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Invested in America

May 28, 2024

By Email

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

Re: Release No. 34-100046; File No. SR-FINRA-2024-007
Notice of Filing of a Proposed Rule Change to Adopt the FINRA Rule 6500 Series (Securities Lending and Transparency Engine (SLATE™))

Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to respond to the request for comment by the U.S. Securities and Exchange Commission ("SEC" or "Commission") with regard to the Financial Industry Regulatory Authority, Inc.'s ("FINRA") proposal to adopt the FINRA Rule 6500 Series (the "Proposed Rule Change") to require reporting of securities loans and provide for the public dissemination of loan information.[2]

As SIFMA stated in its prior letters to the Commission commenting on the proposal and adoption of Rule 10c-1a under the Securities Exchange Act of 1934 ("Exchange Act")[3] — which (among other things) directs FINRA to implement rules regarding the format and manner of its collection of prescribed securities loan information and make publicly available such information — SIFMA is generally supportive of the Commission's goal of increasing transparency in the

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

[2] Exchange Act Release No. 100046, SR-FINRA-2024-007 (May 1, 2024), 89 FR 38203 (May 7, 2024) (Notice of Filing of a Proposed Rule Change to Adopt the FINRA Rule 6500 Series (Securities Lending and Transparency Engine (SLATE™))).

[3] 17 CFR § 240.10c-1a ("SEC Rule 10c-1a"). *See* Exchange Act Release No. 98737 (October 13, 2023), 88 FR 75644 (November 3, 2023) (Reporting of Securities Loans) ("SEC Adopting Release").

securities lending market. That said, SIFMA believes that the Proposed Rule Change materially exceeds the Commission's mandate to FINRA to collect the information described in paragraphs (c) through (e) of SEC Rule 10c-1a. FINRA seeks to impose new requirements which are not contemplated in the SEC's rulemaking and which were not subjected to the Commission's notice and comment process and cost-benefit analysis for the adoption of SEC Rule 10c-1a. In light of the brief 21-day comment period, we have outlined certain overarching recommendations and questions herein for immediate consideration. However, SIFMA will need additional time to review the Proposed Rule Change in its entirety — including FINRA's proposed technical specifications (which were published only seven days ago) and the contemplated reporting fees and fees for commercial use of the published data (which FINRA has yet to propose) — in order to consider the issues carefully and provide comments that will be useful to the SEC and FINRA as part of thoughtful and reasoned rulemaking.

SIFMA welcomes the opportunity to continue to engage with the Staffs of the Commission and FINRA in further discussions on these and other issues as they gather information from the industry regarding the Proposed Rule Change.

I. The Proposed Rule Change Impermissibly Exceeds the Authority Granted to FINRA in SEC Rule 10c-1a(f)

A. The Proposed Rule Change Impermissibly Exceeds the Information Collection Authorized Under SEC Rules 10c-1a(c) through (e)

SEC Rule 10c-1a(f) directs that FINRA (as the only existing Registered National Securities Association, or "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." Paragraph (c) of SEC Rule 10c-1a sets forth 12 specific data elements that must be reported to FINRA in connection with a covered securities loan, which the rule states must be made publicly available. Paragraph (e) of SEC Rule 10c-1a sets forth an additional three specific data elements that must be reported to FINRA, but which FINRA must keep confidential. Finally, paragraph (d) of SEC Rule 10c-1a sets forth three specific data elements that must be reported to FINRA in connection with a modification to an existing covered securities loan.[4]

Nowhere in any of the aforementioned paragraphs does it state that FINRA may require reporting of any additional data elements. Indeed, while the SEC Adopting Release states that "the Commission agrees . . . 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

[4] If such loan was not previously reported to FINRA, all 12 data elements required by paragraph (c) must be reported, as well as the date and time the modified data element was modified. *See* SEC Rule 10c-1a(d)(2).

information,"[5] the Commission's directive to FINRA in Rule 10c-1a(f) is unmistakably clear that FINRA is to limit its rule implementation to "the format and manner of its collection of information described in paragraphs (c) through (e)" *only*.

