

ALERTS

Securities Lending Update: SEC Extends Review Period for Proposed Securities Lending Rules

June 12, 2024

Executive Summary

On June 10, 2024, the US Securities and Exchange Commission (“SEC” or the “Commission”) published a notice extending the period by which the Commission must take action on the Financial Industry Regulatory Authority, Inc.’s (“FINRA”) proposed new FINRA Rule 6500 series (“SLATE Rules”)[1] to Aug. 5, 2024. FINRA’s proposed rulemaking is mandated by recently adopted Rule 10c-1a of the Securities Exchange Act of 1934, as amended (“Exchange Act”) and, if adopted, would implement FINRA’s Securities Lending and Transparency Engine (“SLATE”) for the reporting of securities loans.

The proposed SLATE Rules would apply to any covered person or reporting agent subject to Exchange Act Rule 10c-1a (“Rule 10c-1a”), a group that includes registered broker-dealers, registered investment advisers, private funds, agent banks and registered clearing agencies, as well as foreign (non-US) persons.[2] Registered investment advisers and private funds are not subject to FINRA jurisdiction, but FINRA anticipates referring potential violations of the SLATE Rules by registered investment advisers and other non-FINRA members to the SEC. Accordingly, to protect against an SEC enforcement investigation, registered investment advisers and private funds will need to comply with the FINRA SLATE Rules.

While the proposed SLATE Rules generally adhere to the requirements of Rule 10c-1a, certain provisions would mandate the reporting and subsequent public dissemination of data elements not required under Rule 10c-1a. This appears to exceed Rule 10c-1a's mandate, which requires that FINRA "implement rules regarding the format and manner of its collection of information *described in [Rule 10c-1a]...*"[3]

Absent additional extension by the SEC, the SLATE Rules will become effective on Aug. 5, 2024; *however*, covered persons would not have to report to SLATE until January 2026.[4]

Relevant Background

As further discussed in Schulte's Nov. 7, 2023, *Alert*,^[5] on Oct. 13, 2023, the SEC adopted Rule 10c-1a,^[6] which requires that any "covered securities loan"^[7] be reported to FINRA^[8] the day on which the loan is entered into or modified. Rule 10c-1a separately mandates that FINRA make certain information about covered securities loans publicly available by no later than the morning of the business day after the covered securities loan was reported to FINRA, including information about individual covered securities loans and, separately, aggregate transaction activity and the distribution of loan rates for each reportable security.^[9]

Additionally, Rule 10c-1a mandates that FINRA, as the current sole registered national securities association ("RNSA"), "implement rules regarding the format and manner of its collection of information described in" in the rule.^[10] The proposed SLATE Rules and SLATE system represent FINRA's attempt to comply with this requirement.

While Rule 10c-1a became effective on Jan. 2, 2024, covered persons and reporting agents (collectively, "Reporting Persons") will not need to begin reporting information to FINRA until January 2026 (at the earliest).

Reporting Covered Securities Loans to FINRA

Rule 10c-1a requires that covered persons report to FINRA, or engage a reporting agent to report to FINRA, a number of data elements relating to each covered securities loan. Rule 10c-1a mandates that such information be reported to FINRA by the end of the day on which a covered securities loan is affected.^[11]

In adopting Rule 10c-1a, the SEC anticipated that the required FINRA rulemaking would further define a number of Rule 10c-1a's required data elements and related reporting obligations.[12] While the FINRA Proposal helps clarify certain data elements required by Rule 10c-1a, the proposed SLATE Rules include a number of data elements *not* required by Rule 10c-1a. We discuss the clarified data elements and, separately, the additional data elements below.[13]

Clarified Data Elements

Timing Requirements

While Rule 10c-1a states that covered securities loans must to be reported to FINRA by the end of the day on which a covered securities loan is effected, Rule 10c-1a does not define “end of the day” for purposes of Rule 10c-1a.

The SLATE Rules would require that initial covered securities loans be reported to FINRA within the time periods outlined in proposed FINRA rule 6530(a)(1). Specifically, for initial covered securities loans that are effected:

- At or after 12:00:00 a.m. Eastern Time (“ET”) through 7:45:00 p.m. ET on a business day, the required information must be reported before 8:00:00 p.m. ET that same day.[14]
- After 7:45:00 p.m. ET on a business day, the required information must be reported before 8:00:00 p.m. ET the next business day (T+1);[15] and
- On a Saturday, a Sunday, a federal or religious holiday or at any time on a day on which SLATE is not open must be reported before 8:00:00 p.m. ET the next business day (T+1).[16]

While FINRA noted this timing is “generally consistent with the reporting deadline used by commercial vendors to which some Covered Persons currently voluntarily submit securities lending information,” it may nevertheless prove burdensome for certain participants, particularly as certain covered persons may not currently participate in similar reporting regimes and may need to develop systems and processes to deliver the required information on a timely basis.

