.

<sup>333</sup> See SIFMA AMG Letter, at 9.

<sup>334</sup> 12 CFR 220.10(a) (“Regulation T”).

<sup>335</sup> See SIFMA AMG Letter, at 9 (quoting section 220.10(a) of Regulation T).

exclusion would leave market participants without information about the lending market for the security. The Proposing Release stated that “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 such rates provide.”<sup>342</sup> The public disclosure of information for securities lending transactions of all sizes will help improve price discovery in the securities lending market.<sup>343</sup> Additionally, providing a de minimis threshold could result in avoidance of the final rule’s reporting requirements if industry participants structure otherwise reportable securities loans into smaller tranches in order to fit below a reporting threshold.

The Commission received a comment recommending that the final rule not capture a “broker-dealer hypothecation of customer margin securities.”<sup>344</sup> Another commenter stated that it understood the proposed rule to exclude rehypothecation of a customer’s margin securities.<sup>346</sup> When a broker or dealer hypothecates (or uses) customer margin securities, the customer is not loaning them to the broker or dealer as the customer has already pledged the securities in a margin account to the broker or dealer, as collateral for a margin loan.<sup>347</sup> Accordingly, the final rule excludes hypothecation of securities, but provides that the loan of such customer margin securities by a broker or dealer to another person is a covered securities loan.<sup>348</sup> Specifically, the definition of the term “covered securities loan” under the final rule includes the provision that, “the use of margin securities, as defined in Rule 15c3–3(a)(4) of the Exchange Act, by a broker or dealer will not be a covered

securities loan for purposes of this rule.”<sup>349</sup> It also provides that “if a broker or dealer lends such margin securities to another person, the loan to the other person is a covered securities loan” for purposes of the final rule.<sup>350</sup> Therefore, should a broker or dealer use a customer’s margin securities for purposes other than to lend them to another person, such a transaction would not fall within the definition of the term “covered securities loan” under the final rule. Additionally, if a broker or dealer borrows fully paid or excess margin securities from a customer, that loan is a covered securities loan,<sup>351</sup> and the broker or dealer borrowing the fully paid securities is responsible for reporting the loan to an RNSA.<sup>352</sup>

The Commission also received comment recommending that the final rule not apply to “funding trades.”<sup>353</sup> The commenter further stated its belief that such transactions, which are defined as loans of cash against securities being pledged as collateral, are not the type of activity that should be captured through the proposed rule.<sup>354</sup> To the extent that such funding transactions constitute a use of margin securities by a broker or dealer pursuant to paragraph (j)(2)(iii), they would not fall within the final rule’s definition of “covered securities loan.” Otherwise, commenters were not specific as to whether there would be variations of transactions used to “fund trades.” The final rule does not specifically exclude transactions to “fund trades.” Whether a transaction to “fund trades” is a

covered securities loan will depend on the facts and circumstances of each transaction.<sup>355</sup>

After considering commenters’ concerns and perspectives regarding the proposed scope of transactions for which proposed Rule 10c–1 reporting would have been required, the final rule defines the term “covered securities loan” to mean “[a] transaction in which any person on behalf of itself or one or more other persons, lends a reportable security to another person.”<sup>356</sup> Further, in paragraph (a) of the final rule, the term “loans a security” is replaced with the phrase “agrees to a covered securities loan” in its reporting requirement for covered persons.<sup>357</sup> In response to commenters’ request for clarification as to whether a loan should be reported before or after it is settled, the term “agrees to” clarifies that covered securities loans are required to be reported after the parties agree to the loan, which is before settlement.<sup>358</sup>

For the reasons described above, in this part, the definition of the term “covered securities loan” in the final rule further provides that “a position at a clearing agency that results from central counterparty services pursuant to Rule 17Ad–22(a)(2) of the Exchange Act or central securities depository services pursuant to Rule 17Ad–22(a)(3) of the Exchange Act will not be a covered securities loan for purposes of this rule.”<sup>359</sup> The final rule also provides that “the use of margin securities, as defined in Rule 15c3–3(a)(4) of the Exchange Act, by a broker or dealer, will not be considered a covered securities loan for purposes of this rule,” provided, however, that “if a broker or dealer loans such margin securities, such loan will be considered a covered securities loan for purposes of this rule.”<sup>360</sup>

The definition of the term “covered securities loan,” in conjunction with the definition of the term “reportable security,” discussed above, in Part VII.D,<sup>361</sup> sets forth the scope of the final

<sup>342</sup> See also Proposing Release, 86 FR 69804.

<sup>343</sup> See *infra* Part IX.C.1 (stating that “increased information will result in benefits in the form of . . . improved market stability and price discovery both in the securities lending market and the market for the underlying security”). See also Proposing Release, 86 FR 69804.

<sup>344</sup> Margin securities are securities carried for the account of a customer in a margin account, as well as securities carried in any other account other than securities that are fully paid securities. See 17 CFR 240.15c3–3(a)(3) (“Rule 15c3–3(a)(3)”) and Rule 15c3–3(a)(4) of the Exchange Act defining the terms “fully paid securities” and “margin securities.”

<sup>345</sup> See SIFMA AMG Letter, at 5.

<sup>346</sup> See SIFMA Letter 1, at 9 n.39.

<sup>347</sup> This distinction is made only within the context of a broker or dealer’s hypothecation (or rehypothecation) of customer margin securities. It does not imply that a hypothecation or use of securities in a different context could not constitute a loan of securities.

<sup>348</sup> See final Rule 10c–1a(j)(2)(iii); 17 CFR 240.10c–1a(j)(2)(iii)(A) (“final Rule 10c–1a(j)(2)(iii)(A)”).

<sup>349</sup> See final Rule 10c–1a(j)(2)(iii).

<sup>350</sup> See final Rule 10c–1a(j)(2)(iii)(A).

<sup>351</sup> A broker or dealer must maintain the physical possession or control of all fully paid securities and excess margin securities carried by the broker or dealer for the accounts of customers. See 17 CFR 240.15c3–3(b)(1) (“Rule 15c3–3(b)(1)”). Additionally, a broker or dealer must enter into a written agreement pursuant to Rule 15c3–3(b)(3) in order to not be deemed to be in violation of the provisions of Rule 15c3–3(b)(1) when borrowing fully paid or excess margin securities from any person. See Rule 15c3–3(b)(3).

<sup>352</sup> See final Rule 10c–1a(j)(1)(iii).

<sup>353</sup> See SIFMA AMG Letter, at 5. See also SIFMA Letter, at 15; BlackRock Letter, at 7 (stating that “the SEC should limit the scope to traditional securities lending transactions where the parties have entered into the loan transaction in order for a borrower to obtain use of the securities for a fee, rather than to provide a lender with cash financing that is collateralized with non-cash collateral”).

<sup>354</sup> See SIFMA AMG Letter, at 9 (stating that “[a] ‘non-purpose’ transfer of securities against cash collateral, economically resembles a borrowing of cash by the security’s ‘lender’ against a pledge of securities collateral to the securities ‘borrower.’ However, such transactions are more properly categorized as ‘funding’ transactions (as loans of cash against securities being pledged as collateral) and, therefore, are not the type of activity SIFMA AMG believes the SEC is, or should be, seeking to capture through the Proposed Rule.”).

<sup>355</sup> See final Rule 10c–1a(j)(2)(i).

<sup>356</sup> See final Rule 10c–1a(j)(2)(ii).

<sup>357</sup> See final Rule 10c–1a(a).

<sup>358</sup> See HMA Letter, at 9 (recommending that reporting should include effected, but not-yet-settled loans, and stating that “the Commission and FINRA rules have long required reporting of securities orders, modification, and trades, not just settled transactions, because all of that information is relevant to understanding the markets”). But see Fidelity Letter, at 2 (requesting that the Commission clarify when a loan can be considered “effected” for purposes of report, and stating that “in the marketplace, a securities loan is not considered ‘effected’ by the parties until the loan has been contractually booked and settled”).

<sup>359</sup> See final Rule 10c–1a(j)(2)(ii).

<sup>360</sup> See final Rule 10c–1a(j)(2)(iii).

<sup>361</sup> See final Rule 10c–1a(j)(3).

rule and distinguishes “covered securities loans” from other types of transactions that are not required to be disclosed under final Rule 10c–1a. The final rule’s definition of the term “covered securities loan” will facilitate the public availability of information regarding securities lending transactions. The definition’s scope, encompassing transactions in which any person, on behalf of itself or one or more other persons, lends a reportable security to another person, is designed to provide market participants, the public, and regulators with information that broadly captures activity in the securities lending market. The defined scope of transactions required to be reported to an RNSA under final Rule 10c–1a will contribute to better decision-making by investors, reduced costs of business for brokers or dealers, improved performance and reduced costs for lending programs, new business opportunities for data vendors, improvements to shareholder monitoring, and improved market stability and price discovery in the securities lending market.<sup>362</sup> Additionally, the exceptions to the definition of “covered securities loan” under the final rule should help prevent the double counting of securities loans and support the integrity of publicly available data by excluding redundant and potentially misleading information.

#### F. Information To Be Provided to an RNSA

To facilitate transparency of the securities lending market, the Commission proposed Rules 10c–1(b) through (e) to require certain loan-level data elements (*i.e.*, specified material terms of securities loans) to be provided to an RNSA.<sup>363</sup> Because an RNSA would be required to implement rules regarding the format and manner to administer the collection of

<sup>362</sup> See *infra* Part IX.C.1.

<sup>363</sup> While pricing-related data elements regarding collateralized loans were included in the loan-level data elements proposed to be required to be reported to an RNSA, the proposed rule did not require that securities lenders or their agents report information on how they used collateral. Some commenters stated that because of the potential threats to financial stability arising from collateral re-use, the Commission should consider requiring that securities lenders and their agents report information on how they use collateral. See, *e.g.*, Better Markets Letter, at 7–8. (commenter stating support for requiring disclosure regarding the type of collateral); See Sharegain Letter, at 3 (stating that “[c]ollateral information is essential to understanding fees—*e.g.*, a loan collateralized with equities would typically command a higher fee than a loan collateralized with US treasuries”); see also IHS Markit Letter, at 6–7 (recommending that proposed data elements include reporting of a “trade reference” and “lending agent trade indicator”).

information,<sup>364</sup> 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 of the information to an RNSA.<sup>365</sup>

#### 1. Loan Data Elements—Rule 10c–1a(c) Proposed Rule

To facilitate transparency in the securities lending market, the proposed rule required certain loan transaction data elements to be provided to an RNSA, on a transaction-by-transaction basis, within 15 minutes of the loan being effected, followed by an RNSA assigning each loan a unique transaction identifier, and then making such information publicly available as soon as practicable. The proposed rule included twelve transaction data elements required to be provided to an RNSA.<sup>366</sup>

In proposing the list of loan data elements required to be provided to an RNSA, the Commission explained that the data elements in paragraphs (b)(1) through (b)(5) of the proposed rule, which include the legal name and legal entity identifier (“LEI”) of the issuer; ticker symbol, International Securities Identification Number (“ISIN”), CUSIP, or Financial Instrument Global Identifier (“FIGI”) or other security identifier; date and time loan was effected; and platform or venue loan was effected, identify each loan of securities.<sup>367</sup> In particular, the Commission explained, they contain material terms that are not negotiated between the parties but are elements that would provide important

<sup>364</sup> See proposed Rule 10c–1(f).

<sup>365</sup> See proposed Rule 10c–1(b). See also Proposing Release, 86 FR 69813. This is done in order to allow an RNSA the necessary flexibility to propose and implement rules regarding the format and manner with respect to the collection of information. One commenter stated that the proposed rule does not “provide any details as to the format of such data, whether it would be presented loan-by-loan, the manner in which rates would be presented, whether the loan had its inception as an open-ended loan or a term loan, whether the loan was the subject of a portfolio-based auction, or whether it was part of a conduit lending program.” See Sharegain Letter, at 3. Consistent with the Proposing Release, the Commission is not specifying the details as to the format of the required data, the manner in which rates would be presented, or other detailed information requested, to give an RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly, provided they are consistent with the final rule as adopted as well as other requirements of the Exchange Act applicable to an RNSA. See, *e.g.*, Proposing Release, 86 FR 69816 n.104.

<sup>366</sup> See Proposing Release, 86 FR 69813–14, 69851–52 (describing each of the proposed transaction data elements).

<sup>367</sup> See Proposing Release, 86 FR 69813.

information to allow market participants and regulators to track, understand, and perform analyses on the negotiated terms contained in paragraphs (b)(6) through (b)(12) of the proposed rule, which include the amount of security loaned; securities lending fee or rate (or any other fee or charges); type of collateral used; rebate rate (or any other fee or charges); percentage of collateral to value of loaned securities; termination date of loan; and, whether the borrower is a broker/dealer/customer/clearing agency/bank/custodian/other person.<sup>368</sup> The Commission also explained that the proposed data elements in paragraphs (b)(1) through (b)(5) of the proposed rule would provide an RNSA with enough information to create a unique transaction identifier as required by the proposed rule.<sup>369</sup>

In proposing the negotiated data elements in paragraphs (b)(6) through (b)(12) of the proposed rule, the Commission explained that, because the data elements reflect material terms that are negotiated when securities loans are arranged, increasing the transparency of information will provide market participants with meaningful data that could be used when structuring, pricing, or evaluating loans of securities.<sup>371</sup> The Commission also explained that increasing transparency would allow market participants to analyze signals obtained from the securities lending market when considering investment or trading decisions for a security; and, would also permit an RNSA to perform in-depth monitoring and surveillance of securities lending transactions to

<sup>368</sup> See Proposing Release, 86 FR 69814.

<sup>369</sup> See Proposing Release, 86 FR 69813. As stated by the Commission in the Proposing Release, “[p]aragraphs (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).” *Id.*

<sup>370</sup> See Proposing Release, 86 FR 69814. In proposing the data element in paragraph (b)(6) “the amount of the security loaned”—the Commission did not specify the parameters of “the amount of the security” in order to allow an RNSA flexibility to propose rules that identify, for different types of securities, what information constitutes the “amount of the security.”

<sup>371</sup> See Proposing Release, 86 FR 69814.

identify trends and any anomalous market patterns.<sup>372</sup>

#### Final Rule

The Commission sought comment with respect to each of the proposed transaction data elements.<sup>373</sup> In response, commenters were generally supportive of the Commission's stated goals of increasing transparency and price discovery in the securities lending market by increasing the amount and availability of data in the market.<sup>374</sup> For example, one commenter stated in support of the proposed rule that, "certain data elements [should be made] publicly available, thereby increasing transparency of the securities lending market and reducing competitive advantages that may exist in the marketplace."<sup>375</sup> Another commenter also stated in support that the proposed public dissemination of securities lending information will, among other things, improve price discovery in the securities lending market, reduce information asymmetries, close data gaps, and increase market efficiency.<sup>376</sup> Another commenter stated that, "Proposed Rule 10c-1 represents a properly-tailored way to bring more transparency to this dark area of the market."<sup>377</sup> According to this commenter, "[t]he Proposal would establish a system for the reporting and dissemination of the material terms of

securities lending transactions without attribution, providing issuers, investors, and regulators the necessary data . . . while protecting the identity and intellectual property of any individual market participant."<sup>378</sup> Another commenter expressed support for the proposed rule's inclusion of standards as part of the proposed data elements to be reported, as well as the Commission's efforts to include the LEI in the data elements for the identification of issuers and parties to a lending transaction.<sup>379</sup> Another commenter supported the proposal allowing a choice in use of identifiers, such as the [FIGI], as a possible required data element to be collected and disseminated by an RNSA.<sup>380</sup> Another commenter, in response to the Commission's specific request for comment, stated that retail investors/borrowers without LEIs should not be required to obtain a LEI as "[r]egulators can easily identify who we are by going to our brokers."<sup>381</sup> Another commenter suggested that the Commission should modify the proposal to require "lending agent" be a reported field (instead of requiring the lender's LEI to be disclosed) "to avoid

the potentially confusing appearance of tens or even hundreds of individual loans that are, in reality, part of the same overall loan transaction negotiated between a borrower and a lending agent or third-party intermediary on behalf of the underlying lender(s) for an aggregate notional amount."<sup>382</sup>

With regard to the proposed "rebate rate or any other fee or charges" data element for cash collateralized loans,<sup>383</sup> several commenters pointed out that the relevant data point is actually the lending spread to the reference rate (most commonly the Overnight Bank Funding Rate or "OBFR") as the rebate rate will change daily based on the current level of the reference rate, even as the negotiated lending spread remains fixed.<sup>384</sup> Thus, commenters requested that the Commission clarify (where applicable) that pricing data may be reported as a spread to a benchmark rate and, as discussed below in Part F.2, that such pricing data element does not need to be updated for changes in the value of the benchmark rate.<sup>385</sup>

Another commenter expressed concern that fee and rebate data could be misleading in the absence of additional contextual information, stating that "[f]ee/rebate data, without consideration of firm(s) collateral requirements, counterparty/asset exposure(s), applied lending restrictions or jurisdictional obligations, may create an unrealistic and misleading portrayal

<sup>378</sup> NYSE Letter 1, at 1–2.

<sup>379</sup> See Letter from Stephen Wolf, CEO, Global Legal Entity Identifier Foundation, at 3 (stating that the Commission and an RNSA may benefit from the data that accompanies an LEI, *i.e.*, company legal name can be retrieved automatically or verified from a LEI record).

<sup>380</sup> See Bloomberg L.P. Letter, at 1; *see also* HMA Letter, at 9 (agreeing with using publicly available methods to identify financial instruments beyond CUSIPs). Consistent with the proposed rule, the data elements required in paragraphs (b)(1) and (b)(2) of the proposed rule are designed to be flexible as well as comprehensive so that every loaned security is able to be identified. *See* Proposing Release, 86 FR 69813. In the Proposing Release, the Commission stated with respect to paragraph (b)(1), that it "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)." *See* Proposing Release, 86 FR 69813. Thus, consistent with the Proposing Release, the Commission is not determining whether and how all of the items in paragraph (c)(2) in the final rule must be reported, to give an RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly, provided they are consistent with the final rule as adopted as well as other requirements of the Exchange Act applicable to an RNSA. *See id.*

<sup>381</sup> *See* James J. Angel Letter, at 7 (expressing strong support for the proposed rule but encouraged the Commission not to micromanage the contractual terms between the reporting agents and an RNSA). As this commenter explained, "let FINRA work out the details, as they have the experience, resources, and capability to do a good job and the flexibility to update terms based on experience." *Id.* at 7. In response, the final rule, as modified to streamline and clarify rule text, and the modifications to update or modernize the reporting requirements as needed are responsive to the commenter.

<sup>382</sup> *See, e.g.*, BlackRock Letter, at 3–4; *see also* FIF Letter, at 9 (stating that reporting an LEI is duplicative and likely not useful).

<sup>383</sup> *See* proposed Rule 10c-1(b)(9).

<sup>384</sup> *See* ICI Letter 1, at 5 n.19 (providing this as another example of how the SEC's understanding of the securities lending market structure appears to be inaccurate); *see also* BlackRock Letter, at 2 (recommending that, to improve the transaction level data collected, the transaction record for cash collateralized loans should include the name of the reference rate used and the spread to that reference rate instead of reporting the rebate rate). According to this commenter, while there is a market convention of using the OBFR as the reference rate, this is a negotiable term between the parties to the lending transaction. *See id.* Moreover, according to this commenter, the price negotiation centers on the spread to that reference rate, not the rebate, and the rebate will fluctuate daily as the reference rate value changes. *See id.* *See also* MFA Letter 3, at 5 (recommending that the SEC pare back several of the granular reporting elements that would be difficult to apply and/or misleading, such as pricing, stating that "the Proposed Securities Lending Rule's requirements, for example, requires the rebate rate to be reported in the pricing field, even though the rebate rate will fluctuate potentially daily, as the reference rate—typically the OBFR—changes, and as such would be subject to frequent amendment that could be confusing to market participants").

<sup>385</sup> *See, e.g.*, BlackRock Letter, at 2; RMA Letter, at 4; *see also* FIF Letter, at 9 (stating that "[f]or securities loans that are priced based on a spread to a benchmark, the Commission should provide reporting parties the option to report pricing by reference to the benchmark and the spread").

<sup>372</sup> *See* Proposing Release, 86 FR 69814. Additionally, the Commission explained that the data element in proposed paragraph (b)(11), regarding termination date, is intended to provide market participants with an understanding of the potential future demand and supply of securities; whereas proposed paragraph (b)(12), which requires the borrower type for each transaction, is intended to provide context for evaluating, and also enhance the transparency provided by, the other data elements.

<sup>373</sup> The language "transaction data elements" in proposed Rule 10c-1(b) has been revised to "covered securities loan data elements" in final Rule 10c-1a(c) to be consistent with the use of the newly defined term "covered securities loan," to which the elements refer, in the final rule.

<sup>374</sup> *See, e.g.*, SBAI Letter, at 1 (agreeing with the Commission's assessment of the important role of the securities lending market, as well as supporting the Commission's objective to increase transparency in this area).

<sup>375</sup> Nasdaq Letter, at 3.

<sup>376</sup> *See* FINRA Letter, at 1 (stating that the proposed rule will provide the Commission and other regulators with data that would be used for important regulatory, *i.e.*, monitoring and surveillance, functions); *see also* AFREF Letter 1, at 1, 3 (stating "[t]here is an urgent need to require securities lenders to provide greater details of their loans to an RNSA as outlined by the proposed changes to Rule 10c-1 . . . market participants and regulators alike will greatly benefit from the greater transparency that comes from reporting every securities lending transaction as a result of the proposed changes to Rule 10c-1").

<sup>377</sup> Letter from Hope M. Jarkowski, General Counsel, NYSE Group, Inc. (Jan. 6, 2022) ("NYSE Letter 1"), at 2.

of prevailing rates.”<sup>386</sup> The final rule requires pricing information in 17 CFR 240.10c–1a(c)(8) (“final Rule 10c–1a(c)(8)”) and 17 CFR 240.10c–1a(c)(9) (“final Rule 10c–1a(c)(9)”) because pricing is a material term of a covered securities loan. Further, paragraph (g)(5) of the final rule requires that an RNSA will make a distribution of loan rates for each reportable security publicly available to help market participants compare the pricing of their covered securities loan against the pricing of other covered securities loans. Information about the distribution of loan rates recognizes that the cost-to-borrow securities can be influenced by a number of factors and can give market participants information to help compare the pricing of their loan against other loans. Another commenter requested clarification that only one identifier for a security is required to be reported under the rule (*i.e.*, ticker or ISIN or CUSIP or FIGI) rather than all of them.<sup>387</sup> The final rule permits a covered person to determine which identifier to report, or if it prefers, it may also report multiple identifiers, but one identifier is required to be reported. Further, the final rule also permits the covered person to report a different identifier than the ticker symbol, ISIN, CUSIP, or FIGI. In addition, this commenter requested further clarification on what type of system would represent a “platform or venue” for purposes of proposed paragraph (b)(5).<sup>388</sup> The final rule does not specify

what type of systems are a “platform or venue” for purposes of the data elements required to be reported under 17 CFR 240.10c–1a(c)(5) (“final Rule 10c–1a(c)(5)”). The terms are intended to capture a wide variety of potential vehicles that covered persons might use to transact securities loans. Further, an RNSA has discretion to determine, pursuant to rules that would be subject to the section 19(b) and Rule 19b–4 process, whether to categorize such vehicles (*e.g.*, on-line venue, exchange, OTC).

Many commenters suggested that the proposed transaction-by-transaction reporting requirement be replaced with an aggregated-only requirement (*i.e.*, with some of the commenters wanting both the reporting and publishing of the data elements to be on an aggregated basis only, while other commenters were supportive of reporting to an RNSA on a transaction-by-transaction basis, but then any dissemination to the public must be made by an RNSA on an aggregated-only basis).<sup>389</sup> For instance, one commenter recommended “transaction-by-transaction data be

reported to an RNSA and made available to regulators, but that the RNSA analyze and normalize the reported transaction data to provide aggregated and, where appropriate, averaged transaction terms that do not expose firm and customer investment strategies, and that better reflect the transaction terms available to lenders and borrowers in the securities lending market.”<sup>390</sup> Another commenter stated that the Commission should narrow the scope of transaction data information to be reported to an RNSA (and thereafter made public by an RNSA) to only aggregated transaction data.<sup>391</sup> Some of the comments appeared to be focused on an RNSA’s publication or dissemination obligations when they stated that the final rule should require an RNSA to publish aggregated pricing and volume data (rather than transaction-by-transaction data).<sup>392</sup> However, this was not always clear as many of the comments received were less specific in that their comments on aggregated disclosure were phrased in reference to the proposed rule’s reporting requirement<sup>393</sup> or “reveal short selling trading strategies”<sup>394</sup> or disclosing all individual customer short selling positions on a transaction-by-transaction basis.<sup>395</sup>

The requirements in paragraph (b) of final Rule 10c–1a are limited in scope to the reporting agent’s obligation to provide certain specified data elements to an RNSA on behalf of a covered person. As such, the discussion in this part is limited to the reporting agent’s provision of the Rule 10c–1a information directly and solely to an RNSA, which does not involve or require any public disclosure or public dissemination of such information. By contrast, the dissemination or disclosure of the required information is the obligation of an RNSA, and paragraph (g) of the final rule, and Part VII.] below, discuss an RNSA’s responsibilities with respect to disseminating certain Rule 10c–1a information to the public.

After considering the comments received recommending that the final rule require only aggregated pricing and volume data to be publicly disclosed (discussed below in Part VII.J), the

<sup>386</sup> Letter from Adrian Dale, Head of Regulation, Digital & Market Practice, ISLA (Jan 7, 2022) (“ISLA Letter”), at 2 (suggesting that such fee/rebate data could not be relied upon to support price discovery in the same manner as other markets).

<sup>387</sup> See, *e.g.*, FIF Letter, at 9. Consistent with the Proposing Release, paragraph (b)(2) in the final rule states, “securities usually will have at least one of the items listed assigned to it. If not, the RNSA will be able to require an ‘other identifier’ for further flexibility under paragraph (2).” See Proposing Release, 86 FR 69813. As such, the Commission is not providing further details concerning the required data elements in order to give an RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly, provided they are consistent with the rule as adopted as well as other requirements of the Exchange Act applicable to an RNSA. See also *supra* notes 369 and 380. See Letter from Robert Toomey, Head of Capital Markets, Managing Director & Associate General Counsel, SIFMA (May 15, 2023) (“SIFMA Letter 3”), at 4–5 (stating that “[m]any 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 fee”).

<sup>388</sup> See FIF Letter, at 10 (stating that FIF members request further clarification on what type of system would represent “a platform or venue” for purposes of proposed paragraph (b)(5)’s data element).

<sup>389</sup> Although it seems as though the terms “reporting” and “dissemination” (or “disclosure”) are used interchangeably by some of the commenters, there appears to be agreement by commenters that it is the public disclosure of the data elements by an RNSA that should be required on an aggregated-only basis (rather than requiring disclosure on a transaction-by-transaction basis). See, *e.g.*, ICI Letter 1, at 11 (although the commenter states, for confidentiality reasons, that the Commission should only require “reporting” on an aggregated basis at the end of the day (and to avoid front running risks and other predatory trading practices), from the context of the letter, it appears to be the case that concern is focused on information being disclosed to the public/market); SBAI Letter, at 2; AIMA Letter 1, at 5; RMA Letter, at 18; See also Letter from Matthew R. Cohen, CEO, Provable Markets LLC (Jan. 7, 2022) (“PM Letter 2”) (while highly supportive of the proposal’s objective to increase transparency of information available to brokers, dealers, and investors, commenter expressed concerns that the Commission carefully consider and describe the context of the information provided publicly to the market, and the underlying benefits of each category published to the proposed consolidated tape (similar reproduction of data) to the market). However, one group of commenters disfavored any public dissemination of information (*i.e.*, before a study of the collected data are conducted by the Commission and the Commission consults stakeholders before making any determinations about the specifics of a public dissemination regime) and stated the concern that the “proposals could compromise the [rule’s] objectives by revealing sensitive and potentially misleading information to the public . . . [and that the Commission should] adopt an approach that requires reporting solely for regulatory purposes.” See Letter from Members of the U.S. House of Representatives Frank D. Lucas, David Scott, Blaine Luetkemeyer, Bill Foster, Glenn “GT” Thompson, Alma S. Adams, Ph.D., Bill Huizengia, Vicente Gonzalez, Andy Barr, Josh Gottheimer, Ann Wagner, Wiley Nickel, and Bryan Steil (July 12, 2023) (“Letter from Representative Lucas, et al.”), at 1. See *infra* Part VIII regarding the implementation period for the final rule.

<sup>390</sup> See SIFMA Letter 2, at 4.

<sup>391</sup> See SIFMA AMG Letter, at 6–7.

<sup>392</sup> See, *e.g.*, RMA Letter, at 4; IIB Letter, at 10; EBF Letter, at 2 (commenters use the terms “public dissemination” or “publicly disseminating” when referring to aggregated information or transaction data).

<sup>393</sup> See generally Letter from Jennifer Han, Executive Vice President, Chief Counsel & Head of Regulatory Affairs, Managed Funds Association (Apr. 1, 2022) (“MFA Letter 2”).

<sup>394</sup> See SIFMA AMG Letter, at 7.

<sup>395</sup> See CCMR Letter, at 5.

Commission has determined not to modify the proposed transaction-by-transaction reporting requirement with respect to the provision of Rule 10c-1a information to an RNSA. Such a modification to paragraph (c) of the final rule is unnecessary because the requirement involves reporting of the information directly and only to an RNSA (and not to the public). As such, the reporting requirement does not present the concerns raised by commenters that would warrant requiring the reporting of the data elements on an aggregated-only basis, as was suggested by some commenters.<sup>396</sup> Likewise, another commenter suggested that, 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, the Commission should adjust the information that is made publicly available by an RNSA to be only aggregated securities lending data, including, among other things, a volume-weighted average borrowing fee aggregated across all firms, for each security loaned.<sup>397</sup> Similarly, for the same aforementioned reasons, it is unlikely that providing data information directly and solely to an RNSA will reveal such short trading strategies or mislead or confuse the public to warrant such a modification to the final rule. Instead, because paragraph (c) of the final rule only requires the reporting of information to an RNSA (rather than to disclose the information to the public), the risk of revealing short trading strategies or confusing the public is not applicable. Moreover, an RNSA's responsibilities with respect to the subsequent publication of certain Rule 10c-1a information are subject to the requirements and limitations set forth in paragraph (g) of the final rule,<sup>398</sup> which are discussed below, in Part VII.J.<sup>399</sup>

<sup>396</sup> See *infra* Part VII.J, for discussion regarding the responsibilities of an RNSA with respect to the dissemination of certain Rule 10c-1a information (particularly with respect to the amount, such as size, volume, or both of the reportable securities loaned) that an RNSA receives.

<sup>397</sup> See SIFMA Letter 1, at 18–19. The commenter further stated that it does not object to the proposal to report by the end of the day information on “securities on loan.” See *id.*

<sup>398</sup> See final Rule 10c-1a(g).

<sup>399</sup> Some commenters stated that requiring public disclosure of securities lending activity on a transaction-by-transaction basis, especially within the proposed 15-minute timeframe, would reduce overall short selling activity by inhibiting and increasing the cost of building short positions and, thus, negatively affect market liquidity and pricing efficiency (*i.e.*, by making it more costly to build short positions and thus inhibit market participants from doing so). See, *e.g.*, SIFMA AMG Letter, at 5–7; see also CCMR Letter, at 5 (stating the disclosure of such activity would increase the costs associated

Thus, the Commission is adopting the proposed requirement to report Rule 10c-1a information, on a transaction-by-transaction basis, directly and solely to an RNSA.<sup>400</sup>

In addition, the Commission is adopting, essentially unchanged, the twelve data elements originally set forth in paragraphs (b)(1) through (b)(12) in the proposed rule, except the Commission is making the following non-substantive changes to the language of some of the proposed data elements.<sup>401</sup> Specifically, the Commission is modifying the language of the “the amount of the security loaned” data element in paragraph (b)(6) of the proposed rule (*i.e.*, by adding the language “such as the size, volume, or both”) so that it instead reads, as adopted, “the amount, such as size, volume, or both, of the reportable securities loaned.”<sup>402</sup> This change will help ensure the compliance and accuracy of the Rule 10c-1a information submissions to an RNSA, by specifying in the final rule that the term “amount” means “size, volume, or both.”<sup>403</sup>

with establishing a short position through information leakage and slippage; or lead to copycat short selling activity, which could also increase the cost to borrow the security due to increased demand or could facilitate “short squeezes”). However, as discussed above, modifying the required timeframe for reporting the data elements to an RNSA, and an RNSA's dissemination of such information to the public, as discussed below, in Part VII.J, should help to address the disclosure-related concerns raised by the commenters.

<sup>400</sup> See also *infra* Part VII.J regarding the responsibilities of an RNSA, particularly with respect to the dissemination of Rule 10c-1a information (including with respect to the amount, such as size, volume, or both, of the reportable security loaned) an RNSA receives, keeping together in the release the various RNSA-related provisions.

<sup>401</sup> The proposed time periods for reporting the specified information to an RNSA are discussed below, in Part VII.G.

<sup>402</sup> With respect to the covered securities loan data element in paragraph (c)(6) of the final rule, the amount of the security loaned or borrowed, other than to add the clarifying language “such as size, volume, or both” 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.” See Proposing Release, 86 FR 69814.

<sup>403</sup> See final Rule 10c-1a(c)(6) (requiring reporting of “the amount, such as size, volume, or both, of the reportable security loaned.”). Modifying this loan data element to clarify that the “amount” means “size, volume, or both” helps to address the concern raised by a commenter that had suggested a “unit” field to accompany the proposed “amount” data element in paragraph (b)(6) of the proposed rule so as to allow the “amount” to be defined “unambiguously as a quantity, a notional value or similar as appropriate.” See Letter from Jim Kaye, Americas Regional Director, FIX Trading

The Commission also is modifying proposed paragraph (b)(6) by changing “security” to “securities” (thus, making it plural, consistent with the term “securities” in paragraph (b)(10)); and, also modifying both proposed paragraphs (b)(6) and (b)(10) by adding the term “reportable” to each, so that they are both consistent with the final rule's newly defined term, “reportable securities.” The Commission also is modifying language in proposed paragraph (b)(1) by changing the term “active LEI” to “non-lapsed LEI” for accuracy (*i.e.*, by focusing more precisely on the status of the application for the LEI-indicator, rather than on the entity itself).<sup>404</sup> The Commission has modified proposed paragraph (b)(2) by providing the full names of specified security identifiers and retaining the corresponding abbreviations within a parenthetical with quotes to 17 CFR 240.10c-1a(c)(2) (“final Rule 10c-1a(c)(2)”).

The required pricing data, “[f]or a loan collateralized by cash, the rebate rate or any other fee or charges,” in paragraph (c)(8) of the final rule generally should include when the pricing data element is negotiated or agreed-to as a spread to an identified benchmark or reference rate.<sup>405</sup> The Commission recognizes that the pricing data element is a material term of the loan that is often negotiated or agreed to between the parties. Consistent with paragraph (b)(9) of the proposed rule, as well as the final rule, this benchmark type of pricing, as described by the commenter, will be captured by the final rule text language “the rebate rate or any other fee or charges.”<sup>406</sup> For the aforementioned reasons, negotiated or agreed-to pricing data, including as a spread to an identified benchmark or reference rate, is required to be reported to an RNSA pursuant to the rule as adopted.<sup>407</sup> This requirement should generally help to address commenters' concerns that may stem from an overly narrow application of the pricing data element in paragraph (b)(9) of the

Community (Jan. 4, 2022) (“FIX Trading Letter”), at 2 (requesting further clarification on and the use of common standards for details of the data to be published, similar to the technical standards used by ESMA and SFTR, and a “security id” filed to accompany “security identifier” as certain crypto assets do not have ISINs so the list of eligible securities identifier types needs to allow for this, *i.e.*, support ISO standards for digital token identifiers).

<sup>404</sup> See 17 CFR 240.10c-1a(c)(1) (“final Rule 10c-1a(c)(1)”).

<sup>405</sup> See proposed Rule 10c-1(b)(9).

<sup>406</sup> See final Rule 10c-1a(c)(8).

<sup>407</sup> See final Rule 10c-1a(c)(8).

proposed rule.<sup>408</sup> However, because there are various pricing terms or arrangements that can be negotiated or agreed to by parties to a securities loan, the final rule does not specify or endorse one particular pricing method over another and, thus, is adopting the sufficiently broad pricing data element rule text for purposes of the final rule without modification from the proposed rule text.<sup>409</sup> An RNSA, nevertheless, could address in its rules details regarding the manner in which pricing data must be reported, such as further clarifying how lending cost information is to be reported. As such, an RNSA has the necessary flexibility and discretion to structure its systems and processes as it determines, consistent with its obligations under the final rule as well as other applicable provisions of the Exchange Act.

## 2. Loan Modification Data Elements—Rule 10c–1a(d)

### Proposed Rule

Subject to terms agreed to by the parties, covered securities loans may be modified after they are made. To ensure that the loan data elements reported pursuant to proposed Rule 10c–1(b) would accurately reflect currently outstanding covered securities loans and to prevent evasion, proposed Rule 10c–1(c) required that certain loan modification data elements be provided to an RNSA within 15 minutes after each loan is modified if the modification resulted in a change to information required to be provided to an RNSA under paragraph (b) of the proposed rule (and then for an RNSA to make such information available to the public as soon as practicable).<sup>410</sup> More specifically, the proposed loan modification data elements in paragraphs (c)(1) through (c)(3) of the proposed rule required the following data elements to be provided to an RNSA: (1) the date and time of the modification; (2) a description of the modification; and (3) the unique transaction identifier of the original loan.<sup>411</sup>

In the Proposing Release, the Commission explained that it preliminarily believed the proposed

loan modification data elements in proposed paragraph (c) are necessary to allow an RNSA to identify which loan was being modified, categorize the type of modification, and make information about the modification publicly available.<sup>412</sup> In addition, as proposed, the requirement to provide the loan modification information to an RNSA was conditioned on the modification resulting in a change to the Rule 10c–1 information required to be provided to an RNSA under paragraph (b) of the proposed rule.<sup>413</sup>

### Final Rule

The Commission is adopting the loan modification data elements substantially as proposed.<sup>414</sup> However, the final rule includes a change to the loan modification data elements requirement in response to commenters.<sup>415</sup> Other commenters sought clarification as to when loan modifications should be reported, which is discussed below. In addition, the final rule has been modified to address comments regarding loans that pre-exist the reporting date.

Paragraphs (d)(1)(i) through (iii) of the final rule set forth the data elements that a covered person must report by the end of the day on which a covered securities loan is modified. Paragraph (d)(1)(i) requires covered persons to report “[t]he date and time of the modification;” paragraph (d)(1)(ii) requires covered persons to report “[t]he specific

modification and the specific data element in paragraph (c) of this section being modified; and paragraph (d)(1)(iii) requires the covered person to report “[t]he unique identifier assigned to the original covered securities loan under paragraphs (g)(1) or (g)(3) of this section.”<sup>416</sup>

With respect to paragraph (d)(1)(ii), to help ensure the provision of relevant and useful loan modification reports to an RNSA, the Commission has revised this loan modification data element from the proposed requirement by removing the phrase “[a] description of” and, instead, adding both “the specific modification” as well as “and specific data element in paragraph (c) being modified” (*i.e.*, with respect to the loan modification data element being reported to an RNSA). The revised language “the specific modification” makes explicit that the actual modification must be reported (*e.g.*, the amount of the security loaned increased by 200 shares), not a vague description of the modification (*e.g.*, the amount of the security loaned was increased). The Commission is making this change because it will result in the collection of more accurate and useful information concerning the modification being reported. The Commission is also modifying paragraph (d)(1)(iii) to require the reporting of a previously assigned unique identifier whether assigned at the time of execution of the loan, or, with respect to a pre-existing securities loan as discussed below in this section, at the time of the modification. As a result, the Commission is adopting paragraph (d)(1)(iii) of the final rule, with a slight modification from the proposal such that the rule text of (d)(1)(iii) will require the unique identifier assigned to the original covered securities loan under paragraphs (g)(1) or (g)(3) of this section.”<sup>417</sup>

The Commission also received comment seeking clarity regarding how to report various modifications to a loan.<sup>418</sup> Other commenters who discussed the loan modification data elements discussed the different types of modifications that can occur frequently throughout the day,<sup>419</sup> or

<sup>412</sup> See Proposing Release, 86 FR 69815.

<sup>413</sup> See Proposing Release, 86 FR 69815.

Consistent with the Proposing Release, an example of a modification that will trigger a reporting requirement under paragraph (d) of the final rule includes: the termination of an open-ended loan that results in a reduction of the quantity of the securities initially provided to an RNSA for that loan under paragraph (c)(6)’s data element—*i.e.*, amount of the security loaned. See also Proposing Release, 86 FR 69815. An example of a modification that will not trigger the loan modification data element reporting requirement in paragraph (d) of the final rule is if a borrower posts additional collateral in response to an increase in the value of the loaned securities. *Id.* Under such circumstance, information about this change will not be required to be reported under paragraph (d) because, while paragraph (c)(11) requires the covered person 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. See also *id.* at n.96.

<sup>414</sup> See 17 CFR 240.10c–1a(d)(1)(i) (“final Rule 10c–1a(d)(1)(i)”; 17 CFR 240.10c–1a(d)(1)(ii) (“final Rule 10c–1a(d)(1)(ii)”; 17 CFR 240.10c–1a(d)(1)(iii) (“final Rule 10c–1a(d)(1)(iii)”).

<sup>415</sup> The Commission also received comments that relate to the two loan modification data elements in paragraphs (d)(1)(i) and (d)(1)(iii) of the final rule. These comments are addressed separately below, in Parts VII.G.2 and VII.J, with respect to the timing modifications to paragraph (d) in the proposed rule, and regarding an RNSA’s obligations with respect to assigning the unique identifiers in compliance with the final rule.

<sup>416</sup> See final Rules 10c–1a(d)(1)(i) and (d)(1)(iii).

<sup>417</sup> See final Rules 10c–1a(d)(1)(i) and (d)(1)(iii).

<sup>418</sup> See FIX Trading Letter, at 3. The commenter provided hypotheticals, including: (1) as a result of a corporate action, a loan is closed and two or more loans are created; (2) a consolidation of multiple loans with the same counterparty and for the same security into one loan; and (3) the splitting of a single loan into multiple loans where the lender requires the return of some of the shares.

<sup>419</sup> Comments received by the Commission that focus primarily on the proposed 15-minute timing

<sup>408</sup> See *supra* note 385 (citing commenters who requested that the Commission clarify, where applicable, that pricing data may be reported as a spread to a benchmark rate).

<sup>409</sup> See *supra* note 385 and accompanying text (commenters requesting the Commission to clarify, where applicable, that pricing data may be reported as a spread to a benchmark rate, and that such pricing does not need to be updated for changes in the value of the benchmark rate).

<sup>410</sup> See proposed Rule 10c–1(c).

<sup>411</sup> Proposed Rule 10c–1(c).

sought further information on what types of modifications would likely trigger a loan modification reporting obligation under the final rule.<sup>420</sup> One commenter stated that, in the context of cash collateralized loans, the rebate will fluctuate daily as the reference rate value changes, but suggested that loans where the selected reference rate and spread to that reference rate do not change should be deemed out of scope of the required loan modification reporting.<sup>421</sup> As an example, this commenter stated that, where a loan is collateralized by cash and the negotiated pricing data element is a spread to a benchmark rate, such pricing does not need to be updated for changes in the value of the benchmark rate (*i.e.*, not a reportable loan modification for purposes of the final rule).<sup>422</sup> The same commenter stated more generally that certain modifications to loan information that has already been provided to an RNSA pursuant to proposed Rule 10c-1 should not be required to be provided to an RNSA, claiming that could make data that was already made public potentially misleading.<sup>423</sup> As discussed above, in Part VII.F.1, the pricing data elements required to be reported by paragraph (c)(8) include benchmark pricing, such as a reference to the OBFR in a manner determined by an RNSA. Paragraph (d) of the final rule, requiring reporting of modifications to a paragraph (c) data element, including pricing in paragraph (c)(8), will also capture benchmark pricing. The extent to which the commenter's concern is realized will be

requirement for reporting required loan modification information—including commenters' recommendations with respect to the final rule's timing requirement—are discussed separately, below, in Part VII.G.1.

<sup>420</sup> See, *e.g.*, Pirum Letter, at 2 (discussing that for modifications to previously reported loan transactions, a significant number of these will typically happen in "batch" processes at specific times throughout the day, stating one of the most common modifications is the daily marked-to-market exercise whereby the price of the loan (loan value and required collateral value) and potentially the associated collateral amounts are adjusted to reflect market value changes in the underlying security on loan).

<sup>421</sup> See BlackRock Letter, at 2.

<sup>422</sup> See BlackRock Letter, at 2.

<sup>423</sup> See BlackRock Letter, at 7. According to this commenter, open loans are commonly marked-to-market to the closing price of the relevant security from the previous business day, plus margin and rounding. *See id.* As a result, the actual modification of open loans tends to happen across all positions the next day and at relatively common times across the market. *See id.* The Commission recognizes that, subject to terms agreed to by the parties, covered securities loans may be modified after they are made or are often not finalized until the end of the day. The end-of-day timing modifications to the final rule, as discussed below, in Part VII.G, will help to reduce these concerns raised by the commenters.

determined by how an RNSA chooses to structure the reporting of this variable. For instance, if an RNSA chooses to allow market participants to report a spread and a benchmark, then no modifications will be required to be reported from day to day unless there were a change in the negotiated spread or benchmark. However, if an RNSA chooses to require market participants to report the total fee, then market participants will be required to report changes to the fee if the benchmark changes, which can require daily revisions.<sup>424</sup> However, the Commission does not expect that this will cause confusion. The Commission understands that market participants know that rebates can change regularly and, thus, revisions would not be unexpected. Further, gathering loan modification data is important to facilitate the accurate computation of statistics regarding the cost to borrow by an RNSA and other market participants.

One commenter suggested that the termination of a loan should be reported based on the return of securities by the borrower.<sup>425</sup> Under the final rule, if a borrower returns a portion of loaned shares, the reduction in the amount of shares remaining on loan will be reported as a modification.<sup>426</sup> Similarly, under the final rule, a termination of a covered securities loan is a modification for which information, including the termination date and the reduction of the loaned shares (if any), is required to be reported to an RNSA.<sup>427</sup>

Events such as consolidations and splitting of loans are required to be

<sup>424</sup> See *infra* Part IX.C.1 (discussing an RNSA's discretion with respect to benchmark pricing).

<sup>425</sup> See FIF Letter, at 10 (stating "termination of a securities loan should be reported based on the return of securities by the borrower against the return of the collateral by the lender. The same approach as proposed for reporting new loans and loan terminations should apply for reporting loan modifications.").

<sup>426</sup> Under the final rule, a reduction (or increase) in the loan amount is required to be reported to an RNSA under paragraph (d) of the final rule as a modification to the loan amount in paragraph (c)(6). If the parties to the covered securities loan regard/treat the reduction as termination of the covered securities loan, that is also required to be reported to an RNSA under paragraph (d) of the final rule as a modification to the termination date of the covered securities loan in 17 CFR 240.10c-1a(c)(11) ("final Rule 10c-1a(c)(11)"). Moreover, if the parties to the covered securities loan terminate their loan and such termination involves a reduction in the loan size, this would qualify as a reportable modification under paragraph (d) of the final rule as a modification resulting in a change to the amount or size data element in paragraph (c)(6).

<sup>427</sup> See also Proposing Release, 86 FR 69815 (stating "a termination of a loan would be a modification for which information would need to be provided to an RNSA . . . because the termination would result in a reduction of the quantity of securities initially provided to an RNSA for that loan under paragraph (b)(6)").

reported. A consolidation would be reported as the termination (and therefore modification) of existing loans and entry into a new loan, including the reporting of all required data elements for those modifications and for the new loan. Similarly, the splitting of an existing loan into separate loans could be reported as a modification and termination of the original loan and entry into multiple separate loans.<sup>428</sup> However, that there may be certain life-cycle events in the course of an open-ended loan that some market participants may view as a modification to an existing loan that other market participants might view as a termination of an existing loan and the entry into a new loan. For example, when all outstanding loaned securities are returned to the lender and additional (or the same) shares are subsequently lent under an open-ended loan, one lender may view that event as a termination (and therefore a modification) of an existing loan and a creation of a new loan, whereas another lender may view a similar transaction as two modifications (the return of, and subsequent loan of, securities under the same open-ended loan). In such cases, the lender (or lending agent or reporting agent) may elect to report the required information as either a modification (and termination), or as two modifications to an open-ended loan.

#### Reporting of Data Elements for Pre-Existing Securities Loans

The Commission also received comment seeking clarification on what some commenters called day-one loans, or loans that are agreed to prior to the reporting date of the final rule.<sup>429</sup> One commenter described the day-one problem and stated, "we suggest the Commission find a solution to ensure these loans do not go unreported under a new reporting regime."<sup>430</sup> Other commenters stated that the Commission

<sup>428</sup> In addition, to help reduce concerns about potential confusion and misinterpretation of the data, an RNSA could determine to develop methodologies to identify events as a consolidation or the splitting of existing covered securities loans.

<sup>429</sup> See BlackRock Letter, at 3, 9; AIMA Letter 1, at 5; ICI Letter 1, at 13 n.45 (stating that, given the difficulties the EU faced with "day one" issue regarding implementation of SFTR, ICI recommends that the SEC or FINRA provide clarity regarding applicability of any final rule to securities loans that are outstanding on the rule's implementation date); FIX Trading Letter, at 3 (stating "It is not clear how the rule handles loans created prior to the rule coming into effect but modified after the rule comes into effect . . . . We recommend some wording be added to the rule to clarify a) whether loans already in existence prior to the rule coming into effect need to be reported, b) how modifications should be handled for such loans.").

<sup>430</sup> AIMA Letter 1, at 5.

should consider ways to report and identify such loans.<sup>431</sup>

Certain commenters stated that many loans are open-ended and continuously modified,<sup>432</sup> and sought clarity regarding the treatment of loans in existence prior to the final rule's reporting date for covered persons that are subsequently modified, which commenters characterized as the day-one problem.<sup>433</sup> For example, one commenter stated that the proposal does not consider a key implementation question regarding the day-one problem for reporting existing loans, specifically, that "most loans are open-ended without a set termination date. Accordingly, loans are continually resized and rerated until either the lender or the borrower recalls or returns all shares, respectively. Given the longevity of the average loan, there will be a substantial number of loans that exist prior to the implementation date of the reporting requirements, and such loans will likely continue to be modified as long as they remain outstanding."<sup>434</sup> This commenter provided three possible paths for handling such day-one loans: "(1) report each loan the first time it is modified after the implementation date as if it were a new loan, (2) provide all existing loans with an identifier on the day of implementation, or (3) exclude all existing loans from all reporting obligations, including reporting of modifications made to those loans after implementation date."<sup>435</sup>

The commenter's first alternative for reporting each "day-one" loan the first time it is modified provides an appropriate means of on-boarding data for such loans, as discussed below.<sup>436</sup>

<sup>431</sup> See, e.g., Letter from JD Cumpson (Mar. 14, 2022), at 1 (stating "[t]his should be required to be back-dated for all current lending; no hidden 'legacy' deals that are underreported"); BlackRock Letter, at 3 (stating "the Commission should consider ways to report and identify open securities loans initiated before the first day any new requirements are effective; this is the 'day-one problem' . . . either the Commission or the designated RNAA will need to devise a solution for appropriately incorporating them into the data set").

<sup>432</sup> See, e.g., BlackRock Letter, at 9; AIMA Letter 1, at 5.

<sup>433</sup> See, e.g., BlackRock Letter, at 9; AIMA Letter 1, at 5; ICI Letter 1, at 13.

<sup>434</sup> BlackRock Letter, at 9.

<sup>435</sup> BlackRock Letter, at 9.

<sup>436</sup> See *infra* note 974 (stating that the Commission does not expect significant additional costs to result from this requirement as it is not expected to impact the need for reporting agents to develop and maintain systems for reporting securities lending information but will simply require the inclusion of some additional data transfers that occur largely around the reporting date. Since the cost of individual transmissions are expected to be small, this aspect of the final rule is expected to have a small impact on the

As discussed below, in Part IX.C.1, the lack of information about these loans would harm data quality because it would render the data less complete and would thus limit market participants' ability to determine conditions in the lending market. Accordingly, paragraph (d)(2) of the final rule provides that if a modification is made to a covered securities loan for which reporting under paragraph (a) of the final rule was not required on the date the loan was agreed to or last modified (a "pre-existing covered securities loan") and results in a change to any of the data elements in paragraph (c) of the final rule, there is an obligation to report each of the data elements in paragraph (c) of the final rule as of the date of the modification.<sup>437</sup> Paragraph (d)(2) will provide a snap shot of a pre-existing covered securities loan the first time it is modified on or after the reporting date. If, for example, under the final rule, a pre-existing covered securities loan is first modified two months after the reporting date and the modification results in a change to a data element in paragraph (c) of the final rule, the covered person must provide each of the data elements under paragraph (c) to an RNAA, including the date and time the pre-existing covered securities loan was effected pursuant to 17 CFR 240.10c-1a(c)(3) ("final Rule 10c-1a(c)(3)") and 17 CFR 240.10c-1a(c)(4) ("final Rule 10c-1a(c)(4)"), which will indicate that this is a pre-existing covered securities loan. Reporting of the date and time that the pre-existing covered securities loan was originally effected will provide market participants and regulators with a more complete picture as to the duration of the outstanding loan that is being modified.

In addition to the date and time that the pre-existing covered securities loan was effected (*i.e.*, information in paragraphs (c)(3) and (c)(4)), the covered person must also provide information in paragraphs (c)(1), (c)(2), and (c)(5)

compliance costs of the final rule). See also *infra* note 1029 (The requirement to report information once a loan modification occurs after that loan qualifies for reporting will further support the benefits of the final rule, including reduced information asymmetries and enhanced price competition, by helping to ensure a level playing field during the earlier phases of implementation. This provision will prevent lenders, that have a higher number of long-term loans that did not initially qualify for final Rule 10c-1a reporting, from gaining a competitive advantage by being able to see the loans of other market participants without disclosing the terms of their own loans).

<sup>437</sup> See final Rule 10c-1a(d)(2). This approach also responds to the various requests from commenters, including ICI and BlackRock, requesting that the SEC or FINRA provide clarity regarding the applicability of the final rule to day-one loans (*i.e.*, securities loans that are outstanding on implementation data).

through 17 CFR 240.10c-1a(c)(12) ("final Rule 10c-1a(c)(12)") as of the date of the modification. The date and time of the modification will provide market participants with specificity and context regarding the terms of the modifications, including the rates available for modification at that date and time (which may be different than rates available for new loans). Including the date and time will be important because it will indicate if a report of a modification is not filed in a timely fashion.

If, for example, a pre-existing covered securities loan is first modified, either on or after the reporting date, and it is a modification to the loan amount, the covered person will be required to report the number of shares as modified under paragraph (c)(6) of the final rule to an RNAA, as well as each of the other data elements in paragraph (c), including the date and time the pre-existing covered securities loan was effected, by the end of the day on which such loan was modified. In that same example, the date and time of the modification will be required to be reported. Recognizing that a unique identifier will not yet exist for the loan and no data about the loan was previously reported or made publicly available under the final rule, the data elements in (d)(1)(ii) and (d)(1)(iii) will not be required to be reported for such pre-existing covered securities loans.<sup>438</sup> However, any subsequent modifications going forward will be subject to the modification reporting requirements under paragraph (d)(1) of the final rule such that only the information in paragraphs (d)(1)(i) through (iii) of paragraph (d) will be required to be reported to an RNAA. Pre-existing covered securities loans that do not have a modification to a data element in paragraph (c) will not be subject to the reporting obligation under paragraph (d)(2) of the final rule.<sup>439</sup>

The Commission is not adopting the commenter's alternative of requiring reporting of all pre-existing covered securities loans on the first reporting date. Such an alternative would result in costs and burdens for an RNAA to build out the capacity to handle a much larger number of reports on the first reporting date. The Commission is also not adopting the commenter's alternative of omitting all pre-existing covered securities loans, as the data regarding such loans will be useful to investors as well as regulators and the on-boarding of data for such loans when modified will help reduce information

<sup>438</sup> See final Rule 10c-1a(d)(2).

<sup>439</sup> See final Rule 10c-1a(d)(2).

asymmetries.<sup>440</sup> These modifications to the final rule address the concerns of other commenters seeking certainty regarding such day one loans.

The commenter also recommended “provid[ing] all existing loans with an identifier on the day of implementation.”<sup>441</sup> However, simply providing an identifier to a pre-existing loan without data about the loan would not provide transparency about the terms of the loan. Instead, the final rule requires that an RNSA assign a unique identifier to the pre-existing covered securities loan when it is reported to an RNSA.

Specifically, 17 CFR 240.10c-1a(g)(3) (“final Rule 10c-1a(g)(3)”) requires that an RNSA assign a unique identifier to a pre-existing covered securities loan that is reported to it pursuant to paragraph (d)(2). Consistent with covered securities loans, an RNSA is also required to make publicly available the data elements in paragraphs (c) and (d)(1)(i) reported to it, other than loan amount data element in paragraph (c)(6), not later than the morning of the business day after the covered securities loan is modified.<sup>442</sup> In addition, an RNSA is required to make the loan amount publicly available on the twentieth business day after the pre-existing covered securities loan is modified.<sup>443</sup> These requirements for pre-existing covered securities loans that are modified after the reporting date are necessary so that the data reported regarding these modified loans are also made publicly available in a manner similar to loans that are covered securities loans under paragraph (g) of the final rule.

### 3. Confidential Data Elements—Rule 10c-1a(e)

#### Proposed Rule

The Commission also proposed certain material transaction data elements to be provided to, and retained by, an RNSA, but not made public (“confidential data elements”). As proposed, the confidential data elements provision of the rule is designed to have certain data information used solely by regulators to better understand securities lending, including interest in short selling and price discovery for securities lending, yet without identifying market participants or revealing sensitive

information about their internal operations to the rest of the market. Paragraph (d) of the proposed rule also required the confidential data elements to be provided to an RNSA within 15 minutes after each securities loan was effected (and then an RNSA would be required to keep such information confidential, subject to the provisions of applicable law).

As proposed, the confidential data elements included:

(i) The legal name of each party to the securities loan; where applicable, CRD or IARD Number, MPID, and the LEI of each party to the transaction, and whether such person is the lender/borrower/intermediary between the lender and the borrower (if known);<sup>444</sup>

(ii) If the person lending securities is a broker or dealer and the borrower is its customer, to report whether the security is loaned from a broker’s or dealer’s securities inventory to a customer of such broker or dealer;<sup>445</sup> and

(iii) If known, whether the securities loan is being used to close out a fail to deliver either pursuant to 17 CFR 242.204 (“Rule 204”) of Regulation SHO or outside of Regulation SHO.

#### Final Rule

The Commission sought and received comment regarding the proposed provision that would require lenders or their agents<sup>446</sup> to provide the confidential data items to an RNSA within 15 minutes after each loan is effected.<sup>447</sup> Commenters stated that the Commission should impose explicit confidentiality obligations on FINRA so

as to protect the confidential securities lending information that would be reported.<sup>448</sup> Paragraph (h)(4) of the final rule requires that an RNSA establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of the collected information, which should enhance protection of the confidential data that it collects under the final rule.

One commenter suggested that the final rule include masking or further additional redactions to better protect an individual’s personal non-public information.<sup>449</sup> Another commenter stated that a retail client has increased confidentiality concerns compared to an institutional client.<sup>450</sup> These concerns appear to arise primarily from the potential identification of a broker or dealer’s individual fully paid customers. Paragraph (e)(1) of the final rule specifies that a broker or dealer is not required to provide the legal name of (or otherwise make identifiable) the customer when reporting loans of fully paid excess margin securities pursuant to Rule 15c3-3(b)(3). Thus, a broker or dealer may redact or mask such information prior to submitting the information to an RNSA.

Another commenter supported the Commission’s proposed requirement that lenders provide to an RNSA the identities of borrowers of securities loans (although they would not be publicly disclosed), explaining that this information is essential for effective market oversight, and failure to collect this information would materially

<sup>444</sup> In proposed Rule 10c-1(d)(1), the Commission stated its preliminary belief that provision of this first data element to an RNSA would allow regulators to understand buildups in risk at market participants. It would also provide an RNSA with information that would be required to administer the collection of all data elements provided to it under paragraphs (b) and (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. *See* Proposing Release, 86 FR 69815.