Notwithstanding the unambiguous limits of Rule 10c-1a(f), the Proposed Rule Change seeks to add numerous additional non-confidential data elements, confidential data elements, and modification data elements that are not included in the adopted SEC Rule 10c-1a. Specifically:

- In addition to the non-confidential data elements required by SEC Rule 10c-1a(c), the Proposed Rule Change seeks to require covered persons to report (i) the expected settlement date of the covered securities loan; (ii) apart from the rebate rate or securities lending fee, the dollar cost of any other fees or charges; and (iii) such modifiers and indicators as are required by FINRA under the Rule 6500 Series or the Securities Lending and Transparency Engine ("SLATE") Participant specification;[6]
- In addition to the confidential data elements required by SEC Rule 10c-1a(e), the Proposed Rule Change seeks to require covered persons to report (i) whether the covered person is the lender, borrower, or intermediary; (ii) the unique internal identifier assigned to the covered securities loan by the covered person responsible for reporting the loan to SLATE; and (iii) 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;[7] and
- In addition to the modification data elements required by SEC Rule 10c-1a(d), the Proposed Rule Change seeks to require covered persons to report (i) 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; (ii) the expected settlement date for modifications to the loan amount (if the expected settlement date is a date other than the date of the loan modification) or the effective date for all other loan modifications (if effective date is a date other than the date of the loan modification); (iii) whether the covered person is the lender, borrower, or intermediary; and (iv) such modifiers and indicators as are required by FINRA under the Rule 6500 Series or the SLATE Participant specification.[8]

Moreover, the Proposed Rule Change seeks to impose an *entirely new* suite of data elements, referred to as "modifiers and indicators," which were never addressed in the proposing release

[5] 88 FR at 75682.

[6] Proposed FINRA Rules 6530(a)(2)(E), (K), (Y).

[7] Proposed FINRA Rules 6530(a)(2)(V)-(X).

[8] Proposed FINRA Rules 6530(b)(2)(B), (F), (G), (I).

for Rule 10c-1a[9] or the SEC Adopting Release and which would require a covered person to additionally identify: (i) loans associated with exclusive arrangements; (ii) loans with affiliates; (iii) unsettled loans; (iv) terminated loans; (v) loans with rate or fee adjustments; and (vi) basket loans.[10] These new "modifiers and indicators" reflect highly-sensitive information regarding the characteristics of the reported loan, and will impose additional significant costs and burdens on SIFMA members that were not considered as part of the adoption of SEC Rule 10c-1a. SIFMA finds this particularly concerning given the Proposed Rule Change's statement that, rather than being for FINRA's own internal use in understanding the reported information, "FINRA intends to use these modifiers and indicators to provide regulators and the public with important information regarding the reported securities loan," including by publicly disseminating the modifiers and indicators themselves, as FINRA deems appropriate.[11]

The addition of each of these proposed further data elements exceeds the authority granted by the SEC to FINRA to "implement rules regarding the format and manner of its collection of information described in paragraphs (c) through (e)" of SEC Rule 10c-1a. Further, SIFMA believes it would constitute an impermissible end-run around the Commission rulemaking process for additional data elements to be first proposed by FINRA without being subject to the public comments and economic analyses required to be performed under such rulemaking process. Therefore, SIFMA recommends that the above-referenced additional proposed data elements, including the proposed "modifiers and indicators," be removed in their entirety from the Proposed Rule Change.

SIFMA believes that if the Commission wanted FINRA to collect these additional data elements, confidential data elements, and modification data elements and new "modifiers and indicators," the Commission should have included them in the SEC Proposing Release, along with a cost-benefit analysis, and afforded commenters the opportunity to consider them as part of the Commission's broader rulemaking. Inserting them in the Proposed Rule Change without having afforded the chance to comment on them through the notice and comment period for the SEC Proposing Release deprives the industry and the general public of the opportunity to consider the additional burdens that will be imposed in identifying and programming for these elements, and meaningfully comment on these proposed requirements.