Certain Non-Confidential Data Elements

As noted above, Rule 10c-1a requires that covered persons or their reporting agents report a number of data elements to FINRA by the end of the day on which a covered securities loan is effected. FINRA will, on a loan-by-loan basis, make certain of these data elements publicly available on the following business day (such data elements, the “Non-Confidential Data Elements”).^[17] Specifically, Rule 10c-1a requires covered persons or their reporting agents report the following Non-Confidential Data Elements to FINRA 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.

The proposed SLATE Rules would further define the following non-confidential data elements: (i) the name of the platform or venue where the covered securities loan was effected, (ii) the amount, such as size, volume, or both, of the reportable securities loaned, (iii) for a covered securities loan collateralized by cash, the rebate rate or any other fee or charges, (iv) for a covered securities loan *not* collateralized by cash, the securities lending fee or rate, or any other fee or charges, (v) the termination date of the covered securities loan.

Name Of The Platform Or Venue Where The Covered Securities Loan Was Effected

Rule 10c-1a(c) requires that covered persons or their reporting agents report the “name of the platform or venue where the covered securities loan was effected” when reporting a covered securities loan to FINRA.

The FINRA Proposal notes that FINRA would “make available a list of platforms/venues and their associated identifiers for [such] reporting purposes. If a loan occurs on a platform/venue not yet included on the FINRA list, the covered person must enter the name of the platform/venue in the SLATE report.”^[18] Notwithstanding this clarification, it remains unclear how, exactly, venues will be identified and whether FINRA has anticipated potential information leakage concerns when identifying the “venue” of an individually negotiated loan or other risks associated with identifying the platforms by name (e.g., the name of a prime broker when a fund or other customer borrows securities from its prime broker).

The Amount Of The Reportable Securities Loaned

Rule 10c-1a(c) requires that covered persons or their reporting agents report the “amount, such as size, volume, or both, of the reportable securities loaned” when reporting a covered securities loan to FINRA.

FINRA’s proposal notes that “for a Covered Securities Loan of a security reportable to CAT, a Covered Person must report the number of shares loaned. For a Covered Securities Loan of a security reportable to TRACE or the MSRB’s RTRS, a Covered Person must report the total par value of the securities loaned.”

Rebate Rates, Securities Lending Fees and Other Fees and Charges

Rule 10c-1a(c) requires that covered persons or their reporting agents report “[f]or a covered securities loan collateralized by cash, the rebate

rate or any other fee or charges” and, separately, “[f]or a covered securities loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges.”

The FINRA Proposal notes that “[w]hen reporting a rebate rate or lending fee..., a Covered Person must report the rebate rate or lending fee as a percentage, and separately report the dollar cost of any other fees or charges.”^[19] While the exact manner of reporting will be dictated by the SLATE Participant specifications,^[20] it appears that loans with floating rates may require daily modifications to reflect the effective rate. As such, it appears that FINRA has elected not to implement commenters’ suggestion that floating rate loans be reported by identifying (i) the reference rate and (ii) the spread thereto, and instead will require daily reporting of the effective rate.

Termination date of the Covered Securities Loan

Rule 10c-1a(c) requires that covered persons or their reporting agents report the scheduled “termination date” when reporting covered securities loans to FINRA.

The FINRA Proposal clarifies that where the parties have agreed to a termination date such date must be provided. Where, instead, the parties have agreed to an “open” term, the termination date field would be left blank.

Additional Data Elements

As noted above, the proposed SLATE Rules would require that Reporting Persons transmit a number of data elements to SLATE not required by Rule 10c-1a (as opposed to the above “clarifications” of certain elements required under Rule 10c-1a).