<sup>445</sup> In proposed Rule 10c-1(d)(2), the Commission stated its preliminary belief that this second data element would provide regulators with information on the strategies that broker-dealers use to source securities that are lent to their customers. The Commission also explained that this data element would not apply to lenders that are not broker-dealers. The Commission also stated that it preliminarily believed 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. *See* Proposing Release, 86 FR 69815-16.

<sup>446</sup> The term “lenders or their agents” in proposed Rule 10c-1 is replaced in the final rule by the term “covered person” (as defined in final Rule 10c-1a(j)). *See also* discussion of “covered person” above, in Part VII.A.

<sup>447</sup> *See* proposed Rule 10c-1(d).

<sup>448</sup> ICI Letter 1, at 11 (stating that, “to protect the confidential securities lending information that would be reported to FINRA under proposed rule 10c-1, the SEC should impose explicit confidentiality obligations on FINRA . . . [and] should also ensure that FINRA implements adequate data security measures, given that FINRA will serve as a repository of a large amount of sensitive and non-public securities lending data.”). *See also* Federated Hermes Letter, at 2 (stating that it fully endorses and supports the ICI’s comments, particularly ICI’s proposal to protect confidential data, which, as described includes imposing explicit confidentiality obligations on FINRA and ensuring that FINRA implements adequate data security measures, given that FINRA will serve as a repository of a large amount of sensitive and non-public securities lending data); ISLA Letter, at 2 (expressing concern that if there is too much disclosure of information it could lead to less securities lending activity, particularly if the required data are disproportional or considered unreasonable); MFA Letter 3, at 8 (recommending “that the Commission exercise its regulatory oversight of FINRA to ensure that FINRA implements adequate data security measures”). *See, e.g.,* IIB Letter, at 3 (recommending that the final rule require RNSAs to adopt certain data security measures, including masking or encryption); Charles Schwab Letter, at 2.

<sup>449</sup> *See* Charles Schwab Letter, at 2; *see also* FIF Letter, at 7.

<sup>450</sup> *See* Charles Schwab Letter, at 2.

<sup>440</sup> *See supra* note 436 (discussing costs that result from the requirement to report information once a loan modification occurs after the loan qualifies for reporting).

<sup>441</sup> BlackRock Letter, at 9.

<sup>442</sup> *See* final Rule 10c-1a(g)(3)(i).

<sup>443</sup> *See* final Rule 10c-1a(g)(3)(ii).

weaken the efficacy of the rule.<sup>451</sup> Under the final rule, the names and identities of lenders (other than customers in a fully paid lending arrangement) will be required to be reported to an RNSA. This data will be fully captured by the final rule requiring a broker or dealer (as the “borrower” under the “fully paid” exception) to report such loans. With regard to fully paid arrangements, the final rule requires the broker or dealer to report such loans as the borrower. Although brokers or dealers will not be required to report the customer names to an RNSA, the brokers or dealers will be required to retain such information and make it available to the Commission and its representatives<sup>452</sup> and will be required to retain per RNSA rules.<sup>453</sup>

Another commenter suggested that, to make the rule more useful to investors, in addition to loan characteristics, there should also be a requirement to publicly disclose the legal names of the parties to the loan (in contrast to keeping that information confidential).<sup>454</sup> In fact, multiple retail investor commenters stated that real reform for securities lending must include notifying the public about who is borrowing and lending shares (not just which company’s shares are being borrowed or lent).<sup>455</sup> One commenter stated that

<sup>451</sup> See, e.g., HMA Letter; NYSE Letter 1, at 2 (supporting the proposed confidential treatment of the proposed confidential data elements, particularly the parties to each transaction and further stating that “[p]roposed Rule 10c-1(c)(3) guards against this concern by providing that all identifying information about lending agents, reporting agents, and other persons using reporting agents, will not be made publicly available and the RNSA will be required to keep such information confidential. Thus, the investment strategies of market participants will be appropriately protected through reporting and dissemination of securities lending transactions on an unattributed basis.”).

<sup>452</sup> See, e.g., 15 U.S.C. 78q (section 17(b) of the Exchange Act; see also 17 CFR 240.17a-4(j) (“Rule 17a-4(j)”) (requiring a broker-dealer to furnish records promptly to the Commission); Rule 15c3-3(b)(3) (requiring a broker-dealer to enter into a written agreement with each fully paid lending customer); 17 CFR 240.17a-4(b)(7) (“Rule 17a-4(b)(7)”) (requiring the broker-dealer to retain written agreements relating to its business as broker-dealer).

<sup>453</sup> See, e.g., FINRA Rule 4511 (regarding preservation of records), available at <https://www.finra.org/rules-guidance/key-topics/books-records>.

<sup>454</sup> See Morningstar Letter, at 3. However, if the Commission decides not to require public disclosure of legal names to the public, this commenter suggested, as an alternative, the Commission require detailed information about the fund type and borrower type be provided to the public by an RNSA. See Morningstar Letter, at 3.

<sup>455</sup> See, e.g., Letter from Susanne Trimboth, STP Advisory Services (Dec. 3, 2021) (whose remarks/comments have been extensively quoted/paraphrased by a multitude of commenters on the Proposing Release, i.e., Form A Letters and Form B Letters) (“Trimboth Letter”).

there is no reason for any of the information that is proposed to be provided to an RNSA to be restricted from public view and, thus, it should be made public.<sup>456</sup> However, making this information available to the public could be detrimental because it could identify specific market participants or reveal confidential information about the internal operations or investment decisions of specific market participants.<sup>457</sup>

Others commented more generally on the importance of the securities lending disclosure requirements not adversely impacting the market (e.g., by revealing investors’ short selling strategies). To avoid such adverse impacts, these commenters stated that there should be more prescriptive measures (than requiring policies and procedures, for instance) to prevent an RNSA, or the reporting agent, from releasing any of the confidential transaction data that are provided, under the final rule.<sup>458</sup> Paragraph (h)(4) of the final rule sets forth a multi-part requirement that mandates: (1) written policies and procedures; (2) that such policies and procedures must be reasonably designed; and (3) that an RNSA establishes, maintains, and enforces such policies and procedures. This approach is intended to provide flexibility to an RNSA to tailor policies and procedures that will appropriately maintain the security and confidentiality of the confidential information required by paragraph (e) of the final rule, based on its experience with the multiple types of sensitive and confidential trading data that it

<sup>456</sup> See Letter from Jimit Raithatha (Oct. 11, 2022).

<sup>457</sup> See Proposing Release, 86 FR 69815.

<sup>458</sup> See, e.g., Letter from Managed Funds Association (Jan. 7, 2022) (“MFA Letter 1”), at 4 (suggesting the Commission explicitly require an RNSA to maintain strict confidentiality and information security standards. While the commenter applauded the Commission’s efforts to ensure that FINRA has policies and procedures in place to protect the confidentiality of information that is submitted to it, the commenter believes that the Commission should require, among other things, more prescriptive measures similar to Rule 613 of Regulation NMS (consolidated audit trail) to ensure the security and confidentiality of information, as well as information barriers, information security systems, user confirmation, and access audits.); MFA Letter 3, at 3. Given the confidential and proprietary nature of some of the information that an RNSA will be collecting, this commenter stated it is imperative that the Commission ultimately ensure that FINRA adopt more prescriptive confidentiality and information security in connection with any final rule. As discussed above, the requirements of paragraph (h)(4) of the final rule provide an appropriate level of flexibility to an RNSA regarding specific prescriptive measures to use to maintain the security and confidentiality of the confidential information required by paragraph (e) of the final rule while, at the same time, placing strict requirements around such choices.

routinely handles as an RNSA. Policies and procedures generally are regularly monitored, tested, reviewed, and, if needed, updated to ensure that they remain continuously effective and, thus, should be particularly useful in helping to ensure that an RNSA adjusts to ever-changing technologies intended to circumvent data safeguards. Further, an RNSA’s policies and procedures are subject to Commission oversight.<sup>459</sup>

Some commenters expressed concerns about reporting agents maintaining confidential data received from covered persons.<sup>460</sup> Consistent with the proposed rule, a covered person has the option of whether or not to entrust its confidential information with a reporting agent or to report such information directly to an RNSA. Further, paragraph (a)(2)(i) of the final rule requires that a covered person who relies on a reporting agent to fulfill its reporting obligations under the final rule must enter into a written agreement with such reporting agent. Such agreement could be used by the covered person and reporting agent to memorialize any measures that they agree to regarding the protection of the covered person’s Rule 10c-1a information. Further, registered brokers and dealers and registered clearing agencies are subject to provisions such as section 15(g) of the Exchange Act and thus, have experience with implementing, maintaining, and enforcing policies and procedures and other means of protecting and preventing the misuse of information.<sup>461</sup>

One commenter recommended that the proposed rule be modified to permit an RNSA to confidentially provide regulatory-related information to SROs that are not RNSAs, such as NYSE Regulation, without first obtaining a Commission order.<sup>462</sup> Under the final

<sup>459</sup> See also ICI Letter 1, at 11 (suggesting a proposal to protect confidential data to include imposing explicit confidentiality obligations on FINRA and ensuring that FINRA implements adequate data security measures, given that FINRA will serve as a repository of a large amount of sensitive and non-public securities lending data); ISLA Letter, at 2 (expressing concern that if there is too much disclosure of information it could lead to less securities lending activity, particularly if the required data are disproportional or considered unreasonable).

<sup>460</sup> See S3 Partners Letter, at 12; IHS Markit Letter, at 4; Pium Letter, at 5; BlackRock Letter, at 9.

<sup>461</sup> See 15 U.S.C. 78o.

<sup>462</sup> See, e.g., NYSE Letter 2, at 1–3; Nasdaq Letter, at 3–4 (supporting regulators having access to information that is not publicly available and advocating for the SEC to make non-public information available to other regulators). See also paragraph (h)(2) of final Rule 10c-1a regarding an RNSA making certain information available to the Commission; or other persons as the Commission

rule, an RNSA is required to establish, maintain, and enforce policies and procedures specifically tailored to protect the confidential information enumerated in the final rule. To address commenters' concerns regarding the potential market impact of loan information required to be provided to an RNSA by the final rule, the Commission may designate by order upon a demonstrated regulatory need, dissemination to persons other than an RNSA. Thus, as discussed further below, in Part VII.K, it is appropriate to provide such information to persons (other than the Commission) by order, on a case-by-case basis, upon a demonstrated regulatory need. Such case-by-case determination strikes the proper balance between protecting confidential information and facilitating the regulatory function, such as those of an SRO. Another commenter requested that the Commission clarify whether the "if known" parenthetical, included at the end of paragraph (d)(1) of the proposed rule, was meant to apply to each of the confidential data elements (*i.e.*, CRD, IARD, MPID) in that paragraph.<sup>463</sup> In reviewing this provision, the Commission recognizes that the proposed rule text, by locating the "if known" language at the end of paragraph (d)(1) in the proposed rule (rather than at the beginning as was done with other "if known" language that was used for the confidential data elements in paragraph (d)(3) of the proposed rule), the scope of this "if known" language with respect to the individual confidential data elements in paragraph (d)(1) was not entirely clear. Thus, the placement of the "if known" language similarly at the beginning of the paragraph (e)(1) of the final rule clarifies that each piece of information enumerated in that paragraph (*i.e.*, following the "if known" language) is required to be reported only to the extent that piece of information is known by the covered person. To clarify this intent, it is appropriate to modify proposed paragraph (d)(1) by moving the placement of the "if known" language that is currently proposed at the end of paragraph (d)(1) (in the proposed rule), and relocating it to the beginning of paragraph (e)(1) in the final rule, consistent with the same "if known" language at the beginning of 17 CFR 240.10c-1a(e)(3) ("final Rule 10c-1a(e)(3)").

To the extent the data elements of final Rule 10c-1a(e)(1) are known, providing these data elements to an

may designate by order upon a demonstrated regulatory need.

<sup>463</sup> See OCC Letter, at 9.

RNSA will allow regulators to understand buildups in risk at market participants and may otherwise assist an RNSA in monitoring and surveilling the security markets. The data elements will also provide an RNSA with the necessary information to administer the collection of all the other data elements provided to it under final Rules 10c-1a(c) and (d), such as ensuring the completeness of submissions, contacting persons that have errors in their provided data, and troubleshooting person-specific technical issues.<sup>464</sup>

The Commission also proposed requiring that information be reported (but not publicly disclosed) on whether the securities loan is being used to close out a fail to deliver pursuant to Rule 204 of Regulation SHO<sup>465</sup> or to close out a fail to deliver outside of Regulation SHO. Rule 204 of Regulation SHO generally requires closing a firm's fail to deliver position in equity securities at a registered clearing agency by purchasing or borrowing securities of like kind and quantity. Accordingly, under the final rule, this data element will provide regulators with information both about the loans used by brokers or dealers to close out fails to deliver as required by Regulation SHO, as well as additional insight into the use of loans, particularly the extent that loans are used to cover account-level fail to deliver positions in reportable securities.

Several commenters were supportive of this confidential data element, as proposed, with one commenter noting the benefits of such data for regulatory oversight,<sup>466</sup> and yet other commenters requested that this data element be required to be publicly reported.<sup>467</sup>

<sup>464</sup> See, *e.g.*, Proposing Release, 86 FR 69815 (regarding information collected pursuant to paragraphs (c) through (e) of the final rule available to the Commission; or other persons as the Commission may designate by order upon a demonstrated regulatory need).

<sup>465</sup> 17 CFR 242.204.

<sup>466</sup> See FINRA Letter, at 2 n.4 (stating that fail to deliver data in particular "would significantly enhance FINRA's Regulation SHO surveillance programs"). This commenter stated that it agrees that the proposed rule will provide the Commission, FINRA, and other regulators with data that could be used for important regulatory functions, including facilitating and improving FINRA's in-depth monitoring of members' activity and surveillance of the securities markets in stating, "this additional data would facilitate better surveillance by FINRA for regulatory compliance by its members" and improve FINRA's ability to enforce relevant regulations. See *id.* at 1-2. More specifically, "the additional data, including in particular the identification of whether a loan will be used to close out a fail to deliver, would significantly enhance FINRA's Regulation SHO surveillance programs." *Id.* at 4.

<sup>467</sup> See, *e.g.*, Hindley Letter ("In my opinion, this data not being made publicly available is wrong."); Erick R. Letter ("I believe the terms . . . should also be made public.").

Final Rule 10c-1a(e)(3), adopts this data element as proposed. The Commission has elected to adopt without modification (*i.e.*, not requiring public dissemination) this specific data element in paragraph (d)(3) of the proposed rule because, as a commenter stated,<sup>468</sup> such information could be abused and is designed to be primarily useful for regulatory purposes.<sup>469</sup> As the Commission has stated, fails to deliver may result from long sales as well as short sales, and may be closed out by either purchasing or borrowing shares. Fails to deliver can occur for various reasons, such as "human or mechanical errors or processing delays can result from transferring securities in custodial or other form rather than book-entry form, thereby causing a fail to deliver on a long sale."<sup>470</sup> Such data will be useful to regulators in determining both the extent of the use of securities loans for fails to deliver, as well as how and when fails to deliver are being addressed by securities loans. However, the Commission agrees with the commenter that such information, if made public, could be abused. For example, market participants that become aware of fails to deliver may seek to short squeeze the security knowing that the person failing to deliver has a time-sensitive need to cover its short position.

Another commenter stated that, in addition to the data elements in paragraph (d)(1) of the proposed rule, it will not have knowledge of whether the loan was used to cover a fail to deliver at the time of providing the confidential report to an RNSA, as would be required by paragraph (d)(3) of the proposed rule.<sup>471</sup> The final rule adopts as proposed the requirement that such information must be reported if known.<sup>472</sup>

As non-substantive changes to the rule, the Commission is replacing the word "person" with the defined term "covered person" as discussed above, in Part VII.A. Thus, as adopted, paragraph (e) of final Rule 10c-1a requires, consistent with the Proposing Release, that "[i]f required by paragraph (a) of this section, a covered person directly,

<sup>468</sup> See Citadel Letter, at 11.

<sup>469</sup> See FINRA Letter, at 1-2.

<sup>470</sup> Amendments to Regulation SHO, Release No. 34-60388 (July 17, 2009); 74 FR 38266, 38271 (July 31, 2009) (Adopting Release).

<sup>471</sup> See OCC Letter, at 9 (stating that OCC does not know the CFT, IARD, MPID, or LEI of the lending or borrowing clearing members or whether the lending or borrowing clearing members are acting as intermediaries—and does not know if the loan is being used to close out a fail to deliver pursuant to SEC Regulation SHO or otherwise). See also BlackRock Letter, at 5.

<sup>472</sup> See final Rules 10c-1a(e)(1) and (e)(3).

or indirectly using a reporting agent shall provide the following information to an RNSA, if applicable, by the end of the day on which a covered securities loan is effected.”<sup>473</sup> As non-substantive changes to the rule, the Commission is replacing the word “person” with the defined term “covered person” as discussed above, in Part VII.A. Thus, as adopted, paragraph (e) of final Rule 10c-1a requires, consistent with the Proposing Release, that “[a] covered person shall provide the following information to an RNSA, if applicable, by the end of the day on which a covered securities loan is effected.”<sup>474</sup>

#### 4. Removal of Securities Available to Loan Data Element

##### Proposed Rule

Among the securities lending data elements required to be reported to an RNSA, the Commission included in the proposed rule a requirement to report the total amount of each security that is not subject to legal or other restrictions that prevent it from being lent (“available to lend”).<sup>475</sup> The Commission also required that certain identifying information, including the legal name of the security, and the ticker symbol or other identifier, be reported with the available to lend data.<sup>476</sup> The Commission stated in the Proposing Release that it designed the securities available to loan data elements to allow for the calculation of a “utilization rate” for each security.<sup>477</sup> The utilization rate, which could be calculated by dividing the total number of shares on loan by the total number of shares available for loan, could then be used by market participants to evaluate whether the security will be difficult or costly to borrow.<sup>478</sup>

##### Final Rule

The Commission received numerous comments regarding the “available to lend” data element<sup>479</sup> of the proposed rule. Certain commenters expressed

concern that such data could be inaccurate,<sup>480</sup> with some highlighting a variety of limitations on securities lending that could make the data unreliable.<sup>481</sup> Commenters expressed concern that the available to lend data could be underreported if it omitted data from persons that were not required to provide information to an RNSA or that did not have an open securities loan.<sup>482</sup> One commenter stated that “data would be particularly misleading for large international banking organizations with substantial operations outside of the United States.”<sup>483</sup> Other commenters expressed general concern that the proposed “available to lend” data element could discourage securities lending.<sup>484</sup> Two

<sup>480</sup> See RMA Letter, at 11; IIB Letter, at 8; SIFMA Letter 1, at 15; ICI Letter 1, at 8–9; SIFMA AMG Letter, at 8; State Street Letter, at 4–5; Fidelity Letter, at 4; ABA Letter, at 4; CASLA Letter, at 2; Federated Hermes Letter, at 2; S3 Partners Letter, at 11–12; Sharegain Letter, at 3; Linklaters Letter, at 5; MFA Letter 3, at 6–7; EBF Letter, at 2 (expressing general support for comments from SIFMA and IIB addressing the reporting of “available to lend” data).

<sup>481</sup> See, e.g., State Street Letter, at 4 (“Although clients who participate in securities lending programs generally agree to lend all portfolio assets, or categories of assets, securities lending authorization agreements typically place limits on both portfolio and counterparty exposure. Furthermore, the actual supply of available securities may be impacted by additional client instruction resulting from various idiosyncratic or market events, as well as discretionary transfers in and out of investment portfolios.”). See also IIB Letter, at 8 (“Portfolio limits, concentration limits and simple lending preferences and strategies may substantially limit both the individual securities that a party may be willing to lend and the amount of lending that they are willing to provide on aggregate.”); ICI Letter 1, at 2 n.8 (“A fund may not have on loan at any time securities representing more than one-third of the fund’s total value.” Further stating that “[t]his restriction stems from section 18 of the Investment Company Act.”); SBAI Letter, at 2 (“However, funds managed under 1940 Act regulations have restrictions on their approach to securities lending (e.g., limit on lending: A fund may not have on loan at any time securities representing more than one-third of the fund’s total value), thereby not allowing an accurate calculation of ‘securities available to lend’ on an individual security basis.”); RMA Letter, at 12 (“... securities lending in a portfolio provided to a Lending Agent by a beneficial owner may be limited by (i) negotiated or legal portfolio limits that impact the amounts and types of securities that may be lent, (ii) ad hoc or periodic beneficial owner instructions to limit lending in particular ways based on idiosyncratic preferences . . . or external factors and (iii) discretionary transfers in and out of custody accounts unrelated to securities lending interest, and other factors.”); Linklaters Letter, at 5; James J. Angel Letter, at 4.

<sup>482</sup> See, e.g., IIB Letter, at 8. See also RMA Letter, at 11.

<sup>483</sup> See IIB Letter, at 8.

<sup>484</sup> See, e.g., State Street Letter, at 5 (stating that “[i]n our experience, the prospect of being obligated to disclose, even in aggregate form, all portfolio holdings may be enough to drive certain clients out of the securities lending market, with important implications for liquidity”). See also ICI Letter 1, at 8; IIB Letter, at 8–9; RMA Letter, at 13; IHS Markit

commenters recommended replacing the “available to lend” metric for the calculation of a utilization rate with publicly available information on the issuer’s total share float.<sup>485</sup> However, other commenters supported the reporting of “available to lend” data.<sup>486</sup>

One of the Commission’s goals in proposing the “available to lend” data requirements was “to allow for the calculation of a ‘utilization rate’ for each particular security,” which in turn “could be used by market participants to evaluate whether the security will be difficult or costly to borrow.”<sup>487</sup> The Commission stated in the Proposing Release that “the information provided under paragraph (e) [of the proposed rule] should allow market participants to calculate a utilization rate that is likely to be reliable.”<sup>488</sup> However, many commenters expressed concerns that there may be significant challenges to the accurate reporting of “available to lend” data.<sup>489</sup> One commenter stated, before highlighting barriers to obtaining accurate “available to lend” data, that the “[c]alculation of the utilization rate requires an accurate measure of the ‘securities available to lend’ for all market participants.”<sup>490</sup>

Upon consideration, the Commission agrees with commenters’ concerns with the potential for underreported or inaccurate “available to lend” data being reported. Therefore, final Rule 10c-1a has been amended from the proposed rule to remove the reporting of “available to lend” data, as described under proposed Rules 10c-1(e)(1)(iii) and (e)(2)(iii), and to remove the

Letter, at 11 (stating that “[b]eneficial owners, especially sovereign wealth funds and other sensitive investors, may have policies that could force them to withdraw from securities lending if they are required to submit available to lend data to a broker-dealer”).

<sup>485</sup> See State Street Letter, at 4; IHS Markit Letter, at 7, 9 (responding to Questions 25 and 49).

<sup>486</sup> See HMA Letter, at 7 (stating that such information “is essential to building a comprehensive view of the markets”); FINRA Letter, at 2 (stating that “the information subject to reporting under the Proposal regarding the aggregate quantity of shares . . . available to loan would provide useful information in monitoring the levels of short selling activity occurring in a security and determining when a security is hard to borrow”); ASA Letter, at 3.

<sup>487</sup> See Proposing Release, 86 FR 69817 (stating that the utilization rate “would be calculated by dividing the total number of shares on loan by the total number of shares available for loan”).

<sup>488</sup> See Proposing Release, 86 FR 69817 n.113.

<sup>489</sup> See, e.g., ICI Letter 1, at 8–9; Federated Hermes Letter, at 2; ABA Letter, at 4; RMA Letter, at 11; State Street Letter, at 4–5; IIB Letter, at 8; SBAI Letter, at 2; Sharegain Letter, at 3.

<sup>490</sup> See SBAI Letter, at 2 (stating that “funds managed under 1940 Act regulations have restrictions on their approach to securities lending . . . thereby not allowing an accurate calculation of ‘securities available to lend’ on an individual security basis”).

<sup>473</sup> See final Rule 10c-1a(e) (referring to “Confidential data elements” in paragraphs (e)(1) through (3)).

<sup>474</sup> See final Rule 10c-1a(e) (referring to “Confidential data elements” in paragraphs (e)(1) through (3)).

<sup>475</sup> See proposed Rule 10c-1(e)(1)(iii).

<sup>476</sup> See proposed Rules 10c-1(e)(1)(i) and (ii).

<sup>477</sup> See Proposing Release, 86 FR 69817.

<sup>478</sup> See Proposing Release, 86 FR 69817.

<sup>479</sup> The term “available to lend data” refers to both the “total amount of each security that is not subject to legal or other restrictions that prevent it from being lent” information proposed to be reported by a lending agent under proposed Rule 10c-1(e)(1)(iii), and the “total amount of each specific security that is owned by the person and available to lend” information proposed to be reported by persons that do not use a lending agent under proposed Rule 10c-1(e)(2)(iii).

corresponding requirement that an RNSA make such information publicly available, as described under proposed Rule 10c-1(e)(3). Additionally, final Rule 10c-1a removes the reporting requirements for the identifying information (*e.g.*, legal name of the security, LEI of the issuer, ticker symbol, ISIN, CUSIP, FIGI, or other identifier) of such “available to lend” securities, as listed under proposed Rules 10c-1(e)(1)(i) and (ii) and 10c-1(e)(2)(i) and (ii). Therefore, final Rule 10c-1a does not include a requirement that “available to lend” data be reported to an RNSA, by a lending agent, a person that does not employ a lending agent, or otherwise. The elimination of this requirement from the proposed rule responds to commenter concerns, will limit the burden of the final rule’s reporting requirements on covered persons, and will preempt the potential for inaccurate or unreliable data to be made publicly available to market participants.

#### 5. Removal of Securities On Loan Data Element

##### Proposed Rule

The Commission proposed a requirement that, by the end of each business day that a lending agent was required to provide Rule 10c-1 information to an RNSA or had an open securities loan about which it was required to provide information to an RNSA, the lending agent shall provide to an RNSA the total amount of each security on loan that has been contractually booked and settled (“security on loan”).<sup>491</sup> The proposed rule also required that by the end of each business day that a person that does not use a lending agent provides Rule 10c-1 information to an RNSA, or had an open securities loan about which it was required to provide information to an RNSA, the person shall also provide to an RNSA the total amount of each security on loan that has been contractually booked and settled (“security on loan”).<sup>492</sup> The Commission also proposed that “[f]or each security about which the RNSA receives [such] information . . . . The RNSA shall make available to the public only aggregated information for that security.”<sup>493</sup>

The Commission stated its preliminary belief that securities on loan data could help market participants plan their borrowing activity.<sup>494</sup> The Commission also stated that it designed

the proposed securities on loan data element to allow for the calculation of a “utilization rate” for each particular security.<sup>495</sup> The utilization rate could then be used by market participants to evaluate whether the security will be difficult or costly to borrow.<sup>496</sup>

##### Final Rule

Commenters provided differing views on the proposed reporting requirement for the securities on loan data element. Certain commenters supported or did not object to the requirement to report securities on loan data<sup>497</sup> in the proposed rule.<sup>498</sup> One commenter recommended that more granular securities on loan data be made available, including that the “total number of shares of each stock on loan [should be] disaggregated by lender.”<sup>499</sup> Multiple commenters supported the proposed requirement for an RNSA to make securities on loan data publicly available on an aggregate basis,<sup>500</sup> with one recommending that “[f]or each security, FINRA could disseminate the total volume of securities on loan by shares or principal value (as applicable) and as a percentage of the shares or principal value (as applicable) of all securities that are outstanding.”<sup>501</sup> Another commenter disapproved of the proposed securities on loan data reporting requirement, expressing concerns that the data “may be misleading,” and recommended removing it.<sup>502</sup> The commenter stated that some brokers use approaches to calculating securities on loan data that

<sup>495</sup> See Proposing Release, 86 FR 69817.

<sup>496</sup> See Proposing Release, 86 FR 69817.

<sup>497</sup> The term “securities on loan data” refers to both the “total amount of each security on loan that has been contractually booked and settled” information proposed to be reported by lending agents under proposed Rule 10c-1(e)(1)(iv), and the “total amount of each specific security that is owned by the person” information proposed to be reported by persons that do not use a lending agent under proposed Rule 10c-1(e)(2)(iv).

<sup>498</sup> See SIFMA Letter 1, at 4 n.9; SIFMA AMG Letter, at 11; FINRA Letter, at 2 (stating that “the information subject to reporting under the Proposal regarding the aggregate quantity of shares on loan . . . would provide useful information in monitoring the levels of short selling activity occurring in a security and determining when a security is hard to borrow.”); Better Markets Letter, at 6.

<sup>499</sup> See Letter from Americans for Financial Reform Education Fund, at 3 (Apr. 1, 2022) (“AFREF Letter 2”).

<sup>500</sup> See FIF Letter, at 11; ICI Letter 1, at 11.

<sup>501</sup> See FIF Letter, at 11.

<sup>502</sup> See S3 Partners Letter, at 12 (stating that “prime brokers often use their own internal inventory of shares which means no actual ‘borrowing’ takes place. By failing to take this ‘internalization’ into account, approaches that use ‘securities on loan’ routinely misrepresent the true number of borrowed shares.”).

“routinely misrepresent the true number of borrowed shares.”<sup>503</sup>

Similar to the concerns described above, in Part VII.F.4, about the proposed securities available to loan data element, the Commission agrees with the commenters that there may be challenges to the collection of accurate securities on loan data.<sup>504</sup> Additionally, aggregated information similar to the proposed securities on loan data will be made available by RNSAs, without the additional, potentially duplicative, reporting requirements of proposed Rule 10c-1(e)(1)(iv) and (e)(2)(iv).<sup>505</sup> Under the final rule, RNSAs will be required to design and provide not only information pertaining to the aggregate transaction activity<sup>506</sup> for each reportable security, but also distribution of loan rates for each reportable security.<sup>507</sup> These requirements should provide market participants with information to help plan their borrowing activity, while avoiding potentially duplicative reporting obligations. Such aggregated data would be consistent with some commenters’ support for requiring RNSAs to make “securities on loan” data available on an aggregated basis.<sup>508</sup> Additionally, RNSAs will be required to make the disaggregated “amount of the security loan” data publicly available,<sup>509</sup> comparable to the disaggregated “securities on loan” data recommended by one commenter.<sup>510</sup> However, as discussed below, in Part VII.J, such disaggregated data will only be publicly available on a delayed basis, on the twentieth business day after the covered securities loan is effected, in order to protect the sensitive nature of individual securities lending “amount” information (*e.g.*, such as size or volume).<sup>511</sup> Furthermore, for the reasons described above, in Part VII.F.4, final Rule 10c-1a will not require the reporting of an available to loan data element, which therefore would not be available to pair with the proposed securities on loan data element in order

<sup>503</sup> See S3 Partners Letter, at 12.

<sup>504</sup> See FIF Letter, at 10; S3 Partners Letter, at 11–12; Linklaters Letter, at 5–6.

<sup>505</sup> See final Rule 10c-1a(c).

<sup>506</sup> See final Rule 10c-1a(g)(5). The term “aggregate transaction activity” used in the final rule refers to information pertaining to the absolute value of transactions such that net position changes could not be discerned in the data. The addition of the term “aggregate transaction activity” in the final rule limits the possibility of publishing proprietary information while still providing volume transparency to market participants.

<sup>507</sup> See final Rule 10c-1a(g)(5).

<sup>508</sup> See SIFMA Letter 1, at 18–19; SIFMA AMG Letter, at 10.

<sup>509</sup> See final Rule 10c-1a(g).

<sup>510</sup> See AFREF Letter 2, at 3.

<sup>511</sup> See final Rule 10c-1a(g)(2).

<sup>491</sup> See proposed Rule 10c-1(e)(1)(iv).

<sup>492</sup> See proposed Rule 10c-1(e)(2)(iv).

<sup>493</sup> See proposed Rule 10c-1(e)(3).

<sup>494</sup> See proposed Rule 10c-1(e)(3).

to calculate a “utilization rate” metric.<sup>512</sup> Therefore, while certain benefits derived by market participants from the reporting and disclosing of securities available to lend data and securities on loan data elements together may not be realized, market participants may benefit from the public availability of aggregate transaction activity and distribution of loan rates.<sup>513</sup>

For the foregoing reasons, final Rule 10c-1a has been changed from the proposed rule to remove the reporting of securities on loan data, as described under proposed Rule 10c-1(e)(1)(iv) and (e)(2)(iv), and to remove the corresponding requirement that an RNSA make such information publicly available, as described under proposed Rule 10c-1(e)(3). Therefore, final Rule 10c-1a does not include a requirement that a lending agent or other covered person report securities on loan data to an RNSA.

### G. Timing of Required Reporting to an RNSA

#### 1. Timing of Reporting of Loans

##### Proposed Rule

As discussed above, in Part VII.F.1, paragraph (b) of the proposed rule would have required certain loan transaction data elements to be reported to an RNSA, on a transaction-by-transaction basis, within 15 minutes of the loan being effected, followed by an RNSA assigning each loan a unique transaction identifier and then making such information publicly available as soon as practicable. As part of the proposed rule, the Commission sought specific comment as to the proposed 15-minute requirement for reporting specified data elements to an RNSA.

##### Final Rule

While the proposed 15-minute reporting requirement received some support,<sup>514</sup> most of the comments

<sup>512</sup> See Proposing Release, 86 FR 69817 (“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.”).

<sup>513</sup> See Proposing Release, 86 FR 69817.

<sup>514</sup> Some commenters did express support for the proposed 15-minute reporting requirement. These commenters were primarily smaller retail investors who stressed the benefits of real-time intraday reporting. See, e.g., Letter from Nick Morgan (May 4, 2023) (advocating for transaction-by-transaction reporting and the 15-minute reporting requirement, as well as promoting transparency in securities lending, which will benefit retail investors and strengthen the SEC’s ability to fulfill its mandate while also guarding against economic fragility and potential national security threats). See also Letter from Edwin Liew (May 4, 2023) (supporting the 15-minute reporting requirement saying the cost and effort are justified to prevent fraud and prevent

received by the Commission from larger institutional market participants strongly opposed the proposed rule’s requirement that the specified data elements be reported to an RNSA within 15 minutes after a loan is effected (*i.e.*, in addition to the data being publicly disseminated on a transaction-by-transaction basis). For example, most of these larger market participants explained that the terms of securities loans change during the day and are generally not finalized until the end of the day.<sup>515</sup> These changes include reallocations of securities loans among lenders, re-pricings, and changes in collateral.<sup>516</sup> As a result, the commenters stated that requiring transaction-by-transaction reporting, particularly on a 15-minute/intraday basis, would result in significant unintended negative consequences, including the public dissemination of incomplete or misleading information, which could adversely impact the securities/lending markets.<sup>517</sup> Another commenter also stated that the proposed

hiding in loopholes). In fact, one commenter stated that at a minimum “the final rule should significantly shorten the 15-minute reporting timeframe.” Better Markets Letter, at 8. This commenter urged the Commission to finalize the proposed rule without undue delay and without diluting the proposal in any way absent credible, specific evidence that such dilution will not have an impact on the utility of the data reported. See *id.* This commenter also stated that “the SEC should also shorten the required timeframes for the reporting” and identified “potential shortcomings of these timeframes, including how they hamper real-time regulatory oversight or allow manipulative activity based on information leakage or other means of exploiting the 15-minute reporting delay . . . for public disclosure.” *Id.* Other commenters expressed support for the proposed rule and specifically noted that it is a leading provider of data and analytics in the securities lending market and is currently able to do intraday reporting. See, e.g., Equilend Letter; see also Morningstar Letter, at 4 (stating its support for the proposed 15-minute reporting requirement). The Commission acknowledges the above benefits stated by these commenters regarding the proposed 15-minute reporting requirement and has considered the comments that argued in favor of end-of-day reporting. As discussed below, in this part, the Commission has determined to replace the proposed intraday 15-minute reporting requirement with an end of day requirement that will allow covered persons additional time in which to collect and report their Rule 10c-1a information in compliance with final Rule 10c-1a’s requirements.

<sup>515</sup> See Fidelity Letter, at 2–3 (stating that “[t]he reporting timeframe for transactions should be no earlier than end of day”). See also MFA Letter 1, at 8; MFA Letter 2.

<sup>516</sup> See FIF Letter, at 3.

<sup>517</sup> See, e.g., SIFMA AMG Letter, at 3 (stating that the proposed 15-minute requirement would lead to the reporting of superfluous information benefitting neither market transparency nor regulatory oversight). See also SIFMA Letter 1, at 13–14; SIFMA Letter 2, at 5. See also State Street Letter, at 2–3 (stating the 15-minute reporting requirement will result in incomplete or error prone information because it ignores that loans are usually finalized by the end of day). See also AIMA Letter 1, at 4; ICI Letter 1, at 6.

15-minute reporting requirement is impractical and logistically challenging and would “create noise and misleading information in the market.”<sup>518</sup> In addition commenters stated that there would be costs to participants to create and maintain an entirely new infrastructure for loan data reporting and dissemination.<sup>519</sup>

Other commenters stated that the proposed 15-minute reporting time period would exponentially increase the number of execution (and modification) reports that would be required to be filed.<sup>520</sup> Another commenter stated that requiring reporting every 15 minutes gives away too much proprietary information to the market regarding closely guarded trading strategies, risking exposures to short squeezes, front running, reverse-engineering—particularly with hard-to-borrow securities.<sup>521</sup> Another commenter raised the concern that a 15-minute reporting requirement may be unnecessarily frequent and that there did not appear to be any stated rationale in the Proposing Release for how a 15-minute reporting interval would be helpful to market participants or why this frequency is appropriate.<sup>522</sup>

<sup>518</sup> See, e.g., CCMR Letter, at 5 (stating that disclosing securities loan activity on a transaction-by-transaction basis as soon as 15 minutes after they are effected would likely signal to the market that a short selling position is being actively established in that security, which could have potential negative effects on short sellers, increase costs associated with establishing a short position through information leakage and slippage; or lead to “short squeezes”). See also SBAI Letter, at 2; AIMA Letter 1, at 3–4 n.11; RMA Letter, at 18.

<sup>519</sup> See MFA Letter 1, at 3.

<sup>520</sup> See also RMA Letter, at 9.

<sup>521</sup> See AIMA Letter 1, at 4–5 (stating that in response to the proposed rule market participants may adjust their trading strategies or exit the borrowing market when they otherwise would be active participants thereby reducing liquidity and increasing volatility).

<sup>522</sup> See Letter from Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (Jan. 7, 2022) (“Chamber of Commerce Letter”). But see Nasdaq Letter, at 3 (stating “the data reported should be made available to investors within a reasonable timeframe to utilize the information effectively to make informed investment decisions. To that end, it is unclear whether the fifteen-minute timeframe for reporting certain data is optimal and is supported by sufficient research or other justification. When compared to the speed at which markets operate, the fifteen-minute delay may be excessive and, on the other hand, there may be little benefit to investors in receiving such information after a fifteen-minute delay as opposed to a longer period, such as the end of the day. . . .”). See also RMA Letter, at 9 (stating that “[r]equiring reporting on an intraday basis as proposed would be operationally impractical in many respects and would provide little to no incremental value compared to end-of-day reporting”). See also Federated Hermes Letter, at 1 (stating that “the requirement to report securities loans within 15 minutes of ‘being effected’ or modified does not

To address these concerns, commenters offered possible modifications for the final rule. Many of the commenters who suggested an alternative approach favored an “end-of-day” reporting requirement.<sup>523</sup> They explained that end-of-day reporting would make more sense and result in more worthwhile information being reported as it takes into account that most securities loan trades are not finalized until end of day.<sup>524</sup> One of the commenters explained how most securities loan market participants already use/rely on “end-of-day” data because they view it as the most relevant and reliable measurement of market activity.<sup>525</sup> This commenter also stated that, even though intraday data may already be available from service providers, it is still widely seen as indicative in nature and subject to frequent correction.<sup>526</sup>

Other commenters suggested reporting by end of the next day (*i.e.*, on a T+1 basis similar to what the EU/UK’s Securities Financing Transactions

appear to reflect the reality that the terms of securities loans are fluid and frequently modified throughout a business day”). Thus, the commenter states it is difficult to identify a particular intraday point that a given loan has been “effected.” *See id.* According to the commenter, even if it were possible to determine such an intraday point, 15 minutes is too short of a timeframe to collect and accurately report the required transaction data. Thus, the commenter stated that given the imprecision of defining the exact intraday moment at which a lending transaction is effected, and the frequency with which the transaction’s details are modified, new reporting requirements will be expensive and operationally difficult to implement. *See id.* *See also* IHS Markit Letter, at 2 (opposing the proposed 15-minute reporting requirement and stating “the frequency with which loans would be reported and disseminated would be both an immense hurdle and costly burden for the industry and could also lead to reduced market liquidity and participants withdrawing from lending altogether”).

<sup>523</sup> *See, e.g.*, FIF Letter, at 4 (stating that reporting should be end of day; however, the letter still discusses implementation challenges for broker-dealers and complexity in requiring even end of day reporting).

<sup>524</sup> *See* SIFMA Letter 1, at 3; *see also* ASA Letter, at 2–3 (stating an “end-of-day requirement to report securities lending transactions would be appropriate and provide investors with sufficient transparency regarding the terms of these transactions”); ICI Letter 1, at 6 (claiming any information reported within 15 minutes risks being misleading to investors and “noise” as it would not reflect the parties’ final terms); Sharegain Letter, at 4 (stating its support for a longer reporting time period than 15 minutes, “[i]n our view, decreasing the frequency of reporting to twice a day, or end-of-day reporting, would render compliance with the timing requirement much more reasonable”).

<sup>525</sup> *See* IHS Markit Letter, at 5.

<sup>526</sup> *See* IHS Markit Letter, at 2 (stating that “[i]ntraday data is also difficult to ingest and analyze and therefore accessible to only the largest and most sophisticated participants in the securities lending market”); *see also* ICI Letter 1, at 6 n.22 (stating “it is well understood by market participants . . . that intraday data may be incomplete and is subject to change”).

Regulation (“SFTR”) reporting regime requires).<sup>527</sup> For example, one commenter stated it did not believe there is any additional value to investors in providing intraday data, given the nature of pricing for securities lending transactions, the potential for intraday data to confuse investors, and the unnecessary costs and burdens it would pose to market participants.<sup>528</sup> Another commenter who favored next day reporting maintained that it was a way to avoid the operational challenges, disproportionate costs, and compliance complexities associated with the proposed 15-minute reporting requirement.<sup>529</sup> Another commenter asked the Commission to amend the 15-minute reporting requirement in favor of end-of-day reporting on a next day (T+1) basis and stated that the 15-minute reporting requirement would be impractical, and that a T+1 standard would address transparency, reduce implementation costs, and align with the existing SFTR securities loan reporting regime.<sup>530</sup> Another commenter suggested that the proposed rule be modified to allow the lending agent to have until the following business day to make the required report to avoid reporting errors.<sup>531</sup>

<sup>527</sup> *See, e.g.*, SIFMA AMG Letter, at 3 (suggesting “end of next day, T+1, or at least no more frequently than by the end of each business day”); *See also* BlackRock Letter, at 2–3 (requesting a T+1 reporting requirement); *see also* IIB Letter, at 2 (suggesting “end-of-day” reporting on a T+1 basis instead of intraday reporting); ABA Letter, at 4 (suggesting “until the following business day”); RMA Letter, at 3 (suggesting “end-of-day reporting on a next day, T+1 basis” instead of a 15-minute reporting requirement because it aligns with the existing SFTR securities loans reporting regime); S3 Partners Letter, at 3 (stating the Commission should revise the proposed rule to require aggregate, not transaction level, reporting on T+1). *See also* EBF Letter, at 2 (stating that it supports IIB’s and SIFMA’s EOD and T+1 reporting comments); Citadel Letter, at 2 (referencing the significant costs associated with transaction-by-transaction reporting and the Commission’s conclusion [albeit in another SEC release] that aggregated and delayed disclosure of short sale positions was preferable to transaction-by-transaction and intraday disclosure). *See also* MFA Letter 3, at 5 (stating “the SEC’s proposal to require the reporting of the material terms of a securities loan within 15 minutes of a loan “being effected” is unworkable in a securities loan context”). According to this commenter, securities loans do not involve an outright purchase or sale but may be on-loan for extended periods, can be returned at any time, and may subsequently be re-lent. The terms of a securities loan are typically negotiated throughout the day and often not finalized until the end of the day or the next day.” *Id.* at 5. *See also* Morningstar Letter, at 2–4 (stating support for loan-level data to be made publicly available by next business day in order to provide investors with a more transparent and complete depiction of a fund’s lending activities).

<sup>528</sup> *See* BlackRock Letter, at 2–4.

<sup>529</sup> *See* Pirum Letter, at 2.

<sup>530</sup> *See* RMA Letter, at 3.

<sup>531</sup> *See* ABA Letter, at 4.

Commenters also stated that next day or T+1 reporting would provide more appropriate flexibility for developing systems and processes for reporting at substantially lower cost.<sup>532</sup> Some commenters expressed support for modifying the reporting requirement to require next business day (*i.e.*, on T+1 basis) but also for an earlier reporting requirement (*i.e.*, end of the same day) provided that the Commission provides clarity regarding the precise time period for such reporting (*e.g.*, the exact point in time that will constitute “end of day” for purposes of the final rule) so that market participants will have the clarity and certainty they will need to comply and report accurately.<sup>533</sup>

After reviewing and considering the public comments and recommendations regarding the proposed 15-minute reporting requirement, the Commission is adopting final Rule 10c–1a(c), substantially as proposed, but with targeted modifications to the proposed rule’s reporting period to address commenters’ concerns about the proposed timing requirement being unworkable and overly burdensome by replacing the proposed 15-minute reporting period with end-of-day reporting, as well as bringing the different regulatory regimes in closer alignment with the final rule’s public dissemination requirements. Adopting the final rule with an end-of day reporting requirement will help reduce the concerns raised by the commenters, while still furthering the underlying objectives of the final rule.<sup>534</sup>

As modified, the final rule’s end-of-day reporting requirement will help prevent an excessive number of incomplete or slightly modified reports that otherwise would occur throughout the day yet without providing any incremental value. Thus, in modifying the final rule to include an end-of-day reporting requirement, rather than requiring frequent intraday reporting, the Commission understands the frequency with which parties to a securities loan may agree to some of the

<sup>532</sup> *See, e.g.*, RMA Letter 1, at 11 (stating next-day reporting would provide more appropriate flexibility for developing systems and processes for reporting at substantially lower cost).

<sup>533</sup> *See* ICI Letter 1, at 6 (stating that for anything earlier than T+1, the SEC should provide clarity regarding the timeframe for such reporting to ensure it is feasible).

<sup>534</sup> Consistent with the proposed rule, the Commission is not specifying the time that will be the “end of each business day” or what holidays are a “business day” to give an RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly, provided they are consistent with the rule as adopted. *See also* Proposing Release, 86 FR 69816 n.104. *See supra* note 72 (regarding an example for times set by an RNSA for other reporting regimes).

basic terms initially, but that some or many of the securities loan terms may not be agreed to (or may be updated throughout the day and, thus, not finalized) until the end of the day.<sup>535</sup> Nonetheless, whether or not a loan has been effected is a legal/factual question and a delay in settlement (or if one of the agreed to loan terms is modified the next day) does not impact the initial requirement to report all loans (and modifications) within the required timeframes under the final rule.<sup>536</sup>

As adopted, paragraph (c) of the final rule requires a covered person (directly, or indirectly using a reporting agent) to provide the Rule 10c-1a information, if applicable, to an RNSA “by the end of the day on which a covered securities loan is effected.”<sup>537</sup> By replacing the proposed 15-minute reporting requirement with a more flexible end-of-day (or “EOD”) reporting requirement in final Rule 10c-1a(c), the Commission recognizes that many covered securities loans are not likely to be finalized within that 15-minute time period or until the end of the day. Unlike SFTR in Europe, final Rule 10c-1a’s reporting requirement (*i.e.*, to an RNSA) will not extend until the next day, on a T+1 basis. While final Rule 10c-1a and the SFTR both deal with securities lending, they are two unique and different regulatory regimes, with differences in their underlying objectives and scope of regulations. Final Rule 10c-1a, however, does allow an RNSA until the morning of the next business day (thus on T+1, the same as SFTR) to disseminate the Rule 10c-1a information it receives the night before. This allows an RNSA sufficient time it needs between receipt of the Rule 10c-1a information and its dissemination to the public, which necessitates the Rule

10c-1a information being collected no later than the night before.

## 2. Timing of Reporting of Loan Modification

### Proposed Rule

As discussed above, in Part VII.F.2, paragraph (c) of the proposed rule would have required that certain loan modification data elements be provided to an RNSA within 15 minutes after each loan is modified if the modification results in a change to the Rule 10c-1 information that is already required to be provided to an RNSA under paragraph (b) of the proposed rule (and for an RNSA to make such information available to the public as soon as practicable).<sup>538</sup> In issuing the proposed rule, the Commission sought comment specifically regarding the proposed timing requirement in paragraph (c), which would have required specified loan modification data elements to be reported to an RNSA within 15 minutes after a loan is modified.

### Final Rule

Most of the comments received by the Commission on the proposed loan modification data elements in paragraph (c) of the proposed rule were focused on the proposed 15-minute loan modification reporting requirement, with many of the commenters suggesting that it be replaced with end-of-day reporting (*i.e.*, similar to the end-of-day timing modification discussed above with respect to the securities loan data elements information originally reported to an RNSA).

In addition to the comments discussed above, in Part VII.F.2, commenters opposing the proposed 15-minute reporting requirement also raised concerns that new trades can be executed for market delivery at any time during the day before the close of settlement at DTC and, as a result, that some market participants will book trades in “batches” or at their discretion, as opposed to individually when agreed.<sup>539</sup> Some commenters stated that other reporting regimes do not require intraday reporting, as certain activity reported intraday might

ultimately not result in an executed trade.<sup>540</sup>

Reporting the loan modification data elements for each covered securities loan that is modified is important to ensure that data elements previously reported to an RNSA accurately reflect currently outstanding covered securities loans and to prevent evasion of the rule. However, in response to commenters’ concerns, particularly with respect to operational difficulties associated with the proposed 15-minute loan modification reporting requirement and uncertainties as to the scope of its intended application, the Commission is adopting the loan modification data elements provision in paragraph (d) of the final rule, substantially as proposed, but with a modification as to the timing of the reporting period and some clarifying changes to the proposed rule text.

More specifically, to promote the integrity and consistency of the reporting under the final rule, the Commission has determined to remove the proposed requirement to report loan modification data elements to an RNSA within 15 minutes after each loan is modified and to replace it with the same end-of-day reporting the Commission is requiring for the original loan data elements under paragraph (c) of the final rule.<sup>541</sup> For the same reasons discussed above, in Part VII.F.1, allowing covered persons until the end of the day to report any required loan modification data information to an RNSA is appropriate because it will help to address commenters’ concerns and operational difficulties with frequent intraday reporting while still furthering the transparency objectives of the final rule.

As modified, the final rule requires the specified loan modification data elements to be provided by the covered person (directly or indirectly using a reporting agent) to an RNSA, by the end of the day on which a covered securities loan is modified.<sup>542</sup> By replacing the proposed 15-minute reporting requirement with a more flexible end-of-day reporting requirement in final Rule 10c-1a(d), the timing modification should help reduce the concerns raised by commenters, that is, by allowing covered persons and reporting agents

<sup>535</sup> See RMA Letter, at 10 (expressing the concern that, “data reported during the course of the day would fluctuate substantially, would be incomplete in many respects and would likely include meaningful levels of exception reporting, outcomes that could be mitigated by giving borrowers and lenders the ability to conduct reconciliations at the end of the day prior to reporting”). According to this commenter, most market participants would prefer (trust) verified data with a time delay, which the commenter believed would likely be more accurate than real-time data. See *id.*

<sup>536</sup> Under final Rule 10c-1a, in those instances where a covered securities loan is not settled or finalized until the next day, *i.e.*, T+1, a covered person will still be required to report the covered securities loan by the end of the day on which such covered securities loan is effected by the parties. It will not need to be reported again when it does settle the next day, on T+1—unless the reported covered securities loan is modified the next day, on T+1, when it does settle. See final Rules 10c-1a(c) and (d).

<sup>537</sup> Final Rule 10c-1a(c). See also *infra* note 541 and accompanying text.

<sup>538</sup> See proposed Rule 10c-1(c).

<sup>539</sup> See, *e.g.*, Pirum Letter, at 2 (explaining the batch process and how the majority of the data are processed and received in batches and, thus, end-of-day reporting, rather than the proposed 15-minute reporting requirement, will thereby allow sufficient time for necessary control processes to take place to ensure the accuracy of data submissions).

<sup>540</sup> See, *e.g.*, SIFMA Letter 1, at 14; SIFMA Letter 2, at 5 (supporting concerns raised in the SIFMA Letter 1, at 14); ICI Letter 1, at 6; RMA Letter, at 9; MFA Letter 1, at 9; Fidelity Letter, at 3; IIB Letter, at 6-7; IHS Markit Letter, at 10.

<sup>541</sup> See final Rules 10c-1a(c) through (e) (as modified, and for consistency, all three data elements paragraphs require end-of-day reporting, rather than the proposed 15-minute reporting requirement).

<sup>542</sup> See final Rule 10c-1a(d).

additional time (until the end of each day, rather than just within 15 minutes), to report any required loan modification information to an RNSA and also to help reduce the overall implementation cost for market participants, and allow such participants to better manage the flow of data in line with the existing internal processes for reporting.<sup>543</sup>

### 3. Timing of Reporting of Confidential Data Elements

#### Proposed Rule

As discussed above, in Part VII.F.3, the Commission also proposed that certain confidential data elements would be provided to, and retained by an RNSA,<sup>544</sup> but not made publicly available by an RNSA.<sup>545</sup> Such confidential data was intended to provide regulators with specific information about the loan (such as the identity of the parties to the loan) that would be kept confidential due to concerns about potential misuse of such information. The Commission proposed that such information be reported to an RNSA within 15 minutes after the loan is effected.

#### Final Rule

The Commission is modifying the proposed timing requirement for reporting the confidential data elements, as adopted in paragraph (e) of the final rule, similar to the timing revisions the Commission made with respect to the proposed loan and loan modification data elements adopted in paragraphs (c) and (d) of the final rule (*i.e.*, by replacing the proposed 15-minute reporting requirement with the similar end-of-day reporting period). As modified, and otherwise consistent with the rule as proposed, paragraph (e) of the final rule will continue to require that any confidential data elements be reported to an RNSA;<sup>546</sup> however, an RNSA will be required to keep such information confidential, “in accordance with the provisions of

<sup>543</sup> See, *e.g.*, Proposing Release, 86 FR 69815 n.96 (providing an example of a modification that would not trigger as the requirement in paragraph (c) of the proposed rule (*i.e.*, when a borrower posts additional collateral in response to an increase in value of the loaned securities). Information about this change would not have needed to be provided under proposed paragraph (c) because, while proposed paragraph (b)(10) requires the Lender to provide the percentage of collateral to value of loaned securities required to secure such loan, it did not require information about the value of collateral posted in dollar terms. See also *supra* note 413 (discussing an example of a non-qualifying modification).

<sup>544</sup> See proposed Rule 10c–1(c).

<sup>545</sup> See proposed Rule 10c–1(g).

<sup>546</sup> See final Rules 10c–1a(e)(1) through (e)(3).

paragraph (h) of this section and applicable law.”<sup>547</sup>

#### H. Definition of Registered National Securities Association—10c–1a(j)(5)

##### Proposed Rule

The Commission proposed that any person that loans a security on behalf of itself or another person shall provide to an RNSA certain specified information.<sup>548</sup> However, the Commission did not include a definition of the term “RNSA.” The Proposing Release stated that the only existing RNSA has experience establishing and maintaining systems that are designed to capture transaction reporting, similar to the requirements of final Rule 10c–1a.<sup>549</sup>

##### Final Rule

The Commission received comments stating that FINRA, as the only existing RNSA, is best positioned for such a role.<sup>550</sup> To provide additional clarity regarding the regulatory body that Rule 10c–1a information must be reported to, the final rule defines the term “RNSA” to mean “an association of brokers and dealers that is registered as a national securities association pursuant to 15 U.S.C. 78o–3 (‘section 15A’) of the Exchange Act.”<sup>551</sup> This definition applies to any association of brokers and dealers that is registered as a national securities association pursuant to section 15A of the Exchange Act now or in the future.<sup>552</sup>

#### I. RNSA Rules To Administer the Collection of Information—Rule 10c–1a(f)

##### Proposed Rule

The Commission proposed that “[t]he RNSA shall implement rules regarding the format and manner to administer the collection of information in paragraphs

<sup>547</sup> See final Rule 10c–1a(g)(4). Similar to the other data element provisions under the final rule, modifying paragraph (e)’s reporting time period in this manner will not only help to ensure market participants’ compliance with final Rule 10c–1a’s confidential transaction data requirements but will respond to many of the concerns raised by commenters regarding a more frequent and burdensome intraday timeframe, as was originally proposed.

<sup>548</sup> See proposed Rule 10c–1(a)(1).

<sup>549</sup> See Proposing Release, 86 FR 69808.

<sup>550</sup> See, *e.g.*, OCC Letter, at 12 (stating that “FINRA is currently best positioned to serve in this role given FINRA’s experience and expertise to date in administering other trade reporting systems”). See also HMA Letter, at 7; Nasdaq Letter, at 3–4; IHS Markit Letter, at 1; FINRA Letter, at 2; AFREF Letter 1, at 4 (stating that FINRA “is the only RNSA that exists now, and the Commission should rely on FINRA to aggregate and disseminate the additional data on the securities lending market”).

<sup>551</sup> See final Rule 10c–1a(j)(5).

<sup>552</sup> See 15 U.S.C. 78o–3.

(b) through (d) of [the proposed rule] and distribute such information in accordance with the rules approved by the Commission pursuant of section 19(b) of the Exchange Act and Rule 19b–4 thereunder.”<sup>553</sup> In the Proposing Release the Commission stated its preliminary belief that permitting an RNSA to implement rules regarding the administration of the collection of securities lending transactions would enable an RNSA to maintain and adapt potential technological specifications and any changes that might occur in the future.<sup>554</sup> The Commission also affirmed that it would retain oversight of an RNSA’s adoption of rules to administer the collection of information under proposed Rule 10c–1.<sup>555</sup>

##### Final Rule

The Commission asked in the Proposing Release whether Rule 10c–1 should require that lenders provide material information to an entity other than an RNSA.<sup>556</sup> One commenter stated that FINRA, the only existing RNSA, is best positioned to serve in such a role due to its expertise and experience in administering trade reporting rules.<sup>557</sup> Other commenters also supported the role of RNSAs in collecting and distributing information under the proposed rule,<sup>558</sup> with one specifically stating that the format and manner through which information will be provided to an RNSA should be defined by an RNSA and should not be specified in proposed Rule 10c–1.<sup>559</sup> The Commission agrees with the commenters that an RNSA is well positioned to define, consistent with section 19(b) and Rule 19b–4 of the Exchange Act as well as an RNSA’s own internal business requirements and systems designs, the format and manner in which it collects Rule 10c–1a information.

Alternatively, another commenter recommended that the Commission should eventually transition the collection and dissemination of the data collected under proposed Rule 10c–1 to an internal process at the Commission to enhance enforcement of the proposed rule and allow the Commission to share

<sup>553</sup> See proposed Rule 10c–1(f).

<sup>554</sup> See Proposing Release, 86 FR 69819.

<sup>555</sup> 15 U.S.C. 78s(b).

<sup>556</sup> See Proposing Release, 86 FR 69809 (Question 13).

<sup>557</sup> See OCC Letter, at 12 (stating that it “believes that FINRA is currently best positioned to serve in this role given FINRA’s experience and expertise to date in administering other trade reporting systems”).

<sup>558</sup> See HMA Letter, at 7. See also Nasdaq Letter, at 3–4.

<sup>559</sup> See IHS Markit Letter, at 11.

relevant data.<sup>560</sup> However, in addition to providing securities lending information to the public, the final rule is intended to provide additional tools to RNSAs to enhance RNSAs' surveillance over the securities markets. An RNSA is appropriately suited for collecting and analyzing such data for such surveillance purposes.

Some commenters expressed concerns or provided recommendations for an RNSA's administration of information collected under the final rule. One commenter stated the importance of RNSAs' compliance with section 19(b) and Rule 19b-4 of the Exchange Act when implementing RNSA rules required by final Rule 10c-1a.<sup>561</sup> Consistent with the proposed rule,<sup>562</sup> any proposed changes to an RNSA's rules required by final Rule 10c-1a, including its Rule 10c-1a information collection and dissemination practices, will also be subject to notice, public comment, and Commission review pursuant to section 19(b) and Rule 19b-4 prior to implementation. This requirement, including the notice and opportunity for public comment, will help the Commission ensure that the direct reporting to an RNSA by covered persons is logistically feasible, prior to the effectiveness and implementation of such RNSA rule, and that its methodology helps ensure the accuracy and quality of the reported data.