B. The Proposed Rule Change Impermissibly Reintroduces Intraday Reporting

The SEC Proposing Release had proposed to require covered persons to report information regarding a new covered securities loan or modification to an existing covered securities loan

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[9] Exchange Act Release No. 93613 (Nov. 18, 2021), 86 FR 69802 (Dec. 8, 2021) (Reporting of Securities Loans) ("SEC Proposing Release").

[10] Proposed FINRA Rule 6530(c).

[11] 89 FR at 38208; Proposed FINRA Rule 6540(d)(2) ("FINRA will not disseminate . . . any modifier or indicator required by either the Rule 6500 Series or the SLATE Participant specification *that FINRA determines* shall not be publicly disseminated") (emphasis added).

within 15 minutes after the loan or modification, as applicable, is effected.[12] In response to this proposal, many in the industry — including SIFMA — voiced concern that such a requirement would lead to unnecessary noise in the data and result in the public dissemination of incomplete, inaccurate, and misleading information that could have a severe adverse impact on the securities lending market as well as the overall securities markets.[13] In the SEC Adopting Release, the Commission acknowledged that most of the comments received "strongly opposed" the proposed 15-minute reporting requirement, specifically noting that "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" and 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."[14] Moreover, the SEC Adopting Release noted concerns raised by commenters that requiring intraday reporting within 15 minutes of a new covered securities loan or loan modification "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."[15]

To address these concerns, the Commission replaced its proposed intraday 15-minute reporting requirement with a single, end-of-day reporting requirement, which the Commission stated, "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."[16] However, despite this amendment to the final SEC Rule 10c-1a, the Proposed Rule Change now seeks to require covered persons to report information on all intraday adjustments to a new or existing covered securities loan — which would effectively reinstate the reporting of interim intraday

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[12] 86 FR at 69812 ("Paragraphs (b) through (d) [of the proposed rule] contain loan-level data elements. These data elements would be required to be provided to an RNSA within 15 minutes after each loan is effected or modified, as applicable").

[13] *See* Letter from Kenneth E. Bentsen, Jr., President and CEO, SIFMA, 13 (Jan. 7, 2022) ("SIFMA Letter 1") ("SIFMA strongly believes that, given the nature and granularity of the terms that would be required to be reported under the Proposed Rule, intraday reporting of securities lending transaction information and modifications within 15 minutes would result in the publication of incomplete and inaccurate data that would not be useful — and indeed could be harmful — to market participants.").

[14] SEC Adopting Release, 88 FR at 75679 (citing SIFMA Letter 1; Letter from Kenneth E. Bentsen, Jr., President and CEO, SIFMA (Apr. 1, 2022) ("SIFMA Letter 2"); Letter from Lindsey Weber Keljo, Asset Management Group—Acting Head, SIFMA Asset Management Group (Jan. 7, 2022) ("SIFMA AMG Letter"); Letter from Thomas Tesauro, President of Fidelity Capital Markets, Fidelity Investments (Jan 7. 2022) ("Fidelity Letter"); Letter from Managed Funds Association (Jan. 7, 2022); Letter from Jennifer Han, Executive Vice President, Chief Counsel & Head of Regulatory Affairs, Managed Funds Association (Apr. 1, 2022); Letter from Howard Myerson, Managing Director, Financial Information Forum (Jan. 19, 2022) ("FIF Letter"); Letter from Joseph J. Barry, Senior Vice President and Global Head of Regulatory Affairs, State Street Corp. (Apr. 1, 2022); Letter from Jiří Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association (Jan. 7, 2022) ("AIMA Letter 1"); Letter from Susan Olson, General Counsel, and Sarah A. Bessin, Associate General Counsel, Investment Company Institute (Jan. 7, 2022).