For instance, the SLATE Rules would require that Reporting Persons report:

- Whether the covered person is the lender, borrower or intermediary;
- The unique internal identifier assigned to the covered securities loan by the covered person responsible for reporting the loan to SLATE;
- If the covered securities loan is an allocation of an omnibus loan effected pursuant to an agency lending agreement, the unique internal

identifier for the associated omnibus loan assigned by the covered person responsible for reporting the covered securities loan to SLATE;

- Whether the loan was pursuant to an exclusive arrangement with the borrower or intermediary;
- Whether the loan was made to an affiliate of the lender or intermediary;
- An indicator identifying the amount of any covered securities loan that did not settle by the close of SLATE system hours on the expected settlement date (this would require subsequent reporting by end-of-day on the date the loan actually settled);
- An indicator noting when a covered securities loan has been terminated, including for covered securities loans that did not and will not settle;[21]
- An indicator if the reported loan rebate rate or lending fee accounts for: (1) a billing adjustment or correction to amounts previously rebated or charged; or (2) the value of a distribution or other economic benefit associated with the reportable security; and
- An indicator if a loan rebate rate or lending fee reflects a rate or fee involving a basket of at least 10 unique reportable securities for a single agreed rate or fee for the entire basket.

The proposed SLATE Rules also expressly state that Reporting Persons will have to report such “modifiers and indicators as required by either the Rule 6500 Series *or the SLATE Participant specification.*”[22]

Accordingly, the proposal indicates that FINRA may require data elements in addition to the above and that certain required elements may *not* be subject to the FINRA rulemaking process.

The inclusion of such data elements has the potential to increase the risk of information leakage associated with these reporting requirements.

Aggregate Loan Transaction Activity & Distribution of Loan Rates

Rule 10c-1a(g)(5) requires that FINRA, in its capacity as the sole RNSA, “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...*” (Emphasis added).

Aggregate Loan Transaction Activity

Under the proposed SLATE Rules, the following categories of aggregated information would be disseminated on a security-by-security basis:

- The aggregate volume of securities (both in total and broken down by collateral type) subject to an initial covered securities loan or modification to the amount of reportable securities loaned reported on the prior business day;
- The aggregate volume of securities (both in total and broken down by collateral type) subject to a rebate rate or fee modification reported on the prior business day;
- The aggregate volume of securities subject to an initial covered securities loan or modification to the amount of reportable securities loaned subject to a term loan (i.e., a loan with a specified term) and subject to an open loan (i.e., a loan without a specified term) reported on the prior business day;
- The aggregate volume of securities subject to an initial covered securities loan or modification to the amount of reportable securities loaned broken down by borrower type (as specified in the SLATE Rules) on the prior business day; and
- The aggregate number of initial covered securities loans and terminated covered securities loans (both in total and broken down by collateral type) reported on the prior business day.

Notably, a number of these aggregated data elements appear to be expansions relative to the plain language Rule 10c-1a.[23] In discussing the purpose of providing such additional information, FINRA notes that such data points may provide useful information to market participants without separately assessing the potential for information leakage. However, in recognition of potential information leakage concerns, FINRA would omit from the daily loan volume statistics information for reportable securities for which there are three or fewer types of initial covered securities loans and loan modifications reported to SLATE on a given day.[24]

Distribution of Loan Rates

Under the FINRA Proposal, for each Reportable Security for which an initial covered securities loan or modification thereto has been reported

to SLATE, FINRA will disseminate, no later than the next business day, the relevant security identifier (as determined by FINRA) and information pertaining to the distribution of loan rebate rates or lending fees.

For covered securities loans collateralized by cash, this information would include, as applicable:

- Highest rebate rate,
- Lowest rebate rate, and
- Volume weighted average of the rebate rates reported to SLATE.

For covered securities loans not collateralized by cash, this information would include, as applicable:

- Highest lending fee,
- Lowest lending fee, and
- Volume weighted average of the lending fees reported to SLATE.

The FINRA Proposal indicates that FINRA *may* disseminate additional information regarding the distribution of loan rates *in its discretion*.^[25] This indicates that FINRA may elect to disseminate such additional information absent additional rulemaking.

Fees

The FINRA Proposal notes that FINRA anticipates making information regarding covered securities loans available on its website “free of charge for personal, non-commercial purposes only.”^[26] FINRA anticipates charging for commercial or “professional” uses and separately indicated that it will assess reporting fees on SLATE Participants.^[27] Such fees would be subject to a separate FINRA rule filing.^[28]

Participation in SLATE

Proposed Rule 6520, if adopted, would establish the requirements applicable to covered persons and reporting agents regarding their participation in SLATE. Under the proposed SLATE Rules, a “SLATE Participant” would be “any person that reports securities loan information to SLATE, directly or indirectly,”^[29] and would include both persons who connect to SLATE directly to report covered securities loan information, including reporting agents, *as well as any covered person who has*

engaged a reporting agent or other agent.^[30] Accordingly, all covered persons would be Slate Participants (and subject to the relevant SLATE Rules), regardless of whether the covered person engaged a reporting agent, and would be required to comply with all requirements applicable to Slate Participants, including completion of the SLATE onboarding process.