Another commenter expressed concern that the proposed rule "would provide no mechanism for quality assurance."<sup>563</sup> An RNSA could choose to include mechanisms for quality assurance in its rules to implement the system under the final rule. Further, all RNSA rules implementing the system under the final rule will be subject to notice, public comment, and Commission review under section 19(b) and Rule 19b-4.

Another commenter stated that the Commission "should ensure that direct reporting to the RNSA is logistically feasible for entities that are not broker-dealers."<sup>564</sup> The final rule permits such entities to enter into agreements with reporting agents that are brokers, dealers, or registered clearing agencies to fulfill their reporting obligations on their behalf, should they determine that

direct reporting is not the most appropriate choice for them.<sup>565</sup>

One commenter recommended that the collection, maintenance, and publication of securities lending data, which an RNSA was required to perform under the proposed rule, be subject to a competitive bidding process to select a technology vendor or vendors to provide such services.<sup>566</sup> However, the oversight that the Commission maintains over RNSAs, including oversight of their rules to administer the collection of Rule 10c-1a information pursuant to section 19(b) and Rule 19b-4, would not apply to the more general population of "technology vendors" that the commenter proposes should participate in a competitive bidding process to collect, maintain, and distribute Rule 10c-1a information.<sup>567</sup> The commenter's proposed approach would not be appropriate in the absence of such oversight. The Commission agrees with one commenter's statement that the existing RNSA is well positioned to serve in this role under final Rule 10c-1a given its expertise in administering other trade reporting systems.<sup>568</sup>

Having considered commenters' submissions, for the foregoing reasons, the Commission is adopting the requirement that an RNSA shall implement rules regarding the format and manner to administer the collection and dissemination of certain information, substantially as proposed. The final rule includes minor changes to reflect that the relevant Rule 10c-1a information paragraphs have been renumbered to align with the format of the final rule,<sup>569</sup> to provide citations to the statutory provision and regulation that such rules must be promulgated pursuant to, the term "distribute such information" has been modified to "make publicly available such information" to more accurately reflect an RNSA's responsibilities for the publication of data under final Rule 10c-1a(g), and the term "approved by the Commission" has been modified to "promulgated" to more accurately reflect the process by which RNSA rules are implemented pursuant to section 19(b) and Rule 19b-4 of the Exchange Act.

#### J. RNSA Publication of Data—10c-1a(g) Proposed Rule

The proposed rule would have required an RNSA to make available to the public the information required by proposed paragraph (b), including the legal name of the security issuer, and the LEI of the issuer, if the issuer has an active LEI,<sup>570</sup> and the ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier.<sup>571</sup> In addition, modifications that resulted in a change to the data elements required to be provided to an RNSA under paragraph (b) of the proposed rule would also have been made public by an RNSA.<sup>572</sup> An RNSA would have also provided identifying information for each security for which aggregate information would be made public.<sup>573</sup> Paragraph (e)(3) of the proposed rule further required that an RNSA keep identifying information about lending agents, reporting agents, and other persons using reporting agents confidential, subject to applicable law.<sup>574</sup> In addition, the confidential data elements in proposed Rules 10c-1(d)(1) through (3) would be kept confidential so as to not identify market participants or reveal information about the internal operations of market participants.<sup>575</sup> The proposed rule also required an RNSA to assign a unique transaction identifier to each loan.<sup>576</sup>

#### Final Rule

The Commission received many comments that expressed support for increasing transparency and price discovery in the securities lending market by increasing the amount and availability of data to the public.<sup>577</sup> Commenters were generally supportive of the requirement that an RNSA be responsible for making reportable data publicly available.<sup>578</sup>

The proposed rule combined reporting requirements with RNSA

<sup>570</sup> See proposed Rule 10c-1(b)(1).

<sup>571</sup> See proposed Rule 10c-1(b)(2).

<sup>572</sup> See proposed Rule 10c-1(c).

<sup>573</sup> See proposed Rule 10c-1(g).

<sup>574</sup> See proposed Rule 10c-1(e)(3).

<sup>575</sup> See Proposing Release, 86 FR 69812 n.85.

<sup>576</sup> See proposed Rule 10c-1(b).

<sup>577</sup> See, e.g., FINRA Letter, at 1 (stating that it "agrees with the Commission that the public dissemination of securities lending information under the Proposal will, among other benefits, improve price discovery in the securities lending market."); Nasdaq Letter, at 3; AFREF Letter 1, at 3; Better Markets Letter, at 4-7; Bloomberg L.P. Letter, at 1 ("[w]e appreciate the Commission's endeavor to improve the transparency and efficiency of the securities lending market by increasing the availability of information regarding securities lending transactions"); ASA Letter, at 1; Letter from N. Abanes (Aug. 15, 2023); Letter from Brandon Smith (Aug. 15, 2023).

<sup>578</sup> See, e.g., HMA Letter, at 7.

<sup>560</sup> See AFREF Letter 1, at 4.

<sup>561</sup> See Bloomberg L.P. Letter, at 4 (stating "the importance of RNSAs' compliance with section 19(b) of the Exchange Act and Rule 19b-4 thereunder when implementing rules pertaining to the securities lending data").

<sup>562</sup> See Proposing Release, 86 FR 69819 n.116.

<sup>563</sup> See S3 Partners Letter, at 5.

<sup>564</sup> See BlackRock Letter, at 3.

<sup>565</sup> See final Rule 10c-1a(a)(2).

<sup>566</sup> See S3 Partners Letter, at 12-13.

<sup>567</sup> See S3 Partners Letter, at 12-13.

<sup>568</sup> See OCC Letter, at 12.

<sup>569</sup> See final Rule 10c-1a(g). References to the relevant collected information in paragraphs (b) through (e) of the proposed rule have been amended to reference paragraphs (c) through (e) of the final rule.

publication requirements, which resulted in commenters addressing these respective requirements in conjunction with one another.<sup>579</sup> The Commission did not intend to conflate the requirements. The final rule separates an RNA's publication responsibilities from a covered person's reporting requirements to improve the structure of the final rule. Therefore, final Rule 10c-1a is modified to separate the requirements of an RNA from the reporting requirements applicable to covered persons and reporting agents. Final Rule 10c-1a now places an RNA's publication of data elements into new paragraph (g).

In response to the comments received that the disclosure of reported information by an RNA on a transaction-by-transaction basis could increase the risk of revealing short sale strategies,<sup>580</sup> final Rule 10c-1a bifurcates paragraph (g) requirements such that certain data elements will be made publicly available on a transaction-by-transaction basis and aggregate transaction activity and distribution of loan rates) will also be made publicly available in an aggregated format for each reportable security. With respect to aggregated data, the final rule includes a new requirement for an RNA to make "information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security and the security identifier(s) under paragraphs (c)(1) or (2) of the final rule for which an RNA determines is appropriate to identify" publicly available "as soon as practicable, and not later than the morning of the business day after the covered securities loan is effected or modified."<sup>581</sup> The term "aggregate transaction activity," as used in the final rule, refers to information pertaining to the absolute value of transactions such that net position changes should not be discernable in the data, and is intended to help ensure that only aggregate information about net positions changes, rather than individualized information, is provided to the public. The addition of the term "aggregate transaction activity" responds to commenters' concerns about the potential exposure of proprietary information, while still providing volume transparency to market participants. Providing information

about the distribution of loan rates<sup>582</sup> for each security recognizes that the cost-to-borrow for loans of securities is influenced by a number of factors (*e.g.*, counterparty-creditworthiness) and, thus, information about loan rates on a transaction-by-transaction basis may not facilitate a perfect comparison of such rates between loans of the same security. Consequently, knowing the distribution of loan rates for a given security can give market participants information to help market participants compare the pricing of their covered securities loan against the pricing of other covered securities loans. This can facilitate conversations between beneficial owners and their lending agents or end borrowers with their brokers or dealers regarding the terms of their loan.

Additionally, the final rule delays an RNA's publication of loan amount, on a transaction-by-transaction basis in paragraph (c)(6), to the twentieth business day after the covered securities loan is effected along with the loan and security identifying information specified in paragraphs (g)(1)(i)(A) and (C) of this section.<sup>583</sup> The final rule also delays an RNA's publication of a modification to loan amount, on a transaction-by-transaction basis, in paragraph (c)(6), to the twentieth business day after the covered securities loan is modified with the loan and security identifying information specified in paragraphs (g)(1)(i)(A) and (C).<sup>584</sup>

For purposes of compliance with the final rule, the countdown to the "twentieth business day" starts the day after the covered securities loan is effected. For example, if a covered securities loan were effected at 4:00 p.m. on a Wednesday, and the applicable Rule 10c-1a information is received by an RNA by the end of that day, that Thursday after the Wednesday on which the covered securities loan is effected will start the 20-business day period, assuming that Thursday is not a holiday.

The final rule contains requirements for an RNA to make data elements other than loan amount publicly available as soon as practicable, and not later than the morning of the business

day after the covered securities loan is effected.<sup>585</sup> Similarly, the final rule requires an RNA to make loan modifications, excluding modifications to loan amount, publicly available, as soon as practicable, and not later than the morning of the business day after the covered securities loan is modified.<sup>586</sup> The final rule also requires that an RNA make the data elements in paragraph (c) of the final rule, other than loan amount, publicly available as soon as practicable, and not later than the morning of the business day after the covered securities loan is effected, if a securities loan is modified when such covered securities loan is a pre-existing covered securities loan (*i.e.*, a covered securities loan for which reporting under paragraph (a) was not required on the date the loan was agreed to or last modified).<sup>587</sup> This requirement is designed to provide transparency for covered securities loans that have not been previously reported to an RNA prior to having a data element of paragraph (c) modified. As discussed above, in Part VII.F.2, the final rule also requires that an RNA make publicly available the data elements in paragraph (c) of the final rule for pre-existing covered securities loans. The final rule also contains a requirement for an RNA to keep confidential data elements confidential, in accordance with subparagraph (h) and consistent with applicable law.<sup>588</sup> Final Rule 10c-1a also contains updated terminology from the proposed Rule 10c-1, including that the "unique transaction identifier" is updated to "unique identifier;" and references to "loan" are updated to "covered securities loan."<sup>589</sup> Revisions to final Rule 10c-1a(g) are updated with the relevant paragraphs renumbered to align with the format of the final rule.<sup>590</sup>

Final Rule 10c-1a requires an RNA to assign each covered securities loan a unique identifier in paragraphs (g)(1)(i)(A) and (g)(3). The final rule makes a revision to terminology by replacing the term "unique transaction identifier" assigned by an RNA to the original loan, as used in the proposed rule, with "unique identifier" assigned by an RNA to the original covered securities loan. The removal of "transaction" is to avoid confusion with the defined term "covered securities loan," which is the accurate description

<sup>579</sup> See, *e.g.*, proposed Rule 10c-1(b).

<sup>580</sup> See, *e.g.*, *supra* note 399 and accompanying text.

<sup>581</sup> See final Rule 10c-1a(g)(5).

<sup>582</sup> "Loan rate" refers to aggregate fee and rebate information provided to an RNA in final Rule 10c-1a(c)(8) and final Rule 10c-1a(c)(9). The loan rate for a security is reported differently depending on whether the securities loan is cash or non-cash collateralized. For cash-collateralized loans, the "loan rate" is indicated by the rebate rate (as reflected in final Rule 10c-1a(c)(8)); for non-cash-collateralized loans, the "loan rate" is the lending fee (as reported in final Rule 10c-1a(c)(9)).

<sup>583</sup> See final Rule 10c-1a(g)(2).

<sup>584</sup> See final Rule 10c-1a(g)(3).

<sup>585</sup> See final Rule 10c-1a(g)(1).

<sup>586</sup> See final Rule 10c-1a(g)(3).

<sup>587</sup> See final Rule 10c-1a(g)(3)(i).

<sup>588</sup> See final Rule 10c-1a(g)(4).

<sup>589</sup> See final Rule 10c-1a(g).

<sup>590</sup> See final Rules 10c-1a(g)(3)(i) and (ii).

of what the “unique identifier” represents.

While the final rule continues to require an RNSA to “assign each covered securities loan a unique identifier,” a general theme received from commenters was about the operational efficiency of allowing market participants to create and submit their own unique identifiers.<sup>591</sup> In response to the Proposing Release, one commenter stated that “beneficial owners or those reporting on their behalf should have flexibility to generate their own Transaction Identifiers provided they meet minimum standards for integrity and identification” and that “this Transaction Identifier [be used] in connection with any loan modification reporting in connection with the relevant loan.”<sup>592</sup> Another commenter recommended that “allowance is made for the UTI to be provided to the RNSA by the reporting party, with an on-receipt issuance model only available should firms have no existing UTI for a reportable transaction.”<sup>593</sup> Another commenter agreed that firms should be allowed to internally assign UTIs and report them to an RNSA, but alternatively suggested that if the UTI is required to be assigned by an RNSA then an RNSA should return this internal identifier to the reporting firm along with an RNSA-assigned UTI in order to link a modification to the original reported loan.<sup>594</sup> This commenter also recommended that, under either approach, UTIs should be different in the U.S. and other jurisdictions, as applicable.<sup>595</sup> Another commenter stated that under the final rule, if there was a loan that was reported to both an RNSA and the SFTR, the loan would have an identifier for each system and prevent global aggregation.<sup>596</sup>

The Commission understands that for many reporting entities, obtaining a unique identifier from an RNSA on a post-trade basis and then tagging it to the trade for accurate reporting may add complication and expense and introduces operational risk for post-trade errors in aligning trades with transaction identifiers (particularly if a trade has been modified during the course of intraday trade reporting). According to one commenter, “the objective of a Transaction Identifier is to

uniquely identify a particular transaction; so long as that objective is satisfied, the SEC should be neutral as to the manner in which the Transaction Identifier is produced.”<sup>597</sup> Doing so, the commenter suggests, “would [provide] the flexibility to an RNSA to allow reporting parties to provide their own Transaction Identifiers [which] would likely materially reduce costs for any such parties.”<sup>598</sup> According to the commenter, this approach has been successfully deployed in Europe, under the SFTR, and the U.S. in connection with security-based swap reporting rules.<sup>599</sup> Accordingly, this commenter urged the Commission to permit the reporting agent to generate the transaction identifiers prior to reporting to an RNSA, with an RNSA available to provide Transaction Identifiers as a back-up for those reporting parties who are unable, for whatever reason, to generate their own transaction identifiers.<sup>600</sup> Another commenter stated that while the data elements required to be reported are sufficient to allow for an RNSA to identify loans and to create a unique transaction identifier, the Commission should specify how such identifier will be shared with the reporter.<sup>601</sup>

Having a unique identifier assigned to each covered securities loan is necessary for an RNSA to easily track the loan and facilitate the identification and reporting of any subsequent modifications to a particular covered securities loan. The Commission agrees with the comment that the objective is to have a unique identifier for tracking and that the Commission should be neutral as to the manner in which the unique identifier is produced,<sup>602</sup> and that it is appropriate to allow administrative details of the process to be left to the discretion of an RNSA, rather than dictated by the Commission.<sup>603</sup> It is appropriate to require an RNSA to assign a unique identifier to the loan, even if such loan already has an identifier that is reported to the SFTR, for consistency with an RNSA’s rules and systems. Further, the final rule requires an RNSA to create a system capable of generating unique identifiers, but does not preclude market participants from creating their

own unique identifiers when submitting information to an RNSA.

The Commission agrees that FINRA, as the sole existing RNSA, has the experience and controls to implement an appropriate system for market participants, including, if appropriate, how an identifier will be shared with a reporter. Structuring the final rule to provide an RNSA with flexibility to accept unique identifiers and/or use an RNSA assigned unique identifier to publish data is operationally practical. Accordingly, final Rule 10c–1a(g) maintains that an RNSA shall assign a unique identifier to the covered securities loan and make publicly available as soon as practicable, and not later than the morning of the business day after the covered securities loan is effected.<sup>604</sup>

#### *K. RNSA Data Retention, Availability, Fees, and Security*

##### 1. Data Retention—Rule 10c–1a(h)(1) Proposed Rule

Under the proposed rule the Commission required that RNSAs retain the information collected pursuant to paragraphs (b) through (e) of the proposed rule 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.<sup>605</sup> In the Proposing Release, the Commission stated that requiring an RNSA to retain records for five years was consistent with other retention obligations of records that Exchange Act rules impose on an RNSA.<sup>606</sup> As examples, the Commission identified Rule 17a–1<sup>607</sup> and 17 CFR 242.613(e)(8) (“Rule 613(e)(8)”) of Regulation NMS, both of which require RNSAs to keep documents for a period of not less than five years.

##### Final Rule

The Commission received limited comments concerning this element of the proposed rule. One commenter stated that a retention period of six years plus the current year would simplify GDPR and UK tax compliance.<sup>608</sup> The Commission recognizes the importance of compliance with other regulatory regimes; however, requiring RNSAs to retain records for not less than five years is consistent with other record retention obligations that Exchange Act rules

<sup>591</sup> See, e.g., State Street Letter, at 6; ABA Letter, at 4.

<sup>592</sup> See RMA Letter, at 1, 19.

<sup>593</sup> Pirum Letter, at 4.

<sup>594</sup> See FIF Letter, at 8–9.

<sup>595</sup> See FIF Letter, at 9.

<sup>596</sup> See Pirum Letter, at 4.

<sup>597</sup> RMA Letter, at 19.

<sup>598</sup> RMA Letter, at 19.

<sup>599</sup> See RMA Letter, at 19.

<sup>600</sup> See RMA Letter, at 19.

<sup>601</sup> See IHS Markit Letter, at 8.

<sup>602</sup> See RMA Letter, at 19.

<sup>603</sup> See OCC Letter, at 12 (stating that “FINRA is currently best positioned to serve in this role given [its] experience and expertise to date in administering other trade reporting systems.”).

<sup>604</sup> See final Rule 10c–1a(g).

<sup>605</sup> See proposed Rule 10c–1(g)(1).

<sup>606</sup> See Proposing Release, 86 FR 69819.

<sup>607</sup> See 17 CFR 240.17a–1.

<sup>608</sup> See Letter from Andrew Robinson (Jan. 7, 2022) (“Robinson Letter”), at 12.

impose on RNSAs.<sup>609</sup> Including a retention period that is consistent with other rules applicable to RNSAs could reduce the burden for an RNA to comply with the retention requirements in proposed Rule 10c-1 because RNSAs will have developed experience and controls around administering similar record retention programs.<sup>610</sup> Therefore, the Commission is adopting RNA data retention requirements as proposed (*i.e.*, 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), with the relevant paragraphs renumbered to align with the format of the final rule.<sup>611</sup>

## 2. Data Availability to the Public—Rule 10c-1a(h)(3)

### Proposed Rule

The Commission proposed that RNSAs make certain data<sup>612</sup> available to the public in a convenient and usable standard electronic data format on its website or similar means of electronic distribution, without charge and without use restrictions, for at least a five-year period.<sup>613</sup> The Commission stated its preliminary belief that requiring an RNA to provide certain information to the public would further the direction by Congress in section 984(b) of the Dodd-Frank Act 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.<sup>614</sup> The Commission acknowledged that establishing and maintaining a system to provide public access to Rule 10c-1 information is not without cost, and expressed the preliminary belief that such costs should be borne by an RNA in the first instance and be permitted to be recouped by an RNA from market

participants who report securities lending transactions to an RNA.<sup>615</sup> The Commission also stated its belief that any restrictions on how the publicly available Rule 10c-1 information is used could impede the utility of such information and limit the ability of investors, commercial vendors, and other third parties, such as academics, from developing uses and analyses of the information.<sup>616</sup>

### Final Rule

It is appropriate to remove the phrase “without charge” from an RNA’s availability of information requirements in final Rule 10c-1a(h)(3). Some commenters supported the Commission making certain securities lending information available without charge, as proposed.<sup>617</sup> One commenter stated generally that it would be extremely helpful to have freely available data.<sup>618</sup> The Commission agrees that having access to securities lending data without charge will benefit market participants. As discussed below, in Part VII.K.3, the Commission received comment recommending that RNSAs be permitted to charge fees to entities other than lending agents and beneficial owners.<sup>619</sup> After considering commenter input, the Commission is removing the “without charge” requirement from the final rule to provide RNSAs with greater flexibility to structure reasonable fees. As discussed below, in Part VII.K.3, and as proposed,<sup>620</sup> any such fees will have to be filed with the Commission pursuant to section 19(b) of the Exchange Act and Rule 19b-4, and would be published for notice and public comment. Additionally, consistent with the Proposing Release,<sup>621</sup> and the provisions that govern RNSAs under the Exchange Act,<sup>622</sup> the final rule requires that RNSAs may only establish and collect fees that are reasonable.<sup>623</sup> Furthermore, as proposed, the final rule prohibits use restrictions on the publicly available information.<sup>624</sup> Any restrictions on how the publicly available Rule 10c-1a information is used could impede its utility and limit the ability of investors, commercial vendors, and other third

parties, such as academics, from developing uses and analyses of the information.<sup>625</sup>

The Proposing Release included a request for comment asking if a period of five years is the appropriate length of time for an RNA to make information available to the public.<sup>626</sup> One commenter responded, stating that, “transparency is a good thing, and lessons can be learned from history, ‘in perpetuity’ would be the ideal period of time.”<sup>627</sup> The Commission acknowledges the value of historical studies of securities markets, and the final rule does not preclude an RNA from making certain reported data public in perpetuity. However, requiring that RNSAs make certain information publicly available indefinitely could prove unduly burdensome on RNSAs when compared with the utility of old and potentially less informative data. Furthermore, making information available in a convenient and usable standard electronic data format indefinitely would necessitate that RNSAs retain the data indefinitely, which would be inconsistent with the final rule’s data retention requirements<sup>628</sup> and other retention obligations of records that Exchange Act rules impose on RNSAs.<sup>629</sup> Five years is the appropriate length of time for an RNA to be required 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 market and in individual securities based on changes to the material terms of securities lending transactions.

For the foregoing reasons the Commission is adopting the collected information availability requirements for RNSAs, with respect to making certain collected information available to the public, substantially as proposed, with the phrase “without charge” removed and the relevant paragraphs renumbered to align with the format of the final rule.<sup>630</sup>

<sup>625</sup> The requirement to provide the Rule 10c-1a information in the same manner such information is maintained pursuant to final Rule 10c-1a(h)(1) and without use restrictions is not intended to preclude an RNA from creating alternative means to provide information to the public or subscribers. For example, an RNA might choose to file with the Commission proposed rules to establish data feeds of the Rule 10c-1a information that vendors might subscribe to (including fee-based subscriptions) and repackage for onward distribution.

<sup>626</sup> See Proposing Release, 86 FR 69820 (Question 58).

<sup>627</sup> See Robinson Letter, at 12.

<sup>628</sup> See final Rule 10c-1a(h)(1).

<sup>629</sup> See *supra* note 609.

<sup>630</sup> See final Rule 10c-1a(h)(3). References to the relevant collected information in paragraphs (b) and

<sup>609</sup> See Proposing Release, 86 FR 69819. Rule 17a-1 requires RNSAs to keep documents for a period of not less than five years. Similarly, 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.

<sup>610</sup> See Proposing Release, 86 FR 69819.

<sup>611</sup> See 17 CFR 240.10c-1a(h)(1) (“final Rule 10c-1a(h)(1)”). References to the relevant collected information in paragraphs (b) through (e) of the proposed rule have been updated to accurately reflect their place in paragraphs (c) through (f) of the final rule.

<sup>612</sup> See proposed Rule 10c-1(g)(3) (specifically including the information collected under paragraphs (b) and (c) of the proposed rule and the aggregate of the information provided pursuant to paragraph (e) of the proposed rule).

<sup>613</sup> See proposed Rule 10c-1(g)(3).

<sup>614</sup> See Proposing Release, 86 FR 69819.

<sup>615</sup> See Proposing Release, 86 FR 69819-20.

<sup>616</sup> See Proposing Release, 86 FR 69820.

<sup>617</sup> See James J. Angel Letter, at 3; Morningstar Letter, at 4 (stating that an “RNA’s free and unrestricted disclosures to the public increase transparency”).

<sup>618</sup> See James J. Angel Letter, at 2.

<sup>619</sup> See ABA Letter, at 2-3.

<sup>620</sup> See Proposing Release, 86 FR 69820.

<sup>621</sup> See proposed Rule 10c-1(h).

<sup>622</sup> See 15 U.S.C. 78o(b) (section 15A(b) of the Exchange Act).

<sup>623</sup> See final Rule 10c-1a(i).

<sup>624</sup> See final Rule 10c-1a(h)(3).

## 3. RNSA Fees—Rule 10c–1a(i)

## Proposed Rule

The Commission proposed that RNSAs 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 an RNSA.<sup>631</sup> Under the Exchange Act, RNSAs are allowed to adopt rules that impose the equitable allocation of reasonable fees among members and issuers, and other persons that use an RNSA facility or system.<sup>632</sup> In the Proposing Release the Commission stated its preliminary belief that it would be appropriate to establish and collect reasonable fees from each person who directly provides the information set forth in the rule to an RNSA.

## Final Rule

One commenter supported an RNSA acting in accordance with section 19(b) of the Exchange Act and Rule 19b–4 thereunder when implementing rules regarding fees.<sup>633</sup> Another commenter recommended that reporting costs should not only be borne by persons who provide data directly to an RNSA and recommended that “costs incurred by FINRA . . . be shared among all those that benefit from securities lending activity, not solely on lending agents and beneficial owner clients.”<sup>634</sup> Similarly, another commenter recommended “that the costs incurred by the RNSA to establish and operate the reporting system for securities

lending data should be equitably shared by both borrowers and lenders, along with a tiered fee structure that eliminates costs for General Collateral (“GC”) transactions.”<sup>635</sup>

The Commission recognizes that additional flexibility may be warranted in how costs incurred by an RNSA are recouped. To provide more flexibility in the establishment and collection of reasonable fees by RNSAs, the final rule has been amended from the proposed rule to remove the requirement that fees only be collected “from each person who provides any data set forth in paragraphs (b) through (e) of this section directly to the RNSA.”<sup>636</sup> The final rule provides that an RNSA may “establish and collect reasonable fees, pursuant to rules that are promulgated pursuant to section 19(b) and Rule 19b–4 of the Exchange Act.”<sup>637</sup> These changes from the proposed rule will provide RNSAs with greater flexibility to structure reasonable fees, including permitting the charging of fees to entities that use certain value-added services, as discussed above in Part VII.K.2, when accessing the information made publicly available by an RNSA.<sup>638</sup>

## 4. Data Security—Rule 10c–1a(h)(4)

## Proposed Rule

The Commission proposed a requirement that RNSAs establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of certain confidential information required by the proposed rule.<sup>639</sup> In the Proposing Release the Commission stated its preliminary belief that an RNSA needs to protect Rule 10c–1 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 an RNSA.<sup>640</sup>

## Final Rule

For the reasons discussed above, in Part VII.F.3, the Commission is adopting the final rule as proposed and requiring an RNSA to establish, maintain, and enforce written policies and procedures to maintain the confidentiality of the confidential data elements collected under the final rule.<sup>641</sup>

## L. Data Availability to the Commission and Other Persons—Rule 10c–1a(h)(2)

## Proposed Rule

The Commission proposed that RNSAs be required to make certain information, including confidential information, collected pursuant to the proposed rule available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need.<sup>642</sup>

## Final Rule

Two commenters recommended that the final rule require RNSAs to make collected confidential information available to SROs without obtaining an SEC order.<sup>643</sup> However, another commenter recommended that access to such information by securities exchanges should require a clear regulatory purpose.<sup>644</sup> The Commission recognizes that other regulators and SROs may require access to the confidential information reported to RNSAs pursuant to final Rule 10c–1a for regulatory purposes. However, it is appropriate to only provide such information by order of the Commission upon a demonstrated regulatory need.<sup>645</sup> Imposing this condition on access to reported information should help ensure the security of the reported data elements, while taking into account that other regulators may require access. For the foregoing reasons the Commission is adopting the requirement that RNSAs make collected information available to the

(c) of the proposed rule have been updated to reference paragraphs (c) and (d) of the final rule. The proposed rule’s reference to “the aggregate of the information provided pursuant to paragraph (e) of this section” has been removed from the final rule as discussed above, in Parts VII.F.4 and VII.F.5. Additionally, the word “provide” at the beginning of proposed Rule 10c–1(g)(3) has been replaced by “make” in final Rule 10c–1a(h)(3) for consistency.

<sup>631</sup> See proposed Rule 10c–1(h).

<sup>632</sup> 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.”).

<sup>633</sup> See Bloomberg L.P. Letter, at 3 (stating that “[t]he rules of an RNSA, including those pertaining to any fees, should thus comport with the requirements of the Exchange Act”). See also HMA Letter, at 7 and 10 (stating that “it will be essential for the Commission to ensure that the RNSA’s . . . fees related to the development and operations of the reporting and dissemination systems contemplated by the Proposal are subject to meaningful scrutiny” and recommending “that any fees are imposed pursuant to filings that are subject to Commission review, and approved only if determined to be consistent with the Exchange Act and Commission Rules”).

<sup>634</sup> See ABA Letter, at 3.

<sup>635</sup> See State Street Letter, at 2.

<sup>636</sup> See proposed Rule 10c–1(h).

<sup>637</sup> Final Rule 10c–1a(i).

<sup>638</sup> See *supra* Part VII.K.2 (discussing the removal of the phrase “without charge” from proposed Rule 10c–1(g)(3) concerning the requirements for RNSAs to make certain information available to the public).

<sup>639</sup> See proposed Rule 10c–1(h)(4) (specifically including the information collected pursuant to paragraphs (d) and (e)(3) of the proposed rule).

<sup>640</sup> See Proposing Release, 86 FR 69820.

<sup>641</sup> See final Rule 10c–1a(h)(4).

<sup>642</sup> See proposed Rule 10c–1(g)(2) (specifically including the information collected pursuant to paragraph (a)(2)(iii) and paragraphs (b) through (e) of the proposed rule).

<sup>643</sup> See NYSE Letter 2, at 2 (stating that “[t]here may be NYSE inquiries or investigations where securities lending information would be important, and where time could be of the essence”); Nasdaq Letter, at 4.

<sup>644</sup> See HMA Letter, at 11 (stating that any access by exchanges “must be narrowly tailored to achieve a clear, specific regulatory purpose, and subject to significant oversight by the Commission”).

<sup>645</sup> See Proposing Release, 86 FR 69852. See also final Rule 10c–1a(h)(2). Restrictions on the availability of reported Rule 10c–1a information to other persons is subject to applicable law, as an RNSA could be compelled to provide information pursuant to a court order or other legal authority (such as a subpoena).

Commission, and make it available to other persons as the Commission may designate by order upon a demonstrated regulatory need, with a technical edit,<sup>646</sup> with the relevant paragraphs renumbered to align with the format of the final rule.<sup>647</sup>

#### *M. Cross-Border Application of Rule 10c-1a*

The Commission received a number of comments about the rule's intended cross-border application.<sup>648</sup> Many of these comments requested that the Commission provide cross-border guidance to help promote legal certainty and competitive equity, and that in doing so the Commission rely on existing definitions for U.S. and non-US

<sup>646</sup> The Commission is also making a technical edit to specify that its own access to the information collected pursuant to paragraph (b)(1)(iv) and paragraphs (c) through (e) is not limited. Final Rule 10c-1a(h)(2) has been formatted to distinguish the Commission's access from "other persons as the Commission may designate."

<sup>647</sup> See final Rule 10c-1a(h)(2). References to the relevant collected information in paragraphs (a)(2)(iii) and (b) through (e) of the proposed rule have been updated to reference paragraphs (b)(4) and (c) through (e) of the final rule.

<sup>648</sup> See, e.g., Letter from Mark A. Steffensen, Senior Executive Vice President and General Counsel for HSBC North American Holdings Inc. and HSBC Bank USA, N.A. (Jan. 24, 2023) ("HSBC Letter 1"), at 1-2 (expressing concern that the cross-border application of the proposed rule is unclear and overbroad, which makes it difficult for firms to assess the scope of the new reporting obligations and challenging to implement internal programs, policies, procedures to ensure compliance with the new reporting regime. Further, an expansive cross-border application could lead to questions regarding the Commission's authority to promulgate the rule, and its commitment to respecting the decisions of peer EU/UK regulators.). See also Linklaters Letter, at 2 (stating that, "because the proposed rule would apply to 'any person,' 'the scope of the proposed rule, particularly outside the U.S., is unclear and potentially overbroad"). The commenter, however, offered suggestions for clarifying the proposed rule's extraterritorial scope, including recommending that the Commission clarify that the proposed rule "does not apply to non-U.S. persons that do not use any U.S. jurisdictional means in connection with a securities lending transaction or, alternatively, exclude Canadian institutions from the scope of the proposed rule." See *id.* To provide legal certainty as to its cross-border application, the commenter also suggested that the Commission should clarify that, given that it would be promulgated under section 10(c)(1) of the Exchange Act, final Rule 10c-1a would not apply to non-U.S. persons that do not use any U.S. jurisdictional means to effect, accept, or facilitate a securities lending transaction. See *id.* at 2-3. See also ICI Letter 1, at 7-8 (encouraging the Commission to analyze and clarify the cross-border implications of the final rule to ensure that the final rule does not have inappropriate cross-border reach). See also IIB Letter, at 4-5; RMA Letter, at 17-18; Federated Hermes Letter, at 2 (agreeing with ICI's comment regarding the Commission needing to clarify the cross-border ramifications of the final rule); EBF Letter, at 1-2 (stating that the SEC needs to clarify the cross-border reach of the proposed rule by following the same approach as used for foreign broker-dealer registration, with the goal of being able to define the precise territorial scope of the proposed rule).

market participants to avoid new documentation requirements.<sup>649</sup> Among other things, these commenters requested clarification or specific guidance as to when non-U.S. persons would be subject to the final rule<sup>650</sup> and clarity as to the circumstances under which a securities loan will be deemed to be within the U.S. market for purposes of applying reporting requirements.<sup>651</sup> Some commenters stated that because the rule would apply broadly to "any person" that loans a security on behalf of itself or another person, that could mean the rule would

<sup>649</sup> See RMA Letter, at 18.

<sup>650</sup> One commenter stated that it believed the rule should not apply to non-U.S. persons who do not facilitate, effect, or accept loans in the U.S. That commenter also suggested the Commission consider taking a risk-based approach that advances the goals of section 984 of the Dodd-Frank Act by more precisely targeting the segment of the securities lending market that presents the greatest risks to the U.S. financial system, by excluding certain categories of market participants, such as Canadian Institutions. The commenter did not further explain the parameters of their suggested approach. See Linklaters Letter, at 3. The cross-border scope of the rule should be focused on facilitating, effecting, or accepting loans in the U.S. rather than the alternative approach the commenter suggests that would exclude Canadian Institutions and thereby limit transparency regarding loans of securities that are facilitated, effected, or accepted in the U.S. Another commenter stated that, despite the legislative history of section 10(c) and the Commission's statements in the proposal, "the intent of proposed Rule 10c-1 was to increase transparency of securities lending information with respect to the U.S. markets for the benefit of U.S. brokers, dealers, and investors" but that the reach of the rule to all lenders is broader. See ICI Letter 1, at 7-8. See also SIFMA Letter 1, at 19-20. See MFA Letter 3, at 6 (stating that the Commission should "clarify the cross-border implications of any final securities lending reporting rule it adopts," and also stated that "it would be inappropriate to apply the Proposed Securities Lending Rules to non-U.S. entities such as UCITS, AIFs, or other funds that are subject to reporting under SFTR and not otherwise subject to U.S. regulatory requirements"). See also HSBC Letter 1, at 2 (stating that, "[g]iven that complying with any new reporting regime is likely to be costly and operationally complex regardless of its ultimate scope—especially for large firms with global operations . . . it is essential that the Commission clarify the cross-border application and certain other aspects of each of the proposed rules in line with the Commission's authority to promulgate rules only where necessary and appropriate in the U.S. public interest or for the protection of U.S. investors"). Another commenter urged the Commission to define the jurisdictional scope of the transactions to be reported under the final rule, including which securities must be reported and which parties are required to report. See FIF Letter, at 8.

<sup>651</sup> See, e.g., RMA Letter, at 17 (stating that, "[w]ithout such definition, non-U.S. beneficial owners and agent lenders would be left with substantial legal uncertainty"). According to this commenter, the "reach of the-reporting requirements should be limited territorially, setting explicit rules on when transactions involving non-U.S. entities are deemed to be within scope." *Id.* See also IHS Markit Letter, at 3 (requesting clarity regarding whether international broker-dealers lending U.S. securities are within the scope of the proposed rule).

apply to "all lenders"<sup>652</sup> regardless of whether the lender loans a U.S. security or a non-U.S. security and whether or not the lender was a U.S. person or not.<sup>653</sup> Other commenters, in contrast, warned that, because a significant amount (up to 18 percent) of lender transactions in the U.S. market are provided by funds outside of the U.S., the Commission risks not capturing this considerable volume of activity if it does not clarify cross-border scope of the final rule.<sup>654</sup> Many of these commenters raised questions about the scope of the Commission's cross-border regulatory authority under section 10(c).<sup>655</sup>

Although the Proposing Release did not propose rule text addressing the cross-border aspects of proposed Rule 10c-1 or otherwise discuss the rule's cross-border reach, the Commission is addressing commenters' contentions about the Commission's cross-border authority under section 10(c) and offering general guidance as to the rule's cross-border scope. As an initial matter, the Commission advises that final Rule 10c-1a is intended to reach the full scope of the cross-border authority provided for by section 10(c).<sup>656</sup>

Turning to the cross-border scope of section 10(c), the Commission's understanding of that provision's cross-

<sup>652</sup> See, e.g., SIFMA AMG Letter, at 3 (urging the Commission to "address extraterritorial issues such as the scope of securities (US or non-US) and lenders (US or non-US) as the present drafting potentially addresses all securities (US and non-US) lent by US lenders and/or all US securities lent by all lenders (US and non-US)"). See also Pirum Letter, at 3 (stating that, as proposed, any person that loans a security on behalf of itself or another person has a reporting requirement yet without the rule specifying whether it is the domicile of the person lending the security, the security itself or a combination of both, which brings a transaction into scope for reporting).

<sup>653</sup> See, e.g., ICI Letter 1, at 7-8 (stating that the rule's cross-border reach needs to be clarified because the proposed rule currently applies to "any person" (very broad) and it is unclear whether it could apply to non-U.S. entities). In requesting this clarification, this commenter points out the legislative history of section 10(c) and its focus on U.S. markets and increasing transparency for the benefit of U.S. broker-dealers. See *id.*

<sup>654</sup> See ISLA Letter, at 2.

<sup>655</sup> See, e.g., MFA Letter 1, at 12 (suggesting the Commission limit the scope of the proposed rule to U.S. securities and stating that applying the rule to all securities irrespective of the jurisdiction that principally regulates such offerings goes beyond what is intended by section 10(c). According to this commenter, Congress did not intend to capture cross-border lending activities when it added section 10(c) to the Exchange Act, and capturing such activities would not further the transparency goals of the proposed rule but, instead, could inadvertently result in market participants segregating their foreign lending activities so as to limit U.S. assertion of jurisdiction activities).

<sup>656</sup> Because final Rule 10c-1a is co-extensive with the full cross-border authority of section 10(c), by definition, it cannot exceed the cross-border authority that Congress afforded.

border reach is based on the territorial approach that the Commission has applied when crafting rules to implement other provisions of the Exchange Act.<sup>657</sup> Consistent with that territorial approach (which is based on Supreme Court precedent, including *Morrison v. National Australia Bank, Ltd.* and its progeny) the Commission examined the relevant statutory provision to determine the domestic conduct that is covered by the provision.<sup>658</sup> By its terms, section 10(c) requires reporting when, directly or indirectly, a person has “effect[ed], accept[ed], or facilitate[d]” a transaction involving the loan or borrowing of securities. Based on that language, the Commission concludes that the relevant domestic conduct that triggers the Commission’s regulatory authority under section 10(c) is conduct within the U.S. that comprises (in whole or in part) effecting, accepting, or facilitating of a borrowing or lending transaction. Because the Commission intends final Rule 10c–1a to be co-extensive with the regulatory scope of section 10(c), the Commission is of the view that the rule’s reporting requirements will generally be triggered whenever a covered person effects, accepts, or facilitates (in whole or in part) in the U.S. a lending or borrowing transaction.

One significant exclusion proposed by commenters concerned non-U.S. residents. Having considered those comments, such an exclusion would not be appropriate. Section 10(c) is focused on increasing transparency regarding lending and borrowing transactions that are effected, accepted, or facilitated (in whole or in part) within the U.S. Excluding borrowing and lending transactions by non-U.S. persons when those transactions are effected, accepted, or facilitated (in whole or in part) within the U.S. could impact the completeness of the data, providing less transparency and potentially resulting in U.S. market participants receiving misleading information as a result of those omissions. Moreover, the exclusion of non-U.S. persons suggested by the commenters could cause competitive harm to U.S. market

participants as it would allow non-U.S. persons engaging in the same activities as U.S. persons to benefit from the transparency about the U.S. securities lending market provided by final Rule 10c–1a without contributing to that transparency. For these reasons, the Commission declines to adopt such an exclusion.

Commenters suggested several other exclusions from final Rule 10c–1a that the Commission has also decided not to adopt, including that the final rule should apply only to loans of U.S.-exchange traded securities offered by a U.S. lender.<sup>659</sup> One commenter stated “that market participants—particularly those outside of the United States—might determine to limit or cease trading or interacting with U.S. intermediaries, or leave the U.S. markets altogether” in order to prevent public disclosure of their transactions.<sup>660</sup> Another commenter stated that capturing such activities would not further the transparency goals of the rule but, instead, could inadvertently result in market participants segregating their foreign lending activities so as to avoid reporting under final Rule 10c–1a.<sup>661</sup> Other commenters suggested that final Rule 10c–1a should apply only to loans of securities in which: (1) the country of issue and primary trading market of the securities is the U.S., and (2) the beneficial owner/lender or Lending Agent is a U.S. person.<sup>662</sup> Having considered these comments, as a policy matter, it is not appropriate to exclude any of these categories of lending transactions. Each of these types of transactions could have a potential direct impact upon U.S. markets and U.S. market participants and, thus,

consistent with the breadth of the cross-border scope of section 10(c) it is appropriate to retain these categories of transactions within the rule’s reporting requirements so as to enhance overall transparency in the U.S. securities market.<sup>663</sup>

Finally, some commenters asked the Commission to consider the issue of potential overlap with the SFTR that is already implemented in the EU and UK.<sup>664</sup> These commenters stated that the SFTR uses the domicile of the transacting entities (*i.e.*, both the lender and the borrower) to determine which entity has the reporting obligation and expressed concern about potential adverse impacts from regulatory overlap with Rule 10c–1a to the extent it covers non-U.S. persons.<sup>665</sup> One commenter suggested that the Commission, at a minimum, include a carve-out from proposed Rule 10c–1 (or allow for substituted compliance with respect to the rule) for loans by EU or UK lenders that are subject to reporting under the EU or UK SFTR.<sup>666</sup> The Commission acknowledges that there will be some overlap with the SFTR, however, the overlap that may occur with respect to entities established in the EU or UK (or to the EU or UK branch of a non-EU/UK entity) is not sufficient to warrant an exclusion. To the extent transactions are subject to both the EU or UK SFTR reporting rules and Rule 10c–1a, this overlap will be due to the occurrence

<sup>663</sup> The Commission acknowledges some market participants may seek to restructure their activities to avoid reporting, but on balance it is appropriate that the rule operate within the full scope of the cross-border authority that Congress established when it adopted section 10(c).

<sup>664</sup> See, e.g., BlackRock Letter, at 3 (stating that, when determining scope, the SEC should look to avoid overlap or duplication with SFTR reporting in Europe and encouraging the SEC to minimize the number of individual loans required to be reported under both regimes); IIB Letter, at 5 (expressing the concern that the SEC should provide clear guidelines, as well as follow the registered broker-dealer registration model).

<sup>665</sup> See Pirum Letter, at 3; Fidelity Letter, at 4 (expressing the concern that the Commission does not address whether the proposed rule is intended to require the reporting of loans of non-U.S. securities and recommending that the final rule not require the reporting of loans of non-U.S. securities as such loans are already subject to reporting under the EU’s SFTR); See Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 Nov. 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012; see also ICI Letter 1, at 12–13 (expressing concern regarding the apparent broad reach of the rule and how it potentially could apply to non-U.S. entities, including those entities already subject to SFTR’s reporting regime and citing Article 4 of (EU) 2015/2365, available at <https://www.esma.europa.eu/policy-activities/post-trading/sftr-reporting>). See also CASLA Letter, at 3 (stating that the SEC should clarify if the domicile of the underlying client/agent lender would apply from territorial approach scope perspective).

<sup>666</sup> See HSBC Letter 2, at 1.

<sup>657</sup> See, e.g., *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, Release No. 34–74244 (Feb. 11, 2015), 80 FR 14563, 14649 (Mar. 19, 2015) (discussing the territorial approach to the cross-border application of Title VII requirements for regulatory reporting and public dissemination of security-based swap transactions).

<sup>658</sup> 561 U.S. 247. See, e.g., *Abitron Austria GmbH v. Hetronix Int’l, Inc.*, 600 U.S. 412, 418 (June 29, 2023) (stating that “[the Supreme Court has] repeatedly and explicitly held that courts must ‘identif[y]’ ‘the statute’s ‘focus’” and as[k] whether the conduct relevant to that focus occurred in United States territory”).

<sup>659</sup> See, e.g., HSBC Letter 1, at 3; Mark A. Steffensen, Senior Executive Vice President and General Counsel, HSBC Bank USA, N.A. (Feb. 5, 2023) (“HSBC Letter 2”), at 1–2; SIFMA Letter 1, at 4; SIFMA Letter 2, at 3; see also MFA Letter 1, at 12; MFA Letter 3, at 12.

<sup>660</sup> HSBC Letter 1, at 5. *But see* HSBC Letter 2, at 1 (stating, in response to a question regarding whether the rule should be limited to U.S. lenders that the commenter “would expect the depth and liquidity of the U.S. market to act as a disincentive for U.S. asset managers to avoid U.S. lenders altogether, and [the commenter] cannot envision any incentive for U.S. asset managers to prefer non-U.S. lenders that are themselves subject to similar reporting requirements in their home jurisdictions”).

<sup>661</sup> See MFA Letter 1, at 12. The commenter stated that applying the rule to all securities irrespective of the jurisdiction that principally regulates such offerings goes beyond what is intended by section 10(c), but for the reasons already discussed the Commission does not agree.

<sup>662</sup> See SIFMA Letter 1, at 19–20 (stating that proposed Rule 10c–1 should “apply only to loans of securities where (i) the country of issue and primary trading market of the securities are the U.S. and (ii) the beneficial owner lender or lending agent is a U.S. person”). See also FIF Letter, at 8.

within the U.S. of the relevant domestic activities as specified by section 10(c). For the reasons discussed above, related to transparency and competition within the U.S. market, Rule 10c-1a will apply to those transactions notwithstanding any potential overlap and resulting adverse impacts.

#### N. Additional Comments

One commenter stated that the Commission has already exhausted its rulemaking authority under section 984(b) of the Dodd-Frank Act, that the authority to promulgate rulemaking within the U.S. market, Rule 10c-1a will apply to those transactions notwithstanding any potential overlap and resulting adverse impacts.

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The commenter also stated that, by “linking” securities loan transactions entered into in order to fulfill delivery obligations arising from customer short sales,<sup>670</sup> the Commission would be exceeding the scope of its rulemaking authority.<sup>671</sup> With regard to authority, section 10(c)(1) of the Exchange Act confers the Commission with plenary authority over both short sales and the loan or borrowing of securities, with a limited exception to authority over securities loans related to the safety and soundness or systemic risk of certain financial institutions such as banks and credit unions.<sup>672</sup> A loan of a security may be used for short sales or other purposes, and the use of a securities loan to facilitate a short sale is separate and distinct from the short sale itself. While it is possible that some persons

may seek out short sale information through securities lending information that will be provided under this rule, the modifications made from the proposed rule, in particular delaying the publication of the amount of the loan, should make it more difficult for such persons to succeed at such efforts, thereby addressing the potential negative consequences of such “linking” of securities loan information to short sale information (e.g., short sellers seeking to use securities lending information to alter their short selling strategies, thereby potentially reducing liquidity and harming investors) raised by the commenter.

Some commenters urged the Commission to take additional or different regulatory and non-regulatory actions than the approaches that were proposed, including actions that the Commission did not propose. These suggestions covered a variety of areas, including: notifications to retail investors;<sup>673</sup> securities lending transaction terms;<sup>674</sup> other SEC regulations;<sup>675</sup> SEC enforcement actions and penalty provisions;<sup>676</sup> studies, audits, and roundtables;<sup>677</sup> reporting technologies;<sup>678</sup> broker-dealer

<sup>673</sup> See, e.g., Form Letters A and B; Trimbath Letter; Letter from Adam Rensel (Aug. 16, 2022); Letter from Kevin Hagemann (Aug. 16, 2022); Letter from Sam Wood (Sept. 1, 2022).

<sup>674</sup> See, e.g., Trimbath Letter; Form Letters A and B.

<sup>675</sup> See, e.g., Letter from Marc Pecnik (Dec. 6, 2022); Letter from A K Tran, MD, Ph.D. (Nov. 26, 2021); Letter from Christian Bashnick (Aug. 16, 2022); Letter from Doyoung Park (Aug. 16, 2022); Letter from Dakota Glassburn (Aug. 16, 2022); Form Letter from Brandon Gallagher, et al. (Aug. 16, 2022); Letter from Adrian Convery (Aug. 16, 2022); Letter from Antonio Franco (Aug. 16, 2022); Letter from Cam Johnson (Aug. 16, 2022); Letter from Patrick Barragan (Aug. 16, 2022); Letter from M. A. Uit den Boogaard (Aug. 16, 2022); Letter from Fulton (Aug. 16, 2022).

<sup>676</sup> See, e.g., Letter from DWK (Oct. 8, 2022); Letter from Curtis Higgins (Mar. 2, 2022); Letter from Enrique Deaguila (Oct. 29, 2022); Letter from Matt Hyland (Feb. 19, 2022); Letter from Ryan Deolall (Oct. 30, 2022); Letter from Dave Cazza (Aug. 15, 2023).

<sup>677</sup> See, e.g., Letter from Edmon Blount, Founder and Director Emeritus, Center for the Study of Financial Market Evolution (Dec. 15, 2021) (“CSFME Letter 1”), at 6; Letter from Edmon Blount, Founder and Director Emeritus, Center for the Study of Financial Market Evolution (Apr. 26, 2022) (“CSFME Letter 4”), at 1; Letter from Edmon Blount, Founder and Director Emeritus, Center for the Study of Financial Market Evolution (Nov. 1, 2022) (“CSFMA Letter 5”); see also Letters from Dr. Radek Stech, CEO, Global Principles for Sustainable Securities Lending (Global PSSSL) and Senior Lecturer, University of Exeter Law School (Jan. 7, 2022, Apr. 7, 2022, and Nov. 1, 2022); ISLA Letter, at 2–3.

<sup>678</sup> See, e.g., Letter from David S. Schwartz, Managing Director, Center for the Study of Financial Market Evolution (Mar. 17, 2022) (“CSFME Letter 3”), at 1–2; Advanced Securities Consulting Letter, at 1–3; Letter from Matthew Cohen, Provable Markets (Jan. 7, 2002); Data Boiler

revenue;<sup>679</sup> and “onward lending.”<sup>680</sup> These issues are outside the scope of the proposal, and the final amendments appropriately further the Commission’s objectives of promoting investor protection, enhancing market efficiency, and facilitating capital formation by implementing the requirements of section 984(b) of the Dodd-Frank Act and enhancing the transparency of securities lending and borrowing.

#### VIII. Compliance Date

The Proposing Release did not include a specific proposed compliance date for the final rule, but commenters expressed a range of views on the length and structure of an implementation period.<sup>681</sup>

The Commission received several comments recommending an implementation period that runs from the time that technical specifications are published by an RNSA.<sup>682</sup> One commenter proposed an “initial compliance period of at least 18 months to develop necessary systems and otherwise prepare for compliance.”<sup>683</sup> Another commenter proposed a period of “at least 18 months after publication of technical specifications by the registered national securities association to come into compliance with the new

Technologies Letter LLC; Letter from Alan Konevsky, interim Chief Executive Officer and Chief Legal Officer, tZERO (Jan. 7, 2022); Letter from Dan Liefwalker (Dec. 17, 2021); Letter from Jordan Cox (Jan. 4, 2022); Letter from Samuel Hudock (Mar. 10, 2022); Letter from Enzo Villani (Jan. 19, 2022).

<sup>679</sup> See, e.g., Trimbath Letter, at 1–2.

<sup>680</sup> See, e.g., Form Letters A and B; Trimbath Letter; Letter from Julian Young (Aug. 16, 2022); Letter from Helmut Herglotz (Oct. 31, 2022); Letter from Juan Camarena (Oct. 30, 2022).

<sup>681</sup> With respect to the compliance period, several commenters requested the Commission to consider interactions between the proposed rule and other recent Commission rules. In determining compliance periods, the Commission considers the benefits of the rules as well as the costs of delayed compliance periods and potential overlapping compliance periods. For the reasons discussed throughout this release, to the extent that there are costs from overlapping compliance periods, the benefits of the rule justify such costs. See *infra* Part IX.B for a discussion of the interactions of the final rule with certain other Commission rules.

<sup>682</sup> See FIF Letter, at 2; BlackRock Letter, at 9 (recommending a timeline that allows persons that make covered securities loans to establish internal reporting regimes “after the designated RNSA has completed their technology database and requisite testing”); EBF Letter, at 2 (recommending a period of “at least 18 months after publication of technical specifications by the [RNSA] to come into compliance with the new requirements”); SIFMA Letter 1, at 20 (recommending “that market participants . . . be given a minimum of 18 months following the RNSA’s finalization of the technical specifications for reporting”). See also ASA Letter, at 2 (stating that “[v]endors would need time to modify and upgrade their technology systems to comply with any new standards”).

<sup>683</sup> See IIB Letter, at 3.

<sup>667</sup> See Citadel Letter, at 12–14.

<sup>668</sup> Hickman and Pierce. Administrative Law Treatise Section 4.9 (6th Edition, 2023–1 Cum. Supp. 2018). When are Agencies Required to Act by Rule? (citing *Brock v. Pierce County*, 476 U.S. 253 (1986); *Southwestern Bell Telephone Co. v. Federal Communications Commission*, 138 F.3d 746 (8th Cir. 1998)).

<sup>669</sup> *Investment Company Reporting Modernization*, Release No. 34–79095 (Oct. 13, 2016) 81 FR 81870, 81887–88 n.192 (Nov. 18, 2016).

<sup>670</sup> See Citadel Letter, at 13.

<sup>671</sup> See Citadel Letter, at 14.

<sup>672</sup> See 15 U.S.C. 240.7b(c) (section 10(c)(1) of the Exchange Act).

requirements.”<sup>684</sup> Another commenter recommended that the Commission “provide a minimum two-year implementation period” for the final rule.<sup>685</sup> One commenter stated that ample time should be provided for covered persons to develop “procedures and protocols and properly train their compliance and trading personnel before subjecting them to additional regulation.”<sup>686</sup> However, other commenters encouraged the Commission to expedite the adoption of the final rule.<sup>687</sup>

Certain commenters requested a phased approach to implementation, including a recommendation that the implementation of the final rule begin only with loans of U.S. equity securities.<sup>688</sup> Other commenters recommended initially reporting only securities listed or traded on a U.S. exchange and reporting other U.S. equity securities or debt securities after further study.<sup>689</sup> Other commenters recommended deferring public dissemination of data to allow the Commission to gain experience with the data.<sup>690</sup> Similarly, one commenter supported “an approach to implementation that requires confidential reporting for regulatory

purposes to give the SEC experience with the data to refine it as necessary to ensure it serves its purpose. Any further stages that would require public dissemination of the data should only be considered following additional economic analysis and public consultation.”<sup>691</sup>

Another commenter recommended that “[a]ny proposed timeline should carefully consider the universe of entities required to report transactions for the first time.”<sup>692</sup> The Commission recognizes that covered persons may have differing degrees of expertise and familiarity with existing RNSA reporting systems, and that lacking such familiarity could increase the time needed to prepare for compliance with final Rule 10c-1a’s requirements. However, the Commission also recognizes that the final rule permits the use of reporting agents, as well as other third party vendor service providers, either of which could help facilitate preparation for fulfillment of the final rule’s reporting requirements by less experienced covered persons. For example, some commenters stated that existing third party vendors have experience and technological capacity to be able to provide reporting-related services (e.g., data vendors and entities that report information for other regulatory purposes).<sup>693</sup>

Another commenter proposed means of expediting the implementation of the final rule, including initially: (1) applying it to only larger market participants; (2) requiring only certain data elements; and (3) not enforcing it for several years.<sup>694</sup> However, limiting the reporting of Rule 10c-1a information (*i.e.* to larger market participants or only requiring certain data elements) would provide the public with a narrow and incomplete view of the securities lending market activity.<sup>695</sup>

<sup>691</sup> See Letter from Members of the U.S. House of Representatives Alma S. Adams, Ph.D., Frank D. Lucas, Madeleine Dean, Bill Huizenga, Bill Foster, Blaine Luetkemeyer, Vicente Gonzalez, Ann Wagner, Josh Gottheimer, Andy Barr, Al Lawson, French Hill, David Scott, Tom Emmer, and Bryan Steil (Nov. 22, 2022), at 2. See also Letter from Representative Lucas, et al., at 1; MFA Letter 3, at 8.

<sup>692</sup> See BlackRock Letter, at 7-8.

<sup>693</sup> See S3 Partners Letter, at 12; Sharegain Letter, at 2; IB Letter, at 10.

<sup>694</sup> See James J. Angel Letter, at 10.

<sup>695</sup> See Proposing Release, 86 FR 69807 (stating that “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”); *id.* at 69807 (stating that “participation in the give-to-get 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”).

Similarly, not enforcing the rule for several years could incentivize non-reporting and skew the reported data to disproportionately represent market participants that voluntarily report.

Taking into consideration commenters’ wide-ranging recommendations, the following compliance dates strike an appropriate balance between making securities loan information publicly available and providing adequate time for industry participants to come into compliance. Specifically, the final rule’s compliance dates require that: (1) an RNSA propose rules pursuant to final Rule 10c-1a(f) within four months of the effective date of final Rule 10c-1a; (2) the proposed RNSA rules are effective no later than 12 months after the effective date of final Rule 10c-1a; (3) covered persons report Rule 10c-1a information to an RNSA starting on the first business day 24 months after the effective date of final Rule 10c-1a (the “reporting date”); and (4) RNSAs publicly report Rule 10c-1a information pursuant to final Rules 10c-1a(g) and (h)(3) within 90 calendar days of the reporting date for covered persons to report Rule 10c-1a information to an RNSA. Additionally, upon the reporting date requiring covered persons to report Rule 10c-1a information to an RNSA, RNSAs are required to fulfill the data retention and availability requirements—including relevant information security policies and procedures—pursuant to paragraphs (h)(1), (h)(2), and (h)(4), and may establish and collect reasonable fees pursuant to paragraph (i) of final Rule 10c-1a.

This approach to the final rule’s compliance dates balances the Commission’s goal of increasing transparency in the securities lending market with providing RNSAs and market participants with adequate time to implement systems and processes to comply with the final rule’s reporting requirements. The Commission has also taken into consideration that the technology to collect and disseminate Rule 10c-1a information already exists. Specifically, FINRA, which is currently the only RNSA, already operates facilities that collect and disseminate transaction information, including TRACE.<sup>696</sup> FINRA’s extensive experience in developing and operating such facilities will enable it to design and propose rules regarding the format and manner of its collection of

<sup>696</sup> See FINRA Letter, at 2 (stating that “FINRA has extensive experience establishing and maintaining systems that are designed to capture and disseminate transaction information—similar to the system contemplated by the Commission under the Proposal”).

<sup>684</sup> See EBF Letter, at 2.