[15] *Id.* (citing AIMA Letter 1).

[16] *Id.* at 75680.

terms (that become irrelevant between the parties to the covered securities loan when they are superseded by finalized terms later the same day, and create the appearance of securities lending activity where it does not actually exist) that the Commission removed from the final SEC Rule 10c-1a as a direct result of notice and comment rulemaking.

In light of the foregoing, SIFMA urges that the reporting of intraday adjustments to initial covered securities loans or loan modifications be removed from the Proposed Rule Change in its entirety because requiring such reporting would be inconsistent with the rationale underlying the Commission's decision to require reporting on an end-of-day basis only, and that FINRA instead implement the single, consolidated, end-of-day reporting requirement contemplated by SEC Rule 10c-1a.

C. The Proposed Rule Change's Aggregated Data Categories Are Overly Detailed and Risk Disclosing Sensitive, Proprietary Information

In addition to collecting and publishing non-confidential data elements for new or modified covered securities loans pursuant to SEC Rule 10c-1a(c) and (e), the SEC Adopting Release also directs FINRA to "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."[17]

To fulfill these directives, the Proposed Rule Change proposes to make publicly available the following information:

- For aggregate transaction activity, (i) aggregate volume of securities (both in total and 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; (ii) aggregate volume of securities (both in total and by collateral type) subject to a rebate rate or fee modification, reported on the prior business day; (iii) aggregate volume of securities subject to an initial covered securities loan or modification to the amount of reportable securities loaned with a specified term, and subject to an initial covered securities loan or modification to the amount of reportable securities loaned without a specified term, reported on the prior business day; (iv) aggregate volume of securities subject to an initial covered securities loan or modification to the amount of reportable securities loaned to one or more borrower types reported on the prior business day; and (v) the total number of initial covered securities loans and terminated covered security loans (both in total and by collateral type) reported on the prior business day.[18]
- For distribution of loan rates, (i) the highest rebate rate, lowest rebate rate, and volume weighted average of the rebate rates reported for initial covered securities loans

[17] SEC Rule 10c-1a(g)(5) (emphasis added).

[18] Proposed FINRA Rule 6540(c)(1).

> collateralized by cash and for loan modifications collateralized by cash (where the loan modification involved a change to the rebate rate); and (ii) the highest lending fee, lowest lending fee, and volume weighted average of the lending fees reported for initial covered securities loans not collateralized by cash and for loan modifications not collateralized by cash (where the loan modification involved a change to the lending fee).[19]

SIFMA acknowledges that the Commission afforded FINRA deference as to the manner in which the "aggregate" information should be compiled and presented for public use.[20] However, SIFMA believes that FINRA's deference is limited to the manner in which aggregate data at the level of the entire dataset of reported coved securities loans is reported, and does not permit FINRA to break down the dataset into smaller published subsets, or "slices," based on specific criteria. In effect, the granularity of the smaller subsets of data that the Proposed Rule Change would intend to make publicly available (*e.g.*, data broken down by borrower type) raises significant concerns that sensitive, proprietary trading strategy information may be disclosed. Indeed, there is a risk that the proposed level of detail could even allow users to extrapolate *individual loan amounts* — the publication of which the SEC expressly determined to delay 20 business days in acknowledgement that "the securities lending market [is] tightly linked to short selling positions" and so the amount "could give a strong indication of aggregate short interest[.]"[21]

As such, if the SEC wanted FINRA to include this level of detail, the proposed breakdowns for these two categories of information should have been included in the SEC Proposing Release and subjected to a cost-benefit analysis and formal SEC notice and comment period. SIFMA therefore recommends that FINRA reevaluate its proposed structure and instead propose a revised, less granular structure that does not raise the aforementioned risks.