This may prove exceedingly difficult in practice and would prevent persons from acting as covered persons without first becoming SLATE Participants (absent violation of the SLATE Rules and, potentially, Rule 10c-1a). This may have a negative impact on market participants' willingness and ability to engage in securities lending activities.

Member Specific Obligations

In addition to the reporting requirements described above, the proposed SLATE Rules would impose additional supervisory obligations on FINRA members, including a requirement that FINRA members relying on a reporting agent take reasonable steps to ensure that the reporting agent is complying with SEA Rule 10c-1a and FINRA Rule 6530.^[31] FINRA also noted that it would expect FINRA members to review the covered securities loan reporting data made available to it by the reporting agent or through FINRA's system to evaluate the accuracy and timeliness of the covered securities loan reports submitted on its behalf by the reporting agent.^[32]

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] Notice of Filing of a Proposed Rule Change to Adopt the FINRA Rule 6500 Series (Securities Lending and Transparency Engine (SLATE™)), Release No. 34-100046 (89 Fed. Reg. 38203) (May 7, 2024) ("FINRA Proposal") available here.

[2] See the definitions of "covered person" and "reporting agent" at, respectively, paragraphs (j)(1) and (j)(4) of Rule 10c-1a.

[3] See Rule 10c-1a(f). (Emphasis added).

[4] Separately, industry groups have filed a lawsuit in the US Court of Appeals for the Fifth Circuit seeking to invalidate Rule 10c-1a. This lawsuit is ongoing. The petition for review can be found here.

[5] Available at https://www.srz.com/en/news_and_insights/alerts/sec-securities-lending-rule-increased-transparency-and-the-risk-of-information-leakage.

[6] *Reporting of Securities Loans*, 88 Fed. Reg. 75644 (Nov. 3, 2023) (“10c-1a Adopting Release”), available at <https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23052.pdf>.

[7] *See* Rule 10c-1a(j)(2)(i). Subject to certain exceptions, a covered securities loan is defined as “[a] transaction in which any person on behalf of itself or one or more other persons, lends a reportable security to another person.”

[8] In its capacity as the current sole registered national securities association.

[9] *See* Schulte’s previous Alert regarding the substance of Rule 10c-1a, available here.

[10] *See* Rule 10c-1a(f).

[11] *See* Rule 10c-1a(c).

[12] *See* the 10c-1a Adopting Release at 75667.

[13] As noted above, any requirements beyond those required under Rule 10c-1a appears to go beyond Rule 10c-1a(f)’s mandate.

[14] *See* proposed Rule 6530(a)(1)(A)

[15] *See* proposed Rule 6530(a)(1)(B)

[16] *See* proposed Rule 6530(a)(1)(C).

[17] Other than the size of a particular covered securities loan, which will be disseminated on the twentieth business day after the covered securities loan is effected, the Non-Confidential Data Elements will be made publicly available by no later than the morning of the business day after the covered securities loan was effected or modified.

[18] See the FINRA Proposal at n. 28.

[19] See the FINRA Proposal at n. 30.

[20] That is, technical specifications that will be available to SLATE Participants for reporting purposes.

[21] As proposed, Rule 10c-1a would have effectively required a report whenever a settled covered securities loan terminated by requiring a modification to the loan amount, although such modifications would be report on a twenty (20) business day delay, while the reporting of loan termination would be reported on the next business day.

[22] See the FINRA Proposal at 38207.

[23] As relevant, Rule 10c-1a(g)(5) requires that FINRA make publicly available “information pertaining to the *aggregate transaction activity* and distribution of loan rates for each reportable security...” (Emphasis added).

[24] See the FINRA Proposal at 38216.

[25] See the FINRA Proposal at n. 79, noting “FINRA may, *in its discretion*, publish or distribute additional metrics regarding loan rebate rates and lending fees free of charge.” (Emphasis added).

[26] See the FINRA Proposal at 38212.

[27] *Id.*

[28] *Id.*

[29] See proposed Rule 6510(h).

[30] See the FINRA Proposal at 38210, stating “‘SLATE Participant’ therefore would include both persons who connect to SLATE directly to report Covered Securities Loan information, including Reporting Agents, *as well as any Covered Person who has engaged a Reporting Agent or other agent.*” (Emphasis added).

[31] See the FINRA Proposal at 38210.

[32] *Id.* (Emphasis added)

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