<sup>685</sup> See Fidelity Letter, at 2. The commenter also recommended that “[t]he Commission should also provide necessary guidance to market participants on the final rule a full year in advance of the implementation date.” An RNSA may elect to provide updates as it develops its rules for compliance with final Rule 10c-1a. As discussed below in this part, the compliance date for covered persons, referred to throughout this release as the “reporting date”, will be the first business day 24 months after the effective date of final Rule 10c-1a. See also Nasdaq Letter, at 2 (stating that “a two-year implementation period would provide adequate time for market participants to comply with the Proposal”).

<sup>686</sup> See S3 Partners Letter, at 5.

<sup>687</sup> See HMA Letter, at 1 (stating that the Commission should “revise and adopt the Proposal without delay”); Better Markets Letter, at 1 (recommending that the Commission “finalize this long-overdue, mandatory rulemaking without delay or dilution”).

<sup>688</sup> See, e.g., BlackRock Letter, at 3; ICI Letter 1, at 7; Federated Hermes Letter, at 2; AIMA Letter, at 5; MFA Letter 3, at 6; SIFMA AMG Letter, at 11 (recommending that “[o]nce the SEC and the RNSA become familiar with the data they are receiving and can assess the data’s potential utility to the market, the SEC could then propose rules on making data available to the public”); ABA Letter, at 4 (“The SEC should limit covered securities lending transactions, at least during the initial stages of reporting, to National Market System equity securities and not include fixed-income securities, such as government securities.”); S3 Partners Letter, at 15 (recommending “that the Commission phase-in implementation in a manner consistent with best practices in technology and policy implementation”).

<sup>689</sup> See CASLA Letter, at 2; RMA Letter, at 15-17. See also SBAI Letter, at 2; MFA Letter 3, at 6.

<sup>690</sup> See CASLA Letter, at 2; RMA Letter, at 17; MFA Letter 3, at 7.

information within four months following the effective date of the final rule. Additionally, requiring that RNSA rules are effective no later than 12 months after the effective date of final Rule 10c-1a will help to ensure that information improving the transparency of the securities lending market is made available to the public without unnecessary delay.

A reporting date for covered persons of 24 months after the effective date of final Rule 10c-1a is sufficient for covered persons (and eligible reporting agents) to prepare for compliance with the final rule's reporting requirements. Two commenters recommended an implementation period of two years,<sup>697</sup> and another commenter recommended a compliance period of at least 18 months.<sup>698</sup> One commenter's proposed implementation period of eighteen months after publication of technical specifications by an RNSA could provide more or less implementation time to covered persons than the final rule does. Depending on when an RNSA adopts rules pursuant to final Rule 10c-1a(f), covered persons could potentially have more than 12 months to begin reporting Rule 10c-1a information, including more than the 18 months the commenter recommends. Further, the final rule has been modified to reduce certain burdens, such as requiring end-of-day reporting rather than reporting in 15-minute increments, and removal of the available to lend and securities on loan requirements, which should reduce the amount of time required to prepare for compliance. As stated above, in this part, the reporting date for covered persons strikes a balance between making securities loan information publicly available and providing industry participants with sufficient time to come into compliance. Covered persons' permitted reliance on reporting agents and ability to use third party vendors<sup>699</sup> to help facilitate the fulfillment of reporting obligations will allow for the outsourcing of certain

functions to prepare for and comply with the final rule's requirements.

A compliance date that requires RNSAs to publicly report Rule 10c-1a information within 90 calendar days of the reporting date for covered persons reporting Rule 10c-1a information to an RNSA will help ensure the utility of such data once it is made publicly available. Providing RNSAs with up to 90 calendar days between covered persons being required to publicly report Rule 10c-1a information and RNSAs being required to make such information available to the public pursuant to final Rules 10c-1a(g) and (h)(3) will help RNSAs resolve any initial issues with collecting, aggregating, and publishing Rule 10c-1a information following the reporting date for covered persons. Additionally, upon the reporting date for covered persons an RNSA is required to fulfill the data retention and availability requirements—including relevant information security policies and procedures—pursuant to paragraphs (h)(1), (h)(2), and (h)(4), and may establish and collect reasonable fees pursuant to paragraph (i) of final Rule 10c-1a.

## IX. Economic Analysis

### A. Introduction and Market Failure

#### 1. Introduction

The Commission has considered the economic effects of final Rule 10c-1a and, wherever possible, the Commission has quantified the likely economic effects of the final rule.<sup>700</sup> The Commission is providing both a qualitative assessment and quantified estimates of the potential economic effects of the final rule where feasible. The Commission has incorporated data and other information to assist it in the analysis of the economic effects of the final 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.<sup>701</sup> Further, even in cases where the Commission has some data, quantification 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.

Commenters raised a number of concerns with the analyses and conclusions in the Proposing Release. The Commission reviewed all of the comments received and, in a few instances, have modified the subsequent economic analysis in response to additional information provided by commenters. We have also conducted analyses of changes to the proposed rule text.

The Commission believes that the final rule will increase transparency in the securities lending market by making available the public portion of Rule 10c-1a 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 are able to access existing data.

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 costs associated with tracking market conditions for broker-dealers and lending programs, and improved decision-making by investors, beneficial owners and other market participants.<sup>702</sup> The Commission believes that final Rule 10c-1a will also likely reduce the borrowing costs of some securities,<sup>703</sup> which will improve price discovery, liquidity, and capital formation in the underlying security markets. The Commission also believes the final rule will benefit investors by increasing the ability of regulators to surveil, study, and provide oversight of

<sup>697</sup> See Fidelity Letter, at 2 (recommending that the "Commission should provide a two-year implementation period for any final rulemaking on the Proposal"); Nasdaq Letter, at 2 ("a two-year implementation period would provide adequate time for market participants to comply with the Proposal").

<sup>698</sup> See IIB Letter, at 3 (recommending that the "SEC should provide reporting entities an initial compliance period of at least 18 months to develop necessary systems and otherwise prepare for compliance with the requirements of the rule").

<sup>699</sup> Numerous commenters have mentioned their experience in the market for reporting services. See, e.g., IHS Markit Letter, at 1; Pirum Letter, at 1; DTCC Letter, at 4; Sharegain Letter, at 2. See also Equilend Letter, at 1 (stating that it "welcomes the opportunity to act as a reporting agent for the Proposed Rule").

<sup>700</sup> 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. Section 23(a)(2) of the Exchange Act 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.

<sup>701</sup> For example, while the Commission believes that certain currently available securities lending data products may be biased due to missing observations, the extent of the biases cannot be quantified as the data that would be needed to assess the extent of the bias are missing. See *infra* note 759 and corresponding text for further discussion.

<sup>702</sup> See *infra* Part IX.C.1 for further discussion of the expected benefits of final Rule 10c-1a.

<sup>703</sup> See *infra* Part IX.C.1 for further discussion of the expected effects of final Rule 10c-1a on short selling. See *infra* note 853 and corresponding text for further discussion of why the effects discussed above are likely to be concentrated among stocks that have higher borrowing costs.

both the securities lending market and individual market participants.

The Commission believes that the final Rule 10c-1a will result in costs. The final rule will lead to direct compliance costs as entities providing Rule 10c-1a information to an RNSA will have to build or adjust systems to meet the requirements of the final rule. The entities that provide Rule 10c-1a information to an RNSA may absorb these costs in the form of lower profits or may pass them on to their customers in the form of increased fees for broker-dealer services or lending program services. The final rule will also impose direct costs on an RNSA responsible for collecting, maintaining, and distributing the data, who may pass on these costs by imposing fees on entities that provide Rule 10c-1a information to an RNSA and/or consumers of Rule 10c-1a data ("Rule 10c-1a data"). Additionally, the Commission believes that the final rule could render existing securities lending data services less valuable, potentially leading to less revenue for the firms currently compiling and distributing these data for a fee.<sup>704</sup> Also, broker-dealers and lending programs will have costs in the form of lost information advantage when dealing with beneficial owners and end borrowers in the securities lending market. For securities lending data that are currently not reported, or to which access is limited, making the data public may affect the profitability of certain trading strategies as investors use the data to learn about market sentiment and adjust their trading strategies accordingly.

## 2. Market Failures

In the securities lending market, the cost to borrow a given security depends on a number of factors, including the current demand for the security, the length of the loan, and the type and amount of collateral used, among others.<sup>705</sup> Information about loan prices along with information about loan characteristics helps inform market participants about whether the price of a given securities loan is consistent with the current market rate. At the same time, the securities lending market is characterized by information frictions that stem from the fact that access to timely securities lending data is limited for some market participants.<sup>706</sup> This

<sup>704</sup> See *supra* Part IX.D.2 discussing why existing data providers may retain certain advantages in the market for securities lending data and analytics.

<sup>705</sup> See *infra* note 723 and corresponding text for a discussion of factors that could be important drivers of borrowing costs.

<sup>706</sup> See *infra* Part IX.B.2 for further discussion of the current state of transparency in the securities

means that, at any point in time, there is incomplete information on market conditions and some market participants have better information than others on borrowing costs and transactions. Such incomplete information and asymmetric information may lead to inefficient prices for securities loans (including loans of equity securities and fixed income securities).<sup>707</sup>

There is a general lack of comprehensive information on current market conditions in the securities lending market. Most providers of commercial securities lending data currently focus on loans from lending programs to broker-dealers ("Wholesale" loans)<sup>708</sup> and largely use a "give-to-get" model, where entities who wish to obtain securities lending data are typically required to: (1) be participants in the Wholesale 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. This means that only those market participants with data to report for themselves are able to access the

lending market. In response to commenters, the Baseline has been expanded to include a more robust discussion of data products that are currently available from commercial data vendors. See *infra* Part IX.B.5 for additional discussion.

<sup>707</sup> The Commission believes that the issues discussed in this part regarding a need for additional market transparency apply to all reportable securities, though, as pointed out by commenters (see, e.g., RMA Letter, at 16 and IIB Letter, at 6) and discussed below in Part IX.B.2, the market for securities lending may currently be more transparent for some reportable securities as compared to others. The Commission recognizes that, to the extent that crypto asset securities qualify as reportable securities under final Rule 10c-1a(j)(3), the benefits and costs of the final Rule 10c-1a in the market for crypto asset security lending may vary based on the characteristics of that market. The Commission is unable to describe the lending market in reportable crypto asset securities, however, in part because there is insufficient reporting of crypto asset security transactions to the CAT, TRACE, or RTRS to allow for meaningful analysis.

<sup>708</sup> The Proposing Release defined "Retail" loans as those from a broker-dealer to an end borrower, while loans from lending programs to broker dealers constitute "Wholesale" loans (See Proposing Release, 86 FR 69805, 69831). To avoid confusion with the common use of the term "retail" to refer to a non-institutional (*i.e.*, individual) investor, this release will refer to loans from a broker-dealer to an end borrower as "Customer" loans or loans in the Customer market, and loans from a lending program to a broker-dealer or others as "Wholesale" loans, or loans in the Wholesale market. One commenter expressed concern that the Proposing Release did not adequately address the implications of the Rule for Short Sale Linked Activity (see Citadel Letter, at 5), by which the commenter stated that they are referring to what the Proposing Release calls the "retail market" (see Citadel Letter, at 1). The Economic Analysis uses the terms Wholesale market and Customer market to make clear the implications of the final rule for the different segments of the market.

data, and other market participants have a very limited view into the Wholesale market. Furthermore, participation in give-to-get data products is voluntary, meaning that relevant observations could be missing from the data in a systematic fashion, thus biasing the impression it creates of the lending market.<sup>709</sup>

Some commenters disagreed with the Commission's assessment of the current opacity of the securities lending market. One commenter pointed out that there are some commercial securities lending datasets that are available to all subscribers,<sup>710</sup> and another commenter stated that "the 'give-to-get' model is not the only model for commercial data for securities lending."<sup>711</sup> Based on the Commission's experience, the collection of data for these currently available commercial datasets that are not give-to-get largely relies on surveying asset managers, and potentially others, in the Customer segment of the market about their borrowing experiences.<sup>712</sup> To differentiate this data from the give-to-get data, this type of dataset will be referred to going forward as "Customer market survey" data.

One commenter stated that "the Commission does not explain why [Customer market] survey data is inadequate or unavailable."<sup>713</sup> The Commission acknowledges that Customer market survey data may be more widely available, as access to these datasets is generally not restricted in terms of which entities can purchase the data. However, the Commission believes that Customer market survey datasets are inadequate for two reasons. First, since they rely on surveys of borrowers in the Customer segment of the market, they lack comprehensiveness and have limited insight into the Wholesale market.<sup>714</sup> Second, similar to the give-to-get datasets, Customer market survey datasets may also contain biases as they rely on voluntary submissions of data from a potentially limited subset of

<sup>709</sup> See *infra* Part IX.B.2 for further discussion of the potential for biases related to selection issues in commercial securities lending databases.

<sup>710</sup> See S3 Partners Letter, at 5.

<sup>711</sup> See Citadel Letter, at 8.

<sup>712</sup> See Proposing Release, 86 FR 69832, referring to this data by stating "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." See Antonio Garango, *Short Selling Activity and Future Returns: Evidence from FinTech Data* (Nov. 2020), at 1, 3, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3775338](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775338) (retrieved from SSRN Elsevier database) ("Garango 2020").

<sup>713</sup> See Citadel Letter, at 8.

<sup>714</sup> See *supra* note 708 for a definition of "Customer" loans.

market participants.<sup>715</sup> As discussed above, these two types of datasets differ in terms of the market segments that they cover, and in terms of their accessibility.<sup>716</sup>

One commenter stated that the Commission “has overstated the level of opacity in the securities lending market,” that both the number of data vendors and the detail of their data products have increased over time, and that market participants generally have access to one or more securities lending datasets.<sup>717</sup> However, based on the Commission’s experience, the commercial securities lending data products that are currently available lack comprehensiveness and likely suffer from biases.<sup>718</sup> Furthermore, while some market participants could potentially have access to multiple datasets, this would generally be possible only for a limited set of market participants who have access to give-to-get data, and who may find it cumbersome or costly to combine different types of data.<sup>719</sup> The Commission is not aware of any commercially available securities lending dataset that currently provides securities lending data as comprehensive, accessible, and informative about all segments of the securities lending market (*i.e.*, both the Wholesale market and Customer market), as the data provided by the final rule.<sup>720</sup>

One commenter stated that lending agents frequently provide their clients with benchmark reports based on market data, and that beneficial owners currently benefit from substantial information obtained from lending agents.<sup>721</sup> However, the Commission believes that, even if some lending agents or broker-dealers are incentivized to provide their clients with information about the quality of their securities

lending services, it is unlikely that they have incentives to provide information in a standardized fashion. Therefore, it is unlikely that market participants would be able to use this information to compare the quality of securities lending services across lending agents or broker-dealers.

The Commission believes that the problems of incomplete information and information asymmetries in the securities lending market are unlikely to be solved by market forces. Specifically, these information problems are unlikely to be solved by the availability of commercial securities lending data products. Firstly, there is a general lack of incentives to improve the accessibility of give-to-get datasets. This is because market participants may be discouraged from contributing their data to give-to-get datasets if these datasets are widely available, *e.g.*, to sophisticated investors such as hedge funds who could use this information to learn about the other participants’ trading or hedging strategies.<sup>722</sup> Therefore, for give-to-get data vendors, restricting access is likely seen as necessary in order to persuade market participants to contribute to the vendors’ data products, and information asymmetry would be expected to persist as a result. Secondly, and more generally, as commercial data vendors lack the authority to mandate the reporting of securities loans, both the commercial data products that currently exist (both give-to-get and Customer market survey models), as well as any new commercial data product that could presumably emerge, can only be based on the voluntary contribution of data. Market participants who choose not to contribute data may so choose because they believe it is in their interest to keep their data out of public view. This makes it unlikely that any securities lending data vendor will be able to produce a securities lending data product that is comprehensive and free from biases.<sup>723</sup> Thirdly, as discussed above, the information that lending agents or broker-dealers are incentivized to provide to their clients is unlikely to be standardized and thus useful for comparing the quality of securities lending services across lending agents or broker-dealers. Thus, the availability of this information would also be unlikely to solve the problems of

incomplete and asymmetric information in the securities lending market.

#### A. Economic Baseline

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the final rule are measured consists of the current state of the securities lending market, current practice as it relates to securities lending and availability of data about securities lending, and the current regulatory framework. The economic analysis appropriately considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the final rule are measured.<sup>724</sup>

Several commenters requested the Commission to consider interactions between the economic effects of the proposed rule and other recent Commission rules.<sup>725</sup> The Commission

<sup>724</sup> See, *e.g.*, *Nasdaq v. SEC*, 34 F.4th 1105, 1111–15 (D.C. Cir. 2022). This approach also follows SEC staff guidance on economic analysis for rulemaking. See Staff’s “Current Guidance on Economic Analysis in SEC Rulemaking,” (Mar. 16, 2012), available at [https://www.sec.gov/divisions/riskfin/rsfi\\_guidance\\_econ\\_analy\\_seculemaking.pdf](https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_seculemaking.pdf) (“The economic consequences of proposed rules (potential costs and benefits including effects on efficiency, competition, and capital formation) should be measured against a baseline, which is the best assessment of how the world would look in the absence of the proposed action.”); *Id.* at 7 (“The baseline includes both the economic attributes of the relevant market and the existing regulatory structure.”). The best assessment of how the world would look in the absence of the proposed or final action typically does not include recently proposed actions, because that would improperly assume the adoption of those proposed actions.

<sup>725</sup> See, *e.g.*, AIMA Letter 3, at 4 (“Because the . . . Proposals have aggregate and overlapping effects, they should be considered holistically and their potential adoption should be appropriately sequenced . . . .”); Letter from Eric J. Pan, President and CEO, Investment Company Institute, Aug. 17, 2023 (“ICI Letter 2”), at 1 (“The Commission has issued a wide range of interconnected rule proposals . . . [that] in the aggregate warrant further analysis by the Commission.”). Commenters indicated there could be interactions between this rulemaking and the following rules: *Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers*, Release Nos. 34–93169, IC–34389 (Sept. 29, 2021) 86 FR 57478 (Oct. 15, 2021) (“Amendments to Form N–PX Proposal”) (*see, e.g.*, HMA Letter, at 4); *Short Position and Short Activity Reporting by Institutional Investment Managers*, Release No. 34–94313 (Feb. 25, 2022) 87 FR 14950 (Mar. 16, 2022) (*see, e.g.*, Overdahl Letter, at 14; AIMA Letter 3, at 2); *Prohibition Against Fraud, Manipulation, or Deception in Connection With Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, Release No. 34–93784 (Dec. 15, 2021) 87 FR 6652 (Feb. 4, 2022) (*see, e.g.*, Overdahl Letter, at 14; AIMA Letter 3, at 2; ICI Letter 2, at n. 13); *Modernization of Beneficial Ownership Reporting*, Release Nos. 33–11030, 34–94211 (Feb. 10, 2022) 87 FR 13846 (Mar. 10, 2022) (*see, e.g.*, Overdahl Letter,

<sup>715</sup> See *infra* Part IX.B.2 for further discussion of the potential for biases related to selection issues in commercial securities lending databases.

<sup>716</sup> See *infra* Part IX.B.2 for additional discussion of the characteristics of, and differences between, customer market survey data and give-to-get data.

<sup>717</sup> Specifically, the commenter stated that “the level of detail in the data provided by data vendors has improved drastically” and “the number of data vendors present in the market has been growing,” such that “the vast majority of parties involved in the lending of securities have access to at least one securities lending data vendor, and in many cases multiple vendors.” See IHS Markit Letter, at 13.

<sup>718</sup> See *infra* Part IX.B.2 for further discussion of the biases and lack of comprehensiveness in commercial securities lending datasets.

<sup>719</sup> See *infra* notes 768 through 770 and corresponding text for further discussion of limitations related to combining multiple securities lending datasets.

<sup>720</sup> See *infra* Part IX.B.2 for an additional discussion of this data.

<sup>721</sup> See RMA Letter, at 5–6.

<sup>722</sup> See *infra* Part IX.B.2 for further discussion of market participants’ incentives to provide data to give-to-get data vendors.

<sup>723</sup> See *infra* Part IX.B.2 for further discussion of the potential for biases related to selection issues in commercial securities lending databases.

recently adopted four of the rules mentioned by commenters as potentially impacting the economic effects of the final Rule 10c-1a, namely the recent Amendments to Form N-PX Adoption,<sup>726</sup> the Settlement Cycle Adoption,<sup>727</sup> the May 2023 SEC Form PF Amending Release,<sup>728</sup> and the Beneficial Ownership Amending Release.<sup>729</sup> These recently adopted rules

at 14; ICI Letter 2, at n.13); *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, Release No. IA-5955 (Feb. 9, 2022) 87 FR 16886 (Mar. 24, 2022) (“SEC Private Fund Advisers Proposal”) (see, e.g., Overdahl Letter, at 14); and *Amendments to Form PF to Require Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers and to Amend Reporting Requirements for Large Private Equity Fund Advisers*, Release No. IA-5950 (Jan. 26, 2022) 87 FR 9106 (Feb. 17, 2022) (“February 2022 SEC Form PF Proposing Release”) (see Overdahl Letter, at 14); *Shortening the Securities Transaction Settlement Cycle*, Release Nos. 34-94196, IA-5957 (Feb. 9, 2022) 87 FR 10436 (Feb. 24, 2022) (see SIFMA Letter 1, at 20-21). See also Citadel Letter, at 10 (stating that Rule 10c-1a “must be assessed along with the additional public disclosure contemplated in recent Commission proposals regarding large security-based swap positions, beneficial ownership reporting and short position and activity reporting”).

<sup>726</sup> *Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers*, Release Nos. 33-11131, 34-96206, IC-34745 (Nov. 2, 2022) 87 FR 78770 (Dec. 22, 2022) (“Amendments to Form N-PX Adoption”). The Form N-PX amendments require funds to report publicly their proxy voting records on an annual basis, and apply to most registered management investment companies. The effective date is July 1, 2024.

<sup>727</sup> Settlement Cycle Adoption, *supra* note 738. The Settlement Cycle amendments shorten the standard settlement cycle for most broker-dealer transactions from two business days after the trade date to one business day after the trade date (“T+1”). The implementation date, May 28, 2024, will occur before the implementation of these rules, and we therefore expect that all reports made pursuant to this rule will occur after the implementation of the T+1 settlement cycle. Further, because of the need for an RNA to develop and implement rules before reporting can begin, we believe that the May 2024 implementation date for T+1 will precede any significant compliance costs incurred by market participants pursuant to this final rule.

<sup>728</sup> *Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting*, Release No. IA-6297 (May 3, 2023) 88 FR 38146 (June 12, 2023) (“May 2023 SEC Form PF Amending Release”). The Form PF amendments require large hedge fund advisers and all private equity fund advisers to file reports upon the occurrence of certain reporting events. The compliance dates are December 11, 2023, for the event reports in Form PF sections 5 and 6, and June 11, 2024, for the remainder of the Form PF amendments.

<sup>729</sup> *Modernization of Beneficial Ownership Reporting*, Release Nos. 33-11253, 34-98704 (Oct. 10, 2023) (“Beneficial Ownership Amending Release”). Among other things, the amendments shorten the filing deadlines for beneficial ownership reports filed on Schedules 13D and 13G. The compliance dates are 90 days after the effective date, for Schedule 13D amended filing deadlines; September 30, 2024, for the Schedule 13G amended

were not included as part of the baseline in the Proposing Release because they were not adopted at that time. In response to commenters, this economic analysis considers potential economic effects arising from the extent to which there is any overlap between the compliance period for final Rule 10c-1a and the compliance periods for each of these four adopted rules.<sup>730</sup>

Other rules mentioned by commenters remain at the proposal stage. To the extent those proposals are adopted, the baseline in those subsequent rulemakings will reflect the regulatory landscape that is current at that time.

### 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 U.S., the most common form of collateral for equity security loans is cash. The borrower of the security deposits collateral, typically 102 percent or 105 percent of the current value of the asset being loaned. 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

filing deadlines; and December 18, 2024, for the structured data requirement. We anticipate that the implementation of amendments to Schedules 13D and 13G will precede any significant compliance costs incurred by market participants pursuant to final Rule 10c-1a.

<sup>730</sup> Since proposing this rule, the Commission adopted another proposed rule identified by a commenter, the SEC Private Fund Advisers Proposal. See Overdahl Letter at 14; *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, Release No. IA-6383 (Aug. 23, 2023) 88 FR 63206 (Sep. 14, 2023) (“SEC Private Fund Advisers Adopting Release”). However, the Commission believes there are no potential significant effects from overlapping requirements to comply with final Rule 10c-1a. Specifically, one of the rules from the SEC Private Fund Advisers Adopting Release requires registered investment advisers to private funds to, among other things, provide transparency to their investors regarding the fees and expenses and other terms of their relationship with private fund advisers and the performance of such private funds. The Commission anticipates that most registered investment advisers would either not face any reporting obligations under final Rule 10c-1a(a) or, to the extent they are involved in the lending of securities, would not report loans directly, but would do so through a reporting agent. As a result, the Commission does not anticipate the compliance costs associated with final Rule 10c-1a to be incurred directly by those who are impacted by the SEC Private Fund Advisers Adopting Release.

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. In contrast, borrowers of loans that are collateralized other than with cash typically must pay a lending fee. The following will refer to “cost to borrow” or “borrowing costs” being higher when rebate rates are lower (or negative) in the case of cash-collateralized loans, and lending fees are higher in the case of non-cash-collateralized loans.<sup>731</sup>

Borrowing costs are influenced by 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 creditworthiness of the counterparty, and the relative bargaining power of the parties involved, among other factors.<sup>732</sup> Consequently, there is usually a significant range of borrowing costs for loans of the same security on the same day to different entities.<sup>733</sup>

In the Wholesale market, securities loans are most commonly obtained through bilateral negotiations between lending programs and broker-dealers, often with a phone call.<sup>734</sup> Generally, when an end investor wishes to borrow a share, and their broker-dealer does not have the share available in their own inventory or through customer margin

<sup>731</sup> In many datasets, rebate rates for loans collateralized by cash are converted to fees using the conventional method of subtracting the rebate rate from the Federal funds rate; see, e.g., the footnote in Table 1.

<sup>732</sup> Among other factors that can influence borrowing costs, commenters also pointed out that the size and stability of the lender’s position (see HMA Letter, at 2), the lender’s propensity to recall the loan (see Overdahl Letter, at 6), interest rate stability and supply concentration (see SIFMA AMG Letter, at 6), and factors idiosyncratic to the parties, such as capital and opportunity costs (see RMA Letter, at 6). One commenter pointed out that fees in the Customer market can depend on additional factors, such as whether a borrower/client has exclusive access to a lenders’ portfolio, the volume of a client’s borrow business, and other prime brokerage services being offered, among others (see MFA Letter 1, at 5).

<sup>733</sup> See *infra* Part IX.B.3 for statistics on the range of borrowing costs.

<sup>734</sup> Most broker dealers are regulated by FINRA and are subject to securities lending rules such as FINRA Rules 4314, 4320, and 4330.

accounts to loan,<sup>735</sup> their broker-dealer will borrow a share from a lending agent with whom they have a relationship. Obtaining a securities loan often involves extensive search for counterparties by broker-dealers.<sup>736</sup>

Investors borrow securities in the Customer market for a variety of reasons. In the equity market, a primary reason for borrowing shares is to facilitate a short sale. Investors use short sales to take a directional position in a security, or to hedge an existing position.<sup>737</sup> 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 up to two business days after a transaction occurs (“T+2”) and the lending market has same-day settlement, the loan actually occurs on the settlement day.<sup>738</sup>

Options 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.<sup>739</sup> 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 fail to deliver. Fail to delivers occur when one party of a transaction is unable to deliver at settlement the security that they previously sold. Fail to delivers can occur for multiple reasons.<sup>740</sup> Rule 204

<sup>735</sup> See *infra* Part IX.B.4 for further discussion of the sourcing of shares by broker-dealers for securities loans.

<sup>736</sup> See, e.g., Adam C. Kolasinski, et al., *A Multiple Lender Approach to Understanding Supply and Search in the Equity Lending Market*, 68 J. Fin. 559, 559–95 (2013) (“Kolasinski (2013)”) (providing an examination of the effect of high search cost in the securities lending market).

<sup>737</sup> 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.

<sup>738</sup> Equity settlement moves to T+1 on May 28, 2024; See *Shortening the Securities Transaction Settlement Cycle*, Release Nos. 34–96930, IA–6239 (Feb. 15, 2023), 88 FR 13872 (Mar. 6, 2023) (“Settlement Cycle Adoption”).

<sup>739</sup> 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.

<sup>740</sup> See, e.g., *Amendments to Regulation SHO*, Release No. 34–58775 (Oct. 14, 2008), 73 FR 61690 n.8 (Oct. 17, 2008).

of Regulation SHO generally requires a participant of a registered clearing agency to close out any fail to deliver at the registered clearing agency by purchasing or borrowing securities of like kind and quantity. Thus, a broker or dealer that is required to close out a fail to deliver can borrow shares in the lending market to comply with Rule 204 of Regulation SHO.<sup>741</sup> 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 the Wholesale fixed-income securities lending market. It is the Commission’s understanding that a significant fraction of debt security loans occurs as banks manage liquidity on their balance sheets. 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.<sup>742</sup> Thus, banks lacking sufficient high-quality liquid assets on their balance sheet may borrow such high-quality assets to bolster their liquidity ratios.<sup>743</sup> U.S. Treasury/Agency bonds are often lent for this purpose, and consequently are the most commonly lent securities.<sup>744</sup>

Also, the Commission understands that some financial entities may use securities loans to obtain the type of collateral required for 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.

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.<sup>745</sup> Voting rights remain with the borrower until the loaned securities are returned. Usually, the terms of the loan stipulate that dividends and interest payments must be passed back to the beneficial owner in the form of so-called “substitute dividends.” Because dividends and substitute dividends are

<sup>741</sup> See 17 CFR 242.204.

<sup>742</sup> See, e.g., *Concept Release on the U.S. Proxy System*, Release No. 34–62495 (July 13, 2010), 75 FR 42982, 42994 (July 22, 2010) (“When an institution lends out its portfolio securities, all incidents of ownership relating to the loaned securities, including voting rights, generally transfer to the borrower for the duration of the loan”).

<sup>743</sup> These loans are generally collateralized with securities instead of cash. A market participant can increase the liquidity of their portfolio by borrowing highly liquid securities and collateralizing the loan with less liquid securities.

<sup>744</sup> See OFR Pilot Survey, at 7; *supra* note 136.

<sup>745</sup> See, e.g., OFR Reference Guide, *supra* note 4.

sometimes taxed differently, an investor for whom a substitute dividend is taxed at a lower rate than a dividend may loan its shares to an investor for whom dividends are taxed at a lower rate than substitute dividends.<sup>746</sup>

Several commenters pointed out additional reasons for borrowing securities. One commenter stated that there are many reasons for securities lending that are unrelated to short selling.<sup>747</sup> Another commenter purported that securities lending can be used to gain influence in the voting of equity securities.<sup>748</sup>

However, the Commission expects that the majority of equity securities lending, particularly in the Customer market, occurs to facilitate short selling. Investors’ ability to use securities loans for purposes other than short selling is limited by the “permitted purpose requirement” of the Board of Governors of the Federal Reserve System’s Regulation T. Regulation T broadly governs the lending activities of broker-dealers, and specifies that a broker-dealer may generally borrow or lend U.S. securities from or to a (non-broker-dealer) customer solely “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,” unless an exemption applies.<sup>749</sup> This limitation results in a close correlation between information about aggregate Customer loan sizes and short interest.<sup>750</sup>

## 2. Current State of Transparency in Securities Lending

As described above, currently available securities lending data are produced by commercial data vendors, and are based on voluntary data contributions, either using a give-to-get model or from Customer market surveys.<sup>751</sup> Some commenters expressed their belief that the Proposing Release did not adequately analyze the impact of Customer market survey data.<sup>752</sup> This

<sup>746</sup> This is known as dividend arbitrage. While the IRS has issued regulations to try to combat this type of dividend arbitrage, there is evidence that it still occurs. See Peter N. Dixon, et al., *To Own or Not to Own: Stock Loans around Dividend Payments*, 140 J. Fin. Econ 539,539–59 (2021) (“Dixon, et al., (2021)”).

<sup>747</sup> See IHS Markit Letter, at 3.

<sup>748</sup> See HMA Letter, at 3.

<sup>749</sup> See 12 CFR 220.10(a).

<sup>750</sup> See *infra* Part IX.B.6 for further discussion of the correlation between securities loan information and short interest.

<sup>751</sup> See *supra* Part IX.A.2 for a description of these types of datasets.

<sup>752</sup> For example, one commenter stated that, while they agree “with the Commission’s concerns regarding the inadequacy and information asymmetry issues inherent in the give-to-get model,” the give-to-get model is “is not the industry

baseline, and the discussion following have been expanded to provide a more detailed discussion of the Customer market survey data and its impact on securities lending transparency. The available data have limitations. Specifically, they lack comprehensiveness in that they are based on voluntary data contributions. The reliance on voluntary data contributions increases the likelihood that data are missing in a non-random manner which can introduce biases into the data. Lastly, not all market participants have access to all existing commercial datasets resulting in information asymmetries between market participants.

Some commercial data vendors obtain information on Wholesale loans using a give-to-get model.<sup>753</sup> Access to data collected using a give-to-get model is largely restricted, as only certain entities can purchase the data. The Commission understands entities with access to the give-to-get Wholesale market data access that data using various means such as an application programming interface (API), spreadsheet add-in applications, file downloads, or directly from the distributor's website. It is the Commission's understanding that some large institutional investors who would like the give-to-get data, such as hedge funds, cannot access it, even for a fee, because they do not provide lending data to the commercial vendors and so are not qualified to purchase the data. Additionally, distributing the data to these investors may discourage other market participants from contributing their data to the data vendors. Because securities loans are often entered into to facilitate various trading and hedging strategies, if the give-to-get data providers expanded access to their data, some securities lending market participants may be discouraged from contributing data. Consequently, if sophisticated traders such as hedge funds can access the data, then some market participants may be leery of contributing data to the give-to-get 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

standard." See S3 Partners Letter, at 5. Similarly, another commenter stated that "the 'give-to-get' model is not the only model for commercial data for securities lending." See Citadel Letter, at 8.

<sup>753</sup> See *supra* Part IX.A.2 for a description of the give-to-get model of data collection.

functions.<sup>754</sup> The Commission 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 give-to-get Wholesale data vendors are roughly comparable.<sup>755</sup>

Other commercial data vendors provide a different approach to securities lending data by surveying asset managers and others in the Customer segment of the market about their borrowing experience, such as their costs to borrow, from which they provide estimates of lending fees.<sup>756</sup> One commenter stated that the Commission "offers no reason to believe that the [Customer market] survey and 'give-to-get' data are materially different."<sup>757</sup> Customer market survey data have some characteristics that make them distinct from the give-to-get data provided by the vendors of Wholesale market data discussed above. First, Customer market survey data vendors generally aggregate information from respondents in the Customer market—that is, the end borrowers that engage in securities borrowing to facilitate short selling—and thus cover a different segment of the securities lending market.<sup>758</sup> Second, while Wholesale market data are mostly available only on a restricted basis, Customer market survey data are generally available to any purchaser. However, despite these differences, Customer market survey data face a similar issue to the give-to-get data, in that they only contain information about the subset of those end borrowers that choose to provide data. Since it is unlikely that the full universe of lending programs and borrowers contribute all data to any given data vendor, the Commission believes that both give-to-

<sup>754</sup> For example, some data providers retain the right to review and reject any use of the data at their own discretion.

<sup>755</sup> See *infra* note 812 for evidence of this from the academic literature. The Commission expressed this belief in the Proposing Release (See Proposing Release, 86 FR 69832) and specifically requested comment regarding the baseline of the economic analysis as well as specific comment about "sources of insight" into securities lending activity (See Proposing Release, 86 FR 69849, questions 77 and 78). The Commission did not receive comment on this point and thus continues to believe that the data from the three biggest give-to-get Wholesale data vendors are roughly comparable.

<sup>756</sup> See Garango 2020, *supra* note 712.

<sup>757</sup> See Citadel Letter, at 8.

<sup>758</sup> For reasons below *infra* note 769, there is uncertainty regarding the strength of the correlation between Wholesale and Customer borrowing costs, particularly for stocks that are not hard-to-borrow. Therefore, it is unclear whether customer survey data could be used to glean information about the Wholesale market.

get and Customer market survey data lack comprehensiveness.

Furthermore, as stated in the Proposing Release and restated here, the Commission believes that the give-to-get data are likely biased due to non-random omissions that result from the voluntary nature of data submissions.<sup>759</sup> The Commission also believes that, since Customer market survey data are also based on voluntary submissions, these data also suffer from bias due to non-random omissions. As will be further detailed below, data based on voluntary submissions can contain biases because market participants that choose not to disclose their data likely make that choice because it is in their strategic interest not to disclose, resulting in non-random omissions.

One commenter stated that the Commission's statements in the Proposing Release that give-to-get data could be systematically biased has "no basis beyond mere speculation."<sup>760</sup> The Commission disagrees. It is true that it is not possible to empirically analyze or quantify the extent of this bias using existing data because there currently does not exist a complete dataset with which to compare the existing data, and comparing a biased sample to an unbiased sample is generally the only data-based means of determining the extent of the bias in a non-random sample. Instead, the determination that data are likely to not contain a representative sample is routinely made in economic studies (as well as data analysis generally) based on an understanding of how the sample is created, which alone can be sufficient to determine the likely validity of the sample. The fact that non-random data omissions result in biased data is well established in statistics and data science, and simply stems from the logic that, if the reporting subsample is systematically different from the population, then statistics based on the reporting sample will only reflect the reporting sample, and will not be reflective of the whole population.<sup>761</sup>

In the context of commercial securities lending datasets, the

<sup>759</sup> See Proposing Release, 86 FR 69832.

<sup>760</sup> See Citadel Letter, at 8. Similarly, another commenter asked for an assessment of the current accuracy of existing data; See S3 Partners Letter, at 4. However, neither commenter provided any supplemental analysis challenging the assumption of non-random omissions, nor did they provide additional insight into the nature of any bias. Neither did either commenter provide a pathway to overcoming obstacles related to such an empirical analysis.

<sup>761</sup> See, e.g., James J. Heckman, *Selection Bias and Self-Selection*, in *ECONOMETRICS*, 201–224 (John Eatwell, et al., eds., Palgrave Macmillan, London 1990) ("Heckman (1990)").

Commission believes that, because market participants can choose whether or not they want to contribute data to commercial datasets,<sup>762</sup> it is likely that the sample of securities lending data that is reported to commercial data vendors is, on average, different from the sample that is not reported. As such, there are well-established theoretical reasons as to why these data are likely biased. These reasons are largely based on the fact that market participants that voluntarily contribute data to commercial datasets “self-select” the data that they would like to be included in the dataset. The practice of having entities under study “self-select” into the dataset used to study them is widely acknowledged in the empirical economics literature to be very likely to lead to biased data.<sup>763</sup> This is because the incentives to provide data are likely connected to the incentives that drive the behavior under study, such that the behavior of those market participants that do contribute data are likely to be systematically different from the behavior of those that do not contribute. Trying to draw inferences from such a dataset about the entire population of market participants would thus result in a biased view of the market.

The Commission has identified examples of such incentives that would likely introduce such “self-selection biases” into commercially available securities lending datasets. First, there may be competitive reasons for market participants to selectively choose which loans to contribute to a securities lending dataset. For example, to attract more beneficial owner customers, lending programs would like their average terms to appear better than the benchmark average terms. Thus, they are incentivized to voluntarily contribute information about their lending activity for loans with higher-than-average borrowing costs—skewing the average cost to borrow in the resulting dataset up and making the lender’s performance appear better than it actually was.<sup>764</sup> This could lead the

<sup>762</sup> See *infra* of this part for a discussion of investors’ incentives related to voluntarily contributing data to commercial datasets, and why this may result in systematic differences between those that choose to contribute as compared to those that do not.

<sup>763</sup> See Heckman (1990), *supra* note 761.

<sup>764</sup> One commenter stated that lending agents frequently provide their clients with benchmark reports based on market data, and that beneficial owners currently benefit from substantial information obtained from lending agents. See RMA Letter, at 2; see also *supra* note 721 and *infra* note 772 and corresponding text. However, even if this is the case, many beneficial owners do not have access to securities lending data, particularly give-to-get Wholesale data, and so could likely not independently benchmark transactions.

reported borrowing costs in commercial datasets to be systematically higher than the actual borrowing costs in the securities lending market.<sup>765</sup>

Similarly, some market participants may choose not to voluntarily contribute data to securities lending datasets for their own strategic reasons, such as a desire to keep their activity private. The decision to not to participate is, in itself, indicative that such market participants are likely not reflective of those who do choose to participate. For example, market participants that choose not to contribute data may be more likely to be sophisticated investors with greater incentives to protect their trading and hedging strategies. This matters because the terms of securities loans are influenced by the characteristics of the parties involved,<sup>766</sup> and so it follows that the borrowing costs for market participants that do not voluntarily contribute data are systematically different than the borrowing costs for market participants that do contribute data.

In addition to the issue of self-selection bias, currently there is no securities lending dataset that contains information about both the Customer and Wholesale segments of the market. The give-to-get datasets lack significant coverage of the Customer segment of the market, while the Customer market survey data lack significant coverage of the Wholesale segment of the market.<sup>767</sup>

<sup>765</sup> Note that the reverse could also be true, as lenders, in order to attract more customers in the market for borrowers, may be incentivized to voluntarily contribute information about loans with lower-than-average borrowing costs, which would skew the average cost to borrow downwards. Ultimately, the Commission is not able to determine the potential direction of the self-selection bias, which could also vary over time. This would complicate any attempt to adjust for the bias when performing analyses on the data.

<sup>766</sup> See *infra* Part IX.B.3 for further discussion of the factors that influence the prices of securities loans.

<sup>767</sup> One industry publication noted in an interview with a market participant engaged in Wholesale market lending that they feel unable to benchmark the performance of their lending programs using commercial data because they have very little insight into the Customer market. See, e.g., Bob Currie, *The Power of Reinvention*, Sec. Fin. Times (Aug. 31, 2021), at 20, available at [https://www.securitiesfinancetimes.com/slimes/SFT\\_issue\\_285.pdf](https://www.securitiesfinancetimes.com/slimes/SFT_issue_285.pdf), interviewing Matthew Chessum, who stated that “as a lender, we monitor fees paid to us by the agent, but we only see one side of the trade. We have no sight of the pricing paid by a hedge fund or prime broker, for example, when they borrow those securities.” One commenter questioned the applicability of this citation and stated their opinion that “[t]hat a single person would like to see certain data is not evidence that requiring the disclosure of that data is worth the massive cost,” the commenter also states that “the Commission neglects to estimate the number of market participants that are seeking the same disclosure” (see Citadel Letter, at 10). The

While some, but not all, market participants could potentially gain access to data on both the Wholesale markets and Customer markets by subscribing to both give-to-get and Customer market survey datasets, this would generally be possible only for market participants that contribute data (and thus have access) to give-to-get datasets and would also not surmount the problems of incomplete or potentially biased data. Different types of data may also be cumbersome to combine.<sup>768</sup> There are also limitations to using the Customer market survey data to assess conditions in the Wholesale market.<sup>769</sup> Furthermore, the need to subscribe to multiple datasets increases market participants’ overall costs of data access.<sup>770</sup>

As an additional source of securities lending data, some market participants that have many connections within the securities lending market, such as large broker-dealers and lending programs, can query other market participants directly about current conditions. These centrally connected market participants are also likely to have access to both give-to-get Wholesale data and customer

Commission received numerous comment letters from industry members and organizations expressing support for the public disclosure of securities lending data. See, e.g., Nasdaq Letter, at 1–2; AFRF Letter 1, at 1; Better Markets Letter, at 1; NYSE Letter 1, at 1–2; ASA Letter, at 1; and Morningstar Letter, at 2; The Commission also received letters from academics and individuals supporting additional transparency. See, e.g., James J. Angel Letter, at 1; Letter from Carl Nyborg (Dec. 15, 2021), at 1; Letter from Eric Olsen (Jan. 24, 2022); Letter from Scott Clark (Jan. 22, 2022).

<sup>768</sup> For example, commercial data vendors often convert rebate rates (for cash collateralized loans) into fees, in order to combine with information about lending fees for non-cash collateralized loans and cash collateralized loans; see, e.g., *infra* note 786. Different commercial data vendors may use different methodologies for this conversion, which would make it difficult to combine and compare information about borrowing costs across different datasets.

<sup>769</sup> Borrowing costs in the Customer market are often contractually negotiated in the brokerage agreement between a customer and their broker-dealer. It is common for these brokerage agreements to stipulate a fixed rate for general collateral stocks and some predetermined process to determine rates for stocks on special, such as referencing Wholesale market rates plus some mark-up. For this reason, there is uncertainty regarding how strong the correlation might be between Wholesale and Customer borrowing costs, particularly for general collateral stocks.

<sup>770</sup> One commenter stated that, “while the Proposal stated that purchasing multiple vendor systems is expensive, there was no quantification of actual vendor costs. Nor was there data provided on how many firms actually use multiple vendors” (see S3 Partners Letter, at 4). The Commission cannot provide such analysis because we do not have, and commenters did not provide, typical costs paid to vendors for such data. The Commission understands that such pricing is dynamic and individualized, and is generally not aware of publicly available price lists or client lists.

market survey data. Consequently, the largest and most centrally 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 on the periphery of the lending market and those in the center, who have access to both Wholesale and Customer market commercial datasets as well as queried data from their connections, 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.<sup>771</sup> Because of the above-described issues with the comprehensiveness and accessibility of existing commercial datasets, the availability of commercial data products for the securities lending market does not alleviate this information asymmetry.

One commenter disagreed with the Commission's view that there are information asymmetries between those in the center of the lending markets and beneficial owners and borrowers on the periphery, because beneficial owners benefit from the information obtained by their lending agents.<sup>772</sup> However, the Commission believes that, even if lending agents provide beneficial owners with benchmark reports based on commercial securities lending data, this would not eliminate all information asymmetries. The lending agent, or other centrally located entity, has access to the raw data, as well as the potential to influence that data through their own contributions of data to commercial data vendors, whereas the beneficial owner would need to rely on a subset of the processed data that their lending agent chooses to provide to them, if any.

In addition to the specific problem of information asymmetry between various market participants, 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 in which complete information about securities lending activity were widely available. Asymmetric information in general 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 lenders with many connections in the securities lending market lack a complete picture of the lending market, implying that the loan prices that they quote may not be completely efficient.

Commenters stated that the lending market for U.S. Government securities is already transparent "because there is sufficient liquidity and demand for loans of these types of securities on platforms and venues that have a high degree of transparency."<sup>773</sup> However, the commenters did not provide additional explanation as to why a high degree of liquidity would entail a transparent market, or additional details regarding the transparency of the platforms and venues that trade in U.S. Government securities.

The Commission believes that information asymmetries may still be present in the lending market for U.S. Government securities. Some information about U.S. Government securities loans is available from the commercial securities lending datasets described above. In addition, the Commission understands that information about loans of U.S. Government securities that are awarded to primary dealers through the Federal Reserve Bank of New York's System Open Market Account (SOMA) portfolio is available from the Federal Reserve Bank of New York.<sup>774</sup> While volume

and rate information from these auctions may be informative to participants about benchmark lending rates, these data do not contain information about activity in the broader U.S. Government securities lending market. Furthermore, certain aggregate data from the Federal Reserve's FR 2004 reports, which collect weekly and daily position, transaction, financing, and fails data of primary dealers in U.S. Government securities and other selected fixed income securities, are published in the Federal Reserve Bank of New York's press release, "Weekly Release of Primary Dealer Transactions."<sup>775</sup> This dataset contains aggregate volume information about securities lent and borrowed by primary dealers. It does not contain information about lending rates, and also does not contain information about the U.S. Government loans of market participants other than primary dealers.

Furthermore, some market participants may be able to infer some information about the securities lending market from the market for repos;<sup>776</sup> this is particularly the case for securities with a very active repo market, such as U.S. Government securities. A fixed-

collateral amount, and the identity of the counterparty, *see* Fed. Res. Bank of N.Y., "Historical Transaction Data," available at [https://www.newyorkfed.org/markets/omo\\_transaction\\_data](https://www.newyorkfed.org/markets/omo_transaction_data), last visited Aug. 23, 2023.

<sup>775</sup> The Federal Reserve's weekly Form FR 2004 provides weekly volume statistics about primary dealers' financing activity in U.S. Government securities, including aggregated volumes in securities lending and repo. *See* Fed. Res. Bank of N.Y., "Primary Dealer Statistics," available at <https://www.newyorkfed.org/markets/counterparties/primary-dealers-statistics>, last visited Aug. 23, 2023.

<sup>776</sup> In a repo, 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. Repos 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 repo 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).

<sup>771</sup> For example, broker-dealers acting on behalf of customers have an incentive to lend from their inventory, even if lower cost borrowing options exists, because they keep the whole lending fee in such a transaction. The limited data available to the end borrower about the state of the lending market make it difficult for the end borrower to monitor the performance of its broker-dealer for situations like this.

<sup>772</sup> *See* RMA Letter, at 6 (stating "[w]hile the Proposing Release repeatedly asserts that information asymmetries exist between those 'in the center' of the lending markets and beneficial owners and borrowers on the 'periphery,' in point of fact beneficial owners currently benefit from substantial information obtained by Lending Agents acting on their behalf and pricing remains highly competitive").

<sup>773</sup> *See, e.g.,* RMA Letter, at 16; IIB Letter, at 6.

<sup>774</sup> Through its System Open Market Account (SOMA) portfolio, the Federal Reserve Bank of New York awards U.S. Government securities loans to primary dealers (*i.e.*, financial institutions that are permitted to trade directly with the Federal Reserve System) that have elected to participate in the program based on competitive bidding in a multiple price auction held each business day at noon. Participation by primary dealers is entirely voluntary and summary results are released to the public following each day's auction. *See* Fed. Res. Bank of N.Y., "Securities Lending," available at <https://www.newyorkfed.org/markets/domestic-market-operations/monetary-policy-implementation/securities-lending>, last visited Aug. 23, 2023. For a list of current primary dealers, *see* <https://www.newyorkfed.org/markets/primarydealers>. These data include both daily and historical data on aggregate volumes and rates, as well as transaction-by-transaction data disseminated with a two-year lag. The latter dataset contains identifying information for the security lent (*e.g.*, CUSIP), as well as the lending fee,

term cash collateralized securities loan is economically similar to a repo. Consequently, an investor wishing to gather information about fixed-term loans in the securities lending market could use prevailing terms in the repo market to infer information about borrowing costs for the same securities. However, as majority of securities loans do not have a fixed term,<sup>777</sup> information from the repo market would only be useful for a small subset of securities loans.

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 documents that in 2015 only about 10 percent of the value of securities available for lending were on loan.<sup>778</sup> However, for a specific security it is not always the case 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 borrowing costs many times higher than a security that is not on special.<sup>779</sup>

Securities loans also exhibit a wide range of borrowing costs for the same security on the same day. The range of borrowing costs for the same security can be influenced by a number of characteristics, such as the creditworthiness of the borrower, the type of collateral used, and the terms of

the loan.<sup>780</sup> As discussed in further detail below, the range of borrowing costs likely also represents asymmetric information between the parties to the loan negotiation, such that one party is able to charge a higher price than would be possible if the other party had better information regarding the current loan prices for that security.<sup>781</sup> It may also represent a general lack of price efficiency stemming from incomplete information, as market participants operate without a clear view of the market as a whole.

Table 1 provides descriptive statistics illustrating these characteristics of the securities lending market. The data come from Fidelity National Information Services, Inc. (FIS) and reflect conditions in the Wholesale market for U.S. equity loans on the same days as the OFR Pilot Survey,<sup>782</sup> for the sample of lenders that provide data to FIS.<sup>783</sup>

Panel A of Table 1 provides the distribution of utilization rates (defined as the percent of shares currently on loan relative to the total number of shares available for lending). This panel highlights that utilization rates are highly positively skewed. For most stocks supply significantly outstrips demand with median utilization rates of approximately 12 percent. For stocks at the 90th percentile, utilization rates are near 70 percent, implying that an investor seeking to find shares of such a stock to borrow may have a difficult time doing so.

Table 1 only presents utilization rates for equity lending transactions.

However, at least one commenter states that utilization rates vary significantly across asset classes, stating that data from the OFR Pilot Survey show that utilization rates are lower for more individualized securities, such as corporate bonds.<sup>784</sup> Meanwhile, referencing the OFR Pilot Survey, the commenter pointed out that the utilization rate for U.S. Treasuries and agencies is higher than that of equities.<sup>785</sup>

Panel B of Table 1, which presents borrowing costs in term of lending fees,<sup>786</sup> shows that the lending fees paid for equity loans exhibit a wide range.<sup>787</sup> Stocks that are 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 percent per year while the median stock has a lending fee of about 0.6 percent 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 lending 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 the same day. This range can be quite substantial. For the median stock the range is about three percentage points, or approximately five times the median fee charged for securities lending transactions.

TABLE 1—DISTRIBUTION OF LENDING FEES FOR U.S. COMMON STOCKS \*

	p10	p20	p30	p40	Median	Mean	p60	p70	p80	p90	N
<b>Panel A: Distribution of Utilization Rates</b>											
9–Oct–15 .....	1.02	2.94	5.42	8.28	12.06	22.70	17.21	24.83	39.35	68.98	3,638

<sup>777</sup> The OFR Pilot Survey (*supra* note 136, at 9) estimates that 81% of the loans in their data were open loans for which no maturity date is specified.

<sup>778</sup> See OFR Pilot Survey, *supra* note 136. Note that the number of shares available for loan must be interpreted carefully. The Commission understands 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.

<sup>779</sup> In contrast, easy-to-borrow stocks are often referred to as “general collateral” stocks, which tend to have lower borrowing costs.

<sup>780</sup> See *supra* note 732 for additional factors pointed out by commenters that could be important drivers of borrowing costs.

<sup>781</sup> See *supra* Part IX.B.2 for a discussion of information asymmetries in the securities lending market, specifically between end borrowers and broker-dealers and between beneficial owners and lending programs. See also *supra* note 771 for an example.

<sup>782</sup> We limited our sample to the same period of time as the OFR Pilot Survey (Oct. 9, 2015, Nov. 10, 2015, and Dec. 31, 2015) for ease of comparison. Additionally, while the data presented here is limited to equity loans, final Rule 10c–1a applies to loans of both equity and fixed-income securities. The Commission believes that there is a similar lack of transparency for fixed-income loans and equity loans, and thus the same economic structure likely applies to both the fixed-income and equity lending markets.

<sup>783</sup> FIS data are collected using a give-to-get model and thus is unavailable for many entities other than those that provide their data to FIS.

<sup>784</sup> The commenter states that “the corporate and asset-backed debt markets in particular are characterized by relatively small issuance sizes and substantial differences in instrument characteristics,” and that “while the number of publicly traded equity securities of U.S. issuers is around 3,600, there are over two million unique issuances of corporate and government bonds and asset-backed securities in circulation.” See RMA Letter, at 16.

<sup>785</sup> See RMA Letter, at 16.

<sup>786</sup> FIS converts rebate rates to fees using by subtracting the rebate rate from the Federal funds rate. See *supra* note 731 and the footnote of Table 1.

<sup>787</sup> This result is consistent with the academic literature. See, e.g., Dixon, et al., (2021), *supra* note 746. 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.

TABLE 1—DISTRIBUTION OF LENDING FEES FOR U.S. COMMON STOCKS\*—Continued

	p10	p20	p30	p40	Median	Mean	p60	p70	p80	p90	N
10–Nov–15 .....	0.94	2.82	5.18	8.19	11.72	22.51	16.87	24.59	38.59	68.10	3,638
31–Dec–15 .....	0.75	2.35	4.52	7.31	11.17	22.25	16.49	25.02	40.42	67.64	3,639
<b>Panel B: Distribution of Average Lending Fees</b>											
9–Oct–15 .....	0.48	0.56	0.58	0.6	0.65	3.76	0.76	1.24	2.62	7.07	3,727
10–Nov–15 .....	0.47	0.56	0.59	0.61	0.66	3.77	0.77	1.32	2.76	7.36	3,725
31–Dec–15 .....	0.37	0.46	0.5	0.54	0.58	3.86	0.66	1.12	2.77	7.51	3,725
<b>Panel C: Distribution of Range of Lending Fees</b>											
9–Oct–15 .....	1.01	1.35	1.85	2.27	2.85	8.42	3.57	5.21	7.76	10.41	3,727
10–Nov–15 .....	0.93	1.31	1.81	2.36	2.98	8.39	3.78	5.51	7.73	11.16	3,725
31–Dec–15 .....	1.15	1.48	1.84	2.25	2.68	8.20	3.43	4.20	6.36	11.41	3,725

\* This table provides descriptive statistics using data from FIS on securities lending fees and utilization rates for U.S. Common stocks during sample period that matches the OFR Pilot Survey's sample dates (Oct. 9, 2015, Nov. 10, 2015, and Dec. 31, 2015). 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. Fees are converted to annual percent. N reports the number of observations from which FIS has reported the relevant statistics. Panel A shows the distribution of utilization rates, where the utilization rate is computed as the percent of shares on loan relative to total shares available for lending. Panel B provides estimates of the distribution of average lending fees for each stock and provides percentile thresholds for lending 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 C 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. In all panels 'Mean' is equal-weighted.

One commenter argued that the Proposing Release offered “no evidence to suggest that lending fees broker-dealers charge are so meaningfully different (after controlling for various commercial factors).”<sup>788</sup> As the Commission acknowledged in the Proposing Release and continues to acknowledge here, there are a number of factors that can drive variations in borrowing costs including, *e.g.*, the creditworthiness of the borrower.<sup>789</sup> However, the Commission is unaware of the existence of data that would allow for a full analysis of all possible factors contributing to borrowing costs, and the commenter did not provide any roadmap for performing such an analysis accurately. That the observed range in borrowing costs is likely driven, at least in part, by asymmetric information and a general lack of price efficiency in the securities lending market is supported by academic literature, which finds that asymmetric information drives dispersion in prices, particularly in opaque markets with limited transparency.<sup>790</sup> One

implication of the results from this literature is that price dispersion should be higher when transparency is lower. Indeed, there is evidence that the dispersion in borrowing costs is higher in securities lending markets with less transparency, in which information asymmetry is expected to be higher. For example, the OFR Pilot Survey shows that the range of lending fees is higher in the U.S. equity lending market than it is in the U.S. Treasury/Agency lending market, where transparency is arguably higher.<sup>791</sup>

Furthermore, the Commission views it as unlikely that one of the pricing factors frequently mentioned by commenters, namely the creditworthiness or counterparty risk of the borrower,<sup>792</sup> can fully explain the large range in borrowing costs. Table 1 shows that the median range of fees is about 400 percent larger than the median fee itself—implying that some investors were paying at least four times as much to borrow the same security on

the same day as other investors.<sup>793</sup> Based on staff experience, securities loans are virtually always fully collateralized, and so counterparty risk is unlikely to be sufficient to explain such a large dispersion in borrowing costs.

Other commenters expressed support for the notion that price dispersions in the securities lending market were due to information asymmetries and a lack of informational efficiency.<sup>794</sup> While at least one commenter questioned the need to improve transparency in the corporate bond and U.S. Treasury/Agency lending market due to structural differences between those markets and the equity market,<sup>795</sup> there is evidence that there is a dispersion of borrowing costs within these asset classes as well. Information from the OFR Pilot Survey indicate a large dispersion of lending fees and rebates across all asset classes, including for U.S. Treasury/Agency and corporate bond securities.<sup>796</sup> For the reasons discussed above, the Commission believes that the observed variation in borrowing costs in these

<sup>788</sup> See Citadel Letter, at 10.

<sup>789</sup> See Proposing Release, 86 FR 69833.

<sup>790</sup> See, *e.g.*, Richard C. Green, *Presidential Address: Issuers, Underwriter Syndicates, and Aftermarket Transparency*, 62 J. Fin. 1529 (2007), whose theoretical model shows that, in opaque dealer markets, if the costs of gathering price information are high for some investors, this can result in price dispersion. One key feature of this model is that “the dealings of a particular customer with a dealer are not transparent to other customers,” at 1542. See also Richard C. Green, et al., *Dealer Intermediation and Price Behavior in the Aftermarket for New Bond Issues* (EFA 2006 Zurich Meetings Paper, June 17, 2006) 86 J. Fin. Econ 643, available at <https://ssrn.com/abstract=909352> (retrieved from SSRN Elsevier database), who argue

that differences in investors' access to information about municipal bond prices leads to a high level of price dispersion.

<sup>791</sup> Specifically, using data from Table 8 of the OFR Pilot Survey and defining the range in lending fees as the difference between the 95th percentile and the 5th percentile, the range in lending fees, averaged across the three days in the OFR Pilot Survey sample, is around 303% of the mean lending fee in the equity lending market, and 234% of the mean lending fee in the Treasury lending market. See *supra* Part IX.B.2 for further discussion of why transparency may be higher in the Treasury lending market.

<sup>792</sup> See, *e.g.*, HMA Letter at 2, Overdahl Letter at 6, and ISLA Letter at 2.

<sup>793</sup> The OFR Pilot Survey at Table 8 provides similar statistics and finds similar dispersion for U.S. Equities.

<sup>794</sup> See, *e.g.*, James J. Angel Letter, at 2 (expressing his belief that the increased transparency of the rule would reduce price dispersion in the securities lending market implying that a lack of transparency currently causes some of the currently experienced dispersion in fees).

<sup>795</sup> See RMA Letter, at 16.

<sup>796</sup> See Table 8 and Table 9 in the OFR Pilot Survey which shows, for example that on October 9, 2015, the dispersion between the 5th and 95th percentile fee for treasuries was 200% of the mean fee, for corporate bonds it was 111%, and for equities it was 319%.

markets is likely also at least partially driven by asymmetric information and a general lack of price efficiency in the securities lending market.

#### 4. Structure of the Securities Lending Market

The securities lending market is made up of borrowers, lenders, and intermediaries that can facilitate a transaction. End borrowers can borrow securities either through their broker-dealers, or by themselves if they maintain their own relationships with lending programs. If they borrow through their broker-dealer, then they transact in the Customer market. If they maintain their own relationships and borrow directly from lending programs, then they transact in the Wholesale market.<sup>797</sup> 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. These lenders transact in the Customer market.

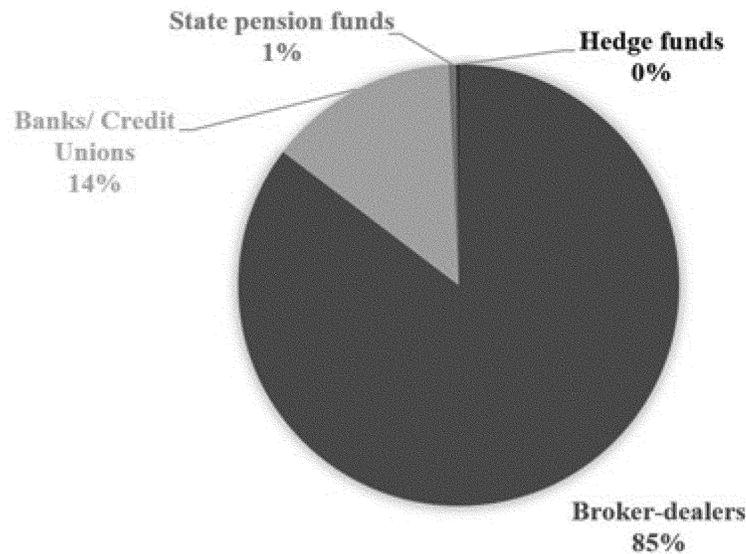
A market participant such as a short seller wishing to borrow shares usually does so through its broker-dealer, who offers to find shares to borrow as part of its suite of services offered to customers. A broker-dealer may start by providing a security loan to its customer with shares from its own inventory or out of another customer's margin account.<sup>798</sup> The Commission understands that in order to facilitate the amount of borrowing customers wish to do, a broker-dealer will sometimes have to find other sources of shares. To that end, broker-dealers maintain securities lending relationships with customers in fully paid accounts as well as relationships with various external 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.<sup>799</sup> The OFR primarily focused on the Wholesale market, and consequently the overwhelming majority of borrowers were broker-dealers; the OFR Pilot Survey does not provide much insight into who the end borrowers are for securities lent by broker-dealers. Figure 1 provides the fraction of total securities on loan by type of borrower based on the OFR Pilot Survey across three trading days in 2015.<sup>800</sup>

**Figure 1 Fraction of shares on loan by borrower type (2015)**



Source: OFR Pilot Survey of Agent Securities Lending Activity

There is currently no common source that those seeking security loans can use 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.<sup>801</sup> 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.

One commenter stated that the level of opacity in the securities lending

market does not lead to high search cost or inhibit the efficiency of the securities lending market, because the level of detail in data provided by data vendors has improved drastically, the number of data vendors in the market has been growing, and the vast majority of parties in securities lending markets have

<sup>797</sup> See *supra* note 708 for further discussion of the distinction between Wholesale and Customer loans.

<sup>798</sup> The notion that broker-dealers will first source shares from internal inventory before accessing lending markets was mentioned in the Proposing

Release (see Proposing Release, 86 FR 69834) and was supported by at least one comment. See, *e.g.*, James J. Angel Letter, at 4 (stating that if "the broker has shares available for lending from its customer margin accounts, it does not need to go out and borrow any more shares.").

<sup>799</sup> See OFR Pilot Survey at Table 1.

<sup>800</sup> These dates are Oct. 9, 2015, Nov. 10, 2015, and Dec. 31, 2015.

<sup>801</sup> See, *e.g.*, Kolasinski (2013), *supra* note 736.

access to one or more sources of data.<sup>802</sup> While these facts are generally associated with declining search costs and increased efficiency, they do not, by themselves, imply low search costs or an efficient market. As discussed above, the Commission continues to believe that the datasets provided by commercial data vendors are characterized by incomplete and potentially biased data.<sup>803</sup> As a result, market participants that want information on whether a given loan price or quote is competitive, or how a given lending agent or broker-dealer is performing relative to a benchmark, may need to consult multiple datasets, if they have access to such data, or request and receive multiple quotes in order to confirm that a given quote is consistent with market conditions. A need to consult multiple sources of information implies high search costs. When the cost of acquiring additional information is high, it may not be economical to acquire the information, resulting in less efficient terms for loans. The Proposing Release also cited academic research characterizing the securities lending market as having high search costs, which was not rebutted by the commenter.<sup>804</sup> Consequently, the Commission continues to believe that, despite the availability of commercial datasets, opacity in the securities lending market contributes to high search costs and inefficiencies in that market.<sup>805</sup>

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 the cost of switching to 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 that would be affected.<sup>806</sup>

Additionally, the relationship nature of the lending market favors larger

broker-dealers who can maintain high-volume relationships with more lending programs. The limited availability of comprehensive data makes it difficult for customers to evaluate the performance of broker-dealers.<sup>807</sup> Customers as well as lenders thus rely on relationships and reputation, a situation that also tends to favor larger broker-dealers.

The primary sources of shares to loan in the Wholesale market 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 agent or by running their own lending program. Broker-dealers borrow shares from lending programs in order to facilitate clearing and settlement on a net-basis, though they may additionally source shares for this purpose from their own inventory, from fully paid shares, and from customer margin accounts.<sup>808</sup>

As described above, a beneficial owner seeking to lend shares will generally provide those shares to a lending agent, who 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. Pooled lending programs generally split the fees generated from lending with the beneficial owners. Based on the staff's experience, the Commission 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.

Over the past two decades, auction-based security lending has become an alternative for lender-borrower interactions. In this setting, unlike with 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.<sup>809</sup>

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 broker-dealers. Thus, the Commission 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.<sup>810</sup> Figure 2 provides a breakout of the percent of shares available for lending provided by the various entities.

<sup>802</sup> See IHS Markit Letter, at 13.

<sup>803</sup> See *supra* Part IX.B.2 for further discussion of issues related to the current availability and comprehensiveness of securities lending data.

<sup>804</sup> See Kolasinski (2013), *supra* note 736, cited in the Proposing Release with regard to search costs. See Proposing Release, 86 FR 69805, 69831, and 69832.

<sup>805</sup> See discussion on this point in *supra* Parts IX.B.2 and IX.B.3.

<sup>806</sup> 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.

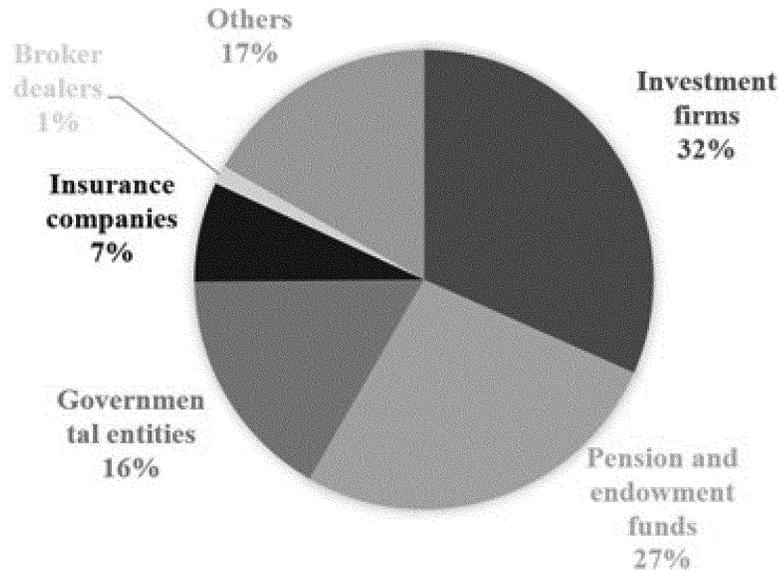
<sup>807</sup> See *supra* Part IX.B.2 for further discussion of issues related to the current availability and comprehensiveness of securities lending data.

<sup>808</sup> See *supra* note 798 and corresponding text for further discussion of broker-dealers' sources of shares for securities loans.

<sup>809</sup> Based on a review of N-CEN reports, the Commission estimates that 226 (out of 684) lenders do not employ a lending agent. See *infra* Part X.

Most of these lenders are likely to operate their own lending programs.

<sup>810</sup> Commercial vendors typically report a value for securities available to loan that is larger than what is reported in the OFR Pilot Survey. 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 U.S. See also *supra* note 778 for a discussion of issues related to estimating the number of shares available for lending.

**Figure 2: Sources of lendable shares (2015)**

Source: OFR Pilot Survey of Agent Securities Lending Activity

#### 5. Structure of the 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.<sup>811</sup> This market consists of a few established vendors that specialize in geographic areas (*i.e.*, U.S. and non-U.S.) 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. The Commission understands that the current practice by commercial data vendors is to provide preliminary statistics on the same day based on the intraday data collected by the vendors, while the main data are disseminated one day later.

The Commission believes that the data provided by the various data vendors operating in the give-to-get Wholesale data market are largely comparable.<sup>812</sup> 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.<sup>813</sup> 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.<sup>814</sup>

The give-to-get model for securities lending data is a significant barrier to entry to any firm seeking to provide analytics services regarding Wholesale loans. 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 in the Wholesale space is largely concentrated among the three biggest data vendors.

One commenter stated that the give-to-get model is "is not the industry standard" in the securities lending data market and pointed out that there are some commercial securities lending datasets that are available to all subscribers.<sup>815</sup> The Commission

commercial data vendors and find very high correlations between the values presented in the different datasets.

<sup>813</sup> See *supra* Part IX.B.2 for further discussions of data providers' incentives when providing data to data vendors under a give-to-get model.

<sup>814</sup> See *supra* Part IX.B.2 for further discussion of the current limits to transparency in the securities lending market.

<sup>815</sup> See S3 Partners Letter, at 5.

understands that the collection of these data largely relies on surveying Customer market participants about their borrowing experiences. Data vendors then aggregate and sell these data, or derivative products that combine the survey data with other data sources to provide derived metrics in areas such as short selling. For example, the Commission staff understands that, based on interactions with vendors of such data, that the customer market survey data are used largely as an input to proprietary algorithms that combine information from multiple data sources—such as FINRA's bimonthly short interest—to produce a short selling metric that is then used by consumers.<sup>816</sup> Building relationships with a large number of Customer market participants is a significant barrier to entry and thus the Commission understands that data provision and analytics regarding customer market survey data is concentrated among the top two biggest data vendors.

#### 6. Short Selling Transparency

Multiple commenters stated that granular securities lending data generally provide information about investors' short selling positions and strategies.<sup>817</sup> This section provides

<sup>816</sup> See *infra* Part IX.B.6 for further discussion of FINRA's bimonthly short interest data.

<sup>817</sup> See, *e.g.*, Overdahl Letter, at 4, 9; Citadel Letter, at 5–6. One commenter stated their belief that the rule would not provide further transparency into the short interest market because "not all securities loan trades facilitate a short sale, and that the securities lending market is not a mirror of the short interest market"; See IHS Market Letter, at 3. See *supra* Part IX.B.1 for a discussion

<sup>811</sup> See the business model descriptions in IHS Markit's 2021 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](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).

<sup>812</sup> See Truong X. Duong, et al., *The Information Value of Stock Lending Fees: Are Lenders Price Takers?*, 21 Rev. Fin. 2353, 2353–2377 (2017) ("Duong, et al., (2017)"), who provide a comparative analysis of the datasets of two of the main

information about existing sources of short selling data to facilitate an analysis of the impact of the Rule on short selling transparency.

#### Securities Lending Data

Because of the need to borrow securities to facilitate a short sale, securities lending data can be used to gain insight into short interest and short sentiment, and market participants use both give-to-get Wholesale data and customer market survey data on Customer loans to gain insights into short selling. For example, some academics have used securities lending data to study short selling in published research.<sup>818</sup> Additionally, while access to Wholesale market data is generally limited,<sup>819</sup> the Commission understands that some third-party data providers combine Wholesale market data with other sources of short selling data, such as bimonthly short interest data, to provide retail clients with estimated short selling metrics. The Commission also understands that commercial data vendors use securities lending data as an input to proprietary algorithms that combine information from multiple data sources—such as biweekly short interest—to produce a short selling metric that is then used by consumers.

Data on Wholesale securities loans provide only a noisy approximation of short interest at the security level. This is because Wholesale loans are made largely to facilitate clearing and settlement on a net basis at a clearing broker, rather than by transaction or position. Thus, Wholesale loans are not traceable to individual short sellers. Further, the Commission understands that broker-dealers will usually source shares to meet their net clearing and settlement requirements from other sources before engaging in Wholesale loans.<sup>820</sup>

of the potential reasons for borrowing and lending securities apart from to facilitate a short trade.

<sup>818</sup> See, e.g., Steven Lecce, et al., *The Impact of Naked Short Selling on the Securities Lending and Equity Market* (Macquarie Business School Research Paper, Feb. 1, 2012) at 83, available at <https://ssrn.com/abstract=3591994> (retrieved from SSRN Elsevier database) stating that “securities lending is a commonly used proxy for the level of covered short selling”; see also, e.g., Gene D’Avolio, *The Market for Borrowing Stock*, 66 J. Fin. Econ. 271 (2002).

<sup>819</sup> See *supra* Part IX.B.2 for further discussion of the give-to-get model.

<sup>820</sup> These sources include, e.g., their own inventory, customer margin accounts, and fully paid accounts at the broker-dealer with lending agreements in place. See *supra* note 798 and corresponding text for further discussion. Also, the fact that give-to-get Wholesale market data are not comprehensive (see *supra* Part IX.B.2 for further discussion), means that there is additional noise with regards to using Wholesale market data to estimate short sale information.

The Commission believes that information about Customer loans is more likely to be informative about short selling activity than information about Wholesale loans.<sup>821</sup> This is because, unlike Wholesale loans, Customer loans are used to facilitate individual short positions. The size of a Customer loan when first created is the same as the size of a short position as of the end of the day on which the short position was created. Should the customer increase or decrease the size of their short position, the Commission understands that the original loan would be modified accordingly. Thus, individual Customer loans can be tracked to reveal the size and changes in individual short positions. However, existing Customer market datasets, like Wholesale market datasets, lack comprehensiveness.<sup>822</sup>

Most commercially available datasets are currently produced with a one-day lag. As a result of the difference in settlement cycles between the equity and securities lending market, there is therefore typically a three-day lag between the availability of the securities lending data and the change in short interest that corresponds to the securities loans.<sup>823</sup>

#### Bimonthly Short Interest Data From FINRA

One of the primary data sources for information about aggregate short positions is the bimonthly short interest data collected by FINRA.<sup>824</sup> FINRA collects aggregate short interest information in individual securities on a bimonthly basis as the total number of shares sold short in a given stock as of

<sup>821</sup> This is also supported by one commenter, who states that, “there is a perfect correlation between a short sale and the associated Short Sale Linked Activity, which facilitates the customer fulfilling the delivery obligations arising from the short sale.” See Citadel Letter, at 5. The commenter states that by “Short Sale Linked Activity,” they are referring to what the Proposing Release calls the “retail market.” See Citadel Letter, at 1. This is equivalent to what is referred to as the Customer market in this release.

<sup>822</sup> See *supra* Part IX.B.2 for further discussion of why the Commission believes that Customer market survey datasets are not comprehensive.

<sup>823</sup> See *supra* note 738 and corresponding text. This lag will decrease to two days when equity settlement moves to T+1 on May 28, 2024.

<sup>824</sup> See, e.g., Division of Economic and Risk Analysis, *Short Sale Position and Transaction Reporting* 6–7, (June 5, 2014), at 17–18, available at <https://www.sec.gov/files/short-sale-position-and-transaction-reporting0.pdf>. This is a study of the Staff of the U.S. Securities and Exchange Commission, which represents the views of Commission staff, and is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of this study and, like all staff statements, it has no legal force or effect, does not alter or amend applicable law, and creates no new or additional obligations for any person.

the middle and end of each month.<sup>825</sup> In the case of U.S. exchange-listed stocks, FINRA shares the data with the listing exchange.<sup>826</sup> FINRA then publishes short interest data for all exchange-listed and OTC equity securities on its Equity Short Interest Data page free for the investing public.<sup>827</sup> Specifically, aggregate positions in each security are provided for publication on the seventh business day after the reporting settlement date.<sup>828</sup>

FINRA computes short interest using information it receives from its broker-dealer members pursuant to FINRA Rule 4560 reflecting all trades cleared through clearing broker-dealers.<sup>829</sup> FINRA Rule 4560 generally requires that broker-dealers that are FINRA members report “short positions” in customer and proprietary firm accounts in all equity securities twice a month through FINRA’s web-based Regulation Filing Applications (RFA) system.<sup>830</sup> FINRA defines “short positions” for this purpose simply as those resulting from “short sales” as defined in Rule 200(a) of Regulation SHO under the Exchange Act.<sup>831</sup> Member firms must report their short positions to FINRA regardless of position size.<sup>832</sup>

These short interest data are widely available and are used by academics and other market participants. These short interest data are found to predict future stock and market returns over the

<sup>825</sup> Specifically, the mid-month short interest report is based on short positions held on the settlement date of the 15th of each month or, if the 15th falls on a weekend or holiday, the previous business day. The end-of-month short interest report is based on short positions held on the last business day of the month on which transactions settle. See FINRA, *Equity Short Interest Data Catalog*, available at <https://www.finra.org/finra-data/browse-catalog/equity-short-interest>, last visited Aug. 23, 2023.

<sup>826</sup> See FINRA, *Short Interest—What It Is, What It Is Not* (Jan. 25, 2023), available at <http://www.finra.org/investors/insights/short-interest>.

<sup>827</sup> See *id.* See also FINRA, *Equity Short Interest Data*, available at <https://www.finra.org/finra-data/browse-catalog/equity-short-interest/data>, last visited Aug. 24, 2023.

<sup>828</sup> See FINRA *Equity Short Interest Data Catalog*, *supra* note 825. See also FINRA, *Short Interest Reporting*, available at <https://www.finra.org/filing-reporting/regulatory-filing-systems/short-interest>.

<sup>829</sup> *Id.* (Short interest for a listed security on any date reported by FINRA is “a snapshot of the total open short positions in a security existing on the books and records of brokerage firms on a given date.”)

<sup>830</sup> FINRA Rule 4560 excludes short sales in “restricted equity securities,” as defined in Rule 144, from the reporting requirement.

<sup>831</sup> See FINRA Rule 4560(b)(1). See *supra* note 301 for the definition of a short sale.

<sup>832</sup> See FINRA, *Short Interest Reporting Instructions* (reporting instructions to FINRA member firms), available at <https://www.finra.org/filing-reporting/short-interest/regulation-filing-applications-instructions>, last visited Aug. 23, 2023.

monthly and annual horizons, suggesting that the bimonthly short interest data capture short selling strategies based on fundamental research.<sup>833</sup> However, the transparency offered by these data is limited in at least two ways. First, the information content is delayed by at least seven business days, and also does not provide insight into the timing with which short positions are established or covered within the two-week reporting period. This precludes the possibility of understanding the behavior of aggregate short selling in the two weeks leading up to the reporting date of the positions. Second, given that the data are aggregated at the security level, they prevent the public from understanding certain aspects of the underlying proprietary short selling strategies. For example, the data can't inform on whether short positions are distributed across a large or small number of market participants.

#### Short Selling Volume and Transaction Data From SROs

This section discusses data that exist on daily and intraday short volume data, which provide different information relative to the bimonthly short interest data discussed above.<sup>834</sup> The bimonthly short interest data provides an aggregate measure of outstanding short interest whereas the data discussed in this section provides information about the flow of short sales in the market. It is less useful in determining total short interest outstanding because it is not accompanied by data regarding when short sales are covered but allows market participants to observe the actual trades of short sellers.

Since 2009, many SROs have been publishing two short selling datasets, including same-day publication of daily aggregated short sale volume in individual securities<sup>835</sup> and publication

<sup>833</sup> See, e.g., Peter N. Dixon & Eric K. Kelley, *Business Cycle Variation in Short Selling Strategies: Picking During Expansions and Timing During Recessions*, 57 J. Fin. Quantitative Analysis 3018 (2022); see also Ekkehart Boehmer, et al., *The Good News in Short Interest*, 96 J. Fin. Econ., 80–97 (2010); Stephen Figlewski, *The Informational Effects of Restrictions on Short Sales: Some Empirical Evidence*, 16 J. Fin. Quantitative Analysis 463 (1981).

<sup>834</sup> See *supra* Part IX.B.6 for more information about FINRA's bimonthly short interest data.

<sup>835</sup> See Division of Economic Research and Analysis, Securities and Exchange Commission (DERA), *Short Sale Volume and Transaction Data* (June 5, 2014), available at <https://www.sec.gov/answers/shortsalevolume.htm>; (showing hyperlinks to the websites where SROs publish these data). See also FINRA, *Daily Short Sale Volume Files*, available at <https://www.finra.org/finra-data/browse-catalog/short-sale-volume-data/daily-short-sale-volume-files> (providing aggregated volume by

of short sale transaction information with a delay of up to two months.<sup>836</sup> Some SROs make the historical daily short volume data available to market participants at a fee.<sup>837</sup>

Despite offering higher granularity, there is a concern that the SRO short volume data may over-represent the total volume of short sales occurring in the market. This is because Regulation SHO provides specific criteria regarding what is a long sale.<sup>838</sup> If a market participant is unclear whether their trade would meet all the requirements at settlement to be marked a long sale, then they may choose to mark the trade as short to not run afoul of Regulation SHO requirements, even if the trade is likely economically equivalent to a long sale.<sup>839</sup> For instance, the market

security on all short sale trades executed and reported to a FINRA reporting facility during normal market hours) and FINRA, *Information Notice: Publication of Daily and Monthly Short Sale Reports* (Sept. 29, 2009), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120044.pdf>.

<sup>836</sup> See FINRA, *Monthly Short Sale Transaction Files*, available at <https://www.finra.org/finra-data/browse-catalog/short-sale-volume-data/monthly-short-sale-volume-files> (providing detailed trade activity of all short sale trades reported to a consolidated tape), last visited Aug. 24, 2023. See also Investor.gov, *Short Sale Volume and Transaction Data*, available at <https://www.sec.gov/answers/shortsalevolume.htm>. Additional transaction data have been available at various times, including transaction data from the Regulation SHO Pilot, which have been discontinued by most exchanges in July 2007 when the uptick rule was removed. See Release No. 34-55970 (June 28, 2007), 72 FR 36348 (July 3, 2007), available at <https://www.sec.gov/rules/final/2007/34-55970.pdf>. The Pilot data comprised short selling records available from each of nine markets: American Stock Exchange, Archipelago Exchange, Boston Stock Exchange, Chicago Stock Exchange, NASD, Nasdaq Stock Market, New York Stock Exchange, National Stock Exchange, and the Philadelphia Stock Exchange. See SEC Division of Trading and Markets, *Regulation SHO Pilot Data FAQ*, available at <https://www.sec.gov/spotlight/shopilot.htm#pilotfaq>.

<sup>837</sup> See, e.g., NYSE.com, *TAQ Group Short Sale & Short Volume*, available at <https://www.nyse.com/market-data/historical/taq-nyse-group-short-sales> (for short sale data relating to all NYSE owned exchanges). See *Nasdaqtrader.com*, *Short Sale Volume and Transaction Reports*, available at <https://nasdaqtrader.com/Trader.aspx?id=shortsale> (for short sale data for Nasdaq exchanges); See also Chicago Board Options Exchange (*Cboe.com*), *U.S. Equity Short Volume and Trades* (for Cboe exchanges), available at <https://datashop.cboe.com/us-equity-short-volume-and-trades>.

<sup>838</sup> Rule 200(g) of Regulation SHO specifies when an order can be marked as long. See also Section III.B (adopting release of Regulation SHO), available at <https://www.sec.gov/rules/final/34-50103.htm#VI>.

<sup>839</sup> See *Proposed rule: Short Position and Short Activity Reporting by Institutional Investment Managers*, Release No. 34-94313 (Feb. 25, 2022) 87 FR 14950, 14989 (Mar. 16, 2022) at note 230 (citing 2009 Letter from SIFMA commenting on an alternative short sale price test, and expressing concern that compliance with Regulation SHO short selling marking requirements “will result in a substantial over-marking of orders as “short” in

participant may be deemed to own the security but does not reasonably believe they can deliver the security in time for settlement, and thereby must mark the order as short regardless of their ownership of the security. Aggregate short selling volume data and short selling transactions data typically have different lags with which they are available, though aggregate short selling volume data can be disseminated as early as the same day of the short sale.<sup>840</sup>

#### B. Economic Effects of the Final Rule

##### 1. Benefits of Increased Transparency in the Securities Lending Market

The Commission believes that the primary impact of final Rule 10c–1a will be to increase transparency in the securities lending market through improvements to the comprehensiveness, breadth, accuracy,<sup>841</sup> and accessibility of securities lending data. These impacts will reduce information asymmetries in the securities lending market and improve informational efficiency leading to a more efficient securities lending market.<sup>842</sup>

Final Rule 10c–1a will reduce information asymmetries and improve informational efficiency in three ways. First, the data provided by final Rule 10c–1a will be more comprehensive than the data currently offered by commercial data vendors because it will not rely on voluntary data submissions but will result from mandated disclosure from both the Wholesale and Customer segments of the market.<sup>843</sup> Second, Rule 10c–1a data will improve

situations where firms are, in fact, “long” the securities being sold”).

<sup>840</sup> For example, FINRA posts daily aggregate short volume data for each security no later than 6:00 p.m. ET of the same day on the relevant trade date; see FINRA, *Daily Short Sale Volume Files*, *supra* note 835. Meanwhile, FINRA posts files including the transaction time, price, and number of shares for every off-exchange short sale transaction in an exchange-listed stock only on a monthly basis; see FINRA, *Monthly Short Sale Volume Files*, *supra* note 836. See also FINRA, *Information Notice 5/10/19: Understanding Short Sale Volume Data on FINRA's website* (May 10, 2019), available at <https://www.finra.org/rules-guidance/notices/information-notice-051019>.

<sup>841</sup> Accuracy in this sense refers to less potential bias in the loans reported and thus in the statistics obtained from the loans reported. See *supra* Part IX.B.2 for a discussion of bias in existing securities lending datasets and how this can lead to inaccurate inference.

<sup>842</sup> The Commission expects that the benefits of final Rule 10c–1a will be similar for all reportable securities lending markets that have a similar need for additional market transparency. It is possible that some markets may be more transparent than others. See *infra* note 958 for further discussion.

<sup>843</sup> See *supra* Part IX.B.2 for further discussion of selection issues in commercial securities lending databases based on voluntary data submissions.

informational efficiency by including certain data fields that are not currently offered by commercial data vendors, contributing to the breadth of available securities lending data. In addition, Rule 10c-1a data will contain detailed security loan modification information. Third, the final rule will expand the accessibility of the data by allowing all market participants to access Rule 10c-1a data, possibly subject to a fee.<sup>844</sup>

The increased transparency from final Rule 10c-1a will result in several notable economic benefits. First, the final rule will reduce information asymmetries, which will benefit investors by reducing borrowing costs, increasing price efficiency, and increasing competition between broker-dealers and lending programs.<sup>845</sup> Second, by reducing the borrowing costs for some securities, the final rule will lower the cost of short selling these securities and improve market efficiency. Third, improvements in the information available to various market participants will lead to a variety of benefits for these participants, including increased profits and reduced costs of business due to easier access to information and more informed decisions.

#### Reduction in Information Asymmetry

The Commission believes that the transparency created by final Rule 10c-1a will reduce information asymmetries between more centrally connected securities lending market participants and those on the periphery. Specifically, it will reduce the information asymmetries between broker-dealers and end borrowers, and between beneficial owners and lending programs. This will result in increased competition between dealers and between lending programs, ultimately leading to better loan terms for some securities.<sup>846</sup>

The Commission believes that the transparency created by the final rule will benefit end borrowers by reducing the information disadvantage they have with their broker-dealers when borrowing shares. Most security loans

obtained by end borrowers are facilitated through broker-dealers.<sup>847</sup> Rule 10c-1a data will allow end borrowers to determine the extent to which their broker-dealers are obtaining terms that are better, worse, or consistent with current market conditions for loans with similar characteristics. It will facilitate this comparison by providing comprehensive transaction-by-transaction information about the cost to borrow and other loan characteristics that are currently mostly unavailable to end borrowers.<sup>848</sup> For example, end borrowers will be able to compare the lending terms provided by their broker-dealers to the terms of similar loans, such as loans with the same collateral and borrower types. End borrowers will also be able to compare loans of similar sizes, though with a delay of 20 business days. The Commission believes that, despite the delay in dissemination, loan size information will still be useful for end borrowers, who can use this information to compare the prices of their loans to other loans with similar terms (e.g., size, collateral type, loan type, etc.), that were effected approximately one month prior. Additionally, to the extent that an RNSA publicly disseminates daily volume-weighted cost-to-borrow statistics as part of its requirement to disseminate daily aggregate information, these statistics will provide end borrowers with access to information about loan prices that incorporates information about loan size information even prior to the public dissemination of loan sizes.<sup>849</sup>

Similarly, the Commission believes that the final rule will benefit beneficial owners by reducing their information

<sup>847</sup> See *supra* Part IX.B.4 for further information about the market for borrowing services.

<sup>848</sup> See *supra* Part IX.B.2 discussing the lack of comprehensiveness of both Customer market data collected through Customer market surveys and Wholesale market data collected using a give-to-get model, the latter of which is also often unavailable to end borrowers due to usage restrictions.

<sup>849</sup> See final Rule 10c-1a(g)(5), requiring an RNSA to disseminate aggregated daily information. In general, the ability of market participants to use the aggregate information provided by an RNSA to compare loan rates across similar loans may depend on the specific form of loan rate information that an RNSA chooses to publish. For example, if an RNSA chooses to publish cost to borrow statistics that are very granular (e.g., it provides separate statistics for Customer and Wholesale loans and/or according to other loan characteristics), then end borrowers would be able to benchmark their transactions to these statistics with increased accuracy. To the extent that an RNSA chooses to publish less granular statistics, then the end borrower could still benchmark relative to the cost to borrow statistics provided by an RNSA, but the benchmark would be noisier. See also *infra* Part IX.C.1 for further discussion of the Commission's uncertainty related to an RNSA's discretion.

disadvantage with respect to their lending programs. By allowing beneficial owners to more easily benchmark their lending programs through access to data on loan prices and other characteristics of recently transacted security loans, as well as the statistics provided by an RNSA on the next business day, the final rule will provide beneficial owners 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. The ability to view the cost to borrow in both the Customer markets and Wholesale markets will also provide beneficial owners with additional information that they can use to benchmark the performance of their lending programs.<sup>850</sup>

Financial institutions such as banks and broker-dealers use the securities lending market in order to manage collateral needed for other transactions.<sup>851</sup> These entities can face the same asymmetric information concerns as do end borrowers and beneficial owners, and thus an increase in market transparency may lead financial institutions to receive better loan terms, and thus improve their ability to manage collateral. Banks also borrow securities to manage their balance sheets,<sup>852</sup> and the Commission believes that this too will become easier as a result of the final Rule 10c-1a due to a more competitive lending market, leading to the benefit of improved balance sheet management by banks.

At the same time, as access to securities lending data increases, competition for securities lending analytics may increase as well.<sup>853</sup> Increased competition for and availability of securities lending analytics would further reduce information asymmetries by reducing the cost of and increasing access to securities lending analytics for both end borrowers and beneficial owners.

If an end borrower or beneficial owner believes that a particular broker-dealer or lending agent is consistently underperforming, the final rule will provide that market participant with the

<sup>850</sup> See, e.g., *supra* note 767 and corresponding text describing how a market participant engaged in Wholesale lending stated in an interview that they feel unable to benchmark the performance of their lending programs using commercial data because they have very little insight into the Customer market.

<sup>851</sup> See *supra* Part IX.B.1 for further discussion of financial institutions' use of securities loans for collateral and balance sheet management.

<sup>852</sup> See *id.*

<sup>853</sup> See *infra* Part IX.D.2 for a discussion of the expected impact of the final rule on competition for securities lending data analytics services.

<sup>844</sup> See *infra* Part IX.C.3 for a discussion of the fees that an RNSA could charge to data consumers. See also *supra* Part VII.K.3 for further discussion of final Rule 10c-1a(i), which allows an RNSA to "establish and collect reasonable fees, pursuant to rules that are promulgated pursuant to section 19(b) and Rule 19b-4 of the Exchange Act."

<sup>845</sup> Consequently, some market participants may see returns decrease due to more competitive fee pricing, which may lower securities lending revenues for some lenders. See *infra* Part IX.C.4 for further discussion.

<sup>846</sup> A reduction in the cost to borrow may result in lower securities lending revenues for some lenders. See *infra* Part IX.C.4 for further discussion.

tools to identify such underperformance and address it with their broker-dealer or lending agent, or to find a new broker-dealer or lending agent.<sup>854</sup> For example, a beneficial owner or end borrower could use the transaction-by-transaction Rule 10c-1a data to create a bespoke benchmark of recently transacted loans that are similar to a loan they wish to effect, and compare this benchmark to the terms offered by their lending agent or broker dealer for that loan. A beneficial owner or end borrower could also use the daily information disseminated by an RNSA about the distribution of loan prices to assess how the terms offered by their broker-dealer or lending agent compare more generally to the distribution of recently transacted loans in the same security. An increased ability to compare loan performance will increase competition between broker-dealers and between lending agents, which will ultimately improve lending terms for both end borrowers and beneficial owners.<sup>855</sup>

The Commission expects improved terms to be concentrated among securities that are “on special” and have higher borrowing costs. This is because general collateral securities lending is a low margin business and lending supply for these securities far outstrips lending demand.<sup>856</sup> Combined, these two factors mean that there is likely not much room for fees to improve for general collateral securities.<sup>857</sup> As securities become on special (*i.e.*, harder to borrow), lending rates and utilization rates increase. Higher utilization rates mean that there are fewer shares available to borrow and lend. In this environment, high search

costs and asymmetric information are significant contributors to both the level and dispersion of fees, and reducing asymmetric information has a better chance of leading to better terms.<sup>858</sup> Beneficial owners that currently lend shares of hard-to-borrow securities for rates that are consistently below the market average could receive higher lending rates for these securities as their lending agents both have better access to information and become more accountable for their performance due to beneficial owners also having access to the same information. Similarly, end borrowers whose borrowing costs are currently higher than the market average for hard-to-borrow securities may see their borrowing costs decrease as both their broker-dealers’ information access and their ability to monitor to their broker-dealers improve. These two effects suggest that the dispersion of borrowing costs for hard-to-borrow securities will diminish.

That transparency can result in improved market quality is consistent with the experience in other markets. The implementation of TRACE improved transparency in the corporate bond market, and research has shown that TRACE lowered the average cost of transacting and increased competition between dealers in this market.<sup>859</sup> Additionally, recent research from Brazil has shown that improving securities lending transparency led to lower fees, increased liquidity, and

<sup>858</sup> See, e.g., Kolasinski (2013) (finding that when demand for lendable shares outstrips supply, lending fees increase and the dispersion of lending fees is high, particularly when search costs are high).

<sup>859</sup> See, e.g., Amy K. Edwards, et al., *Corporate Bond Market Transaction Costs and Transparency*, 62 J. Fin. 1421, 1421–1451 (2007); Michael Goldstein, et al., *Transparency and Liquidity: A Controlled Experiment on Corporate Bonds*, 20 Rev. Fin. Stud. 235 (2007); Hendrik Bessembinder, et al., *Market Transparency, Liquidity Externalities, and Institutional Trading Costs in Corporate Bonds*, 82 J. Fin. Econ. 251 (2006); and Hendrik Bessembinder & William Maxwell, *Markets: Transparency and the Corporate Bond Market*, 22 J. Econ. Perspectives 217(2008) (“Bessembinder & Maxwell (2008)”). In addition to these papers, the Proposing Release also cited a paper showing a lower dispersion of transaction costs in the corporate bond market following the introduction of TRACE; see Proposing Release, 86 FR 69837 note 222 and corresponding text. Since the Proposing Release the Commission has become aware that this result has been removed from a more recent version of the paper after results suggested “that reduced price dispersion is more likely attributable to market changes other than transparency”; see Michael A. Goldstein, et al., *Dealer Behavior and the Trading of Newly Issued Corporate Bonds*, (June 21, 2021), at 19 n.21, available at <https://ssrn.com/abstract=1022356> (retrieved from SSRN Elsevier database). Nonetheless, the general result that information asymmetries can lead to price dispersion in fixed-income and dealer markets has been well-documented in other literature; see, e.g., the papers cited in *supra* note 790.

increased price efficiency in that country.<sup>860</sup> In both cases, researchers have identified reduced information asymmetry as a key mechanism leading to improved market outcomes.<sup>861</sup>

While some commenters supported the applicability of evidence from TRACE,<sup>862</sup> other commenters questioned the applicability of evidence from TRACE<sup>863</sup> and from the Brazilian policy change.<sup>864</sup> Specifically, commenters argued that, because bond transactions are irrevocable and fungible, the identity and characteristics of the counterparty are less relevant to prices in bond transactions than in securities loans, and thus the Commission’s reliance on TRACE studies to draw inferences about the securities lending market is misplaced.<sup>865</sup> At least one commenter disputed the Commission’s use of the Brazilian policy change to draw inferences about the potential benefits of proposed Rule 10c-1 because the Brazilian policy “did not involve the trade-by-trade disclosure of stock lending terms” and is thus not comparable to the Rule.<sup>866</sup> The Commission continues to believe that both events provide meaningful information about the potential impacts of the final Rule 10c-1, as evidence from both events illustrates how a reduction in asymmetric information between market participants has the effect of improving market quality.

First, the introduction of TRACE, which introduced transaction-by-transaction transparency into a market that previously did not have such transparency, represents a policy change that is markedly similar to that under the final Rule 10c-1a. The Commission acknowledges that the market setting for TRACE is different from that of final Rule 10c-1a, for example, because of the

<sup>860</sup> See Fábio Cereda, et al., *Price Transparency in OTC Equity Lending Markets: Evidence from a Loan Fee Benchmark*, 143 J. Fin. Econ. 569, 569–592 (2022) (“Cereda (2022)”).

<sup>861</sup> See, e.g., Bessembinder & Maxwell (2008), at 226, stating that the results from the academic literature on the introduction of TRACE shows that it “reduced dealers’ information advantage relative to customers,” and that, “with transaction reporting, customers are able to assess the competitiveness of their own trade price by comparing it to recent and subsequent transactions in the same and similar issues.” See also Cereda (2022), at 587, stating that their results are consistent with the idea that “[g]ood benchmarks mitigate search frictions by lowering the informational asymmetry among market participants.”

<sup>862</sup> See James J. Angel Letter, at 2.

<sup>863</sup> See, e.g., Overdahl Letter, at 6; Citadel Letter, at 8. At least one commenter stated that the evidence from TRACE was applicable.

<sup>864</sup> See Overdahl Letter, at 5–7.

<sup>865</sup> See Overdahl Letter, at 6.

<sup>866</sup> See Overdahl Letter, at 7.

<sup>854</sup> One commenter questioned the usefulness of transaction-by-transaction reporting and asserted that the Proposing Release did not explain how an investor would make use of these data (see Citadel Letter, at 9). This part, along with Part VI.C.1.a in the Proposing Release, discuss the ways in which investors could use the data. The Commission acknowledges that not every factor affecting prices, such as counterparty risk, is accounted for in the data provided by the final rule. See *infra* in this part for further discussion. Furthermore, the ability of end borrowers to switch broker-dealers may be limited by switching costs; see *infra* in this part for further discussion on switching costs. At least one commenter expressed concern that the proposed rule may result in increased costs when switching lending agents. See CSFME Letter 1, at 5. See *infra* Part IX.C.4 for further discussion.

<sup>855</sup> See *infra* Part IX.D.2 for a discussion of the expected impact of the final rule on competition between broker-dealers and between lending programs.

<sup>856</sup> See, e.g., State Street Letter, at 5; See also RMA Letter, at 5, 8 (discussing low margins in securities lending more generally); See also *infra* Part IX.C.4 for additional discussion.

<sup>857</sup> See Panel A of Table 1 in *supra* Part IX.B.3, showing that for most stocks the lending supply significantly outstrips demand with median utilization rates of approximately 12%.

importance of counterparty risk in securities loans prices as compared to prices of corporate bonds.<sup>867</sup> However, the fact that corporate bond prices are less sensitive to the identities of the counterparties than securities loans does not invalidate using TRACE to illustrate the effect of decreasing information asymmetry. Instead, it simply implies that the baseline dispersion in corporate bond prices prior to TRACE was likely less than it currently is in the securities lending market.<sup>868</sup>

Second, while the Brazilian study takes place in a similar market setting as Rule 10c–1a (*i.e.*, the securities lending market) it is true that the policy details differ. In particular, the Brazilian policy change involved an increase in transparency not through the creation of a transaction-by-transaction report, but through an increase in the informativeness of an available loan fee “benchmark.”<sup>869</sup> However, despite the differences in details, the policy had a similar target to that of Rule 10c–1a: namely, an improvement in the transparency of the securities lending market.<sup>870</sup> The Brazilian study shows that this increase in transparency

improved market quality through the economic channel of reduced information asymmetry. This study is thus directly relevant for final Rule 10c–1a, as the Commission expects that many of the economic effects of the rule will be realized through the same economic channel (*i.e.*, a reduction in information asymmetry).

Additionally, in support of their concern over the applicability of TRACE research, one commenter stated that, “while there is no reason for the supply of corporate bonds to decrease in response to increased trade transparency, greater transparency in the securities lending market may well reduce the lending supply.”<sup>871</sup> This commenter cited industry research showing that increased short selling transparency can decrease beneficial owners’ willingness to lend shares,<sup>872</sup> as well as academic research calling into question the applicability of TRACE to securities lending “since greater loan fee transparency could reduce the lending supply.”<sup>873</sup>

The Commission believes that the industry study cited by the commenter has empirical limitations that make it difficult to extract robust empirical conclusions from the study. These limitations are acknowledged by the author of the study; specifically, the author states that, during the sample period, which occurs during the height of the 2008 financial crisis, “equity markets were in a relatively disordered state,” and that “such extreme change in markets has the consequence of making it complicated to establish a control group of stocks such that all variables, except regulatory variables, remain constant. This, in effect, makes it difficult to attribute causality solely to the regulatory variables.”<sup>874</sup> The Commission agrees that the extreme market volatility during 2008–2009 increases the likelihood that the decrease in beneficial owners’ appetite to lend out shares documented by the author may have been driven by other market events concurrent to but distinct from changes to regulatory regime for

short selling and, as a result, “causality is still difficult to prove.”<sup>875</sup>

The Brazilian study, also cited by the commenters, occurred during a less volatile period rendering potentially cleaner empirical results. The authors of that study indeed suggest that the loan supply could decrease “if the lower loan fees received by lenders were not sufficient to cover the potential losses from not selling a stock when shorting activity increases.”<sup>876</sup> However, later in that same paragraph, the authors reject this hypothesis and conclude that their results were not consistent with increased transparency affecting liquidity in the lending market.<sup>877</sup>

#### Improved Market Quality Due to Lower Short Selling Costs

The Commission expects that final Rule 10c–1a will produce countervailing effects through its impact on short selling, but ultimately that the net result will be positive. On one hand, the final rule will benefit short sellers by lower borrowing costs for securities that are hard to borrow, which will improve market quality through increased price efficiency, managerial oversight, and liquidity.<sup>878</sup> On the other hand, the final rule could potentially harm market quality by making it easier for other investors to discern short sellers’ trading strategies, thereby discouraging the costly fundamental research that underlies some short selling strategies.<sup>879</sup> On balance, the Commission expects that the final rule, which delays the dissemination of loan volume information by 20 business days, is not likely to significantly expand market participants’ abilities to discern short selling strategies.

The Commission expects that final Rule 10c–1a will lower short selling costs by decreasing borrowing costs, especially for hard-to-borrow securities.<sup>880</sup> Academic research

<sup>867</sup> See, e.g., discussions in *supra* Part IX.B.3, acknowledging that a variety of factors can drive the pricing of securities loans, including counterparty risk. The Commission also acknowledged this in the Proposing Release by noting that counterparty characteristics played a role in pricing loans; See Proposing Release, 86 FR 69831. See also Proposing Release, 86 FR 69837, stating that “the data would allow end borrowers to determine the extent to which their broker-dealer is obtaining terms that are better, worse, or consistent for current market conditions for loans with *similar* characteristics” (emphasis added).

<sup>868</sup> See *supra* note 790 for a discussion of theoretical and empirical evidence that information asymmetry drives dispersion in prices. It could also be the case that securities lending transactions are more sensitive to idiosyncratic factors, such as “the identities of the transacting parties” as mentioned by a commenter (see Overdahl Letter, at 6), because there is a lack of transparency in the market about what a standardized price for a given set of loan characteristics should be, which could drive idiosyncrasies in loan prices. If prevailing market prices become more generally available, it could be the case that an increase in competition lessens the importance of idiosyncratic factors for the pricing of securities loans. In this case, final Rule 10c–1a may make the securities lending market behave more similarly to more fungible markets such as the corporate bond market, making an analysis of TRACE more applicable to the securities lending market.

<sup>869</sup> According to the authors, this loan fee benchmark is publicly reported by a centralized platform maintained by the Brazilian Stock Exchange, on which all securities lending transactions are registered by brokers. See Cereda (2020), at 570.

<sup>870</sup> See Cereda (2020), at 570, referencing statements from the Brazilian stock exchange that “. . . the purpose of this change is to make the securities lending service ever more transparent, in order to attract more securities lenders and borrowers and to meet the demand of institutional investors.”

<sup>871</sup> See Overdahl Letter, at 6.

<sup>872</sup> See Overdahl Letter, at 6, citing *The Effects of Short-Selling Public Disclosure Regimes on Equity Markets* (2010), OliverWyman.com, at 4, 16–17, available at <https://www.oliverwyman.com/our-expertise/insights/2010/feb/the-effects-of-short-selling-public-disclosure-regimes-on-equity.html>.

<sup>873</sup> See Overdahl Letter, at 9, citing Cereda et al. (2022).

<sup>874</sup> See Oliver Wyman, *supra* note 872, at 11. Specifically, the report examines a short selling ban that took place in the UK between Sept. 18, 2008, and Jan. 16, 2009, and compares this to a “pre-ban” period between Jan. 1, 2008, and Sept. 17, 2008, and a “post-ban” period beginning on Jan. 17, 2009.

<sup>875</sup> See *id.*

<sup>876</sup> See Cereda (2022), at 571. Specifically, the authors state that their “findings, however, indicate that the increased transparency had positive effects overall; it reduced loan fees, increased lending volume, did not affect lenders’ total revenue, and favored more efficient lenders.”

<sup>877</sup> See *id.*

<sup>878</sup> See *supra* in this part for a discussion on why the Commission expects the economic effects of the final rule to be concentrated among hard-to-borrow stocks.

<sup>879</sup> See, e.g., Overdahl Letter, at 3; Citadel Letter, at 5–7, 11; MFA Letter 3, at 3–4, 8.

<sup>880</sup> See discussions in above and below in this part regarding the impact of the final rule on borrowing costs. This effect may be concentrated among stocks that are “on special” and have higher borrowing costs, in which there are more opportunities for an increase in price efficiency to lower fees. See *supra* in this part for a discussion on why the Commission expects the economic

indicates that, when short selling costs diminish, investors increase their fundamental research because it is easier to trade on any negative information that they uncover (e.g., poor earnings).<sup>881</sup> This increase in fundamental research may in turn lead to better investment decisions by these investors.<sup>882</sup> Additionally, by facilitating more research, the final rule will 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.<sup>883</sup>

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 or value-destroying behavior.<sup>884</sup> Research also indicates that when short selling becomes easier the effectiveness of short sellers as monitors increases.<sup>885</sup>

Reducing the costs of short selling may also have the benefit of increasing liquidity in the underlying securities markets. 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 the securities lending market, the stock market is less liquid.<sup>886</sup> Lower short selling costs could have potential benefits for options market liquidity as well. Securities lending affects liquidity in the options market through its impact

effects of the final rule to be concentrated among hard-to-borrow stocks.

<sup>881</sup> See Dixon, et al., (2021), *supra* note 746 and Peter Dixon, *Why Do Short Selling Bans Increase Adverse Selection and Decrease Price Efficiency?* Rev. Asset Pricing Stud. 122 (2021) (“Dixon (2021)”). 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.

<sup>882</sup> See *infra* this part for further discussion on how increased information for participants in the securities lending market may increase the profitability of some investors’ trading strategies more generally.

<sup>883</sup> See, e.g., Jesse Blocher, et al., *Connecting Two Markets: An Equilibrium Framework for Shorts, Longs and Stock Loans*, 108 J. Fin. Econ. 302, 302–22 (2021) and Dixon (2021) *supra* note 881.

<sup>884</sup> See, e.g., Eric C. Chang, et al., *Does Short-Selling Threat Discipline Managers in Mergers and Acquisitions Decisions?*, J. Acct. & Econ. 101223 (2019). See also Massimo Massa, et al., *The Invisible Hand of Short Selling: Does Short Selling Discipline Earnings Management?*, 28 Rev. Fin. Stud. 1701 (2015).

<sup>885</sup> See, e.g., Vivian W. Fang, et al., *Short Selling and Earnings Management: A Controlled Experiment*, 71 J. Fin. 1251 (2016).

<sup>886</sup> See Dixon, et al. (2021), *supra* note 746.

on how easily options market makers can delta hedge.<sup>887</sup> 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 final rule increases the ease with which investors can trade in options, the proposal may further enhance price efficiency in the options market.<sup>888</sup>

Commenters to the proposed Rule 10c–1, which did not include a delay in the dissemination of any information that would be collected under the rule, expressed concern that the dissemination of Rule 10c–1a data could harm short sellers, and thus U.S. financial and capital markets in general, and that this outcome was not analyzed in the Proposing Release.<sup>889</sup> Some commenters expressed concern that information about Customer loans collected under the rule in particular could be used to determine individual short positions with a high degree of accuracy,<sup>890</sup> and that this could result in harm to short sellers,<sup>891</sup> resulting in

<sup>887</sup> See *supra* Part IX.B.1 for a discussion of option market makers’ use of securities lending markets to engage in delta hedging.

<sup>888</sup> See, e.g., David Easley, et al., *Option Volume and Stock Prices: Evidence on Where Informed Traders Trade*, 53 J. Fin. 431, 431–65 (1998); Jun Pan & Allen M. Poteshman, *The Information in Option Volume for Future Stock Prices*, 19 Rev. Fin. Stud. 871 (2006); Sophie Ni, et al., *Stock Price Clustering on Option Expiration Dates*, 78 J. Fin. Econ. 49 (2005).

<sup>889</sup> See, e.g., Overdahl Letter, at 9–11; Citadel Letter, at 5–7; AIMA Letter 2, at 2; CCMR Letter, at 1; AIMA Letter 3, at 2; MFA Letter 3, at 3–4, 8. The Proposing Release acknowledged that the Rule could diminish the value of collecting and trading on negative information by revealing some new short selling information to the market, and that these dynamics could mitigate some of the benefits discussed. See Proposing Release, Part VI.C.1.c.

<sup>890</sup> See, e.g., Citadel Letter, at 5; Overdahl Letter, at 4; SIFMA AMG Letter, at 5. Other commenters expressed concern that the data provided under proposed Rule 10c–1 could allow for reverse engineering of trading strategies more generally; see, e.g., MFA Letter 1, at 8; MFA Letter 2, at 5; RMA Letter, at 18.

<sup>891</sup> Commenters pointed to a number of ways that short sellers could be harmed, including increased costs to establishing short positions, particularly large positions that require time to build up (see, e.g., Citadel at 6), and increased risks of copycat strategies (see, e.g., Overdahl Letter, at 9–10; Citadel Letter, at 6; MFA Letter 1, at 7; AIMA Letter 2, at 2–3), frontrunning (see, e.g., SBAI Letter, at 2), issuer retaliation (see, e.g., Citadel Letter, at 6), negative impacts on activities that rely on short selling for hedging purposes (see, e.g., Citadel Letter, at 6), and short squeezes (see, e.g., Citadel Letter, at 6; Overdahl Letter, at 11; MFA Letter 1, at 7; S3 Partners Letter, at 7). One commenter cites a number of academic studies supporting the notion that disclosure of short selling positions can be harmful to markets, including Truong X. Duong et al., *The Costs and Benefits of Short Sale Disclosure*, 53 J. Banking & Fin. 124 (2015) and Stephan Jank, et al., *Flying Under the Radar: The Effects of Short-Sale Disclosure Rules on Investor Behavior and Stock Prices*, J. Fin. Econ. 209 (2021) (see Overdahl Letter, at 8).

negative outcomes for market quality, such as reductions in liquidity, price efficiency and shareholder engagement.<sup>892</sup>

The Commission acknowledges these commenters’ concerns about the effect of proposed Rule 10c–1 on short sellers, and believes that these concerns are mitigated by the final rule’s inclusion of a delay in disseminating loan size information.<sup>893</sup> Specifically, the Commission acknowledges that activity in certain segments of the securities lending market are tightly linked to short selling positions, in particular the market for Customer loans.<sup>894</sup> Thus, the sum of loans identified in Rule 10c–1a data as being to “a customer (if the person lending securities is a broker or dealer)”<sup>895</sup> could give a strong indication of aggregate short interest. However, under the final rule, this information will only be directly available to Rule 10c–1a data consumers after a delay of 20 business days,<sup>896</sup> which significantly reduces the novelty of this information compared to the proposed rule. In particular, this delay means that the loan size information, which is the portion of the data most

<sup>892</sup> See, e.g., Citadel Letter, at 6; MFA Letter 1, at 2 and 7; SIFMA AMG Letter, at 5 and 7; SIFMA Letter 1, at 12, 15; AIMA Letter 1, at 2; Overdahl Letter, at 4; CCMR Letter, at 1. One commenter referred to increased short selling disclosure as a wealth transfer that is not necessarily welfare enhancing. See Overdahl Letter, at 3.

<sup>893</sup> The proposed rule, which commenters expressed concern, would have required market participants to report transactions to an RNSA within 15 minutes of the terms being settled with an RNSA disseminating the data to the public as soon as practicable thereafter.

<sup>894</sup> See *supra* Part IX.B.6 for further discussion of why the market for Customer loans is tightly linked to short selling positions.

<sup>895</sup> See 17 CFR 240.10c–1a(c)(7) (“final Rule 10c–1a(c)(7)”), which requires a covered person to report, for a covered securities loan, 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. While most loans that facilitate short sales will likely be associated the category of borrowers that are “a customer (if the person lending securities is a broker or dealer),” not all will. Some large market participants do not use broker-dealers as an intermediary when sourcing loans; instead, they maintain relationships directly with lending programs to source shares when they wish to sell short. These transactions would show up in the data as a loan to “other person.” Lastly, to the extent that a broker-dealer borrows shares to facilitate their own short selling, the loan would show up in the data as a loan to a “broker or dealer.” However, by summing up all loans to “a customer (if the person lending securities is a broker or dealer)” and “other person,” market participants could likely estimate outstanding short interest with considerable accuracy.

<sup>896</sup> Note that, the difference in settlement cycles between the equity and lending markets means that the size of equity loans that facilitate short sales won’t be made public until approximately 22 business days after the short sale occurs in the stock market. See *supra* note 738 and corresponding text.

directly related to short selling activity, disseminated under final Rule 10c–1a will generally be less timely than pre-existing sources of short selling transparency, such as FINRA’s bimonthly short interest data.<sup>897</sup>

Additionally, the Commission does not believe that market participants will have more timely access to indicators of aggregate short interest from the daily information disseminated by an RNSA pertaining to the aggregate transaction activity for each reportable security.<sup>898</sup> This is because the term “aggregate transaction activity” refers to information pertaining to the absolute value of transactions, and excludes information that could reveal net transaction activity information.<sup>899</sup> Therefore, it would not be possible to use this information to discern information about, for example, changes in net short sale positions.

The loan amount data disseminated under final Rule 10c–1a will provide some novel information about short positions, although only on a look-back basis after the 20-business-day dissemination delay has lapsed. In particular, since each loan likely relates to a unique market participant, the public dissemination of such transaction-by-transaction volume data under final Rule 10c–1a, albeit delayed, will provide an indication of the distribution of short sentiment, *i.e.*, whether short interest is concentrated among a few short sellers with large positions, or whether it is spread out over many short sellers.<sup>900</sup> It can also give an indication about when individual market participants increased or decreased their short positions by examining the change in the size of a loan from the reported data. As most currently available sources of short selling information only contain information about aggregated short selling activity,<sup>901</sup> this could represent an increase in the granularity of market participants’ information about past short positions and, in this way, could provide information about short sellers’ strategies. Specifically, market

participants could examine the historical securities lending data to try to identify factors that may be indicative of short selling activity. However, it is not clear that such an analysis, which would be inherently noisy, would provide actionable insights into future short selling activity that could harm short sellers’ abilities to profit from negative information.

#### Economic Effects From Improved Securities Lending Data Quality

The Commission believes that final Rule 10c–1a will increase the information about the state of the securities lending markets that is generally available to market participants. As discussed in this section, increased information will result in benefits in the form of better decision-making by investors, beneficial owners and other market participants, reduced costs of business for broker-dealers, improved performance and reduced costs for lending programs, new business opportunities for data vendors, improvements to shareholder monitoring and, ultimately, improved market stability and price discovery both in the securities lending market and the market for the underlying security.<sup>902</sup>

Overall, the data provided by the final rule will significantly improve market participants’ views into lending rates for various securities. It does so first through the comprehensiveness of the data. By mandating the disclosure of certain information about all securities loans, the data provided by the Rule will be comprehensive and thus not prone to biases that occur due to non-random observations.<sup>903</sup> Comprehensive reporting also means that the data provided by the final rule covers both the Wholesale and Customer segments of the market, allowing market participants to compare trends in both markets simultaneously. The data will also be more granular than existing data. In addition to information about the size

of the loan and the loan fee, the data provided by the final rule contains a number of other data fields which allow market participants to parse the data to analyze the subset of transactions that are most relevant to their needs.

There are a few dimensions where data provided by commercial data providers may be similar to or provide information not provided by the Rule. The data provided by the final rule is disseminated next day, which is similar to the timeliness of much of the data provided by the commercial data providers except that some commercial data providers offer subsets of intraday transaction data that is timelier than the data provided by the final rule. Additionally, the data provided by the Rule masks loan size for 20 business days. Consequently, existing data providers’ information regarding shares on loan will be considerably timelier than the data provided by the Rule. Lastly, the Rule does not provide information about utilization rates, and so market participants wishing to observe utilization rates will need to maintain access to commercial datasets.

First, the improvement in securities lending rate information and the ability to create bespoke benchmarks will improve the quality of information that market participants rely on to make decisions regarding investment strategies that require borrowing securities and the cost of those strategies.<sup>904</sup> An increase in the quality of information regarding the costs of borrowing a security may decrease risk and thereby increase the risk-adjusted profits of pursuing investment strategies that require borrowing securities, such as short sales.<sup>905</sup> For example, 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 by examining the data regarding recently transacted securities loans, as well as information provided by an RNSA about aggregate transaction activity and cost to borrow.<sup>906</sup>

Access to Rule 10c–1a data may also benefit investors by enabling them to make more informed decisions about whether to buy, hold, or sell a given

<sup>897</sup> See *supra* Part IX.B.6 for a discussion of the FINRA bimonthly short interest data which are made available for publication on the seventh business day after the reporting settlement dates, which occurs bimonthly.

<sup>898</sup> See final Rule 10c–1a(g)(5), requiring an RNSA to disseminate aggregated daily information.

<sup>899</sup> See *supra* Part VII.J for further discussion.

<sup>900</sup> Note that this may only be possible with noise to the extent that some borrowers, such as institutional investors, break their loans up across multiple prime brokers. See *supra* note 806 for more information about the use of multiple prime brokers by some institutional investors.

<sup>901</sup> See discussion of the FINRA bimonthly short interest data and SRO short selling volume and transaction data above in Part IX.B.6.

<sup>902</sup> One commenter expressed concern that the Proposing Release did not explain how market participants would use the data (See Citadel Letter, at 9). However, the Proposing Release provided specific examples of how the data could be used (See Proposing Release, 86 FR 69829, 69836, 69840). These examples, and more, are also provided throughout the current Economic Analysis and particularly in this part. Similarly, some commenters expressed concern that the Proposing Release did not identify who, other than regulators, would benefit from certain data (see, e.g., ICI Letter 1, at 9). However, the same discussions of how market participants would use the data also provide discussions of how various market participants would benefit from the data. In this vein, this part discusses a variety of uses and benefits of Rule 10c–1a data.

<sup>903</sup> See *supra* Part IX.B.2 for additional discussion of bias in existing securities lending data.

<sup>904</sup> See *supra* in this part for a discussion of how the final rule will improve transparency through increased comprehensiveness, breadth, and accessibility of securities lending data.

<sup>905</sup> See *supra* this part for further discussion of the expected economic effects of the final rule through its impact on short selling.

<sup>906</sup> See *infra* this part for a discussion of the Commission’s uncertainty regarding how the aggregated information disseminated by an RNSA will compare to currently available data and the range of analyses that market participants will be able to perform using this information.

security. This will occur as they will have increased certainty regarding lending rates and which securities are most likely to be profitably lent or not, leading to better risk allocations, investment decisions, and ultimately risk-adjusted returns. Extant research has demonstrated that securities lending data have information relevant to the prices of the underlying security.<sup>907</sup> By making securities lending information both more granular and more accessible for market participants, final Rule 10c–1a will enable investors to utilize data to gain insights into the underlying security. As investors become more informed, their investment decisions are expected to improve.

Additionally, an improved view of current lending market conditions for various securities may help inform beneficial owners in making better decisions concerning which shares to make available for lending, potentially leading to more profitable lending. For example, to the extent that beneficial owners do not currently have a clear means of determining which securities have high average lending rates Rule 10c–1a data may alert them about securities with high borrowing costs, which would enable them to better optimize which shares in their portfolio to make available for lending.<sup>908</sup> Furthermore, as a result of having better access to information about the securities lending market, financial institutions will be able to improve their collateral and balance sheet management.<sup>909</sup>

Second, a clearer understanding of lending market conditions, and specifically lending market rates, facilitated by the dissemination of Rule 10c–1a data may benefit broker-dealers by decreasing the search costs incurred to obtain a locate in order to facilitate

a short sale on behalf of a customer.<sup>910</sup> The increase in transparency under the final rule will allow broker-dealers to better ascertain current prevailing lending rates for security loans with certain characteristics prior to calling lending programs to get competing quotes. Broker-dealers tend to find loans for their customers through the network of lending programs with which they have relationships, after they have exhausted their own inventory and customer margin accounts.<sup>911</sup> Rule 10c–1a data will enable them to determine with greater ease whether a quote from a lending program is competitive. It is possible that new broker-dealers may choose to enter the market for lending services<sup>912</sup> because of this reduction in cost, which may further increase competition between broker-dealers.<sup>913</sup>

Third, final Rule 10c–1a will benefit lending programs by providing a means by which they may improve the performance of their lending. Rule 10c–1a data will provide lending programs with a source of securities lending market data that is more comprehensive than existing commercial data. With these data, the lending programs will have an improved ability to determine prevailing market conditions as they compete to lend shares, which may improve their lending performance.

Fourth, more comprehensive, granular, and accessible securities lending information may also lead to additional business opportunities for commercial securities lending data vendors.<sup>914</sup> In addition to data products, commercial data vendors also provide analytics to their customers,<sup>915</sup> and may be able to support these analytics data services with the data provided by the final rule. Further, because the commercial data vendors would be less dependent on their data providers for data, they may be able to provide

analytics to more market participants. This may result in increased competition for data analytics services as the barriers to entry for providing analytics services decline and new entrants compete to provide analytics services.<sup>916</sup> While this effect may lower what the data vendors can charge for analytics services, to the extent that the commercial data vendors offer their customers other securities lending services, such as execution services, the final rule may enhance their other business lines by providing more comprehensive data to support other securities lending market services. To the extent that there is a demand for covered persons to contract privately with third party vendors to assist in reporting under final Rule 10c–1a, this would likely also lead to additional business opportunities for commercial securities lending data vendors, as these vendors already have experience with handling and disseminating securities lending data and could leverage that experience to offer such services to customers.<sup>917</sup>

Ultimately, the improved information access will result in improved market quality in the security lending market. More informed investment decisions facilitated by the final rule may improve market stability by allowing investors to better manage risk. Furthermore, as all participants in the securities lending market will be able to 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 will improve. This will lead to more efficient prices for securities loans.<sup>918</sup> This improved information access may also improve price discovery in the market for the securities underlying the security loans, as information about the underlying security will have a greater opportunity to incorporate into the price of the underlying security.<sup>919</sup>

The requirement to report all of the data elements under paragraph (c) the first time the modification of a “day-one” loan (that is, loans in existence

<sup>907</sup> See Duong, et al. (2017) *supra* note 812. 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 results imply that, all things equal, lenders charge higher fees to lend their shares when they have negative information about a company. See also Kaitlin Hendrix & Gavin Crabb, *Borrowing Fees and Expected Stock Returns* (Nov. 6, 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3726227](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3726227) (retrieved from SSRN Elsevier database).

<sup>908</sup> 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. See *supra* note 778. This additional information may help a beneficial owner that is close to its program limit optimally choose which shares to make available for lending.

<sup>909</sup> See *supra* Part IX.B.1 for further discussion of the use of securities lending by financial institutions for collateral and balance sheet management.

<sup>910</sup> Regulation SHO requires a broker-dealer to have reasonable grounds to believe that a security can be borrowed so that it can be delivered on the date delivery is due before effecting a short sale order in any equity security. This “locate” must be made and documented prior to effecting the short sale. See 17 CFR 242.203(b)(1) and (2). See also Key Points about Regulation SHO, available at <https://www.sec.gov/investor/pubs/regsho.htm>.

<sup>911</sup> See *supra* note 798 discussing broker-dealers’ preferences for sourcing shares for loans. See also *supra* Parts IX.B.1 and IX.B.4 discussing the role of broker-dealers in facilitating borrowing by customers.

<sup>912</sup> See *supra* Part IX.B.4 for further discussion of the market for lending services.

<sup>913</sup> See *supra* Part IX.D.2 for further discussion of the expected effects of the final rule on competition between broker-dealers.

<sup>914</sup> The Commission acknowledges that the final rule may also result in lost revenue for commercial securities lending data vendors. See *supra* Part IX.C.4 for further discussion.

<sup>915</sup> See *supra* Part IX.B.5.

<sup>916</sup> See *infra* Part IX.D.2 for further discussion of the expected effects of the final rule on competition for securities lending data analytics services.

<sup>917</sup> While covered persons can use third party vendors to help prepare their reports, such vendors would not be reporting agents under final Rule 10c–1a. See *supra* Part VII.B.2.

<sup>918</sup> This effect may be concentrated among stocks that are “on special” and have higher borrowing costs, in which there are more opportunities for an increase in price efficiency to lower fees. See *supra* in this part for a discussion on why the Commission expects the economic effects of the final rule to be concentrated among hard-to-borrow stocks.

<sup>919</sup> See *infra* Part IX.D.1 for further discussion of the expected effects of the final rule on price efficiency.

prior to the final rule's reporting date for covered persons) occurs will avoid the exclusion of certain loan information during the early phases of implementation.<sup>920</sup> This will enhance the extent to which Rule 10c–1a data improves informational efficiency during the earlier phases of implementation. In the Wholesale market lending largely facilitates clearing and settlement, and for commonly lent securities it is possible that a broker dealer could have a continuous need to borrow the security. In this case the broker dealer likely would enter into a loan that is kept open for an extended period of time, but with frequent size and/or rate modifications to match their ongoing settlement needs and market conditions.<sup>921</sup> Therefore, absent such a requirement, all the terms of such a lending arrangement would not be fully reportable unless the existing loan is closed out and a new one is opened. It could take a considerable amount of time for this to occur and thus the data collected by the Rule would lack the full context for such loans until they were closed and then re-entered into. The lack of information about these loans would harm data quality because it would render the data less complete and would thus limit market participants' ability to determine conditions in the lending market and would thus mitigate the benefits described in this section. Ensuring that these loans are included upon their first modification improves the quality of the data in the earlier phases of reporting which would in turn speed up the time when the benefits articulated will become fully available to market participants.

#### Potential Limits to Benefits and Sources of Uncertainty

Commenters mentioned a number of factors that may limit the extent to which the rule increases transparency in the securities lending market, and thereby limit the associated benefits as well. However, despite these potential limitations, the Commission expects that final Rule 10c–1a will improve the transparency and efficiency of the securities lending market, which will improve market participants' access to

<sup>920</sup> Several commenters sought clarification on issues related to "day-one" loans. See *supra* note 429 and corresponding text for a discussion of and response to these commenters.

<sup>921</sup> For example, FIS data on returned securities suggest that while the average security returned in the Wholesale market had been on loan for about a month, some loans were open for up to a year or more. See also Blackrock Letter, at 9 and *supra* note 434 and surrounding text.

information and lower their information asymmetry.

Commenters noted that loan fees are determined by a variety of factors, some of which are not directly included in Rule 10c–1a data.<sup>922</sup> Though the Commission believes that the final rule will improve market participants' ability to compare loans, the Commission recognizes that the data provided will not include information about all of the factors that are relevant to the pricing of securities loans. As such, two loans may appear to be similar based on the Rule 10c–1a data but may not have the same fees due to factors not recorded in the data, such as the counterparty risk or the stability of the portfolio. Some commenters expressed concern that failing to provide all information relevant to pricing would lead the data to be either not useful, potentially misleading, or even harmful.<sup>923</sup>

The Commission recognized in the Proposing Releases and continues to acknowledge that Rule 10c–1a data will not contain all information needed to perfectly price loans.<sup>924</sup> However, compared to the baseline level of information available to market participants, the more granular,

<sup>922</sup> See, e.g., Citadel Letter, at 9; Overdahl Letter, at 6; RMA Letter, at 6; MFA Letter 1, at 5; SIFMA Letter 1, at 15. See also *supra* note 780 and corresponding text.

<sup>923</sup> See, e.g., Citadel Letter, at 9, stating that the "Commission does not explain why it would be useful for one investor to know what another investor paid on a loan without knowing any of the material facts of the other investor's relationship with its broker-dealer." Similarly, see RMA Letter, at 6 (stating that "there is no reason to believe that securities lending transactions are fully fungible or that pricing can be represented in a single 'spot' market price"); see Overdahl Letter, at 6 (stating that "the fact that one market participant borrowed a security at a certain rate is not necessarily informative about the value of a loan with a different market participant."). Furthermore, several commenters expressed concern that such information could be misleading. See, e.g., MFA Letter 1, at 9 (stating that, since "rates in the [Customer] Market are based on many variables specific to a broker-dealer-client contractual relationship," transaction-by-transaction loan data "may actually result in a distorted representation of the actual market."). See also ISLA Letter, at 2, who similarly state that fee/rebate data "may create an unrealistic and misleading portrayal of prevailing rates." See also SIFMA Letter 1, at 14, stating that "intraday loan-by-loan data can be misleading based on circumstances unique to certain securities loan transactions." See also *supra* note 732 and corresponding text for a discussion of the variety of factors that can affect the pricing of securities loans. Other commenters expressed their opinion that pricing information would be valuable to market participants. See, e.g., James J. Angel Letter, at 2–3.

<sup>924</sup> See, e.g., Proposing Release, 86 FR 69839, recognizing that benefits would be somewhat limited by the fact that the data does not contain "all information necessary to perfectly compare the fees on different loans," but concluding that "the proposed Rule improves the ability to compare loans."

comprehensive, and accessible data provided by the final rule will improve market participants' abilities to compare loans and provide numerous benefits to market participants.<sup>925</sup> The Commission does not believe that this information will be misleading or harmful because, as the commenters make clear, it is well understood in this market that the pricing of loans is determined by many factors.<sup>926</sup> Knowing this, beneficial owners and end borrowers will be able to use this information to create, for example, an expected range of borrowing costs and use these data to facilitate conversations with their lending agent or broker dealer about why certain loans have prices that they do, or why a specific loan falls where it does in the distribution of similar loans. Further, to the extent that the distribution of borrowing costs provides information that is relevant to stock prices, this information alone could improve price efficiency in the underlying securities market.<sup>927</sup>

One commenter questioned the utility of information about borrowing costs, asserting their belief that the cost to borrow is not as important to the execution of short sale strategies as whether there are shares available to borrow.<sup>928</sup> The Proposing Release acknowledged that information on shares available is useful to markets.<sup>929</sup> Rule 10c–1a data will not specifically provide information on shares available. Market participants seeking such information may need to contract with current commercial data vendors, if they can, for estimates of shares available and utilization rates. However, since borrowing costs are correlated with the ease of locating securities to borrow, the improved access to fee information provided by the final rule will provide market participants with increased information regarding the availability of shares to lend.<sup>930</sup>

<sup>925</sup> See *supra* in this part for a discussion of these benefits.

<sup>926</sup> See, e.g., the information provided by commenters in *supra* note 732.

<sup>927</sup> See, e.g., Duong, et al. (2017), who find that information derived from securities lending data can be used to predict stock returns.

<sup>928</sup> See S3 Partners Letter, at 9 (stating that "We do not believe the Commission has explored if the costs to borrow are material to the execution of a short sale strategy. We believe a bigger issue may be the lack of shares to borrow, not the cost of borrowing."); Other commenters, however, did believe that loan pricing information would provide useful and meaningful information. See, e.g., PM Letter 2, at 3; and James J. Angel Letter, at 1.

<sup>929</sup> See, e.g., Proposing Release, 86 FR 69834, 69840.

<sup>930</sup> See Kolasinski (2013) *supra* note 736 (writing on the link between the cost to borrow and availability of shares to lend).

Some commenters expressed concern that the data may be too granular to be directly usable by market participants,<sup>931</sup> and at least one commenter expressed concern that the final rule could increase information asymmetries if the complexity of the data are such that only the largest and most sophisticated market participants would be able to benefit.<sup>932</sup> The Commission is mindful that the reports prepared according to the final rule will contain a large volume of statistical data, and as a result it may be difficult for some market participants to review and digest the reports. However, by requiring reporting entities to report transaction-level information in a uniform manner rather than aggregated data, the final rule will make it possible for market participants and other interested parties to make their own determinations about how to group securities or loans when comparing across loan transactions. Requiring more detailed data will also help ameliorate potential concerns about overly general statistics, or about the specific categorization of loans and selection of aggregated metrics, by allowing market participants and other interested parties to conduct their own analysis based on alternative categorizations of the underlying data. Should certain market participants not have the means to directly analyze the detailed statistics, third parties, such as commercial securities lending data vendors, likely will respond to the needs of investors by analyzing the disclosures and producing more digestible information using the data.<sup>933</sup> Additionally, this concern is mitigated somewhat by the requirement that an RNSA provide information about the distribution of loan rates at the security level,<sup>934</sup> which could be more easily used similar to current data models.

One commenter suggested that the inclusion of short positions data would lead to double counting and could confuse market participants.<sup>935</sup> Short positions are not required to be reported, but loans from a broker-dealer to an end customer—such as might support a short position—will be marked in the data as loans to a

“customer (if the lender is a broker-dealer).” The Commission does not believe that the inclusion of such data constitutes double counting because a loan from a broker-dealer to their customer (e.g., to facilitate a short sale and where the broker-dealer is the lender) is a distinct economic activity from a loan that the broker-dealer may engage in as the borrower (e.g., to meet their own clearing and settlement obligations).<sup>936</sup> The Commission does not believe that such data will lead to confusion because these loans are marked in the data in a way that allows market participants to separate customer loans from other loans in their analysis.

One commenter suggested that including rebate data could lead to confusion because rebates are often fixed to benchmarks that can change from day to day, potentially leading to many, perhaps daily, modifications of the loan needing to be submitted and that the volume of these data could confuse market participants.<sup>937</sup> The extent to which the commenter’s concern is realized will be determined by how an RNSA chooses to structure the reporting of this variable.<sup>938</sup> For instance, if an RNSA chooses to allow market participants to report a spread and a benchmark, then no modifications would be required to be reported from day to day unless there were a change in the negotiated spread or benchmark. However, if an RNSA chooses to require market participants to report the total fee, then market participants would be required to report changes to the fee if the benchmark changes, which could require daily revisions.<sup>939</sup> However, the Commission does not believe that this will cause confusion. The Commission expects that market participants know that rebates can change regularly and thus revisions would not be unexpected. Further, gathering loan modification data is important to facilitate the accurate computation of statistics regarding the cost to borrow by an RNSA and other market participants.

At least one commenter suggested that some of the benefits of the Rule from reducing information asymmetries may be limited as a result of switching costs.<sup>940</sup> The Commission acknowledges

that the cost of switching to a new broker-dealer can be high,<sup>941</sup> and that high switching costs may make it more difficult for some end borrowers to easily switch their broker-dealer for one that would offer them better terms on a loan.<sup>942</sup> However, at the same time, by increasing end borrowers’ access to comprehensive information about the securities lending market, final Rule 10c–1a will improve end borrowers’ ability to determine which broker-dealers are offering better loan terms, as well as to negotiate better terms with broker-dealers. Both of these will increase the benefits to end borrowers from switching broker-dealers. Holding switching costs constant,<sup>943</sup> final Rule 10c–1a could thus still result in more end borrowers finding it beneficial to switch to better-performing broker-dealers. Furthermore, as discussed in the Proposing Release,<sup>944</sup> even for those borrowers for which switching broker-dealers would not be cost effective, the data would provide benchmark statistics that may enable smaller borrowers to select higher performing broker-dealers initially.

The benefits of the final rule may be limited if the rule results in a reduction

acknowledges this possibility and discusses further below in Part IX.C.4. See also S3 Partners Letter, at 9, stating “[p]rice transparency does not change a borrower’s need to execute a short sale strategy with the brokers that they already have existing agreements with.” See also *supra* in this part for a discussion of studies of the introduction of TRACE and the impact of transparency on price.

<sup>941</sup> See *supra* Part IX.B.4 for a discussion of costs related to switching broker-dealers.

<sup>942</sup> However, several factors may mitigate high switching costs. For example, some institutional investors are likely to have multiple prime brokers, which would facilitate the transfer of business to better-performing broker-dealers (see *supra* note 806), and, for individual investors, transferring between retail brokers may be less costly, for example, because some retail brokers will compensate new customers for transfer fees that their outgoing broker-dealer may charge them. See, e.g., Chad Morris, *ACAT Fee: Account Transfer Fee in 2023*, Brokerage-Review.com, available at <https://www.brokerage-review.com/discount-broker/acad-account-transfer-fees.aspx>, last visited Aug. 28, 2023 (providing a list of fees for different brokers). The effect of switching costs on competition may also depend on the variability of the quality of broker-dealers’ lending services over time. For example, if the quality of any broker-dealer’s lending quality varies significantly over time, customers of those broker-dealers may find it optimal to switch between broker-dealers with some frequency, which would increase their overall switching costs. On the other hand, if the quality of broker-dealers’ lending services is relatively constant over time, the number of times that a customer would optimally want to switch between broker-dealers would likely be more limited, and in this case switching costs may be a relatively small and/or short-term friction.

<sup>943</sup> At least one commenter expressed concern that the proposed rule may result in increased costs when switching lending agents. See CSFME Letter 1, at 5.

<sup>944</sup> See Proposing Release, 86 FR 69837 n.221.

<sup>931</sup> See, e.g., IHS Markit Letter, at 13; RMA Letter, at 18.

<sup>932</sup> See IHS Markit Letter, at 14.

<sup>933</sup> See *supra* Part IX.B.5 for a discussion of commercial data vendors’ current offering of securities lending data analytics services, and above in this part for a discussion of the expected effects of the final rule on creating new business opportunities for providers of securities lending data analytics services.

<sup>934</sup> See final Rule 10c–1a(g)(5), requiring an RNSA to disseminate aggregated daily information.

<sup>935</sup> See MFA Letter 3, at 4.

<sup>936</sup> See *supra* Part IX.B.2.

<sup>937</sup> See MFA Letter 3, at 5.

<sup>938</sup> See *supra* Part VII.F.1 for additional discussion of the reporting of this data.

<sup>939</sup> See the last paragraph of Part VII.F.1 and surrounding text for additional discussion of the latitude granted to an RNSA in determining the specific format required for the loan cost information.

<sup>940</sup> See, e.g., Citadel Letter, at 8. One commenter suggested that switching costs between lenders and lending agents could increase because of the rule; See CSFME Letter 1, at 5. The Commission

in the supply of securities loans. A lower supply of securities loans, for example, could weaken or even counteract the rule's expected effect on lowering borrowing costs.<sup>945</sup> As previously discussed, the Commission believes that the empirical evidence does not show an increase in securities lending transparency would result in a decrease in the supply of securities loans.<sup>946</sup> However, another possibility that was pointed out by commenters is that the supply of securities loans could decrease if compliance costs are passed on to lenders and beneficial owners, who are then less willing or able to participate in the securities lending market as a result.<sup>947</sup> The Commission recognizes that some market participants, including beneficial owners, may experience reduced revenue from securities lending as a result of the rule.<sup>948</sup> However, the Commission expects that beneficial owners and lenders will for the most part benefit from the final rule, as a result of increased information about the securities lending market and reduced information asymmetry.<sup>949</sup> This benefit, which could even encourage more beneficial owners and lenders to enter the securities lending market, would serve to mitigate an increase in cost and a subsequent decrease in lending, to the extent that it would occur.

One commenter stated that securities lending data would be less useful for corporate bonds and asset-backed securities (ABS) because, due to the "the greater diversity of bond characteristics, data from one set of bonds cannot be as easily used as benchmarks for others," and as a result "there is little indication that data from corporate bond or ABS lending transactions would be sufficiently useful to justify the reporting costs."<sup>950</sup> As discussed above, the Commission acknowledges that the data provided will not include information about all of the factors that are relevant to the pricing of securities loans. It is possible

that this limitation on the benefits may be higher for certain infrequently loaned securities, such as corporate bonds. However, the Commission believes that, even for less liquid lending markets, Rule 10c-1a will still reduce information asymmetries and improve pricing efficiency by facilitating better benchmarking than is currently possible, and thus will represent an improvement relative to the baseline similar to other assets discussed. For example, market participants will be able to use Rule 10c-1a data to pool information across similar securities and/or similar time horizons to create their own bespoke benchmarks for loan terms.

The commenter also stated that securities lending data would be less useful for U.S. Government securities because "the market for these products is already fairly transparent," and thus "imposing reporting obligations would not provide sufficient additional data to justify the compliance burden."<sup>951</sup> As discussed in the Baseline, the Commission believes that information asymmetries in the lending market for U.S. Government securities loans are unlikely to be fully addressed by the currently available datasets, and thus this market will ultimately still benefit from an increase in transparency.<sup>952</sup>

While the adoption of final Rule 10c-1a will lead to benefits from an overall increase in transparency, the Commission acknowledges that, in some areas, there is uncertainty as to how the information content of Rule 10c-1a data will compare to that of existing data. The requirement for an RNSA to disseminate daily information about aggregate transaction activity and distribution of loan rates will also provide market participants with information about the securities lending market.<sup>953</sup> However, how the aggregate information disseminated by an RNSA will compare to the information available from current commercially available datasets, and the range of analyses that market participants will be

able to perform using this information, will depend on the specific aggregate statistics that an RNSA chooses to publish.

The Commission bases its estimates on an RNSA providing daily information that is at least as informative as comparable statistics that are currently provided by the commercial datasets. This is because, consistent with section 19(b) of the Exchange Act, any changes to an RNSA rules required by final Rule 10c-1a, including its Rule 10c-1a information collection and dissemination practices, would have to be filed with the Commission pursuant to section 19(b) and Rule 19b-4 prior to implementation.<sup>954</sup> Such rules would also be subject to public comment.<sup>955</sup> This process offers market participants the opportunity to provide feedback on the potential specific statistical form of the aggregated daily information based on, *e.g.*, their experience using information from commercial datasets. As such, the daily information provided by an RNSA could be at least as informative as those statistics provided by current data providers. Therefore, at a minimum, the Commission expects that the final rule will result in a positive benefit to market participants in the form of increased securities lending market transparency. This is because, while the aggregate information released by an RNSA may be the same or similar to what is currently provided by commercial datasets, the comprehensiveness and accessibility of the Rule 10c-1a data is expected to be better than that of commercial data, such that aggregate information produced using Rule 10c-1a data can be expected to be better than that produced using currently available commercial data.<sup>956</sup>

## 2. Regulatory Benefits

Final Rule 10c-1a will improve upon current data sources by providing an RNSA (*i.e.*, FINRA)<sup>957</sup> and the

<sup>945</sup> See *supra* in this part for discussions of the Commission's expectation that the final rule will lower borrowing costs for some securities.

<sup>946</sup> See *supra* in this part for further discussion for this literature.

<sup>947</sup> See, *e.g.*, State Street Letter, at 4, stating that "greater costs are also likely to create additional dis-incentives for institutional investors to participate in the securities lending market, with broadly negative implications for liquidity."

<sup>948</sup> See *infra* Part IX.C.4 for further discussion of the expected effect of the final rule on securities lending revenues.

<sup>949</sup> See *supra* in this part for a discussion of the expected benefits of the final rule from reduced information asymmetry between beneficial owners and lending programs.

<sup>950</sup> See RMA Letter, at 16.

<sup>951</sup> See RMA Letter, at 16.

<sup>952</sup> See *supra* Part IX.B.2 for further discussion of the Commission's understanding of the current state of transparency in the market for U.S. Government securities lending. The Commission also acknowledges that, in addition to the market for U.S. Government securities lending, there may be other securities lending markets with higher transparency. However, the Commission believes the regulatory benefits discussed in this part will still apply, as will the benefits for data consumers from the additional context provided by the Rule 10c-1a data, such as information about 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.

<sup>953</sup> See final Rule 10c-1a(g)(5).

<sup>954</sup> See *supra* Part II.J for further discussion of how the final rule handles RNSA Rules to administer the collection of information.

<sup>955</sup> 15 U.S.C. 78s(b). See also FINRA, *FINRA Rulemaking Process*, available at <https://www.finra.org/rules-guidance/rulemaking-process>, last visited Aug. 24, 2023.

<sup>956</sup> See *supra* Part IX.B.2 for a discussion of issues related to the currently available commercial securities lending datasets. For example, in contrast to commercial datasets, since it is not based on voluntary submissions, final Rule 10c-1a data will be less likely to be prone to bias, and thus aggregate information that is constructed using final Rule 10c-1a data will be less prone to biases as well.

<sup>957</sup> Currently, FINRA is the only RNSA. Although the final rule applies to "an RNSA," this portion of our analysis describes benefits to and involving

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.<sup>958</sup> Further, the improved access and comprehensiveness and reduced bias of the publicly available data will also accrue to FINRA and the Commission, as well as any other regulators using these data. This access will benefit investors by enhancing regulatory tools employed to promote fair and orderly securities markets. In particular, investors may benefit from improved surveillance and enforcement uses, market reconstruction uses, and market research uses.

#### Surveillance and Enforcement Uses

The party identities and purpose information<sup>959</sup> may facilitate better surveillance by FINRA for regulatory compliance by its members, and may improve its ability to enforce such regulations. Additionally, FINRA will be able to notify another regulator as permitted.

For example, for FINRA, the information on whether the security is loaned from a broker-dealer's securities inventory to its customer<sup>960</sup> may assist FINRA in determining whether a broker-dealer is charging lending fees or paying rebates commensurate with the market. Thus, beneficial owners and end borrowers, who engage in securities lending transactions, will be better protected against potential unfair pricing of securities loans 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 final rule can 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

FINRA so that we can discuss specific FINRA Rules and practices that will be affected.

<sup>958</sup> See final Rule 10c–1a(e).

<sup>959</sup> See *id.*

<sup>960</sup> See 17 CFR 240.10c–1a(e)(2) (“final Rule 10c–1a(e)(2)”).

activities will 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 can 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 information on whether the loan is being used to close out a fail to deliver<sup>961</sup> is relevant to Rule 204 compliance. Importantly, being able to estimate the securities lending revenues and costs of particular participants may help to fine tune disgorgement estimations. The Commission and FINRA can also use Rule 10c–1a data to oversee broker-dealer compliance with Exchange Act Rule 15c3–3.<sup>962</sup>

The Commission believes that the requirement pursuant to Rule 10c–1a to identify all parties to securities lending transactions with LEIs, if such parties have LEIs, will facilitate the Commission and FINRA's efforts to monitor securities lending.<sup>963</sup> Reporting of LEIs by legal entity securities loan participants that have LEIs will help provide a more precise and consistent means of identification for loan participants as compared to using loan participant names and, if available, CRDs, IARD Numbers, or MPIDs.<sup>964</sup> In that regard, obtaining an LEI requires that an entity's identity be verified by a third party upon issuance of the LEI and upon annual renewal of the LEI.<sup>965</sup> Additionally, LEIs contain “Level 2”

<sup>961</sup> See final Rule 10c–1a(e)(3).

<sup>962</sup> See 17 CFR 240.15c3–3.

<sup>963</sup> Examples of other regulatory entities and jurisdictions that use LEIs include the U.S. Commodity Futures Trading Commission (“CFTC”), Alberta Securities Commission (Canada), European Markets and Securities Authority, and Monetary Authority of Singapore. See Global LEI Foundation, *Regulatory Use of the LEI* (Aug. 21, 2023), available at <https://www.gleif.org/en/lei-solutions/regulatory-use-of-the-lei>.

<sup>964</sup> More than 2.2 million LEIs have been issued. See Office of Fin. Res., *Legal Entity Identifier*, available at <https://www.financialresearch.gov/data/legal-entity-identifier/>, last visited Aug. 23, 2023.

<sup>965</sup> See *Global LEI System*, LEIROC.com, available at <https://www.leiroc.org/lei.htm>, last visited Aug. 23, 2023. Information associated with the LEI includes the “official name of the legal entity as recorded in the official registers[,]” the entity's address, country of incorporation, and the “legal form of the entity.” See Financial Stability Board (“FSB”), *Options to Improve Adoption of the LEI, in Particular for Use in Cross-Border Payments* (July 7, 2022), available at <https://www.fsb.org/2022/07/options-to-improve-adoption-of-the-lei-in-particular-for-use-in-cross-border-payments/>.

information about the linkages between the entities being identified and their parent and child entities,<sup>966</sup> which can better enable Commission staff and market participants to understand the relationships between various firms with an eye toward potential aggregations of risk. Furthermore, requiring LEI disclosure for loan participants that have LEIs also will facilitate the linkage of data reported about securities loans with any relevant data, such as data on short sales or positions, from other sources.<sup>967</sup> However, because the Commission is not requiring loan participants without LEIs to obtain and report them, the aforementioned benefits will only arise for reported securities loans in which participants have LEIs.

One commenter expressed concern that, to the extent that there is a wide variance in interpretation of data, the rule could result in “false positive” enforcement actions.<sup>968</sup> Conversely, the Commission believes that improvements in securities lending data will enhance the ability of FINRA and the Commission to oversee the securities lending market and more efficiently detect potential rule violations, such as those described above. This will result in more targeted actions, which will benefit market participants by resulting in more efficient oversight.

#### Market Reconstruction Uses

Final Rule 10c–1a 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 lawmakers, investors, and the media as well as calls by some for increased regulation in some areas.<sup>969</sup> Rule 10c–1a data will allow for more detailed evaluations of such events in the future

<sup>966</sup> See Global LEI Foundation, *Level 2 Data: Who Owns Whom*, available at <https://www.gleif.org/en/lei-data/access-and-use-lei-data/level-2-data-who-owns-whom>, last visited Aug. 22, 2023.

<sup>967</sup> For example, the European Union's SFTR requires legal entity parties to securities financing transactions to provide their own LEIs and the LEIs of their counterparties to trade repositories. See *ESMA Updates Its Statement on the Implementation of LEI Requirements for Third-Country Issuers Under the SFTR Reporting Regime* (Apr. 13, 2021), available at <https://www.esma.europa.eu/press-news/esma-news/esma-updates-its-lei-statement>. The EU has numerous LEI requirements for entities operating in its securities markets, including, inter alia, for credit and financial institutions (pursuant to the Capital Requirements Regulation) and for fund and fund managers (pursuant to the Alternative Investment Funds Directive). See *id.* Likewise, as mentioned, the CFTC requires counterparties identify themselves to the agency with LEIs in connection with swap trades, including long-and-short equity index swap trades. See 17 CFR 45.6.

<sup>968</sup> See S3 Partners Letter, at 8.

<sup>969</sup> See, e.g., Proposing Release, 86 FR 69803 n.11.

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 comprehensive view of 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 analyses can help determine if further regulatory intervention in markets is warranted and can inform the nature of any intervention.

Market Research Uses

Greater access and more comprehensive data on the securities

lending market will improve the quality and expand the scope of research by both academics and regulators, which will better inform the regulators. In particular, improving the information available for their policy decisions will 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 will also better inform policy decisions.

3. Direct Compliance Costs

Final Rule 10c-1a will require various entities to enter into contracts and develop recording and reporting systems to comply with the final rule. This section provides estimates of those costs. We note that the Commission has provided certain estimates for purposes of compliance with the Paperwork Reduction Act of 1995 ("PRA"), as further discussed below, in Part X. Those estimates, while useful to understanding the collection of information burden associated with the final rules, do not purport to reflect the full economic costs associated with making the required disclosures.

TABLE 2—TOTAL QUANTIFIED COMPLIANCE COSTS

	#	Total initial industry cost	Total annual industry cost
Covered Persons and Reporting Agents .....	609	<sup>a</sup> \$522,590,000	<sup>b</sup> \$233,260,000
RNSA .....	1	<sup>c</sup> 3,880,000	<sup>d</sup> 2,760,000

<sup>a</sup>\$522,590,000 = sum of estimates in *infra* Table 3 note m 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. These estimates are adjusted for an inflation rate of 29.89% based on the Bureau of Labor Statistics data on CPI-U between Sept. 2013 and May 2023. See U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*, available at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm). Therefore, the current inflation-adjusted effective hourly wage rates are estimated at \$494 ( $\$380 \times 1.2989$ ) for attorneys, \$409 ( $\$315 \times 1.2989$ ) for compliance managers, \$338 ( $\$260 \times 1.2989$ ) for senior systems analysts, and \$83 ( $\$64 \times 1.2989$ ) for compliance clerks.

<sup>b</sup>\$233,260,000 = estimate in *infra* Table 3 note n.

<sup>c</sup>10,924 hours  $\times$  (0.75  $\times$  \$338/hour + 0.25  $\times$  \$409/hour)  $\approx$  \$3,880,000. See *infra* note 1196 and note a.

<sup>d</sup>7739.5 hours  $\times$  (0.75  $\times$  \$338/hour + 0.25  $\times$  \$409/hour) + 52 hours  $\times$  \$83/hour  $\approx$  \$2,760,000. See *infra* note 1199 and note a.

Table 2 shows that the Commission believes that final Rule 10c-1a will impose a one-time cost of \$3.88 million and ongoing expenses of \$2.76 million on FINRA, the only RNSA. An RNSA will incur these costs to develop systems to take and disseminate data required by the final rule. These include larger costs associated with creating and maintaining the infrastructure to enable providing covered persons and reporting agents to provide an RNSA with Rule 10c-1a information and

entering into written agreements with providing covered persons and reporting agents, as well as smaller costs associated with providing such information to the public.<sup>970</sup> These costs will be somewhat mitigated by the fact that final Rule 10c-1a requires an RNSA to disseminate the data "as soon as practicable,"<sup>971</sup> which gives an RNSA some flexibility to build systems that mitigate costs.

Table 2 also shows that covered persons and reporting agents will, in

aggregate, incur roughly \$523 million in initial costs and \$233 million annually in ongoing costs to comply with the final rule.<sup>972</sup> These costs come from costs to develop and maintain systems and from costs to enter into agreements.<sup>973</sup> Tables 3 and 4 break these costs down by those incurred by reporting agents, and by covered persons based on the decision by covered persons to self-report or use a reporting agent.

<sup>970</sup> As discussed in *supra* Part VII.B.2, covered persons, including persons that are not RNSA members, that elect not to use a reporting agent are responsible for providing the Rule 10c-1a information to an RNSA directly and may do so without becoming RNSA members. Therefore, these costs may include costs to an RNSA of establishing connections to persons that are not members of an RNSA.

<sup>971</sup> See final Rule 10c-1a(g)(1).

<sup>972</sup> As discussed in *supra* Part VII.A, the Commission is adopting an exception to the general approach that reporting requirements do not apply to the borrower in a securities lending transaction,

specifying that the borrower is responsible for the reporting obligation in the instance of a broker or dealer borrowing fully paid or excess margin securities from a customer; see final Rule 10c-1a(j)(1). Absent this exception, reporting obligations may have fallen on broker-dealer customers who may not have timely access to the required information, and may have less familiarity with reporting information to an RNSA than their broker or dealer; see *supra* note 145.

<sup>973</sup> The Commission expects that the costs associated with developing a reporting system to be lower under the final rule as compared to the proposed rule as a result of the change from the

proposed rule to impose an end-of-day reporting requirement. As described by some commenters, an intraday reporting framework would have required substantial technology development and cost for those providing covered persons and reporting agents that may have lacked the capacity to do so. See, e.g., SBAI Letter, at 1, and IHS Markit, at 13. Removing the intraday reporting requirement removes the need for those providing covered persons to acquire this capacity, thus lowering at least their initial burden associated with system design and configuration. See *supra* Part IX.B.1 for further discussion.

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 Covered Persons <sup>a</sup> .....	<sup>b</sup> 255	<sup>c</sup> \$272.01	<sup>d</sup> \$122.40
Non-Providing Covered Persons <sup>e</sup> .....	<sup>f</sup> 248	<sup>g</sup> 132.27	<sup>h</sup> 59.52
Reporting Agents <sup>i</sup> .....	<sup>j</sup> 106	<sup>k</sup> 113.07	<sup>l</sup> 51.34
<b>Total</b> .....	<b>609</b>	<b><sup>m</sup> 517.34</b>	<b><sup>n</sup> 233.26</b>

<sup>a</sup> Providing covered persons would provide information directly to an RNSA.  
<sup>b</sup> The estimated number of providing covered persons includes 4 broker-dealer intermediaries, 217 persons that effect a covered securities loan as the lender when an intermediary is not used, and 34 broker-dealers borrowing fully paid or excess margin securities. *See infra* Part X.  
<sup>c</sup> 3,000 hours × 255 × (0.75 × \$338/hour + 0.25 × \$409/hour) ≈ \$272,010,000. *See infra* note 1157 and *supra* Table 2 note a.  
<sup>d</sup> 1,350 hours × 255 × (0.75 × \$338/hour + 0.25 × \$409/hour) ≈ \$122,400,000. *See infra* note 1161 and *supra* Table 2 note a.  
<sup>e</sup> Non-providing covered persons would use a reporting agent to provide information to an RNSA.  
<sup>f</sup> The estimated number of non-providing covered persons would include 31 non-broker-dealer intermediaries and 217 persons that effect a covered securities loan as the lender when an intermediary is not used. *See infra* Part X.  
<sup>g</sup> 1,500 hours × 248 × (0.75 × \$338/hour + 0.25 × \$409/hour) ≈ \$132,270,000. *See infra* note 1163 and *supra* Table 2 note a.  
<sup>h</sup> 675 hours × 248 × (0.75 × \$338/hour + 0.25 × \$409/hour) ≈ \$59,520,000. *See infra* note 1167 and *supra* Table 2 note a.  
<sup>i</sup> Reporting agents would provide information directly to an RNSA.  
<sup>j</sup> The number of reporting agents includes 97 broker-dealers and 9 clearing agencies. *See infra* Part X.  
<sup>k</sup> 3,000 hours × 106 × (0.75 × \$338/hour + 0.25 × \$409/hour) ≈ \$113,070,000. *See infra* note 1180 and *supra* Table 2 note a.  
<sup>l</sup> 1,350 hours × 106 × (0.75 × \$338/hour + 0.25 × \$409/hour) + 52 hours × 106 × \$83/hour ≈ \$51,340,000. *See infra* notes 1181 and 1191 *supra* Table 2 note a.  
<sup>m</sup> \$517.34 million ≈ sum of estimates in *supra* notes c, g, and k.  
<sup>n</sup> \$233.26 million ≈ sum of estimates in *supra* notes d, h, and l.

Table 3 shows that covered persons and reporting agents would incur an aggregate of roughly \$517 million in initial costs and \$233 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 covered persons who provide the Rule 10c-1a information to an RNSA instead of relying on a reporting agent to do so.<sup>974</sup> It is possible that some providing covered persons could privately contract with third party vendors to assist them with their reporting obligations.<sup>975</sup> The potential for third

party vendors, such as existing securities lending data vendors, to leverage their existing experience with collecting and disseminating securities lending data as well as economics of scale could result in lower compliance costs. If this is the case, the compliance costs for providing covered persons could be lower than what is reflected in Table 3.

TABLE 4—QUANTIFIED COMPLIANCE COSTS OF ENTERING INTO AGREEMENTS

	#	Agreement counterparty	Total initial industry cost	Total annual industry cost
Non-Providing Covered Persons <sup>a</sup> .....	<sup>b</sup> 248	Reporting Agent .....	<sup>c</sup> \$3,670,000	\$0
Reporting Agents <sup>d</sup> .....	<sup>d</sup> 106	Person who Provides 10c-1a Information .....	<sup>f</sup> 1,570,000	0
		RNSA .....	<sup>g</sup> 8,800	0
<b>Total</b> .....	<b>354</b>		<b><sup>h</sup> 5,250,000</b>	<b>0</b>

<sup>a</sup> *See supra* note Table 3 note e.  
<sup>b</sup> *See supra* note Table 3 note f.  
<sup>c</sup> 30 hours × 248 × \$494/hour ≈ \$3,670,000. *See infra* note 1171 and *supra* Table 2 note a.  
<sup>d</sup> *See supra* note Table 3 note i.  
<sup>e</sup> *See supra* note Table 3 note j.  
<sup>f</sup> 30 hours × 106 × \$494/hour ≈ \$1,570,000. *See infra* note 1185 and *supra* Table 2 note a.  
<sup>g</sup> 1 hour × 106 × \$83/hour ≈ \$8,800. *See infra* note 1188 and *supra* Table 2 note a.  
<sup>h</sup> \$5,250,000 ≈ sum of estimates in *supra* notes c, f, and g.

<sup>974</sup> In addition, there may be costs for reporting entities associated with determining whether a loan is a covered securities loan according to final Rule 10c-1a(f)(2), including whether a particular security is a reportable security. However, these costs are likely to be negligible, as many covered persons and reporting agents, including broker-dealers, are already required to determine whether a security is reportable to the CAT, TRACE, or RTRS are part of their compliance with other regulatory obligations. The Commission believes that many covered persons that do not have the resources or expertise to determine whether a security is a reportable security will be likely to use reporting agents, who, as broker-dealers and/or clearing agencies, will

likely have access to this information. These costs may also include costs to covered persons that are not members of an RNSA of establishing connections to an RNSA. *See supra* note 970. We do not expect significant additional costs to result from the requirement to report information once a loan modification occurs after that loan qualifies for reporting. This is because the primary costs associated with the rule are those associated with developing and reconfiguring their current systems to capture the required data elements. The variable cost of each individual transmission to an RNSA is expected to be very small. This requirement is not expected to impact the need for reporting agents to develop and maintain systems for reporting

securities lending information, because reporting agents will be required to develop these systems to meet the other provisions of the final rule. Rather, this will simply require the inclusion of some additional data transfers that occur largely around the reporting date. Since the cost of individual transmissions are expected to be small, this aspect of the final rule is expected to have a small impact on the compliance costs of the rule.  
<sup>975</sup> Note that, while covered persons can use third party vendors to help prepare their reports, such vendors would not be reporting agents under final Rule 10c-1a. *See supra* Part VII.B.2.

Table 4 shows that covered persons and reporting agents will incur an aggregate of \$5.25 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 will be incurred by covered persons that directly employ a reporting agent. There will not be ongoing costs because, once an agreement is signed, there will be no need to modify the written agreement or take additional action after it is executed.

One commenter expressed concern some of the compliance costs incurred by lending agents could be passed along to lenders and beneficial owners, including funds and their shareholders.<sup>976</sup> The Commission acknowledges that it is possible that some compliance costs may be passed along to beneficial owners, for instance, in the form of higher fees charged for lending services or lower pro-rated lending revenue.<sup>977</sup> Compliance costs may also be passed along by broker-dealers to end borrowers in the form of higher borrowing costs.<sup>978</sup> Ultimately, the extent to which either beneficial owners or end borrowers may bear some of the costs of complying with final Rule 10c-1a will depend on the extent to which covered persons, including lending agents and broker-dealers, pass on their compliance costs to their customers and/or split these costs across different types of customers. However, this effect is expected to be mitigated by the fact that the projected compliance costs of the final rule as a fraction of an estimate of the total lending fee revenue generated is likely small enough to be within the bounds of a positive profit margin.<sup>979</sup>

In addition to the above enumerated costs, the estimated 361 reporting entities (*i.e.*, providing covered persons and reporting agents), as well as subscribers to Rule 10c-1a data, may be

required to pay fees to an RNSA.<sup>980</sup> The fees that these entities may be required to pay will depend on a number of factors, including the number of reporting entities and subscribers, along with how an RNSA will choose to split any such fees between these different types of entities.

Some commenters expressed concern that an RNSA would have monopoly pricing power over the resulting data.<sup>981</sup> However, any fee that an RNSA would charge must be consistent with the Exchange Act and rules thereunder, and are subject to Commission review, notice and public comment.<sup>982</sup> Consequently, the Commission believes that an RNSA is unlikely to exert monopoly pricing in terms of fees for the data, and that their fees will be reasonably related to costs. As shown in Table 2, the Commission expects an RNSA to incur ongoing costs of \$2.76 million per year. If the 361 providing covered persons and reporting agents were the only entities to subscribe to the data, dividing the cost incurred by an RNSA by the 361 entities results in an annual fee per reporting entity of approximately \$7,600, or approximately \$633 per month. This cost would decrease to the extent that entities other than covered persons choose to subscribe to Rule 10c-1a data, which would allow an RNSA to spread its costs across more entities. At the same time, this estimate represents a lower bound on the estimated fees levied by an RNSA as an RNSA likely will need to recoup some of the initial fixed costs associated with administering the data.<sup>983</sup>

<sup>980</sup> One commenter stated that the “the estimated costs are understood to be incomplete” in the Proposing Release because “the RNSA (*i.e.*, FINRA) is also entitled to recover its costs from market participants who report securities lending transactions to the RNSA.” See CSFME Letter 1, at 4. However, this possibility was acknowledged by the Commission in the Proposing Release. See Proposing Release, 86 FR 69843, stating that “the estimated 409 reporting entities would also be required to pay reporting fees to the RNSA.”

<sup>981</sup> See, *e.g.*, Bloomberg L.P. Letter, at 4; HMA Letter, at 11.

<sup>982</sup> RNSA rule filings are subject to notice, comment and Commission review pursuant to section 19(b) of the Exchange Act and Rule 19b-4. An RNSA must demonstrate that proposed fees satisfy the Exchange Act requirements under section 15A(b), 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.

<sup>983</sup> 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

One commenter stated that, by considering proposed Rule 10c-1 “in isolation” from other recent Commission rules, “the Commission is not providing a comprehensive picture of the compliance and other direct costs,” and that “these costs will aggregate and will burden market participants with higher costs when considered jointly.”<sup>984</sup> But, consistent with its long-standing practice, the Commission’s economic analysis in each adopting release considers the incremental benefits and costs for the specific rule—that is, the benefits and costs stemming from that rule compared to the baseline. In doing so, the Commission acknowledges that in some cases resource limitations can lead to higher compliance costs when the compliance period of the rule being considered overlaps with the compliance period of other rules. In determining compliance periods, the Commission considers the benefits of the rules as well as the costs of delayed compliance periods and potential overlapping compliance periods.

We considered here whether recently adopted rules identified by commenters that affect market participants subject to the final rule<sup>985</sup> have overlapping implementation timeframes with the final rule. We found, however, that the compliance dates for these rules do not

the estimates provided herein as best estimates based on the information currently available to the Commission.

<sup>984</sup> See Overdahl Letter, at 15. Another commenter stated that because “[t]he resources of market participants are not infinite,” that commenter “believe[s] that unnecessary and aggressively timed regulatory changes will impact costs, complexity, competition and the ability of smaller market participants to enter into or remain in the markets.” ICI Letter 2, at 12. See also AIMA Letter 3, at 4 (recommending that rule adoptions “should be appropriately sequenced and their compliance periods appropriately aligned” so that “market participants” will not face “unnecessary costs”); Citadel Letter, at 10 (noting the Commission “has not assessed the cumulative impact of its myriad of recent position and activity disclosure-related proposals on market participants”).

<sup>985</sup> Specifically, we considered the Amendments to Form N-PX Adoption, the Settlement Cycle Adoption, and the Beneficial Ownership Amending Release, and the May 2023 SEC Form PF Amending Release. We expect that few if any entities subject to the May 2023 SEC Form PF Amending Release will face direct reporting obligations, and thus incur compliance costs, under final Rule 10c-1a. Form PF is required for private fund advisers. See *supra* Part IX.B. We do not expect private fund advisers to face direct implementation costs under final Rule 10c-1a, although we acknowledge that their lending programs and/or broker-dealers may pass along compliance costs to them. Entities subject to the Amendments to Form N-PX Adoption, the Settlement Cycle Adoption, or the Beneficial Ownership Amending Release could have reporting obligations under final Rule 10c-1a; however we anticipate no or little overlap between the implementation periods for those rules and this one.

<sup>976</sup> See, *e.g.*, ICI Letter 1, at 10 (stating that “fund shareholders will absorb part of the substantial costs of Rule 10c-1 . . . these costs ultimately will come directly out of the pockets of beneficial owners, including funds and their shareholders, to the detriment of their long-term interests”). See also State Street Letter, at 5 (stating that the rule “approach has the practical effect of imposing all systems-related cost for the new reporting mandate solely on agent lenders and their clients (*i.e.*, institutional investors, such as pension plans and mutual funds)”).

<sup>977</sup> See *supra* Part IX.B.4 for a description of the market for lending services.

<sup>978</sup> This possibility is discussed further in *infra* Part IX.C.4.

<sup>979</sup> See estimates in *infra* note 993.

significantly overlap with the expected industry compliance dates of final Rule 10c-1a,<sup>986</sup> and therefore we do not expect significant effects on compliance costs arising from overlapping compliance periods. We acknowledge that to the extent such overlap occurs, there could be costs, but we do not expect these to be significant costs.<sup>987</sup>

The Commission does not believe that loan participants will incur costs associated with obtaining and renewing LEIs, because only those loan participants that have non-lapsed LEIs will be required to report them. One commenter stated that borrowers should be required to obtain an LEI if they do not already have one, because the lack of an LEI would make it more challenging to identify entities.<sup>988</sup> We agree that wider LEI adoption and reporting would likely lead to more consistent and precise identification of legal entities, which could enhance analysis of the reported information.<sup>989</sup> We also recognize that any mandatory LEI reporting requirement for LEI-eligible loan participants would also generate additional costs for loan participants that do not currently have them, although such costs would likely be modest.<sup>990</sup>

#### 4. Other Costs

##### Increase in Borrowing Costs

The Commission acknowledged in the Proposing Release that increased compliance costs could lead to some consolidation in the securities lending market and impose some costs on market participants, including potentially higher prices associated with reduced competitive pressures.<sup>991</sup> However, the Commission believes that this effect by itself is unlikely to lead to

<sup>986</sup> See *supra* Part VIII on the compliance date for this final rule, and *supra* notes 726 through 728 for compliance dates of other recent rules discussed here.

<sup>987</sup> See also *infra* Part IX.D.2 (discussing possible effects of overlap on competition).

<sup>988</sup> See IHS Markit Letter, at 9.

<sup>989</sup> We note in this regard the recently enacted Financial Data Transparency Act of 2022, which directs the Commission and other financial regulators to establish data standards for collections of information. See James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, 117–263, tit. LVIII, 136 Stat. 2395, 3421–39 (2022).

<sup>990</sup> A U.S. entity can currently obtain and renew an LEI from one of eleven LEI operating units. See Global Legal Entity Identifier Foundation, *Get an LEI: Find LEI Issuing Organizations*, available at <https://www.gleif.org/en/about-lei/get-an-lei-find-lei-issuing-organizations>, last visited Aug. 29, 2023. One LEI operating unit currently discloses an initial fee of \$60 and a renewal fee of \$40. See Bloomberg LEI, *Frequently Asked Questions*, “Fees, Payments & Taxes,” Bloomberg LEI v. 1.4.71, available at <https://lei.bloomberg.com/docs/faq/what-fees-are-involved>, last visited Aug. 29, 2023.

<sup>991</sup> See Proposing Release, 86 FR 69843.

higher overall borrowing costs due to the fact that the value of securities available to be loaned generally far exceeds the total value on loan.<sup>992</sup> For general collateral securities, which make up the majority of loans, a modest decline in shares available to lend would not eliminate the slack in the market and thus would not likely increase fees. For securities “on special” with less available supply relative to demand, it is possible that a decline in shares available to lend could result in higher borrowing costs for some securities. However, the Commission believes that, to the extent that it occurs, these fee increases would likely be small and have minimal downstream economic effects. This minimal effect is expected for two reasons. First, the projected compliance cost of the final rule is a relatively small fraction of the likely total lending fee revenue generated, which makes it likely that most broker-dealers and lending programs would continue to earn a positive profit margin after accounting for these costs.<sup>993</sup> Second, academic research suggests that very small increases in lending fees are unlikely to result in significant downstream economic effects.<sup>994</sup> As a result, the

<sup>992</sup> See Panel A of Table 1 above in Part IX.B.3, showing that for most stocks the lending supply significantly outstrips demand with median utilization rates of approximately 12%.

<sup>993</sup> Averaging the fees across all three surveyed days from Table 8 of the OFR Pilot Survey and then multiplying those fees by the average dollar value of securities lent across all three days surveyed produces an estimated \$2.7 billion in lending fees collected in 2015. These fees only account for the Wholesale market, so multiplying this estimate by two to, conservatively, account for fees collected in the Customer market yields an estimate of \$5.4 billion in lending fees collected annually. See *supra*, in Part IX.C.3, the total direct compliance costs associated with the Rule are approximately \$236 million per year. Under a conservative assumption that 100% of the direct compliance costs will be transferred to borrowers in the form of higher fees spread equally across all loans, this would increase lending fees by \$236 million/\$5.4 billion ~ 4.7%. For perspective, for U.S. equities the OFR Pilot Survey reports the average lending fee across the three days surveyed was approximately 33 basis points (bps). A 4.7% increase in this lending fee would be an increase of 1.44 basis points. For U.S. Treasury/Agency securities, the average lending fee reported in the OFR Pilot Survey was approximately 16 bps. A 4.7% increase in this lending fee would be 0.70 bps. These numbers are estimates and could be somewhat higher or lower depending on various assumptions. If lenders absorb some of the direct compliance costs, the increase in fees will be smaller; if the total size of shares on loan increases, the increase would be smaller still. If the increase becomes concentrated among just a subset of stocks, such as general collateral stocks, the increase in fees would be larger. Regardless, these calculations illustrate that the economic magnitude of an increase in lending fees is likely to be small.

<sup>994</sup> Research shows that an exogenous shock to the lending supply affects loan prices, but that the downstream effects of these fee changes are modest

Commission expects that any increase in borrowing costs that may result from consolidation among broker-dealers or lending programs would be minimal, and therefore likely offset by a simultaneous decrease in borrowing costs due to improved transparency and efficiency in the securities lending market which, as described above, are expected to concentrate among stocks that are on special.<sup>995</sup>

##### Lower Revenues From Securities Lending

Commenters expressed concern that, to the extent that lenders are not able to pass on compliance costs to borrowers through increased fees, the rule could lead to decreased profit from securities lending for some market participants.<sup>996</sup> However, the Commission estimates that, as the projected compliance cost of the final rule is a relatively small fraction of the likely total lending fee revenue generated, most market participants will continue to be able to earn a positive profit margin from securities lending.<sup>997</sup>

In addition, as acknowledged in the Proposing Release, a reduction in information asymmetry may result in reduced revenue for some broker-dealers and lending programs in at least two ways.<sup>998</sup> First, a reduction in securities lending revenues could occur

or non-identifiable. See Dixon, et al. (2021), *supra* note 746. See also Steven N. Kaplan, Tobias J. Moskowitz, & Berk A. Sensoy, *The Effects of Stock Lending on Security Prices: An Experiment*, 68 J. Fin. 1891 (2013). The loan fee effects reported in these studies tend to be multiples of the potential loan fee effects discussed in this section. Consequently, the resulting economic impact of any such fee increase would also likely be correspondingly smaller.

<sup>995</sup> See *supra* Part IX.C.1 discussing the expected effects of the final rule on lowering borrowing costs for investors, as well as for a discussion on why the Commission expects the economic effects of the final rule to be concentrated among hard-to-borrow stocks.

<sup>996</sup> See, e.g., State Street Letter, at 5 (stating that “there is, in our view, no practical way for agent lenders to try to recuperate even a portion of these new costs from borrowers through changes to existing market pricing conventions. In effect therefore, the costs associated with the establishment and maintenance of the reporting system for securities lending transactions envisioned by the Commission will substantially narrow, if not eliminate, existing revenue streams for agent lenders and their clients in what is already a low margin business.”); See also RMA Letter, at 8 (stating that “for structural reasons, Lending Agents are also unlikely to be able to fully pass on the costs of implementation to borrowers.”); CSFME Letter 1, at 4–5 (stating that “most beneficial owners participate in securities lending to generate marginal income. If lenders are forced to bear the final cost of compliance with Rule 10c-1, they may find their margins so thin that they can no longer justify their lending activities, pulling their liquidity from the market.”).

<sup>997</sup> See *supra* note 993 for a description of this estimate.

<sup>998</sup> See Proposing Release, 86 FR 69837.

because end borrowers and beneficial owners will have more information about the state of the lending market. As a result, 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 represent a reduction in revenue for some broker-dealers and lending programs. It is possible that 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.<sup>999</sup> The loss of revenue will in part be a transfer to the end borrowers and beneficial owners that switch to better-performing lending programs and better-performing broker-dealers, as well as the better-performing lending programs and broker-dealers that attract additional customers. The Commission is not able to quantify the potential loss in revenue that could occur for underperforming broker-dealers and lending programs because the Commission is not able to quantify the extent to which these broker-dealers and lending programs' current revenues are driven by asymmetric information.<sup>1000</sup>

Second, lending programs may also experience reduced profitability through the lower rates offered by broker-dealers to their customers.<sup>1001</sup> If a given lending program has become skilled in cultivating relationships with broker-dealers currently willing 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

<sup>999</sup> See *infra* Part IX.D.2 for a discussion of the implications of the final rule for competition between broker-dealers.

<sup>1000</sup> As discussed in *supra* Part IX.B.3, the observed dispersion in loan fees may give a rough upper bound on the extent to which loan fees are driven by asymmetric information, which may provide some insights into a potential loss in revenue due to the reduction of asymmetric information. For example, the results from Table 1 showed that the most that some borrowers pay above the median market loan price for loans of the same security is around 400%. However, this would be an extreme upper bound, as the vast majority of borrowers, to the extent they overpay, would overpay less than 400% above median market prices, the dispersion loan fees is likely driven by factors other than asymmetric information (see *supra* note 789), and it is not necessarily the case that the final rule will fully eliminate the impact of asymmetric information on loan fees.

<sup>1001</sup> See, e.g., ICI Letter 1, at 10 (stating that “fund shareholders will absorb part of the substantial costs of Rule 10c–1. . . these costs ultimately will come directly out of the pockets of beneficial owners, including funds and their shareholders, to the detriment of their long-term interests.”). Furthermore, while the Commission expects the net impact of the final rule on borrowing costs to be negative, see *supra* Part IX.C.4 for a discussion of the possibility that compliance costs may increase borrowing costs.

charged for security loans—lowering the total lending revenue produced by securities lending.<sup>1002</sup> While the Commission expects that beneficial owners will benefit from the final Rule as a result of the reduction in information asymmetry,<sup>1003</sup> in some cases lower lending revenues and potentially increased costs may reduce the revenue earned by some beneficial owners.<sup>1004</sup> As acknowledged in the Proposing Release, this would represent a partial transfer from beneficial owners to the end borrowers who may receive better terms on average as a result of decreased information asymmetries.<sup>1005</sup> Ultimately, the Commission is not able to quantify the net impact of the rule on beneficial owners' lending revenues, as the Commission is not able to quantify, among other items, the extent to which end borrowers may receive better terms on average as a result of decreased information asymmetries.<sup>1006</sup>

#### Lower Revenues for Securities Lending Data Vendors

Commenters expressed concern that the increase in securities lending information provided by the rule will also result in costs in the form of lost revenue for commercial securities lending data vendors, which could lead some data vendors to pare back their product offerings.<sup>1007</sup> The Commission acknowledges that this may occur for a number of reasons. First, commercial data vendors may pare back their offerings if demand for their products decreases because their customers switch to using Rule 10c–1a data. Second, some market participants who currently contribute data under a give-to-get model may find it less worthwhile to do so when the rule provides an alternative source of data. This effect would diminish the quality of the give-to-get data currently provided by commercial data vendors and may lead to fewer market participants being willing to purchase the data. Both of these effects could result in lower revenues. To the extent that data

<sup>1002</sup> See *id.*

<sup>1003</sup> See *supra* Part IX.C.1 for a discussion of how a decrease in information asymmetries will benefit end borrowers and beneficial owners.

<sup>1004</sup> See *supra* note 976 and corresponding text for a discussion of how compliance costs may affect beneficial owners to the extent that they are passed on to them by lending programs.

<sup>1005</sup> See Proposing Release, 86 FR 69837. See *supra* Part IX.C.1 for a discussion of the expected effects of the final rule on reducing information asymmetries between end borrowers and broker-dealers.

<sup>1006</sup> See *supra* note 1000 for further discussion of a potential rough estimate of the extent to which securities lending prices are driven by asymmetric information.

<sup>1007</sup> See, e.g., Overdahl Letter, at 4.

vendors do pare back their product offerings and/or if the quality of their data products are diminished, then this could reduce transparency in the securities lending market in cases where these datasets contain information that is not collected and disseminated by the final rule, such as utilization rates and shares available to lend.

The Commission believes that a potential mitigating factor that may reduce or even offset the severity of this loss in revenue will be that commercial data vendors may offset some of the impact of lowered demand for their data by enhancing their related data analytics businesses using Rule 10c–1a data.<sup>1008</sup> Furthermore, to the extent that customers value the availability of information about securities available to lend and utilization rates, the fact that commercial data vendors will continue to have superior access to this information<sup>1009</sup> will likely mitigate or even offset a decrease in demand, as investors would continue to purchase commercial datasets in order to gain access to this information. The Commission is unable to quantify the potential impact of the final rule on securities lending data vendors' revenues because this would require knowledge of the baseline level of such revenues, which the Commission does not have access to and about which commenters did not provide information.

#### Miscellaneous Costs

Some commenters expressed concern that the rule requires the reporting of sensitive information and thus could present a risk to individuals in the case of a data breach.<sup>1010</sup> The Commission recognizes that the final rule collects sensitive information and that the costs of a data breach could be substantial.<sup>1011</sup> These costs include, but

<sup>1008</sup> See *supra* Part IX.C.1 for further discussion of the expected effects of the final rule in creating new business opportunities for providers of securities lending data analytics services.

<sup>1009</sup> Note, however, that the information about shares available to lend collected by commercial data vendors is likely subject to the issues discussed in *supra* Part IX.B.2, including self-selection biases and a lack of comprehensiveness.

<sup>1010</sup> See, e.g., IIB Letter, at 11; Charles Schwab Letter, at 2.

<sup>1011</sup> See, e.g., *Proposed Rule, Cybersecurity Risk Management Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants, the Municipal Securities Rulemaking Board, National Securities Associations, National Securities Exchanges, Security-Based Swap Data Repositories, Security-Based Swap Dealers, and Transfer Agents* (“Proposed Cybersecurity Rule”), 88 FR 20212 (Apr. 5, 2023) (“In 2020, the average loss in the financial services industry was \$18.3 million, per company per incident. The average cost of a financial services data breach was \$5.85

are not limited to, the following: (1) trading losses that could occur due to the revelation of private trading strategies or economic positions which may enable identifying and trading opportunistically around such strategies, such as facilitating a short squeeze; (2) business disruptions that could occur if the data breach results in temporary system down time; (3) data breach response costs as market participants must devote resources to determining how to respond to the data breach; and (4) reputational harm to an RNSA. While the potential costs of a breach, to the extent that one occurs could be severe, RNSAs, as well as ATs and SROs, are currently subject to existing regulations that aim to improve the resiliency and oversight of securities market technology infrastructure, such as Regulation Systems Compliance and Integrity (“Regulation SCI”).<sup>1012</sup> Adherence to regulations that seek to ensure the resiliency and integrity of technology systems can reduce the probability of a data breach and mitigate the costs associated with a breach, should it occur.

Some commenters expressed concern that the rule could inhibit innovation in securities lending, such as the potential adoption of blockchain technology, by diverting resources away from innovation and towards compliance.<sup>1013</sup> While such diversion is possible, we expect that market participants will continue to pursue innovation that creates a competitive advantage or for which there is a market demand. One commenter suggested that innovations such as blockchain technology could obviate the need for transaction reporting systems.<sup>1014</sup> The Commission acknowledges this possibility; however, such innovations would need to overcome the market failures described earlier in this analysis.<sup>1015</sup>

One commenter expressed concern that, “with lenders dependent upon their agents for reporting to the RNSA, the rule could make it more difficult for lenders to switch agents.”<sup>1016</sup> To the extent that there would be any bespoke reporting services offered by lending agents, it is possible that the final rule

million.”) (citing Jennifer Rose Hale, *The Soaring Risks of Financial Services Cybercrime: By the Numbers*, Diligent (Apr. 9, 2021).

<sup>1012</sup> See 79 FR 72252. See also SEC, *Spotlight on Regulation SCI*, available at <https://www.sec.gov/spotlight/regulation-sci>.

<sup>1013</sup> See, e.g., RMA Letter, at 8; ISLA Letter, at 3.

<sup>1014</sup> See, e.g., RMA Letter, at 8 (stating that “financial technologies like blockchain that could ultimately obviate the need for special transaction reporting systems and make transactions viewable on their native ledgers.”).

<sup>1015</sup> See *supra* Part IX.A.2.

<sup>1016</sup> See CSFME Letter 1, at 5.

could increase a lender’s dependence on their lending agent, and thus marginally increase their costs of switching agents. However, the Commission expects this increased cost, to the extent it occurs, to be minimal. The Commission expects that many covered persons, including lending agents, will rely on reporting agents to provide the Rule 10c–1a information directly to an RNSA. This would generally result in an unbundling of lending and reporting services, such that an increased dependence on a lending agent for their reporting services would be unlikely. To the extent that a lender requests or requires bespoke reporting services from their lending agent, that lender could examine such a service among the package of lending services—including reporting services—that a prospective agent offers, and decide accordingly while taking into account the potentially higher costs of switching to a new lending agent.

To the extent that there are entities that would like to serve as reporting agents but are not currently registered as broker-dealers,<sup>1017</sup> the cost of registering as a broker-dealer may be another cost associated with the final rule.<sup>1018</sup> However, the final rule does not require any entity to serve as a reporting agent, and as such this cost would only accrue to those entities that make the business decision to become a reporting agent. It is likely that an entity that is not currently registered as a broker or dealer will only make the business decision to become a reporting agent if they believe that the cost of registering as a broker-dealer is more than offset by the revenue that they will earn as a reporting agent.

#### 5. Reduced Benefits From Alternative Arrangements

##### Economically Similar Arrangements

The Commission recognizes a risk that the comprehensiveness of Rule 10c–1a data, and hence the benefits that accrue due to the comprehensive nature of the data, could be diminished to the extent that market participants choose to use arrangements that are economically similar to securities lending agreements. For example, market participants may substitute repo for securities lending agreements.<sup>1019</sup> This substitution may occur because a fixed term cash collateralized securities loan is economically very similar to a

<sup>1017</sup> One commenter that is not a broker-dealer requested that the Commission allow non-broker-dealers to become reporting agents because they already have connections to firms for the reporting of securities loans. See S3 Partners Letter, at 12.

<sup>1018</sup> See final Rule 10c–1a(ii)(A), requiring a reporting agent to be a broker or dealer.

<sup>1019</sup> See *supra* note 776 for a definition and discussion of repo contracts.

repo.<sup>1020</sup> 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 believes that this risk varies across asset classes. In equities, the Commission 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.<sup>1021</sup> Among 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 final Rule 10c–1a leads to improvements in the functioning of the securities lending market, then the risk of migration may diminish to the extent that improved efficiency in the securities lending market diminishes the incentive to transfer activity to potentially less developed repo markets.

Should this substitution affect a significant volume of securities lending, certain benefits and costs discussed above may decline. The less comprehensive data could reduce the extent to which the Rule reduces any biases or gaps in the data. For instance, market participants who use the data to price securities loans will have a less accurate and potentially biased view of the market, which will limit the benefits from increased transparency.<sup>1022</sup>

Additionally, regulators using the data to determine lending market conditions at the time of, for example, a Reg SHO

<sup>1020</sup> See *supra* note 777 for evidence of this from the OFR Pilot Survey.

<sup>1021</sup> The Commission 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 volatility of equities relative to fixed-income securities, equities are a significantly riskier collateral type, limiting their appeal as “collateral” for short term finance.

<sup>1022</sup> See *supra* Part IX.C.1 for a discussion of expected benefits from the final rule related to increasing the transparency of the securities lending market. One commenter states that the benefits of the rule are likely to be limited for fixed-income (see RMA Letter, at 16; see also *supra* note 950), which, as discussed in this section, is also the asset class most likely to see circumvention through the use of repo markets. As discussed in *supra* Part IX.C.1, the Commission expects the fixed-income market to benefit from the final rule. However, to the extent that this asset class sees lower overall benefits from final Rule 10c–1a, this would also serve to limit the amount to which the benefits of final Rule 10c–1a would be lowered as a result of circumvention.

violation will 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 will incur lower compliance costs from the final rule, including one-time implementation costs if they replace all securities lending with repo. Further, a significant substitution will reduce the ongoing costs of an RNSA because an RNSA will not have to collect and process as many transaction reports.

#### Cross-Border Application

One commenter expressed concern that “an overly broad or ambiguous reach of Proposed Rule 10c–1 could reduce liquidity and place U.S. intermediaries . . . at a competitive disadvantage,” because “market participants—particularly those outside of the United States—might determine to limit or cease trading or interacting with U.S. intermediaries (or leave the U.S. markets all together) in order to prevent public disclosure of their transactions.”<sup>1023</sup> The Commission acknowledges some market participants could be incentivized to restructure their activities to avoid reporting. Specifically, in an effort to avoid having their lending activities fall within the reach of section 10(c), participants could relocate overseas any of their current U.S.-based conduct that constitutes effecting, accepting, or facilitating a lending transaction. However, the Commission believes that this risk is low. As pointed out by the same commenter, there are disincentives for market participants to move lending activity outside of the U.S. market, including “the depth and liquidity of the U.S. market,” as well as few incentives for “U.S. asset managers to prefer non-U.S. lenders that are themselves subject to similar reporting requirements in their home jurisdictions.”<sup>1024</sup>

#### C. Impact on Efficiency, Competition, and Capital Formation

##### 1. Efficiency

In the securities lending market, the availability of Rule 10c–1a data for market participants will lead to more efficient prices for securities loans.<sup>1025</sup>

<sup>1023</sup> See *supra* note 660, citing HSBC Letter 1.

<sup>1024</sup> See *supra* note 660, citing HSBC Letter 2.

<sup>1025</sup> See *supra* Part IX.C.1 for a discussion of how an increase in transparency in the securities lending market will improve market efficiency. More efficient prices do not imply that all securities loans will have the same price. There are many factors that affect the cost of a securities loan and can lead to a range of prices for securities loans. See *supra* note 780 and corresponding text.

The reduction in asymmetric information in the market for lending programs and broker-dealers may also make those markets more efficient.<sup>1026</sup> Additionally, the Commission believes that final Rule 10c–1a may have secondary effects that will increase price efficiency in the underlying securities markets and option markets.<sup>1027</sup> Also, the increased ease with which banks and other financial institutions will be able to manage collateral and balance sheets as a result of the final rule<sup>1028</sup> could lead to increased efficiency in their functioning and in those markets in which they play a role.

##### 2. Competition

The Commission believes that the net impact of final Rule 10c–1a on competition is difficult to predict, in that some aspects will likely increase competition and some aspects will likely reduce competition. Competition will likely be impacted in the markets for broker-dealer services, lending programs, and securities lending data vendors.

The Commission believes that one effect from the final rule’s reduction of information asymmetry between end borrowers and broker-dealers, and between beneficial owners and lending programs, will be to increase competition between broker-dealers and between lending programs.<sup>1029</sup> A reduction in information asymmetry will permit better monitoring of the performance of these entities by their respective customers, and will likely force these entities to do more to match the performance of their competitors, to

<sup>1026</sup> See *supra* Part IX.C.1 for a discussion of the final rule’s expected benefits from reducing asymmetric information in the securities lending market.

<sup>1027</sup> See *supra* Part IX.C.1 for a discussion of the final rule’s expected benefits for markets related to the securities lending market, and for a discussion of the final rule’s benefits for the underlying securities market from reducing short selling costs.

<sup>1028</sup> See *supra* Part IX.C.1 for a discussion of the final rule’s expected benefits from improved financial management for financial institutions.

<sup>1029</sup> See *supra* Part IX.C.1 for a discussion of the expected effects of the rule in terms of reducing information asymmetries between end borrowers and broker-dealers, and between beneficial owners and lending programs. See also *supra* note 855 and corresponding text. The requirement to report information once a loan modification occurs after that loan qualifies for reporting will further support the benefits of the final rule, including reduced information asymmetries and enhanced price competition, by helping to ensure a level playing field during the earlier phases of implementation. This provision will prevent lenders that have a higher number of long-term loans that did not initially qualify for final Rule 10c–1a reporting from gaining a competitive advantage by being able to see the loans of other market participants without disclosing the terms of their own loans. See *supra* Part IX.C.1.

the extent that they do not already do so. One commenter stated that the effect of the final rule on competition between broker-dealers may be attenuated by the presence of high switching costs.<sup>1030</sup> The Commission does not believe that switching costs for most market participants are high enough such that this is a likely outcome.<sup>1031</sup>

Furthermore, 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, thus enhancing competition among securities lending platforms.

Commenters expressed concern that competition in the securities lending market could decrease if lenders are driven out of the market because of compliance costs.<sup>1032</sup> The Commission does not believe that compliance costs are such that this would be a likely scenario because the projected compliance costs associated with final Rule 10c–1a are likely to be a relatively small fraction of total lending fee revenues.<sup>1033</sup> At the same time, the reduction in asymmetric information in the securities lending market that will result from the final rule may diminish broker-dealer and lending program profits to the extent that it reduces their current information advantage over their customers.<sup>1034</sup> 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 recognizes that, given the significant fixed costs of implementing the systems required by the final rule for lending programs to report to an RNSA, some smaller<sup>1035</sup>

<sup>1030</sup> See Citadel Letter, at 8.

<sup>1031</sup> See *supra* Part IX.C.1 for a discussion of why switching costs may be limited.

<sup>1032</sup> See, e.g., RMA Letter, at 5.

<sup>1033</sup> See *supra* note 993 and corresponding text for an estimate of compliance costs as a fraction of securities lending revenues.

<sup>1034</sup> See *supra* Part IX.C.4 for further discussion. This was also acknowledged by the Commission in the Proposing Release; See Proposing Release, 86 FR 69837, stating that a “reduction in information asymmetry could result in reduced revenue for some broker-dealers and lending programs.”

<sup>1035</sup> 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 XI. Rather, smaller is meant to convey the size of these entities in relation

lending programs and broker-dealers may consolidate or exit the lending market. The Commission 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 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 will cease operating as a result of these fixed costs.<sup>1036</sup> The Commission recognizes that smaller lending agents may have unique business models that are not currently offered by competitors, but the Commission believes a competitor could create similar business models if demand were adequate.<sup>1037</sup>

The Commission believes that the dissemination of Rule 10c-1a data collected under the final rule will change the competitive landscape for securities lending data 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.<sup>1038</sup> 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 an RNA as a result of the final rule will

to larger market participants engaged in securities lending transactions.

<sup>1036</sup> 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 to the broker-dealer space to compete with established broker-dealers.

<sup>1037</sup> The Commission believes that this effect will be enhanced under the final rule as compared to the proposed rule. While proposed Rule 10c-1 only allowed a “bank, clearing agency, broker, or dealer” to act as a lending agent or “intermediary” (see proposed Rule 10c-1(a)(1)(i)(A)), the final rule applies the term “intermediary” more broadly to “any person that effects a covered securities loan on behalf of the lender” (see final Rule 10c-1a(j)(1)(i)). Permitting other types of persons who can act as lending agents in addition to banks, clearing agencies, brokers, or dealers will support the ability of new lending agents to enter the market, promoting competition in the market for lending services.

<sup>1038</sup> See *supra* note 853 and corresponding text. However, the Commission acknowledges that the final rule may result in some loss of revenue or product quality for some commercial data vendors. See *supra* Part IX.C.4.

produce an alternative to existing data vendors’ commercial securities lending data products. Existing data vendors may retain a competitive advantage, however, as they will likely continue to have access to information on utilization rates and shares available for lending, which are not provided by the final rule.

Some commenters expressed concern that the rule would cause lending activity to migrate overseas to avoid the reporting obligation under final Rule 10c-1a, which would make the U.S. securities lending market less competitive.<sup>1039</sup> While it is possible that some market participants could move their activity to other jurisdictions in attempt to circumvent the reporting obligation of final Rule 10c-1a, the Commission believes that it is unlikely that this would occur on a large scale. This is because the final Rule imposes a reporting obligation on any qualifying loan regardless of whether the person is located abroad or is a non-U.S. person when the transaction occurs.<sup>1040</sup>

In addition, as stated above, some commenters requested the Commission consider interactions between the economic effects of the proposed rule and other recent Commission rules, as well as practical realities such as implementation timelines. One commenter stated that because “[t]he resources of market participants are not infinite,” that commenter “believe[s] that] unnecessary and aggressively timed regulatory changes will impact costs, complexity, competition and the ability of smaller market participants to enter into or remain in the markets.”<sup>1041</sup> As discussed above, the Commission acknowledges that simultaneous compliance periods may in some cases increase costs. This may be particularly true for smaller entities with more limited compliance resources. This effect can negatively impact competition because these entities may be less able to absorb or pass on these additional costs, making it more difficult for them to remain in business or compete. However, we determined that the rules highlighted by commenters either did not impose implementation costs on the same entities as this final rule and/or had compliance dates that did not significantly overlap with the expected industry compliance dates of this final rule, and therefore we do not expect these effects on competition to be

<sup>1039</sup> See, e.g., HSBC Letter 1, at 5.

<sup>1040</sup> See *supra* Part VII.M for further discussion of the cross-border applicability of final Rule 10c-1a.

<sup>1041</sup> See ICI Letter 2, at 12. See also *supra* Part IX.B.6 for a description of related comments.

significant.<sup>1042</sup> We acknowledge that to the extent such overlap (in scope or timing) occurs, there could be costs which could affect competition, but we do not expect these costs to be significant.

### 3. Capital Formation

The Commission believes that the impact of final Rule 10c-1a will have mostly positive effects on capital formation. In particular, improved price discovery in securities markets<sup>1043</sup> and improved balance sheet management by financial institutions<sup>1044</sup> could facilitate improvements in the provision of capital. In addition, to the extent that the final rule reduces the costs of short selling it may facilitate more effective discovery of negative information that in turn could lead to more efficient allocation of capital.<sup>1045</sup> However, to the extent that the Rule increases the cost of short selling for some stocks in some situations, it could also lead to less efficient allocation of capital in these instances.<sup>1046</sup>

#### D. Alternatives

##### 1. Report Loan Sizes Without a Delay

The Commission considered an alternative requiring that an RNA disseminate loan sizes at the same time as it disseminates all other loan information (*i.e.*, without a 20-business-day delay). This alternative would increase the timeliness of securities lending information available to the public, which could improve market quality by reducing information asymmetries as well as providing additional transparency to the securities lending market. However, it could also harm market quality by providing novel information about short positions with a greater timeliness than the short selling information that is currently available.<sup>1047</sup>

To the extent that the aggregate cost-to-borrow statistics that an RNA publicly disseminates are volume-weighted, these statistics will provide end borrowers with access to

<sup>1042</sup> See also *supra* Part IX.C.3.

<sup>1043</sup> See *supra* Part IX.C.1 for further discussion of the expected benefits of the final rule from increased transparency in the securities lending market, including improvements in price discovery. See also *supra* Part IX.D.1.

<sup>1044</sup> See *supra* Part IX.C.1 for further discussion of the expected benefits of the final rule related to improved financial management for financial institutions.

<sup>1045</sup> See *supra* Part IX.C.1.

<sup>1046</sup> See *supra* Part IX.C.1 discussing instances where the cost of short selling could increase, consistent with the views of some commenters.

<sup>1047</sup> See *supra* Part IX.B.6 for further discussion of the timeliness of current sources of short selling information.

information about loan prices that incorporates information about loan sizes even prior to the public dissemination of loan sizes.<sup>1048</sup> However, disseminating securities loan sizes as well as modifications of securities loan sizes on the next business day after a loan is effected or modified would allow market participants to produce their own custom cost-to-borrow metrics that are most tailored to their business needs. This would allow market participants to focus on the aspects of the market that are most relevant to their business needs. This effect would increase the benefits of final Rule 10c-1a from increased transparency in the securities lending market.<sup>1049</sup>

However, the information could also be used to estimate short selling positions with more accuracy than is possible under the final rule. A market participant wishing to gain insight into short selling sentiment could aggregate the sizes of all open loans that are associated with categories of borrowers that are likely to be short sellers.<sup>1050</sup> If information about these loans is available the day after the loans are effected then, given the settlement cycles for equity short sales and equity loans,<sup>1051</sup> this would be equivalent to three business days after an equity short sale took place. These data would be considerably timelier than existing short interest data such as the FINRA data. Additionally, market participants could follow individual short positions with a three-business-day lag for equity short positions. This is a capacity that is not possible using existing data. This could be accomplished by tracking individual loans that are marked as being to a customer if the lender is a broker dealer. While the identity of the borrower would not be available to the public, market participants could discern

<sup>1048</sup> If an RNSA chooses to publish cost to borrow statistics that are very granular and, for example, provide separate statistics for Customer and Wholesale loans and/or according to other loan characteristics, then end borrowers would be able to benchmark their transactions to these statistics with increased accuracy. To the extent that an RNSA chooses to publish less granular statistics, then the end borrower could still benchmark relative to the cost to borrow statistics provided by an RNSA, but the benchmark would be noisier.

<sup>1049</sup> See *supra* Part IX.C.1 for further discussion of the expected benefits of the final rule from increasing the transparency of the securities lending market.

<sup>1050</sup> See *supra* note 895 and corresponding text for more information about, since activity in the Customer market for securities loans are tightly linked to short selling positions, the sum of loans identified in the Rule 10c-1a data as being to “a customer (if the person lending securities is a broker or dealer)” could give a strong indication of aggregate short interest.

<sup>1051</sup> See *supra* note 738 and corresponding text.

whether changes in short interest were due to changes across many positions or few.

This additional information that market participants could extract about short selling could enable copycat investing strategies that seek to mimic what the short sellers do. This could increase the costs of establishing a short position, thus making it costlier for short sellers to profit from their research. If the profitability of research diminishes, there is the risk that less market research could be performed and, if this occurs, there could be negative impacts on market quality and corporate monitoring.<sup>1052</sup>

## 2. Alternative Timeframes for Reporting or Dissemination

The Commission also considered an alternative requiring different timeframes for reporting or disseminating the securities lending transaction information.

First, the Commission considered requiring covered persons to provide an RNSA with Rule 10c-1a information earlier than the end of each business day on which a covered securities loan is affected.<sup>1053</sup> For example, the Commission could require covered persons to provide an RNSA with information about a loan within a fixed period after the loan has been effected, such as 15 minutes. This alternative would increase the timeliness of securities lending information, potentially increasing some of the benefits of final Rule 10c-1a, such as regulators’ access to this information for regulatory and surveillance use.<sup>1054</sup> Furthermore, if an RNSA were required to make the information publicly available as soon as practicable after an, e.g., 15-minute reporting timeframe, this could increase the benefits of the final rule for transparency in the securities lending market by making the data available up to one business day sooner than under the final rule.<sup>1055</sup> It would, however, likely increase compliance costs to an RNSA as they would be required to build out systems capable of intraday dissemination.

At the same time, several commenters pointed out numerous costs associated with more timely and frequent reporting. For example, some

<sup>1052</sup> See *supra* Part IX.C.1 for further discussion of the potential negative consequences of revealing short sellers’ strategies.

<sup>1053</sup> See final Rule 10c-1a(c).

<sup>1054</sup> See *supra* Part IX.C.2 for further discussion of the regulatory benefits of the final rule.

<sup>1055</sup> See *supra* Part IX.C.1 for further discussion of the expected benefits of the final rule from increasing transparency in the securities lending market.

commenters suggested many loan terms are not finalized until the end of the day,<sup>1056</sup> and so a 15 minute reporting requirement increases the risk that the data provided by the final rule could be less accurate and more prone to errors that would later have to be corrected, which would mitigate the usefulness of the final rule. This alternative would also require greater compliance costs because, as commenters also pointed out, securities lending systems would need greater adaptations to comply with a more stringent reporting time horizon.<sup>1057</sup>

The Commission could also require covered persons to provide an RNSA with Rule 10c-1a information later than the end of each business day on which a covered securities loan is effected, for example, by the end of the next business day after a covered securities loan is effected. This alternative may lead to lower compliance costs, as reporting entities would have more time to prepare the Rule 10c-1a information for reporting; however, the Commission 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. Furthermore, a longer reporting horizon would delay the dissemination and availability of securities loan information, potentially reducing some of the benefits of the final rule.

In general, because securities loan terms 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 that the loan is effected, and the compliance costs associated with reporting loans at shorter time horizons.

The Commission also considered alternatives requiring an RNSA to distribute the collected data required in paragraph (c) at different horizons, such

<sup>1056</sup> See, e.g., SIFMA AMG Letter, at 4 (stating that “the securities lending market is not an ‘intraday market,’ as the terms are not settled at the exact time a loan ‘is agreed to by the parties.’ Rather, terms such as collateral type, fees, and even loan size are worked out between the parties before ultimately being settled, typically at the end of the business day”); Charles Schwab Letter, at 2 (stating that “some loans are not finalized until the end of the trading day”); BlackRock Letter, at 2 (stating that “the nature of the securities lending markets poses a number of logistical hurdles that will make intraday reporting impractical”).

<sup>1057</sup> See, e.g., IHS Markit Letter, at 13 (stating that “most lenders will not be able to meet the 15-minute requirement without substantial technology development and cost”); Charles Schwab Letter, at 2 (stating that “the proposed 15-minute reporting window would . . . [create] a significant operational burden on firms”).

as by the end of the following day.<sup>1058</sup> This alternative would allow an RNSA to process the data during regular business hours, potentially limiting the amount of data validation an RNSA could perform prior to distributing the data. However, this would delay market participants' abilities to benefit from Rule 10c-1a data by at least a business day. Furthermore, given the automated nature of the data, the compliance costs associated with this alternative are not likely to be significantly lower than those associated with the final rule. 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 delayed dissemination of size information about large loans (*i.e.*, loans larger than a certain size threshold) while disseminating size information about smaller loans the next business day. This alternative would provide more information to the market than the final rule because it would not mask the size of smaller loans, and thus could enhance the final rule's benefits due to increased transparency.<sup>1059</sup> However, this alternative would increase the amount of novel information about short positions that the market could learn from Rule 10c-1a data, which would increase the risk of negative effects due to over-exposing short selling information.<sup>1060</sup> This alternative would also increase the complexity of the Rule as determinations would need to be made regarding the optimal threshold size level, as well as how to handle loan modifications that could potentially move a given loan size above or below the given threshold.

### 3. Only Require Dissemination of Aggregate or Wholesale Statistics

The Commission also considered an alternative whereby an RNSA would produce only aggregate statistics and no transaction-by-transaction reports.<sup>1061</sup>

<sup>1058</sup> The final rule requires an RNSA to disseminate transaction-level information (apart from loan size) as soon as practicable, but no later than the morning of the business day after the covered securities loan is affected. *See* final Rule 10c-1a(g). For a discussion of an alternative in which loan size information is released without a delay, *see supra* Part IX.E.1.

<sup>1059</sup> *See supra* Part IX.C.1.

<sup>1060</sup> *See supra* Part IX.C.1 for further discussion of the potential negative consequences of revealing short sellers' information.

<sup>1061</sup> This was suggested by some commenters. *See, e.g.*, RMA Letter, at 4; SIFMA Letter 1, at 3-4, MFA Letter 3, at 4-5.

Specifically, an RNSA could aggregate transaction data elements and produce various aggregated statistics at the end of the business day following the date that the loans were effectuated, without disseminating the raw transaction-by-transaction data.

This alternative would not change the reporting requirements for covered persons relative to the final rule and thus would have the same initial and ongoing compliance costs as the final rule for covered persons. This alternative would be somewhat less costly to implement for an RNSA than the final rule, which requires an RNSA to produce daily aggregate information,<sup>1062</sup> similar to this alternative, but also requires dissemination of loan-by-loan information, which this alternative would not do.

This alternative would increase the amount of information available to the public relative to the baseline and thus would mitigate information asymmetries relative to the baseline. Aggregate statistics would also make it more difficult for market participants to use the data to discern information about short positions, which would reduce the risk of exposing short selling strategies relative to the adopted Rule.<sup>1063</sup>

However, only having daily aggregate data would not provide the same transparency benefits as final Rule 10c-1a. Without comprehensive transaction data, 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 if the terms that their broker-dealer offers are consistent with current market terms for similar loans, 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. A lack of publicly disseminated transaction data 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.

<sup>1062</sup> *See* final Rule 10c-1a(g)(5).

<sup>1063</sup> *See supra* Part IX.C.1 for further discussion of the potential negative consequences of revealing short sellers' information.

These effects would reduce the benefits of final rule for improved competition.

The diminished transparency of this alternative relative to the final rule may also lead to less improvement in the efficiency of the securities lending market, leading to fewer benefits for traders in the form of increased trading profits.<sup>1064</sup> This alternative would also hamper research into the securities lending market by some market participants and academics, relative to the final rule, by preventing researchers from performing analysis using individual transactions.

The Commission also considered several alternatives related to the applicability of the rule to market for Customer loans, including an alternative in which Customers loan are excluded from reporting requirements, and an alternative in which Customer loans are reported, but not disseminated to the public. One commenter stated that "the Commission should limit the Proposal to the 'wholesale' market," because including Customer market loans in a securities lending reporting regime would be akin to a "transaction-by-transaction short sale public reporting regime."<sup>1065</sup>

The Commission believes that limiting the applicability of the rule for Customer loans would significantly limit the benefits of the rule for increasing transparency in the securities lending market. In particular, end borrowers would not benefit from a reduction in their information disadvantage vis-à-vis their broker-dealers in the securities lending market.<sup>1066</sup> As a result, the effects of the rule on competition between broker-dealers, which would be expected to lower borrowing costs for hard-to-borrow stocks and thus reduce costs for short sellers, would not materialize.<sup>1067</sup> Market participants would also not be able to use Rule 10c-1a data to compare trends in both the Wholesale and

<sup>1064</sup> *See supra* Part IX.C.1 for a discussion of how improvement in securities lending information could lead to increased profits for some investors by increasing their certainty regarding investment strategies that require borrowing securities.

<sup>1065</sup> *See* Citadel Letter, at 11. The commenter refers to Short Sale Linked Activity, by which the commenter stated that they are referring to what the Proposing Release calls the "retail market" (*see* Citadel Letter, at 1). The Economic Analysis uses the terms Wholesale market and Customer market to make clear the implications of the final rule for the different segments of the market. *See also* MFA Letter 3, at 4 (stating that "it is critical that the Proposed Securities Lending Rules be revised to capture only wholesale securities lending activity").

<sup>1066</sup> *See supra* Part IX.C.1 for a discussion of the expected effects of the final rule on reducing information asymmetry.

<sup>1067</sup> *See supra* Part IX.C.1 for a discussion of the expected effects of the final rule on short sellers.

Customer markets simultaneously.<sup>1068</sup> Furthermore, while the Commission acknowledges that information about Customers loans can correspond closely to information about short positions,<sup>1069</sup> the Commission believes that concerns about whether the dissemination of Customer loan information will harm short sellers are largely addressed by requiring that an RNSA delay public disclosure of the loan amount by 20 business days. This modification should significantly reduce the novelty of the information disseminated under the final rule regarding short sellers' positions, such that it is less timely than pre-existing sources of short selling transparency, such as FINRA's bimonthly short interest data.<sup>1070</sup>

Second, excluding Customer loans from reporting requirements altogether would not only reduce the benefits of the rule from increased transparency as described above, but would also reduce the regulatory benefits of the rule, as the Commission and FINRA would no longer benefit from an improved ability to use Rule 10c-1a data for surveillance and enforcement, market reconstruction, and market research in Customer segment of the lending market.<sup>1071</sup> Furthermore, it is unclear whether the costs of the rule for short sellers would be significantly reduced by the exclusion of Customer loans from reporting requirements compared to excluding them from dissemination, as the commenter's concerns related to the inclusion of Customer loans stem primarily from the public dissemination of this information.

#### 4. Require Reporting of Shares Available to Lend and Shares on Loan

The Commission also considered an alternative requiring market participants to report shares available to lend and shares on loan to an RNSA. An RNSA would then produce aggregate statistics by security regarding shares available to loan and shares on loan. This alternative would increase the amount of information available to market participants regarding conditions in the securities lending market, which would increase the benefits of the rule from

<sup>1068</sup> See *supra* Part IX.C.1 for a discussion of this benefit.

<sup>1069</sup> See *supra* Part IX.B.6 for further discussion of why the market for Customer loans is tightly linked to short selling positions.

<sup>1070</sup> See *supra* Part IX.B.6 for a discussion of the FINRA bimonthly short interest data which are made available for publication on the seventh business day after the reporting settlement dates, which occur bimonthly.

<sup>1071</sup> See *supra* Part IX.C.2 for a discussion of the expected regulatory benefits associated with final Rule 10c-1a.

increased transparency.<sup>1072</sup> It could also benefit consumers of Rule 10c-1a data by lowering barriers to entry for firms to start providing securities lending analytics services, as they could incorporate shares available into their analysis without purchasing data from the current commercial data vendors. This could lead to benefits in the form of increased competition for securities lending analytics.<sup>1073</sup>

However, commenters opposed the inclusion of shares available on the grounds that any measure of shares available would be inherently noisy.<sup>1074</sup> The Commission does not believe that requiring reporting entities to report shares available would result in a measure that is inherently noisier than the current estimates provided by commercial data vendors, which research shows can be informative.<sup>1075</sup> As such a measure would be more comprehensive than existing estimates, it would likely be more informative than existing data estimates. However, the Commission acknowledges that any estimate of shares available to lend would be noisy for numerous reasons, including the reasons mentioned by commenters,<sup>1076</sup> and that this noise limits the benefits of requiring the reporting of information about shares available to lend.

This alternative would also increase the costs to the commercial data vendors that currently offer utilization rate and shares available information because it would provide market participants with alternate access to such information. This effect could

<sup>1072</sup> See *supra* Part IX.C.1 for further discussion of the expected effects of the final rule on increase transparency in the securities lending market.

<sup>1073</sup> See *supra* Part IX.D.2 for further discussion of the final rule's expected effects on competition between securities lending data analytics firms.

<sup>1074</sup> See, e.g., AIMA Letter 1, at 2; SIFMA AMG Letter, at 8, 11; CASLA Letter, at 2; MFA Letter 3, at 6-7.

<sup>1075</sup> See, e.g., Dixon, et al. (2021) *supra* note 746.

<sup>1076</sup> See, e.g., SBAI Letter, at 2 (stating that "funds managed under 1940 Act regulations have restrictions on their approach to securities lending (e.g., limit on lending: A fund may not have on loan at any time securities representing more than one-third of the fund's total value), thereby not allowing an accurate calculation of 'securities available to lend' on an individual security basis"); MFA Letter 1, at 10 (stating that "while a lender's portfolio holdings may be eligible securities for lending, they are unlikely to be 'available to lend' at all times."); See also SIFMA Letter 1, at 15 (stating that "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.").

lower demand for the data currently provided by commercial data vendors, leading to a loss of business for these data vendors.<sup>1077</sup>

Regarding shares on loan information, the Commission believes that the benefit of requiring covered person to report aggregate information about shares on loan would also be limited, as this information is rendered somewhat redundant by the requirement that an RNSA disseminate aggregated transaction activity information for each security.<sup>1078</sup> At the same time, requiring covered persons to report aggregate information about both shares on loan and shares available would increase the compliance costs relative to the final rule by requiring an additional report (*i.e.*, a report on aggregated securities lending activities) to be reported to an RNSA in addition to the transaction-by-transaction securities lending data.

#### 5. Restrict Covered Persons to Broker-Dealers

The Commission also considered an alternative requiring only broker-dealers, rather than any person that qualifies as a "covered person" under the definition in the rule,<sup>1079</sup> to report securities lending transactions to an RNSA. The Commission believes that this alternative would be less costly overall than final Rule 10c-1a. Specifically, covered persons that are not broker-dealers 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, the only RNSA, so the overall implementation costs associated with connecting to an RNSA for the purposes of reporting 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 benefit from an increase securities lending transparency sooner.<sup>1080</sup>

However, under this alternative, Rule 10c-1a data would not provide a comprehensive view into the securities lending market. Even though broker-dealer activity makes up a significant

<sup>1077</sup> See *supra* Part IX.C.4 for further discussion of the final rule's expected effects on securities lending data vendors' revenues.

<sup>1078</sup> See final Rule 10c-1a(g)(5).

<sup>1079</sup> See final Rule 10c-1a(j)(1) for a definition of "covered person."

<sup>1080</sup> See *supra* Part IX.C.1 for further discussion of the expected benefits from the final rule stemming from increased transparency in the securities lending market.

percentage of securities lending transactions in the Customer market, the alternative would exclude market participants such as lending programs that are significant players in the securities lending market, particularly in the Wholesale market.<sup>1081</sup> 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 borrowers or beneficial owners seeking to keep their transactions out of the public view, further tilting the competitive landscape in their favor. This could create an uneven playing field for entities engaged in the securities lending market, diminishing the benefits of the rule for competition and transparency.

#### 6. Expand Reporting Agents Beyond Broker-Dealers and Clearing Agencies

The Commission also considered an alternative expanding who can act as a reporting agent to entities other than broker-dealers and clearing agencies.<sup>1082</sup> Commenters expressed concern that restricting reporting agents to only broker-dealers would result in conflicts of interest between broker-dealers acting as reporting agents on the one hand, and beneficial owners and lenders who transact with these broker-dealers in the primary market on the other.<sup>1083</sup> Since information about an entities' lending activities is likely to correspond closely to that entities' inventory levels, it is possible that such a risk of information leakage may be a significant cost for some lenders and lending agents who are "highly concerned about visibility into inventory levels."<sup>1084</sup>

Furthermore, expanding reporting agents to entities other than broker-dealers and clearing agencies would serve to increase the number of entities that would compete to provide lenders

<sup>1081</sup> See, e.g., Table 3 in the OFR Pilot Survey, which estimates that loans from broker-dealers only account for around 1.57% of shares on loan and around 1.33% of shares available to loan in the Wholesale market.

<sup>1082</sup> See final Rule 10c-1a(j)(4) for a definition of "reporting agent."

<sup>1083</sup> See, e.g., IHS Markit Letter, at 2, 10-11; S3 Partners Letter, at 12.

<sup>1084</sup> See IHS Markit Letter, at 2.

and lending agents with reporting services. Thus, expanding the eligibility of reporting agents would serve to promote more competition in this market,<sup>1085</sup> potentially leading to lower fees for lenders and lending agents that would rely on these reporting agents for these services.

However, the Commission believes that expanding reporting agent eligibility beyond broker-dealers and clearing agencies would increase the costs associated with the rule. The Commission's oversight over reporting agents that are neither broker-dealers nor clearing agencies could be limited, which could shift the costs of monitoring reporting agents for accuracy and compliance onto the lenders and lending agents that would hire them. This would serve to increase covered persons' ongoing costs.

In addition, to the extent that covered persons are concerned about contracting with broker-dealers as reporting agents because of potential conflicts of interest, to the extent that there are clearing agencies that would act as reporting agents, these covered persons could contract with these entities.

Furthermore, covered persons are not restricted from contracting privately to use third-party vendors to assist in reporting.<sup>1086</sup> Therefore, those market participants that are concerned about revealing sensitive inventory information to broker-dealers but would still benefit from reporting assistance could privately contract with third-party vendors. Since covered persons could not rely on third-party vendors to fulfill their regulatory obligations,<sup>1087</sup> contracting with a third-party vendor for assistance in reporting may require covered persons to incur some amount of monitoring costs; however, this option should provide covered persons with additional flexibility and a way to potentially mitigate reporting costs.<sup>1088</sup>

#### 7. Publicly Releasing the Information in 10c-1a(e)

The Commission also considered an alternative requiring public disclosure of the information in Rule 10c-1a(e), namely available identifiers for each

<sup>1085</sup> This was supported by commenters. See, e.g., HMA Letter, at 8 (stating that "having separate reporting agents who are not brokers may enable lenders to more freely shop amongst multiple, competing lending agents").

<sup>1086</sup> Note that, while covered persons can use third party vendors to help prepare their reports, such vendors would not be reporting agents under final Rule 10c-1a. See *supra* Part VII.B.2.

<sup>1087</sup> See *id.*

<sup>1088</sup> See *supra* Part IX.C.3 for a further discussion about how contracting with third party vendors may allow covered persons to lower their compliance costs.

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 other data elements in Rule 10c-1a that are 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.<sup>1089</sup> 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 an RNSA, to those who access the data, and to participants in the securities lending market. An 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.<sup>1090</sup> If it facilitates such trading

<sup>1089</sup> See, e.g., Joseph E. Engleberg, et al., *How are Shorts Informed?: Short Sellers, News, and Information Processing*, 105 J. Fin. Econ. 260 (2012); David E. Rapach, et al., *Short Interest and Aggregate Stock Returns*, 121 J. Fin. Econ. 46 (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, et al., *Short Sales Are Almost Instantaneously Bad News: Evidence from the Australian Stock Exchange*, 53 J. Fin. 2205 (1998).

<sup>1090</sup> See SEC Division of Economic Research and Analysis (DERA), *Short Sale Position and*

strategies, releasing the identities of short sellers could act as a constraint on fundamental short selling, reducing the incentives to conduct fundamental research.<sup>1091</sup> Less fundamental research could potentially result in over- or underpricing, 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.<sup>1092</sup>

#### 8. Additional Information in the Reported or Disseminated Information

The Commission also considered alternatives requiring additional data fields to be reported and requiring an RNSA to compute derived fields for public dissemination.

For example, the Commission could require entities to report in their lending transactions whether a given loan was transacted on their own behalf, or on behalf of a customer, *i.e.*, whether the loan was transacted on a principal or agent basis. This alternative would allow FINRA and the Commission to oversee compliance with various regulations. These data could allow for the review of 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.<sup>1093</sup> The Commission is unaware of any regulation or rule requiring non-FINRA members to collect this information, and this alternative may significantly increase costs for non-FINRA members who would be required to build out systems to collect and report such information.

*Transaction Reporting* (May 5, 2014), available at <https://www.sec.gov/files/short-sale-position-and-transaction-reporting%2C0.pdf>, at 52–53.

<sup>1091</sup> See Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 Am. Econ. Rev. 393 (1980), available at <https://ssrn.com/abstract=228054> (retrieved from SSRN Elsevier database).

<sup>1092</sup> See *supra* Part IX.C.1 for further discussion of the potential negative consequences of revealing short sellers' information.

<sup>1093</sup> See, e.g., FINRA Rule 4314.

As discussed in the Proposing Release,<sup>1094</sup> the Commission considered including in Rule 10c–1a(e) 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 could help protect investors by improving 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. However, the Commission has since come to understand that it may not be feasible for broker-dealers to identify which customers' shares are being loaned.<sup>1095</sup>

#### 9. Only Allow an RNSA To Charge Fees to Data Reporters

The Commission also considered an alternative that would allow an RNSA to charge fees to reporters of Rule 10c–1a information, but not to subscribers to access the securities lending data. The effect on costs of this alternative would be that any fees levied by an RNSA to help pay for costs to collect and disseminate the data would shift onto covered persons providing data to an RNSA. The Commission believes that many of the market participants providing data to an RNSA under the final rule will also be consumers of the data. If all 361 entities providing data were the only entities to subscribe to the data, for these market participants it is unclear how much difference this shift in fees would make. However, to the extent that more market participants subscribe to the data, prohibiting an RNSA from this additional source of revenue would likely result in higher reporting fees than under the final rule.

This alternative would potentially increase the benefits of the final rule for increased transparency, in that providing access to Rule 10c–1a data for free may increase the number of market participants who access it.<sup>1096</sup> However, TRACE has been successful in mitigating inefficiencies in the corporate bond market despite the fact that it is

<sup>1094</sup> See Proposing Release, 86 FR 69846.

<sup>1095</sup> See, e.g., James J. Angel Letter, at 3 (stating that shares available for lending from a brokerage firm's customers' margin accounts are in “fungible bulk” and that “the firm may not even have identified which customer's shares are being loaned out when it makes its delivery” to the DTC to settle its net delivery obligation).

<sup>1096</sup> See *supra* Part IX.C.1 for further discussion of the expected benefits from the final rule on increased transparency in the securities lending market.

only available for fee.<sup>1097</sup> Furthermore, the Commission expects that most of the entities likely in a position to affect the securities lending market or to use information from the securities lending market to affect other markets would subscribe to the data regardless of whether there was a cost to subscribing. Therefore, the Commission does not believe that disallowing an RNSA from charging fees to data subscribers would result in significant additional benefits to the securities lending market relative to the final rule.

#### 10. Longer Holding Period Requirement

The Commission also considered an alternative requiring an 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.<sup>1098</sup> 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 above.<sup>1099</sup> 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

<sup>1097</sup> See *supra* Part IX.C.1 for a discussion of empirical evidence that the introduction of TRACE improved efficiencies in the corporate bond market.

<sup>1098</sup> 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.

<sup>1099</sup> See *supra* Parts IX.C.1 and IX.C.2.

Exchange Act Rule 15c3-3 (Customer Protection Rule), to calculate disgorgement.

The Commission believes that the alternative would impose additional costs on an RNSA not required by the final rule in terms of storing and maintaining historical data. However, since the final rule already requires an RNSA to build systems to collect and disseminate five 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.

While the final rule allows FINRA to destroy the data after five years, the Commission believes that it is unlikely that FINRA would do so. This is because the cost of retaining the data is likely relatively small and the data may have commercial value. For instance, an RNSA could levy additional fees for access to historical data. If this is the case, and an RNSA chooses to keep the historical data under the final rule, then the cost difference to an RNSA between the final rule and this alternative would likely be minimal given that this alternative would require an RNSA to comply with a requirement that they may already choose to do on their own.

#### 11. Longer Implementation Period

The Commission considered alternatives that would allow for a longer implementation period. Several commenters requested implementation periods of 18 or 24 months,<sup>1100</sup> which may be longer than the final rule's implementation period.<sup>1101</sup> Some commenters requested a phased-in approach to implementation, for example, by first only requiring information to be reported for certain types of securities, or initially delaying the public dissemination of data.<sup>1102</sup> The Commission recognizes that a longer implementation period would give reporting entities additional time and flexibility while building out the systems necessary to facilitating the reporting required under the final rule,

<sup>1100</sup> See, e.g., SIFMA Letter, at 4 (recommending "an 18-month build-out period following the RNSA's finalization of the technical specifications for reporting"); Fidelity Letter, at 5 (recommending a two-year implementation period).

<sup>1101</sup> See final Rule 10c-1a(f) and *supra* Part VIII for additional discussion of the implementation timeline.

<sup>1102</sup> See, e.g., Chamber of Commerce Letter, at 4 (recommending at "phased implementation by asset class") and SIFMA Letter 1, at 4 (recommending "a staged reporting regime to allow regulators sufficient time to analyze collected data before public dissemination of any information").

which may allow a more efficiency allocation and resources and thus reduce their implementation costs. Similarly, delaying the public dissemination of data would give an RNSA additional time and flexibility to build out systems related to dissemination, which may reduce their implementation costs.

However, the Commission also recognizes that any delay in the implementation period would also delay the realization of the benefits of final Rule 10c-1a, both those related to increased transparency in the securities lending market,<sup>1103</sup> as well as the regulatory benefits.<sup>1104</sup> Furthermore, while an initial delay in the public dissemination of the data would maintain the regulatory benefits of the rule, as regulators would still have access to the data, other market participants' access to the information would be delayed, which would delay the benefits of the Rule related to increased transparency. Thus, a choice of implementation period requires balancing the need to allow for sufficient time to build out reporting systems, on the one hand, and ensuring that market participants have timely access to Rule 10c-1a information on the other.

#### 12. Report to the Commission Rather Than to an RNSA

The Commission also considered an alternative requiring that covered persons disclose Rule 10c-1a information directly to the Commission—for example, through EDGAR, rather than to an RNSA. Such an alternative could alter which entities incur costs and would likely increase overall costs relative to the final rule 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 submission process required for providing Rule 10c-1a information.<sup>1105</sup> Establishing similar connectivity with EDGAR may require additional effort for covered persons compared to the proposal. Additionally, FINRA has expertise creating repositories similar to that called for in the final rule, suggesting

<sup>1103</sup> See *supra* Part IX.C.1 for a discussion of the benefit of the final rule related to increased transparency in the securities lending market.

<sup>1104</sup> See *supra* Part IV.C.2 for a discussion of the regulatory benefits of the final rule.

<sup>1105</sup> For example, FINRA's TRACE system.

that the final rule will likely be more efficient than this alternative.

The Commission is uncertain of how some benefits of this alternative would compare to certain benefits of the final rule. Specifically, while this alternative would not alter the content of the data in the final rule, the accessibility and timeliness of the data under this alternative 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 an RNSA could provide, given an RNSA has more experience collecting and disseminating similar data (e.g., TRACE). Thus, this alternative could result in significantly higher compliance costs than the final rule.

Additionally, the regulatory benefits of the alternative relative to the final rule will depend on whether the Commission chose to grant an RNSA 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 an RNSA 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.<sup>1106</sup> Thus, the regulatory benefits of the rule could be severely diminished.

#### 13. 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,<sup>1107</sup> the Commission considered proposing a new NMS Plan to set up a reporting and dissemination process that mirrors the CT Plan. Reporting entities could report the data to Transaction Reporting Facilities operated by competing

<sup>1106</sup> See *supra* Part IX.C.2 for further discussion of the expected regulatory benefits of the final rule.

<sup>1107</sup> *Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data*, Release No. 34-92586, 86 FR.44142 (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).

consolidators,<sup>1108</sup> who would consolidate and distribute the data for a fee. The NMS Plan would set the fee paid by (or rebate collected by) the reporting entities to (or from) the competing consolidators for the collection of the data.<sup>1109</sup> We did not receive public comments addressing this alternative.

This alternative is more likely than the final rule to improve the competitiveness of the market for securities lending data. Under this alternative, current data vendors, who have experience collecting and disseminating securities lending information, could compete as competing consolidators for securities lending data and have the same access to the supply of consolidated data as any other competing consolidator, including an RNSA or SRO. Conversely, as final Rule 10c-1a gives RNSAs the authority to implement rules regarding the format and manner of collection and dissemination of Rule 10c-1a data,<sup>1110</sup> the final rule may be more likely to result in a situation in which a current vendor may need to compete with an RNSA that has exclusive access to the raw Rule 10c-1a data. However, since final Rule 10c-1a does not require the reporting of shares available to lend,<sup>1111</sup> to the extent that commercial data vendors' superior access to information about shares available to lend and utilization rates provides them with a competitive advantage under the final rule,<sup>1112</sup> it may not necessarily be the case that this alternative would result in significantly better outcomes for current data vendors than the final rule. This alternative would, however, reduce the barriers to entry in the market for securities lending data because all new

entrants would have access to the same data for consolidation and distribution.

This alternative could provide for the public dissemination of securities lending transaction information without the reliance on an RNSA alone. It could also leverage the processes of the NMS Plan, but would require compliance costs by one or more SROs that chose to set up and operate a Transaction Reporting Facility. Fees for reporting transactions could offset such compliance costs. While the Commission cannot be sure how these fees under this alternative would compare to the fees under the final rule, competition between competing consolidators could result in reporting facilities that are more efficient than that of an RNSA. However, as most SROs (including all of the national securities exchanges) do not necessarily have expertise that is specific to the dissemination of securities lending data, compliance costs may be higher than those proposed under the CT Plan, for which national securities exchanges do have relevant experience as they disseminate equity market data through their proprietary data feeds. A need to coordinate between multiple SROs in order to establish an NMS Plan may also imply higher coordination costs in this alternative as compared to the final rule.

#### X. Paperwork Reduction Act

Certain provisions of final Rule 10c-1a contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").<sup>1113</sup> The hours and costs associated with complying with the final rule's reporting requirements, RNSA rule implementation requirements, publication of data requirements, and data retention requirements, as applicable, constitute PRA burdens.

In accordance with the PRA, the Commission is submitting the final rule amendments to the Office of Management and Budget ("OMB") for review.<sup>1114</sup> The Commission published a notice requesting comment on these collections of information requirements in the Proposing Release and submitted these requirements to the OMB for review in accordance with the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The title and control number

for these collections of information are OMB Control No. 3235-0788.

The Commission received limited comments on the PRA burden estimates included in the Proposing Release.<sup>1115</sup> One commenter stated that the Commission has covered most of the impacts of the proposed rule.<sup>1116</sup> Another commenter stated that the proposed rule's reporting regime would require considerable time to develop, test, launch, and monitor.<sup>1117</sup> Comments on specific parts of the Proposing Release's PRA burden estimates are discussed below, in this part, as they relate to the particular PRA burden estimates that are the subject of those comments. The Commission acknowledges the PRA burdens that will be assumed by covered persons, reporting agents, and RNSAs in complying with the final rule, and its estimates of the collection of information for the amendments, as adopted, have been updated from the estimates included in the Proposing Release, as appropriate, with the updated estimates based on the modifications in the final rule, comments received, and more recently available data.

The information collections are necessary to remediate certain issues present in the securities lending market. As discussed above, in Part I, the Commission is adopting amendments to close securities lending data gaps and increase market efficiency. Final Rule 10c-1a is designed to increase the transparency of information available to brokers, dealers, and investors with respect to the loan or borrowing of securities. Additionally, final Rule 10c-1a is designed to provide an 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 broker-dealers are building up risk; what strategies broker-dealers use to source securities that are lent to their customers; and what loans broker-dealers provide to their customers with fail to deliver positions.

To achieve these objectives, the Commission is adopting the requirements discussed above, in Parts VII.A through M. Under final Rule 10c-1a, certain persons are required to report information about securities loans to an RNSA. The final rule also requires that an RNSA make certain information provided to an RNSA, along with daily information pertaining to the aggregate

<sup>1108</sup> 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).

<sup>1109</sup> The Proposing Release described this alternative slightly differently, with the data collected by an SRO rather than by competing consolidators. On further consideration we believe the scenario described here is more likely because it is similar to the Market Data Infrastructure rule, but both scenarios would result in economic competition on data price, and we considered both versions of this alternative.

<sup>1110</sup> See *supra* Part VII.I for further discussion.

<sup>1111</sup> See *supra* Part IX.C.1 for further discussion related to the fact that Rule 10c-1a data will not specifically provide information on shares available.

<sup>1112</sup> See *supra* Part IX.D.2 for further discussion of the impact of the final rule on competition in the market for securities lending data and analytics.

<sup>1113</sup> 44 U.S.C. 3501 through 3521. The burdens associated with the information collection requirements are referred to as "PRA burdens."

<sup>1114</sup> See 44 U.S.C. 3507(d); 5 CFR 1320.11.

<sup>1115</sup> See, e.g., CSFME Letter 1, at 3; IHS Markit Letter, at 13.

<sup>1116</sup> IHS Markit Letter, at 13.

<sup>1117</sup> See MFA Letter 3, at 8.

transaction activity and distribution of loan rates for each reportable security, publicly available. Further, the final rule requires certain confidential information to be reported to an RNSA to enhance RNSA oversight and enforcement functions.

#### A. Respondents

As a preliminary matter, the opacity of the securities lending market makes estimating the number of respondents difficult. Indeed, as discussed above, an objective of Rule 10c-1a is to close the data gaps in this market.<sup>1118</sup> Despite these data gaps, the Commission has estimated the number of respondents who are a covered person, reporting agent, or RNSA.

As described in detail below, in this part, the respondents under final Rule 10c-1a are: (1) covered persons and (2) reporting agents capturing the applicable Rule 10c-1a information and providing it to an RNSA, in the format and manner required by the applicable rule(s) of such RNSA, and within the time periods specified in paragraphs (c) through (e) of the final rule, as applicable to the covered securities loan;<sup>1119</sup> and (3) an RNSA complying with the final rule's requirements to implement rules regarding the format and manner of its collection of Rule 10c-1a information, publish the information specified in final Rule 10c-1a(g) in accordance with the time frames required for such publication, and retain and make available to the Commission, or any other persons designated by the Commission, certain specified information. Given the differences in the information collections applicable to these parties, as discussed below, in this part, the discussion of burdens applicable to covered persons and reporting agents are separated from the discussion of those applicable to an RNSA.

#### 1. Covered Persons

As discussed above, in Part VII.A, under final Rule 10c-1a(j)(1), a covered person is any intermediary other than a clearing agency when providing only the functions of a central counterparty

pursuant to Rule 17Ad-22(a)(2) of the Exchange Act or a central securities depository pursuant to Rule 17Ad-22(a)(3) of the Exchange Act; any person that agrees to a covered securities loan as a lender when an intermediary is not used unless paragraph (j)(1)(iii) of the final rule applies; or a broker or dealer when borrowing fully paid or excess margin securities pursuant to Rule 15c3-3(b)(3) of the Exchange Act.

In the Proposing Release, the Commission estimated, based on a review of Forms N-CEN filed with the Commission that identify the lending agents used by investment companies, that there would be 37 lending agent intermediaries, 3 of which would provide information directly to an RNSA and 34 of which would provide information to a reporting agent.<sup>1120</sup> Using updated figures based on a review of Forms N-CEN filed with the Commission, it is estimated that there are 35 intermediaries. Of the 35 intermediaries identified, four are broker-dealers. Broker-dealers have experience providing information directly to RNSAs. The Commission estimates that those four intermediaries would provide information directly to an RNSA. The other 31 intermediaries are not broker-dealers. Therefore, the Commission estimates that they would provide information to a reporting agent rather than establish connectivity directly to an RNSA.

In the Proposing Release, the Commission estimated, based on the number of funds within investment companies that do not employ a lending agent based on a review of Forms N-CEN filed with the Commission, that there would be 278 lenders that would not employ a lending agent, 139 of which would provide information to an RNSA and 139 of which would provide information to a reporting agent.<sup>1121</sup> One commenter stated that this was an underestimate that accounted for only those lenders that are registered with the Commission.<sup>1122</sup> The Commission agrees with the commenter and is updating the estimate regarding unregistered entities, which comprise approximately 67 percent of the securities available for lending.<sup>1123</sup> The unregistered portion of the securities lending market, therefore, is estimated to be 1,389 entities.<sup>1124</sup> However,

according to the OFR Pilot Survey, only about 15 percent of securities loans are not intermediated and go directly to end borrowers.<sup>1125</sup> Therefore, it is estimated that the number of unregistered lenders that would not use an intermediary is 208 entities.<sup>1126</sup> Accordingly, the Commission estimates that there are 434 persons that agree to a covered securities loan as the lender when an intermediary is not used, based on a review of Forms N-CEN filed with the Commission showing the number of investment companies that do not employ an intermediary.<sup>1127</sup> Consistent with the estimated ratio included in the Proposing Release,<sup>1128</sup> of these 434 persons, the Commission estimates that 217 persons will provide information to an RNSA (including by using a third-party vendor) and that 217 persons will provide information to a reporting agent.

As discussed above, in Part VII.A, paragraph (j)(1)(iii) was added to the proposed rule to specify that, if a broker or dealer is borrowing fully paid or excess margin securities in the covered securities loan, the broker or dealer is required to provide the Rule 10c-1a information to an RNSA. Based on a review of FOCUS Reports Part II, Item 4350, it is estimated that there are 34 brokers or dealers borrowing fully paid or excess margin securities pursuant to Rule 15c3-3(b)(3) of the Exchange Act. Consistent with the estimate for the number of intermediaries who are brokers or dealers and would provide information directly to an RNSA, the Commission estimates that the 34 brokers or dealers borrowing fully paid or excess margin securities would provide information directly to an RNSA.

Consistent with the estimate included in the Proposing Release,<sup>1129</sup> the Commission is not estimating that persons who agree to a covered securities loan on behalf of themselves or another person and employ a lending agent assume any PRA burdens because those persons would not be responsible for providing information to an RNSA. Accordingly, the Commission estimates that 503 covered persons<sup>1130</sup> will be

<sup>1125</sup> See OFR Pilot Survey, at 7-8.

<sup>1126</sup>  $1,389 \text{ unregistered entities} \times 0.15 = 208 \text{ unregistered entities.}$

<sup>1127</sup>  $226 \text{ registered investment companies that agree to a covered securities loan as the lender when an intermediary is not used} + 208 \text{ unregistered entities} = 434 \text{ persons that effect a covered securities loan as the lender when an intermediary is not used.}$

<sup>1128</sup> Proposing Release, 86 FR 69823.

<sup>1129</sup> See Proposing Release, 86 FR 69822.

<sup>1130</sup>  $35 \text{ intermediaries} + 434 \text{ persons that agree to a covered securities loan as the lender when an intermediary is not used} + 34 \text{ brokers or dealers}$

<sup>1118</sup> See *supra* Part I; see also *supra* Part IX.B.2.

<sup>1119</sup> The Proposing Release separated such persons into the following categories: lending agents, reporting agents, and lenders that would not employ a lending agent. The final rule differs from the proposed rule in that different categories of persons are used to describe those who have or may have a reporting requirement, as applicable, and as discussed above, in Parts VII.A and VII.B.

Therefore, the categories of persons included herein, as well as the estimates, vary from those included in the Proposing Release. For instance, this release uses the term "intermediaries," which is comparable to the Proposing Release's use of the term "lending agents."

<sup>1120</sup> Proposing Release, 86 FR 69822.

<sup>1121</sup> Proposing Release, 86 FR 69822-23.

<sup>1122</sup> See CSFME Letter 1, at 3.

<sup>1123</sup> See OFR Pilot Survey, Table 2, at 7. ( $\$2.519 \text{ trillion} + \$1.563 \text{ trillion} + \$663 \text{ billion} + \$1.585 \text{ trillion} / \$9.443 \text{ trillion} \times 100\% \approx 67\%$ ).

<sup>1124</sup>  $(684 \text{ registered investment companies that agree to a covered securities loan as the lender} \times (0.67/0.33)) \approx 1,389 \text{ unregistered entities.}$

subject to PRA burdens under final Rule 10c–1a(a). As set forth in paragraph (a)(1) of the final rule, any covered person who agrees to a covered securities loan on behalf of itself or another person is required to provide Rule 10c–1a information directly to an RNSA;<sup>1131</sup> however, a covered person may enter into a written agreement with a reporting agent for the reporting agent to provide information to an RNSA.<sup>1132</sup> Of the 503 covered persons, the Commission estimates that 255 are providing covered persons<sup>1133</sup> and that 248 are non-providing covered persons.<sup>1134</sup>

## 2. Reporting Agents

Under the proposed rule, the term “reporting agent” referred specifically to certain broker-dealers. In the Proposing Release, the Commission estimated, based on the number of broker-dealers that lent securities in 2020, that there would be 94 reporting agents.<sup>1135</sup> Under final Rule 10c–1a(j)(4), a reporting agent means a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under final Rule 10c–1a(a)(2). Based on the number of broker-dealers that lent securities as of December 2022 (97),<sup>1136</sup> as well as the number of registered clearing agencies in 2023 (9),<sup>1137</sup> it is estimated that there are 106

borrowing fully paid or excess margin securities pursuant to Rule 15c3–3(b)(3) of the Exchange Act = 503 covered persons.

<sup>1131</sup> For the purposes of the PRA estimates included in this release, such covered person is referred to as a “providing covered person.”

<sup>1132</sup> For the purposes of the PRA estimates included in this release, such covered person is referred to as a “non-providing covered person.”

<sup>1133</sup> 4 broker-dealer intermediaries + 217 persons that agree to a covered securities loan as the lender when an intermediary is not used and will provide information to an RNSA + 34 brokers or dealers borrowing fully paid or excess margin securities = 255 providing covered persons.

<sup>1134</sup> 31 non-broker-dealer intermediaries + 217 persons that agree to a covered securities loan as the lender when an intermediary is not used and will provide information to a reporting agent = 248 non-providing covered persons.

<sup>1135</sup> Proposing Release, 86 FR 69822.

<sup>1136</sup> These persons likely have experience providing RNSAs with information through other trade-reporting requirements and have experience with securities lending. 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 and a lack of granular data about the current market, however, the Commission continues to believe that an estimate based on the number of broker-dealers that lent securities in is reasonable with regard to the estimate of the number of reporting agents. See Proposing Release, 86 FR 69822.

<sup>1137</sup> See *Cybersecurity Risk Management Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants, the Municipal Securities Rulemaking Board, National Securities Associations, National Securities Exchanges, Security-Based Swap Data Repositories, Security-*

reporting agents<sup>1138</sup> that may be subject to PRA burdens under final Rule 10c–1a(b).

### 3. RNSA

Under final Rule 10c–1a(j)(5), an RNSA is an association of brokers and dealers that is registered as a national securities association pursuant to section 15A of the Exchange Act. Consistent with the estimate included in the Proposing Release,<sup>1139</sup> it is estimated that there is one RNSA that will be subject to PRA burdens under paragraphs (f), (g), and (h) of the final rule.

#### B. Collection of Information Related to Covered Persons

Final Rule 10c–1a applies to any covered person who agrees to a covered securities loan on behalf of itself or another person. Under final Rule 10c–1a(a)(1), a covered person who agrees to a covered securities loan on behalf of itself or another person shall provide to an RNSA the Rule 10c–1a information, in the format and manner required by the applicable rule(s) of such RNSA, and within the time periods specified in paragraphs (c) through (e) of the final rule. As discussed above, in this part, this type of covered person is referred to as a providing covered person. However, a covered person may rely on a reporting agent to fulfill the covered person’s reporting obligations under final Rule 10c–1a(a) if the covered person: (1) enters into a written agreement with the reporting agent that agrees to provide the Rule 10c–1a information to an RNSA on behalf of such covered person, in accordance with the requirements set forth in Rule 10c–1a(b)(1), and (2), provides the reporting agent with timely access to the Rule 10c–1a information. As discussed above, in this part, this type of covered person is referred to as a non-providing covered person.

One commenter stated that the Commission should consider that not all “reporters” have licenses to multiple instrument identifiers required for reporting, meaning that smaller firms

*Based Swap Dealers, and Transfer Agents*, Release No. 34–97142 (Mar. 15, 2023), 88 FR 20212 (Apr. 5, 2023), 88 FR 20294. For purposes of this PRA burden estimate, all registered clearing agencies are included as respondents who are reporting agents. A registered clearing agency may elect not to be a reporting agent, in which case the PRA burden estimate may decrease due to the decrease in number of respondents.

<sup>1138</sup> 97 broker-dealers that lent securities + 9 registered clearing agencies = 106 reporting agents. This estimate differs from that included in the Proposing Release because the final rule adds registered clearing agencies to the list of persons who are eligible to be reporting agents.

<sup>1139</sup> See, e.g., Proposing Release, 86 FR 69829.

would need to purchase additional data licenses and thereby add to their cost structure.<sup>1140</sup> As discussed above, in this part, unlike providing covered persons who are estimated to have experience in providing information directly to an RNSA, persons who do not have the necessary licenses and systems are estimated to use a reporting agent as non-providing covered persons for purposes of the PRA estimates. Therefore, as non-providing covered persons, they are not estimated to acquire any additional licenses for purposes of compliance with the final rule.

The below analysis is separated into categories of persons who may provide the Rule 10c–1a information to an RNSA.<sup>1141</sup> These categories are providing covered persons and non-providing covered persons.<sup>1142</sup> Both providing covered persons and non-providing covered persons assume PRA burdens in complying with final Rule 10c–1a(a)(1).

#### 1. Providing Covered Persons

In the Proposing Release, the Commission estimated that lending agents who would be required to provide Rule 10c–1 information to an RNSA and lenders who run their own securities lending program rather than employ a lending agent and provide Rule 10c–1 information directly to an RNSA would assume certain burdens related to developing and reconfiguring their current systems to capture the required Rule 10c–1 information. The Proposing Release referred to such persons as “providing lending agents” and “self-providing lenders,” respectively. The PRA burden estimates for providing lending agents and self-providing lenders are summarized in PRA Table 1 of the Proposing Release.<sup>1143</sup>

##### a. Initial Burden

Providing covered persons assume PRA burdens related to developing and

<sup>1140</sup> See IHS Markit Letter, at 13.

<sup>1141</sup> As more fully discussed below, there would be some variation between covered persons that are in the same category. The analysis provided herein is organized so that the discussion of covered persons who share commonalities allows for a logical presentation and discussion of burdens. This structure for the analysis is consistent with that provided in the PRA included in the Proposing Release. See Proposing Release, 86 FR 69822 n.130.

<sup>1142</sup> As an example of variability between covered persons in the same category, the parties within the intermediary category and a person that agrees to a covered securities loan as a lender when an intermediary is not used may choose to employ a reporting agent. As discussed below, this choice will result in information collection burdens being different for covered persons within the same category.

<sup>1143</sup> Proposing Release, 86 FR 69827.

reconfiguring their current systems to capture the required Rule 10c–1a information.<sup>1144</sup> Providing covered persons, in complying with the final rule, will also be required to establish connections that will allow them to provide the information to an RNSA, which involves establishing connections with an RNSA and the persons on whose behalf they are lending securities.

As stated in the Proposing Release,<sup>1145</sup> the PRA burden for this requirement is similar to that of establishing the appropriate systems and processes required for collection and transmission of the required information in complying with the CAT<sup>1146</sup> because of the general similarity between the systems established under that rule and the systems that would be required to be established under final Rule 10c–1a. One commenter argued that the Proposing Release’s operational PRA burden estimates were inappropriate because the CAT would not capture loan modifications.<sup>1147</sup> However, the PRA burden estimates included in the Proposing Release accounted for loan modifications.<sup>1148</sup> Further, the Commission continues to believe that the CAT-related burden estimates serve as an appropriate basis for the PRA burdens associated with compliance with the final rule, as both the CAT and final Rule 10c–1a require the provision of trade information to a third-party information repository.<sup>1149</sup> The systems complying with final Rule 10c–1a will be significantly less complex than those required by the CAT because the systems required for compliance with final Rule 10c–1a will need to capture less information overall.<sup>1150</sup>

<sup>1144</sup> While providing covered persons may already track the data elements as a part of the regular course of business, capturing this information would be a new regulatory requirement.

<sup>1145</sup> See Proposing Release, 86 FR 69823.

<sup>1146</sup> See *Joint Industry Plan, Order Approving the National Market System Plan Governing the Consolidated Audit Trail*, Release No. 34–79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (“CAT Approval Order”), 81 FR 84921.

<sup>1147</sup> CSFME Letter 1, at 3.

<sup>1148</sup> See, e.g., Proposing Release, 86 FR 69822.

<sup>1149</sup> The burden estimates included in the CAT Approval Order are based on a study of cost estimate calculations. See CAT Approval Order, 81 FR 84857.

<sup>1150</sup> 17 CFR 242.613 (“Rule 613(c)(1)”) of the Exchange Act 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. Final Rule 10c–1a requires the reporting of loan modification data, as applicable, but does not

The PRA burden estimates for systems development and monitoring are based on the burdens applicable to non-Order Audit Trail System (“OATS”) reporters under the CAT.<sup>1151</sup> The Commission determined to use this estimate due to the factors it considered, as part of the CAT Approval Order, in categorizing firms and estimating burdens.<sup>1152</sup> Non-OATS reporters were estimated to assume the least amount of burdens under the CAT NMS Plan due to the limited scope of their reportable activity.<sup>1153</sup> In addition, non-OATS reporters assumed new reporting burdens in complying with the CAT, similar to how providing covered persons will assume new PRA burdens in complying with the final rule’s reporting requirements. Based on the overall size of the securities lending market and the number of providing covered persons that may provide information directly to an RNSA, the Commission believes that the volume of securities lending transactions for providing covered persons will be, on average, of a similar scope to the volume of reports estimated by non-OATS reporters under the CAT Approval Order.

In the Proposing Release, the Commission, estimated that each providing lending agent and self-providing lender would assume 3,600 PRA burden hours in developing and reconfiguring their current systems to capture the required data elements, with a total industry-wide burden of 511,200 hours.<sup>1154</sup> One commenter stated that most lenders will not be able to meet the proposed 15 minute reporting requirement without substantial technology development and cost.<sup>1155</sup> As discussed above, in Part VII.G.1, the change from the proposed rule to impose an end-of-day reporting requirement should help to reduce the number and frequency of reports that would otherwise be required to be provided to an RNSA throughout the day. An intraday reporting system would have required a level of automation and data processing capacity that some providing covered persons would not currently have

require that order information be provided to an RNSA. Additionally, more trades that are reportable to the CAT are executed than securities lending transactions.

<sup>1151</sup> CAT Approval Order, 81 FR 84887.

<sup>1152</sup> See Proposing Release, 86 FR 69823.

<sup>1153</sup> The CAT Approval Order estimated that non-OATS reporters would have fewer than 350,000 reportable events each month. CAT Approval Order, 81 FR 84928.

<sup>1154</sup> 10,800 hours assumed by providing lending agents + 500,400 hours assumed by self-providing lenders = 511,200 total hours.

<sup>1155</sup> IHS Markit Letter, at 13.

implemented. Implementing an end-of-day reporting requirement in place of the intraday reporting requirement removes the need for those providing covered persons to acquire this level of automation and processing capacity, thus lowering at least their initial burden associated with system design and configuration. Therefore, the Commission estimates that providing covered persons each will assume 3,000 PRA burden hours in developing and reconfiguring their current systems to capture the required data elements,<sup>1156</sup> with a total industry-wide burden of 765,000 hours.<sup>1157</sup>

#### b. Ongoing Annual Burden

Once a providing covered person has established the appropriate systems and processes required for the collection and provision of the Rule 10c–1a information to an RNSA,<sup>1158</sup> it is estimated that providing covered persons will assume ongoing annual PRA burdens associated with, among other things, providing the Rule 10c–1a information to an RNSA, monitoring systems, implementing systems changes, and troubleshooting errors. The Commission estimates that the ongoing annual PRA burden will be equivalent to the ongoing burden estimated for non-OATS reporters in the CAT Approval Order, as adjusted for the change from the proposed intraday reporting requirement to the end-of-day reporting requirement, for the same reasons discussed above with respect to automation and processing. In the Proposing Release, the Commission, estimated that each providing lending agent and self-providing lender would assume 1,350 PRA burden hours associated with monitoring systems,

<sup>1156</sup> 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 × 1,800 working hours per year = 3,600 hours). See CAT Approval Order, 81 FR 84938. Consistent with the estimate included in the Proposing Release, the estimate used in this release is based on the CAT Approval Order’s estimate for non-OATS reports due to the similarities between the requirements applicable to providing covered persons under final Rule 10c–1a and the requirements applicable to non-OATS reporters under the CAT Approval Order. However, in light of the change from the proposed intraday reporting requirement to an end-of-day reporting requirement, as discussed above, in this paragraph, it is appropriate to adjust the estimate to the following: 2 FTEs × 150 working hours per month × 10 months = 3,000 burden hours. The figure for 150 working hours was determined by dividing 1,800 working hours by 10 months.

<sup>1157</sup> 3,000 hours × 255 providing covered persons = 765,000 hours.

<sup>1158</sup> Such process of providing the applicable Rule 10c–1a information to an RNSA is estimated to be highly automated, so the Commission is including the burden for doing so in this estimate.

implementing systems changes, and troubleshooting errors, with a total industry-wide burden of 191,700 hours.<sup>1159</sup> Consistent with the Proposing Release, it is estimated that each providing covered person will assume 1,350 PRA burden hours per year,<sup>1160</sup> leading to a total industry-wide ongoing annual burden of 344,250 hours.<sup>1161</sup>

## 2. Non-Providing Covered Persons

In the Proposing Release, the Commission estimated that lending agents who enter into a written agreement with a reporting agent to provide information to an RNSA (“non-providing lending agents”) and lenders that directly employ a reporting agent would assume certain burdens related to developing and reconfiguring their current systems to capture the required Rule 10c–1a information, as well as in entering into an agreement with a reporting agent. The PRA burden estimates for non-providing lending agents and lenders that directly employ a reporting agent are summarized in PRA Table 1 of the Proposing Release.<sup>1162</sup> As discussed above, in Part IX.A.1, in light of the rule text changes from the proposed rule, the PRA burdens included in the Proposing Release with regard to such persons are estimated in this release with regard to non-providing covered persons.

Non-providing covered persons will assume distinct PRA burdens from those applicable to providing covered persons. First, non-providing covered persons will assume fewer initial and ongoing PRA burdens related to systems development and monitoring because non-providing covered persons will not, for purposes of compliance with final Rule 10c–1a(a), need to establish connectivity to an RNSA and may have flexibility with regard to the format in which it provides the Rule 10c–1a information to the reporting agent. Second, non-providing covered persons will assume the initial burden of negotiating and executing a written agreement with the reporting agent, as

required by final Rule 10c–1a(a)(2) but are not estimated to assume an ongoing annual PRA burden associated with such written agreement.

### a. Systems Development and Monitoring

#### i. Initial Burden

Non-providing covered persons will assume the initial burden of developing and reconfiguring their current systems to capture Rule 10c–1a information. Non-providing covered persons will assume fewer PRA burdens than providing covered persons will because non-providing covered persons may have the flexibility to collaborate with a reporting agent to determine the most efficient means of establishing systems that comply with the final rule’s reporting requirements. For example, if agreed to by both the non-providing covered person and the reporting agent, the non-providing covered person could have the flexibility to provide to the reporting agent the applicable Rule 10c–1a information that does not meet the specific format requirements of an RNSA if the reporting agent is able to reformat the information once received. Given these and other potential efficiencies, the Commission estimates that a non-providing covered person will assume half of the initial burden hours that a providing covered person will assume to develop and reconfigure their current systems to capture the Rule 10c–1a information. The Commission, therefore, estimates that each non-providing covered person will assume an initial PRA burden of 1,500 hours, leading to a total industry-wide initial PRA burden for this requirement of 372,000 hours.<sup>1163</sup> This method of deriving the burden hours for non-covered persons is consistent with that used in the Proposing Release with regard to non-providing lending agents and lenders that directly employ a lending agent.<sup>1164</sup> However, as discussed above, in Part IX.B.1, the estimated number of initial burden hours assumed has been lowered in light of the change from the proposed intraday reporting requirement to an end-of-day reporting requirement.

<sup>1163</sup> 1,500 hours × 248 non-providing covered persons = 372,000 hours.

<sup>1164</sup> See Proposing Release, 86 FR 69824, 69826. The estimated PRA burden included in the Proposing Release was 1,800 hours per providing lending agent or Lender that would directly employ a reporting agent, with an initial industry-wide PRA burden of 311,400 hours. 61,200 hours for non-providing lending agents + 250,200 hours for lenders that would directly employ a reporting agent = 311,400 total hours.

### ii. Ongoing Annual Burden

Once a non-providing covered person has established the necessary systems and processes for the collection and provision of the Rule 10c–1a information to the reporting agent, such person will assume ongoing annual PRA burdens associated with, among other things, providing the data to the reporting agent, monitoring systems, implementing systems changes, and troubleshooting errors.<sup>1165</sup> As with the initial PRA burden estimate for the systems development and monitoring requirement, the ongoing annual PRA burden estimate for non-providing covered persons is estimated to be less than that for providing covered persons because non-providing covered persons may have the flexibility to collaborate with a reporting agent to determine the most efficient means of establishing systems for purposes of compliance with the final rule. For example, the reporting agent could design programs that create direct links to a non-providing covered person’s systems to facilitate the gathering of information such that ongoing intervention would not be required by the non-providing covered person. In addition, non-providing covered persons and reporting agents could negotiate terms that may allow the non-providing covered person to avoid providing certain Rule 10c–1a information that can be gleaned from another data element, such as an issuer’s legal name if a security has a valid CUSIP.

Given these and other potential efficiencies, the Commission estimates that a non-providing covered person will assume half of the ongoing annual PRA burden that a providing covered person will assume with regard to the development and reconfiguration of current systems to capture the Rule 10c–1a information. The Commission, therefore, estimates that each non-providing covered person will assume an ongoing annual PRA burden of 675 hours,<sup>1166</sup> leading to a total industry-wide ongoing annual PRA burden for this requirement of 167,400 hours.<sup>1167</sup> This method of deriving the ongoing burden hours for non-providing covered persons is consistent with that used in the Proposing Release with regard to non-providing lending agents and

<sup>1165</sup> See final Rule 10c–1a(a)(2)(ii) (requiring that the covered person provide the reporting agent with timely access to the Rule 10c–1a information).

<sup>1166</sup> 1,350 hours (ongoing burden applicable to providing covered persons) × 50% = 675 hours.

<sup>1167</sup> 675 hours × 248 non-providing covered persons = 167,400 hours.

<sup>1159</sup> 4,050 hours assumed by providing lending agents + 187,650 hours assumed by self-providing lenders = 191,700 hours.

<sup>1160</sup> In the CAT NMS Plan Release, the Commission estimated that, on average, the ongoing annual burden non-OATS reporters would be 0.75 FTE employees (0.75 FTEs × 1,800 working hours per year = 1,350 burden hours). See CAT Approval Order, 81 FR 84938. The Commission is using this estimate because of the similarities between the requirements applicable to providing covered persons under the final rule and the requirements applicable to non-OATS reporters under the CAT NMS Plan.

<sup>1161</sup> 1,350 hours × 255 providing covered persons = 344,250 hours.

<sup>1162</sup> Proposing Release, 86 FR 69827.

lenders that directly employ a reporting agent.<sup>1168</sup>

**b. Entering Into Written Agreement With Reporting Agent**

Final Rule 10c–1a(a)(2)(i) requires a covered person to enter into a written agreement with a reporting agent in order to rely on the reporting agent to fulfill the covered person's reporting obligations under paragraph (a)(1) of the final rule. In meeting this requirement, non-providing covered persons may assume initial PRA burdens associated with drafting, negotiating, and executing the agreements.

These agreements are estimated to be standardized across the industry because the data elements are consistent for all persons.<sup>1169</sup> The Commission estimates that the only terms that may require negotiation are price and the format in which the information will be provided. To account for negotiation and any administrative tasks related to processing and executing agreements, the Commission is estimating that non-providing covered persons will spend 30 hours on this task.<sup>1170</sup> Accordingly, the Commission estimates that the total industry-wide initial PRA burden attributed to this requirement is 7,440 hours.<sup>1171</sup> However, consistent with the Proposing Release, there should be no associated ongoing annual PRA burden once the agreement is signed, as the final rule does not separately impose a requirement to modify the written agreement or take additional action after the agreement is executed.

**D. Collection of Information Related to Reporting Agents**

Under final Rule 10c–1a(b), any reporting agent that assumes the reporting obligation on behalf of a

covered person pursuant to Rule 10c–1a(a)(2) shall do all of the following: (1) provide such Rule 10c–1a information to an RNSA, in the format and manner required by the applicable rule(s) of such RNSA, and within the time periods specified in paragraphs (c) through (e) of the final rule;<sup>1172</sup> (2) establish, maintain, and enforce written policies and procedures that are reasonably designed to provide the Rule 10c–1a information to an RNSA on behalf of the covered person in the format and manner required by the applicable rule(s) of an RNSA, and within the time periods specified in paragraphs (c) through (e) of the final rule;<sup>1173</sup> (3) enter into a written agreement with an RNSA that permits the reporting agent to provide Rule 10c–1a information to an RNSA on behalf of the covered person;<sup>1174</sup> (4) provide an RNSA with a list naming each covered person on whose behalf the reporting agent is providing Rule 10c–1a information to an RNSA and provide an RNSA with any updates to the list of such persons by the end of the day such list changes;<sup>1175</sup> and (5) preserve for a period of not less than three years, the first two years in an easily accessible place, the Rule 10c–1a information obtained by the reporting agent from the covered person pursuant to Rule 10c–1a(a)(2), including the time of receipt, and the corresponding Rule 10c–1a information provided by the reporting agent to an RNSA, including the time of transmission to an RNSA, and the written agreements under paragraphs (a)(2) and (b)(3) of the final rule.<sup>1176</sup>

Reporting agents will assume PRA burdens associated with their compliance with three requirements in final Rule 10c–1a(b).<sup>1177</sup> First, to

facilitate the provision of Rule 10c–1a information to an RNSA, reporting agents will assume burdens related to the development and monitoring of systems. This includes establishing, maintaining, and enforcing written policies and procedures that are reasonably designed to provide the Rule 10c–1a information to an RNSA on behalf of the covered person in the format and manner required by the applicable rule(s) of an RNSA, and within the time periods specified in paragraphs (c) through (e) of the final rule. It also includes the provision of an updated list of persons on whose behalf they are providing Rule 10c–1a information. Second, reporting agents will assume burdens in entering into written agreements with non-providing covered persons. Third, reporting agents will assume burdens in entering into agreements with an RNSA to provide Rule 10c–1a information on behalf of a non-providing covered person.

**1. Systems Development and Monitoring**

Reporting agents will provide Rule 10c–1a information to an RNSA on behalf of non-providing covered persons. In doing so, because reporting agents will need to change their internal systems to collect the Rule 10c–1a information, they will assume initial PRA burdens related to developing and reconfiguring their current systems to capture the required data elements. In addition, reporting agents will need to establish, maintain, and enforce written policies and procedures that are reasonably designed to provide Rule 10c–1a information to an RNSA on behalf of non-providing covered persons, in the format and manner required by the applicable rule(s) of an RNSA, and within certain time periods specified in paragraphs (c) through (e) of the final rule.<sup>1178</sup> Because reporting agents will provide to an RNSA the same type of Rule 10c–1a information that providing covered persons will provide,<sup>1179</sup> the Commission estimates that the initial and ongoing annual PRA burdens related to the development and monitoring of systems that facilitate the provision of Rule 10c–1a information to an RNSA are the same. Therefore,

reporting agents and providing covered persons, as discussed above, because they both must provide Rule 10c–1a information to an RNSA in complying with final Rule 10c–1a. Accordingly, and consistent with the PRA burden estimates included in the Proposing Release, the PRA burden estimates for reporting agents are not being adjusted incrementally from the estimates for providing covered persons. See Proposing Release, 86 FR 69825 n.156.

<sup>1178</sup> See final Rule 10c–1a(b)(2).

<sup>1179</sup> See final Rules 10c–1a(a)(1) and (b)(1).

<sup>1168</sup> See Proposing Release, 86 FR 69824, 69826. The estimated PRA burden included in the Proposing Release was 675 hours per providing lending agent or lender that would directly employ a reporting agent, with an ongoing industry-wide PRA burden of 116,775 hours. 22,950 hours for non-providing lending agents + 93,825 hours for lenders that would directly employ a reporting agent = 116,775 total hours.

<sup>1169</sup> See final Rules 10c–1a(c) through (e).

<sup>1170</sup> Each covered person is estimated to execute one such agreement because of the efficiencies gained from using only one reporting agent and the commoditized information that would be provided. Accordingly, the estimate of 30 hours would be the initial PRA burden required for one agreement. This estimate is consistent with that included in the Proposing Release. See Proposing Release, 86 FR 69824.

<sup>1171</sup> 30 hours × 248 non-providing covered persons = 7,440 hours. This method of deriving the initial burden hours for non-providing covered persons is consistent with that used in the Proposing Release with regard to non-providing lending agents and Lenders that directly employ a lending agent. See Proposing Release, 86 FR 69824, 69826–27.

<sup>1172</sup> See final Rule 10c–1a(b)(1).

<sup>1173</sup> See final Rule 10c–1a(b)(2).

<sup>1174</sup> See final Rule 10c–1a(b)(3).

<sup>1175</sup> See final Rule 10c–1a(b)(4).

<sup>1176</sup> See final Rules 10c–1a(b)(1) through (b)(5).

<sup>1177</sup> The Rule 10c–1a information provided to an RNSA would be the same; however, certain aspects of the requirements applicable to reporting agents differ slightly from those applicable to providing covered persons. For example, reporting agents, unlike providing covered persons, will need to design systems to establish connectivity with the non-providing covered persons on whose behalf they are providing information to an RNSA. In addition, reporting agents, unlike providing covered persons, are required under final Rule 10c–1a(b)(4) to provide to an RNSA the identity of the person on whose behalf it is providing Rule 10c–1a information. Further, reporting agents, unlike either type of covered person—providing covered person or non-providing covered person—are required to establish, maintain, and enforce reasonably designed written policies and procedures to provide information to an RNSA. See final Rule 10c–1a(b)(2). Despite these differences, the estimates used in the CAT approval Order are an appropriate basis from which to estimate the burdens for

consistent with the Commission's estimate included above, in Part IX.B.1, the Commission estimates that each reporting agent will assume an initial PRA burden of 3,000 hours in developing and reconfiguring current systems to capture the required data elements. Accordingly, the industry-wide initial PRA burden is estimated to be 318,000 hours.<sup>1180</sup>

Once a reporting agent has established the appropriate systems and processes required for the collection and provision of the applicable Rule 10c-1a information, the reporting agent will assume ongoing annual PRA burdens associated with providing such information to an RNSA, in addition to an updated list of persons on whose behalf they are providing information, monitoring systems, implementing changes, and troubleshooting errors. As discussed above, in this part, because reporting agents provide to an RNSA the same information that providing covered persons provide, the Commission estimates that each reporting agent will assume an ongoing annual PRA burden of 1,350 hours related to this requirement. Accordingly, the total industry-wide ongoing annual PRA burden is estimated to be 143,100 hours.<sup>1181</sup>

## 2. Entering Into Written Agreements With Non-Providing Covered Persons

To fulfill a covered person's reporting obligation under final Rule 10c-1a(a), any reporting agent must enter into a written agreement with the covered person on whose behalf they are providing Rule 10c-1a information to an RNSA.<sup>1182</sup> In meeting this requirement, reporting agents will assume initial PRA burdens related to drafting, negotiating, and executing such an agreement. Compliance with this requirement, however, should not create any ongoing annual burdens once the agreement is executed. This is because the final rule does not impose any requirement for reporting agents to modify the written agreement or take additional action after the agreement is executed.

<sup>1180</sup> 3,000 hours × 106 reporting agents = 318,000 hours. The estimated initial burden per reporting agent is reduced from that included in the Proposing Release in light of the final rule's inclusion of an end-of-day reporting requirement, as discussed above, in Part IX.B.1.

<sup>1181</sup> 1,350 hours × 106 reporting agents = 143,100 hours. This methodology is consistent with that used in the Proposing Release with respect to reporting agents. See Proposing Release, 86 FR 69825.

<sup>1182</sup> See final Rule 10c-1a(a)(2)(i).

These agreements are estimated to be standardized across the industry because the data elements are consistent for all persons.<sup>1183</sup> The only terms (of an agreement between a non-providing covered person and a reporting agent) that may require negotiation are the price and the format in which the information would be provided. This process is estimated to be highly automated. Reporting agents are estimated to require the same amount of time to comply with this requirement as non-providing covered persons will require. Accordingly, the Commission estimates that each reporting agent will spend 30 hours on this task.<sup>1184</sup> As a result, the total industry-wide initial PRA burden related to this requirement is estimated to be 3,180 hours.<sup>1185</sup>

## 3. Entering Into Written Agreements With an RNSA

Any reporting agent that assumes the reporting obligation on behalf of a covered person pursuant to final Rule 10c-1a(a)(2) must also enter into a written agreement with an RNSA that permits the reporting agent to provide Rule 10c-1a information to an RNSA on behalf of the covered person.<sup>1186</sup> Because the Rule 10c-1a information is standardized for all reporting agents, there are no terms of these agreements that will need to be negotiated. Instead, an RNSA may create a form agreement for all reporting agents. Because these agreements are estimated to be standardized, the Commission estimates that reporting agents will assume a one-hour initial PRA burden to account for any administrative tasks related to processing and executing these agreements.<sup>1187</sup> Reporting agents that enter into written agreements with an RNSA should not incur any ongoing annual burden to comply with this requirement once the agreement is executed, as the Rule 10c-1a information is standardized. Accordingly, the Commission estimates that the industry-wide initial PRA burden for this requirement is 106 hours.<sup>1188</sup>

<sup>1183</sup> See *supra* note 1169 and accompanying text.

<sup>1184</sup> See *supra* note 1170 and accompanying text.

<sup>1185</sup> 30 hours × 106 reporting agents = 3,180 hours. This methodology is consistent with that used in the Proposing Release with respect to reporting agents. See Proposing Release, 86 FR 69825.

<sup>1186</sup> See final Rule 10c-1a(b)(3).

<sup>1187</sup> 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.

<sup>1188</sup> 1 hour × 106 reporting agents = 106 hours. This methodology is consistent with that used in

## 4. Record Preservation Requirement

Any reporting agent that assumes the reporting obligation on behalf of a covered person pursuant to final Rule 10c-1a(a)(2) must also preserve for a period of not less than three years, the first two years in an easily accessible place, the Rule 10c-1a information it obtained from the covered person pursuant to paragraph (a)(2) of the final rule, including the time of receipt, and the corresponding Rule 10c-1a information provided by the reporting agent to an RNSA, including the time of transmission to an RNSA, and the written agreements that the reporting agent entered into with the covered person and with an RNSA.<sup>1189</sup> The initial PRA burden associated with preserving the collected Rule 10c-1a information is related to the reporting agent's burden of developing and reconfiguring its current systems to capture the required data elements. Therefore, an initial burden associated with the preservation of information under final Rule 10c-1a(b)(5) is not separately estimated.

Compliance with this record preservation requirement is estimated to 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 in complying with this requirement. Reporting agents each will assume an ongoing annual PRA burden of 52 hours per year.<sup>1190</sup> Accordingly, the Commission estimates that the industry-wide ongoing annual PRA burden for this requirement is 5,512 hours.<sup>1191</sup>

the Proposing Release with respect to reporting agents. See Proposing Release, 86 FR 69825.

<sup>1189</sup> See final Rule 10c-1a(b)(5).

<sup>1190</sup> This estimate is consistent with the 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 MSRB keep on file for a period of not less than five years, the first two years in an easily accessible place, at least 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), 84 FR 57921.

<sup>1191</sup> 52 hours × 106 reporting agents = 5,512 hours. This methodology is consistent with that used in the Proposing Release with respect to reporting agents. See Proposing Release, 86 FR 69825-26.

PRA TABLE 1—SUMMARY OF ESTIMATED BURDENS FOR COVERED PERSONS AND REPORTING AGENTS

Type of respondent	Rule 10c–1a requirement	Type of PRA burden	Number of entities impacted	Total initial industry burden (hours)	Total annual industry burden (hours)
Providing Covered Persons ...	Systems Development and Monitoring.	Third-Party Disclosure .....	255	765,000	344,250
Non-providing Covered Persons.	Systems Development and Monitoring.	Third-Party Disclosure .....	248	372,000	167,400
Non-providing Covered Persons.	Entering into Agreement with Reporting Agent.	Third-Party Disclosure .....	248	7,440	0
Reporting Agents .....	Systems Development and Monitoring.	Third-Party Disclosure .....	106	318,000	143,100
Reporting Agents .....	Entering into Agreement with Non-providing Covered Person.	Third-Party Disclosure .....	106	3,180	0
Reporting Agents .....	Entering into Agreement with RNSA.	Third-Party Disclosure .....	106	106	0
Reporting Agents .....	Record Preservation Requirement.	Recordkeeping .....	106	0	5,512

*E. Collection of Information Related to RNSAs*

RNSAs will assume new PRA burdens in complying with final Rule 10c–1a(f) through (h). The PRA burdens associated with an RNSA’s compliance with paragraphs (f) through (h) are discussed below. All estimates included in this Part X are consistent with the Commission’s estimates included in the Proposing Release for an RNSA.<sup>1192</sup>

1. Burden Estimates Related to RNSA Rule Implementation

Under final Rule 10c–1a(f), an RNSA is required to implement rules regarding the format and manner of its collection of Rule 10c–1a information and make publicly available such information in accordance with rules promulgated pursuant to section 19(b) and Rule 19b–4 of the Exchange Act. The PRA burden associated with filing any proposed rule changes by an RNSA is already included under the collection of information requirements contained in Rule 19b–4 under the Exchange Act.<sup>1193</sup> Therefore, a separate PRA burden estimate is not included for the purposes of the PRA included for this rulemaking.

2. Burden Estimates Related to the Publication of Data

As discussed above, in Part VII.J, an RNSA will be required, following the receipt of information pursuant to paragraph (c) or (d) of the final rule, to assign a unique identifier to the covered securities loan and make certain information publicly available (on its website or similar means of electronic

distribution, without use restrictions, for a period of at least five years)<sup>1194</sup> within the time frames specified in paragraph (g) of the final rule. In complying with these requirements, an RNSA will need to create, implement, and maintain the infrastructure to enable providing covered persons and reporting agents to provide an RNSA with the Rule 10c–1a information. This includes establishing technical requirements and specifications for such infrastructure, creating a system that can 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 providing covered persons and reporting agents. In addition, the infrastructure employed will need to comply with paragraphs (h)(1) and (h)(2) of the final rule, which require an RNSA to retain the collected Rule 10c–1a information 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 to make the information collected pursuant to paragraphs (b)(4) and (c) through (e) of the final rule available to the Commission, or other persons as the Commission may designate by order upon a demonstrated regulatory need, respectively.

The initial burden assumed by an RNSA in creating and implementing the infrastructure for providing covered persons and reporting agents to provide the applicable Rule 10c–1a information to an RNSA, and for an RNSA to make such information publicly available, is

similar to the initial burden assumed by national securities exchanges and RNSAs in complying with the requirement to establish the appropriate systems and processes for the collection and transmission of the required information under the CAT. However, the systems that are implemented to comply with Rule 10c–1a should be significantly less complex than those that are implemented to comply with the CAT. This is because the Rule 10c–1a systems will need to capture less information overall than what the CAT requires.<sup>1195</sup> Further, as discussed above, in Part IX.A.3, there is only one RNSA that will need to create and implement the infrastructure for providing covered persons and reporting agents to provide Rule 10c–1a information, in contrast to the multiple national securities exchanges that create systems to comply with the CAT. In addition, an RNSA will have internal staff that can create and implement the infrastructure for providing covered persons and reporting agents to provide Rule 10c–1a information, unlike certain tasks required under the CAT that may require outsourcing. Accordingly, the PRA burden estimates for this collection of information are substantially reduced as compared to those for the CAT, as discussed below, in this part.

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 providing covered persons and reporting agents to provide the Rule 10c–1a information to an RNSA, and for an RNSA to assign a unique identifier to the covered

<sup>1192</sup> See Proposing Release, 86 FR 69827–29.

<sup>1193</sup> See *Proposed Rule Changes of Self-Regulatory Organizations*, Release No. 34–50486 (Oct. 5, 2004), 69 FR 60287 (Oct. 8, 2004), 69 FR 60293.

<sup>1194</sup> See final Rule 10c–1a(h)(3).

<sup>1195</sup> See *supra* note 1150 and accompanying text.

securities loan and make the specified information publicly available.<sup>1196</sup> The RNSA is not estimated to assume external costs for the implementation of the infrastructure to enable providing covered persons and reporting agents to provide the Rule 10c–1a information, assign a unique identifier to the covered securities loan, and make the final rule’s specified information publicly available. This is because the sole RNSA currently existing, FINRA, has experience in implementing systems to collect information from its member broker-dealers.<sup>1197</sup> Therefore, the Commission estimates that the average one-time initial PRA burden related to developing the infrastructure to enable providing covered persons and reporting agents to provide the Rule 10c–1a information, assign a unique identifier to the covered securities loan, and make the final rule’s

specified information publicly available is 10,924 hours.<sup>1198</sup>

Once an RNSA has developed the infrastructure to enable providing covered persons and reporting agents to provide the Rule 10c–1a information, assign a unique identifier to the covered securities loan, and make the final rule’s specified information publicly available, the Commission estimates that an RNSA will assume ongoing annual PRA burdens of 7,739.5 hours related to ensuring that the infrastructure is up-to-date and remains in compliance with the final rule, for an estimated annual ongoing burden of 7,739.5 hours.<sup>1199</sup>

3. Burden Estimates Related to Data Retention and Availability

Under final Rule 10c–1a(h)(1), an RNSA must retain the collected Rule 10c–1a information 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 initial burden associated with retaining the collected Rule 10c–1a information is assumed in an RNSA’s burdens related to implementing and maintaining the infrastructure for providing covered persons and reporting agents to provide Rule 10c–1a information to an RNSA, as discussed above, in Part X.2. Therefore, the Commission is not separately assessing an initial burden associated with the retention of collected Rule 10c–1a information. The Commission, however, estimates that an RNSA will assume an ongoing annual PRA burden of 52 hours to retain the collected information,<sup>1200</sup> for an estimated annual industry-wide burden of 52 hours.

PRA TABLE 2—SUMMARY OF ESTIMATED BURDENS FOR RNSA

Rule 10c–1a requirement	Type of PRA burden	Number of entities impacted	Total initial industry burden hours	Total annual industry burden hours
Publication of Data .....	Reporting and Third-Party Disclosure .....	1	10,924	7,739.5
Data Retention and Availability .....	Recordkeeping .....	1	0	52

F. Collection of Information Is Mandatory

Each collection of information discussed above is a mandatory collection of information.

G. Confidentiality of Responses to Collection of Information

The Commission may receive confidential information as a result of this collection of information, such as the identity of covered persons. The final rule does not permit an RNSA to make such information publicly available.<sup>1201</sup> Aside from this information, the collection of information is broadly expected to be publicly available information. To the

extent the Commission receives confidential information pursuant to this collection of information, through its examination and oversight program, through an investigation, or by some other means, such information will be kept confidential, subject to the provisions of applicable law.

H. Retention Period for Record Preservation Requirement

Pursuant to final Rule 10c–1a(h)(1), an RNSA is required to retain the collected Rule 10c–1a information 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. Pursuant to final Rule 10c–1a(b)(5), a reporting agent that assumes the reporting obligation on behalf of a covered person pursuant to paragraph (a)(2) of the final rule is required to preserve the Rule 10c–1a information obtained by the reporting agent from the covered person pursuant to final Rule 10c–1a(a)(2), including the time of receipt, and the corresponding Rule 10c–1a information provided by the reporting agent to an RNSA, including the time of transmission to an RNSA, as well as the written agreements under paragraphs (a)(2) and (b)(3) of the final rule, for a period of not less than three years, the first two years in an easily accessible place.

<sup>1196</sup> 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 43,696.80 burden hours in total. See CAT Approval Order, 81 FR 84921. Given the size of the overall equity market in comparison to the size of the securities lending market, the Commission believes equating the PRA burden hours (to develop the infrastructure for the provision of Rule 10c–1a information and for an RNSA to assign a unique identifier to the covered securities loan and make the specified information publicly available) with the CAT burden hours would overestimate the burden hours. The initial burden in complying with final Rule 10c–1a’s requirements related to an RNSA’s publication of data should be calculated based on the size of the securities lending market in comparison to the size of the equities market. Consistent with the

Commission’s estimate in the Proposing Release, 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. See Proposing Release, 86 FR 69828. Accordingly, the size of the securities lending market is approximately 25% of the U.S. equity market. Therefore, it is estimated that the initial PRA burden to develop and implement the needed systems changes to capture and publish the Rule 10c–1a information is 25% of the burden hours for the CAT, which is 10,924 burden hours.

<sup>1197</sup> See, e.g., *supra* Part VII.H.

<sup>1198</sup> 1 RNSA × 10,924 hours = 10,924 hours.

<sup>1199</sup> The PRA burdens assumed in complying with this requirement are similar to the burdens assumed by national securities exchanges and RNSAs in complying with the data collection and reporting requirements for the CAT. This was

estimated to be approximately 30,958.20 total hours. See CAT Approval Order, 81 FR 84922. Consistent with the Commission’s initial PRA burden estimates related to an RNSA’s publication of data in accordance with the proposed rule, as such burden estimate relates to the Commission’s estimates in the CAT Approval Order, the Commission estimates for purposes of compliance with the final rule that the annual ongoing burden related to the publication of the specified data is similarly 25% of the hours required for compliance with CAT. This is estimated to be 7,739.5 hours.

<sup>1200</sup> See *supra* note 1190. The resulting burden hours that are assumed in addition to those that already exist for Rule 17a–1, for purposes of this PRA estimate, are appropriate because an RNSA may be required to retain records related to Rule 10c–1a information provided by covered persons or reporting agents that are not RNSA members.

<sup>1201</sup> See final Rule 10c–1a(g)(4).

## XI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (“RFA”) <sup>1202</sup> requires Federal agencies, in promulgating rules, to consider the impact of those rules on “small entities,” <sup>1203</sup> a term that includes “small businesses.” <sup>1204</sup> Section 603(a) <sup>1205</sup> of the Administrative Procedure Act, <sup>1206</sup> as amended by section 604(a) of the RFA, requires the Commission to undertake a final regulatory flexibility analysis of rules it is adopting, unless the Commission certifies that the rules would not have a significant impact on a substantial number of small entities. <sup>1207</sup>

Small entities include broker-dealers with 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) (“Rule 17a-5(d)”), or, if not required to file such statements, a broker-dealer who had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the last day of the preceding fiscal year (or in the time it has been in business, if shorter), and is not affiliated with any person (other than a natural person) who is not a small business or small organization. <sup>1208</sup> A small business or small organization, for purposes of “issuers” or “person” other than an investment company, is defined as a person who, on the last day of its most recent fiscal year, had total assets of \$5 million or less. <sup>1209</sup> In the Proposing Release, the Commission certified, pursuant to section 605(b) of the RFA, that the proposed rule would not have a significant economic impact on a substantial number of small entities. <sup>1210</sup> The Commission requested but did not receive any comments on the

<sup>1202</sup> 5 U.S.C. 601 *et seq.*

<sup>1203</sup> 5 U.S.C. 605(b).

<sup>1204</sup> 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 rulemaking, are set forth in 17 CFR 240.0-10 (“Rule 0-10”). Rule 0-10 also provides that the Commission may, if warranted by the circumstances, use a different definition for particular rulemakings. See 17 CFR 240.0-10.

<sup>1205</sup> 5 U.S.C. 603(a).

<sup>1206</sup> 5 U.S.C. 551 *et seq.*

<sup>1207</sup> 5 U.S.C. 605(b).

<sup>1208</sup> See 17 CFR 240.0-10(c).

<sup>1209</sup> 17 CFR 242.0-10(a).

<sup>1210</sup> Proposing Release, 86 FR 69851.

certification as it related to the entities impacted by the proposed rule.

Based on the Commission’s analysis of the existing information relating to persons who are subject to the final rule, it is unlikely that any broker-dealer, clearing agency, investment company, or bank categorized as a “small business” or “small organization” under Rule 0-10 would serve as a covered person, reporting agent, or RNSA, as they would almost certainly have insufficient capital to participate in lending activities involving a covered securities loan or would register with the Commission as a national securities association. Accordingly, the Commission believes it is unlikely that, in the future, a substantial number of small entities may become impacted by the final rule. This is because broker-dealers who have a reporting obligation or elect to serve as a reporting agent are likely to have at least \$500,000 in total capital; as described above, investment companies, together with other investment companies in the same group of related investment companies, who have a reporting obligation are likely to have net assets of over \$50 million as of the end of its most recent fiscal year; banks who have a reporting obligation are likely to have total assets of over \$5 million; <sup>1211</sup> clearing agencies who elect to serve as reporting agents are likely to have compared, cleared, and settled at least \$500 million in securities transactions during the preceding fiscal year and have had a least \$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); <sup>1212</sup> or such persons are likely to be affiliated with a person who is not a small business or small organization as defined under Rule 0-10.

For the foregoing reason, the Commission certifies, pursuant to section 605(b) of Title 5 of the U.S. Code, that final Rule 10c-1a will not have a significant economic impact on a substantial number of small entities.

## XII. Other Matters

If any of the provisions of the final rule, or application thereof to any person or circumstances, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

<sup>1211</sup> 17 CFR 242.0-10(a).

<sup>1212</sup> See 17 CFR 240.0-10(d).

Pursuant to the Congressional Review Act, <sup>1213</sup> the Office of Information and Regulatory Affairs has designated these rules as a “major rule,” as defined by 5 U.S.C. 804(2).

## Statutory Authority

The Commission is adopting final Rule 10c-1a 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 Public Law 111-203, 984(b), 124 Stat. 1376 (2010).

## List of Subjects in 17 CFR Part 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 amending title 17, chapter II of the Code of 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 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, 78j-4, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 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, Sec. 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, Sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

\* \* \* \* \*

Section 240.10c-1a also issued under 15 U.S.C. 78j(c), and Pub. L. 111-203, 984(b), 124 Stat. 1376 (2010).

\* \* \* \* \*

■ 2. Add § 240.10c-1a immediately following § 240.10b-21 to read as follows:

#### § 240.10c-1a Securities lending transparency.

(a) *Reporting requirements for covered persons.* Any covered person who agrees to a covered securities loan on behalf of itself or another person shall:

(1) Provide to a registered national securities association (“RNSA”) the information in paragraphs (c) through (e) of this section (“Rule 10c-1a information”), in the format and manner required by the applicable rule(s) of such RNSA, and within the time periods

<sup>1213</sup> 5 U.S.C. 801 *et seq.*

specified in paragraphs (c) through (e) of this section.

(2) Provided, however, a covered person may rely on a reporting agent to fulfill its reporting obligations under paragraph (a)(1) of this section if such covered person:

(i) Enters into a written agreement with a reporting agent that agrees to provide the Rule 10c–1a information to an RNSA on behalf of such covered person in accordance with the requirements in paragraph (b) of this section; and,

(ii) Provides such reporting agent with timely access to the Rule 10c–1a information.

(b) *Reporting agent requirements.* Any reporting agent that assumes the reporting obligation on behalf of a covered person pursuant to paragraph (a)(2) of this section shall:

(1) Provide such Rule 10c–1a information to an RNSA, in the format and manner required by the applicable rule(s) of such RNSA, and within the time periods specified in paragraphs (c) through (e) of this section;

(2) Establish, maintain, and enforce written policies and procedures that are reasonably designed to provide Rule 10c–1a information to an RNSA on behalf of a covered person in the format and manner required by the applicable rule(s) of an RNSA, and within the time periods specified in paragraphs (c) through (e) of this section;

(3) Enter into a written agreement with an RNSA that permits the reporting agent to provide Rule 10c–1a information to an RNSA on behalf of a covered person;

(4) Name each covered person on whose behalf the reporting agent is providing Rule 10c–1a information to an RNSA and provide an RNSA with any updates to the list of such persons by the end of the day such list changes; and

(5) Preserve for a period of not less than three years, the first two years in an easily accessible place:

(i) The Rule 10c–1a information obtained by the reporting agent from the covered person pursuant to paragraph (a)(2) of this section, including the time of receipt, and the corresponding Rule 10c–1a information provided by the reporting agent to an RNSA, including the time of transmission to an RNSA; and

(ii) The written agreements under paragraphs (a)(2) and (b)(3) of this section.

(c) *Data elements.* A covered person shall provide the following information, if applicable, to an RNSA, by the end of the day on which a covered securities loan is effected:

(1) The legal name of the security issuer, and the Legal Entity Identifier (“LEI”) of the issuer, if the issuer has a non-lapsed LEI;

(2) The ticker symbol, International Securities Identification Number (“ISIN”), Committee on Uniform Securities Identification Procedures (“CUSIP”), or Financial Instrument Global Identifier (“FIGI”) of the security, or other security identifier;

(3) The date the covered securities loan was effected;

(4) The time the covered securities loan was effected;

(5) The name of the platform or venue where the covered securities loan was effected;

(6) The amount, such as size, volume, or both, of the reportable securities loaned;

(7) The type of collateral used to secure the covered securities loan;

(8) For a covered securities loan collateralized by cash, the rebate rate or any other fee or charges;

(9) For a covered securities loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges;

(10) The percentage of collateral to value of reportable securities loaned required to secure such covered securities loan;

(11) The termination date of the covered securities loan; 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.

(d) *Loan modification data elements.* A covered person shall provide the following information to an RNSA by the end of the day on which a covered securities loan is modified:

(1) If the modification occurs after the data elements under paragraph (c) of this section for such covered securities loan are provided to an RNSA, and results in a change to information previously required to be provided to an RNSA under paragraph (c) of this section:

(i) The date and time of the modification;

(ii) The specific modification and the specific data element in paragraph (c) of this section being modified; and

(iii) The unique identifier assigned to the original covered securities loan under paragraph (g)(1) or (g)(3) of this section;

(2) If the modification is to a covered securities loan for which reporting under paragraph (a) was not required on the date the loan was agreed to or last modified and results in a change to any of the data elements in paragraphs (c)(1) through (12) of this section:

(i) The data elements in paragraphs (c)(1) through (12) of this section as of the date of modification and the date and time of the modification.

(ii) [Reserved]

(e) *Confidential data elements.* A covered person shall provide the following information to an RNSA, if applicable, by the end of the day on which a covered securities loan is effected:

(1) If known, the legal name of each party to the covered securities loan, other than the customer from whom a broker or dealer borrows fully paid or excess margin securities pursuant to § 240.15c3–3(b)(3) (“Rule 15c3–3(b)(3)”) of the Exchange Act, Central Registration Depository (“CRD”) or Investment Adviser Registration Depository (“IARD”) Number, market participant identification (“MPID”), and the LEI of each party to the covered securities loan, and whether such person is the lender, the borrower, or an intermediary between the lender and the borrower;

(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 covered securities 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 §§ 242.200 through 242.204 of this chapter (“Regulation SHO”).

(f) *RNSA rules.* An RNSA shall implement rules regarding the format and manner of its collection of information described in paragraphs (c) through (e) of this section and make publicly available such information in accordance with rules promulgated pursuant to 15 U.S.C. 78s(b) (“section 19(b)”) and § 240.19b–4 (“Rule 19b–4”) of the Exchange Act.

(g) *RNSA publication of data.* An RNSA shall:

(1) Following receipt of information pursuant to paragraph (c) of this section, as soon as practicable, and not later than the morning of the business day after the covered securities loan is effected, assign a unique identifier to the covered securities loan and make publicly available the following information:

(i) For each covered securities loan effected on the previous business day:

(A) The unique identifier assigned by an RNSA;

(B) The information it receives under paragraphs (c)(1) through (5) and (7) through (12) of this section; and

(C) The security identifier(s) under paragraphs (c)(1) or (2) of this section

that an RNSA determines is appropriate to identify the relevant reportable security.

(2) Following receipt of information pursuant to paragraph (c) of this section, on the twentieth business day after the covered securities loan is effected, make publicly available the information specified in paragraph (c)(6) of this section along with the loan and security identifying information specified in paragraphs (g)(1)(i)(A) and (C) of this section.

(3) Following receipt of information pursuant to paragraph (d) of this section, assign a unique identifier to the covered securities loan if one was not assigned pursuant to paragraph (g)(1)(i)(A) of this section; and:

(i) As soon as practicable, and not later than the morning of the business day after the covered securities loan is modified, make publicly available information pertaining to any modification to the data specified in paragraphs (c)(1) through (5) and (7) through (12) of this section; provided however, for a covered securities loan for which paragraph (c) information is reported to an RNSA pursuant to paragraph (d)(2) of this section, make publicly available the data specified in paragraphs (c)(1) through (5) and (7) through (12); and

(ii) On the twentieth business day after the covered securities loan is modified, make publicly available the data specified in paragraph (c)(6) of this section along with the loan and security identifying information specified in paragraphs (g)(1)(i)(A) or (g)(3), as applicable, and (g)(1)(i)(C) of this section.

(4) Following receipt of information pursuant to paragraph (e) of this section, keep such information confidential, in accordance with the provisions of paragraph (h) of this section and applicable law.

(5) Following the receipt of information specified in paragraphs (c) and (d) of this section, as soon as practicable, and not later than the morning of the business day after covered securities loans are effected or modified, make publicly available, on a daily basis, information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security and the security

identifier(s) under paragraphs (c)(1) or (2) of this section for which an RNSA determines is appropriate to identify.

(h) *Data retention and availability.* An RNSA shall:

(1) Retain the information collected pursuant to paragraphs (c) 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 paragraphs (b)(4) and (c) 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) Make the information collected under paragraphs (c) and (d) of this section available to the public in the same manner such information is maintained pursuant to paragraph (h)(1) of this section on an RNSA's website or similar means of electronic distribution, without use restrictions, for a period of at least five years; and

(4) Establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of confidential information required by paragraph (e) of this section.

(i) *RNSA fees.* An RNSA may establish and collect reasonable fees, pursuant to rules that are promulgated pursuant to section 19(b) and Rule 19b-4 of the Exchange Act.

(j) *Definitions.* For purposes of this section:

(1) The term *covered person* means:

(i) Any person that agrees to a covered securities loan on behalf of a lender ("intermediary") other than a clearing agency when providing only the functions of a central counterparty pursuant to § 240.17Ad-22(a)(2) ("Rule 17Ad-22(a)(2)") of the Exchange Act or a central securities depository pursuant to § 240.17Ad-22(a)(3) ("Rule 17Ad-22(a)(3)") of the Exchange Act; or

(ii) Any person that agrees to a covered securities loan as a lender when an intermediary is not used unless paragraph (j)(1)(iii) of this section applies; or

(iii) A broker or dealer when borrowing fully paid or excess margin securities pursuant to Rule 15c3-3(b)(3) of the Exchange Act.

(2) The term *covered securities loan* means:

(i) A transaction in which any person on behalf of itself or one or more other persons, lends a reportable security to another person.

(ii) Notwithstanding paragraph (j)(2)(i) of this section, a position at a clearing agency that results from central counterparty services pursuant to Rule 17Ad-22(a)(2) of the Exchange Act or central securities depository services pursuant to Rule 17Ad-22(a)(3) of the Exchange Act will not be a covered securities loan for purposes of this rule.

(iii) Notwithstanding paragraph (j)(2)(i) of this section, the use of margin securities, as defined in § 240.15c3-3(a)(4) ("Rule 15c3-3(a)(4)") of the Exchange Act, by a broker or dealer will not be a covered securities loan for purposes of this rule.

(A) Provided, however, if a broker or dealer lends such margin securities to another person, the loan to the other person is a covered securities loan for purposes of this rule.

(B) [Reserved]

(3) The term *reportable security* means any security or class of an issuer's securities for which information is reported or required to be reported to the consolidated audit trail as required by § 242.613 ("Rule 613") of the Exchange Act and the CAT NMS Plan ("CAT"), the Financial Industry Regulatory Authority's Trade Reporting and Compliance Engine ("TRACE"), or the Municipal Securities Rulemaking Board's Real-Time Transaction Reporting System ("RTRS"), or any reporting system that replaces one of these systems.

(4) The term *reporting agent* means a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under paragraph (a)(2) of this section.

(5) The term *RNSA* means an association of brokers and dealers that is registered as a national securities association pursuant to 15 U.S.C. 78o-3 ("section 15A") of the Exchange Act.

By the Commission.

Dated: October 13, 2023.

**J. Matthew DeLesDernier,**  
*Deputy Secretary.*

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