II. The Proposed Rule Change Raises Numerous Other Key Issues and Questions

SIFMA will need additional time to review the Proposed Rule Change in its entirety — including FINRA's proposed technical specifications and contemplated reporting fees and fees for commercial use of the published data — in order to consider the issues carefully and provide additional comments on the other potential issues raised by the Proposed Rule Change. These include (but are not limited to):

- FINRA's proposal of rules relating to FINRA's maintaining the security and confidentiality of reported confidential information as required by SEC Rule 10c-1a(h)(4).
- Specific details of the technical specifications proposed by FINRA in order to understand the information that must be reported (*e.g.*, how terminated loans are to be reported,

[19] Proposed FINRA Rule 6540(c)(2).

[20] *E.g.*, SEC Adopting Release, 88 FR at 75707, at n. 849 (describing the possible manners in which FINRA might publish information regarding aggregate transaction activity and distribution of loan rates).

[21] *Id.* at 75710.

including a partial termination; how "as of" modifications are to be reported; how changes to interest rate benchmarks should be reported; the categories for type of collateral to be reported).

- The need for additional guidance/clarification on the extraterritorial scope of the rules (*e.g.*, applicability to foreign entities, applicability to foreign securities).
- The contemplated reporting fees.
- The contemplated fees for commercial use of data and the differences between the "fee" data and the "free" data.
- Further detail on the proposed duty of covered persons to report to FINRA a reportable security not currently reflected in SLATE.
- The proposed *de minimis* exclusion is set too low and also should be mandatory rather than discretionary.
- Possible adjustments to the proposed cutoff times for reporting of initial covered securities loans and loan modifications.
- The effect of the new Rule 6500 Series on the existing FINRA short interest reporting regime.
- The treatment of impactful corporate actions under the new reporting requirements.
- Whether firms are expected to consume information from SLATE as part of their ordinary-course securities lending operations.
- Considerations regarding the reporting compliance date and firms' end-of-year code freeze.

III. Specific Exclusions from the Definition of "Covered Securities Loan"

In connection with submitting this letter, SIFMA members note that they are building systems that will exclude transactions and activities that *are not* "covered securities loans." In this regard, based on the language of the SEC Adopting Release,[22] the delivery by a broker-dealer of

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[22] *See* 88 FR at 75663. ("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.[300] To provide such clarification, under the final rule covered persons will not be required to report short sales as defined by 17 CFR 242.200(a) ("Rule 200(a)"), but will be required to report loans that are used for short sales.

[300] *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

securities to settle a short sale — and the consequent carrying of a short position in a brokerage account — is not reportable under SEC Rule 10c-1a as a "covered securities loan."

SIFMA members further note that the way in which securities are sourced by a carrying broker to settle that short sale — and carry that short position — will determine whether that sourcing transaction itself (not the short sale or resulting short position) might be a reportable transaction. For example:

- Broker facilitates short sale settlement of 100 shares ABC
- Broker sources the 100 ABC shares as follows:
    - Rehypothecates 40 shares from a customer margin account
    - Borrows 25 shares from an external lender
    - Borrows 35 shares from a fully-paid custodial customer account
- The lender will report a loan of 25 ABC
- The broker will report the loan of 35 ABC that it borrowed from its Fully Paid custodial customer
- There is no reporting requirement for the rehypothecation of the 40 ABC

SIFMA members will build systems that include the aforementioned reporting logic. In connection with building such systems, SIFMA members welcome the opportunity to further share their expertise regarding the securities lending market to help FINRA and Commission Staff achieve their objective of adopting FINRA rules to implement SEC Rule 10c-1a.

* * *

SIFMA appreciates the opportunity to respond to the Proposed Rule Change and also your consideration of our recommendations as set forth herein, as well as our request for additional time to meaningfully review the proposal. SIFMA would welcome the opportunity to meet with the Commission Staff and FINRA Staff to further discuss the comments and recommendations described herein and convey our comments on other aspects of the Proposed Rule Change. If you have any questions or require additional information, please do not hesitate to contact us by calling Rob Toomey at (212) 313-1124 or Joe Corcoran at (202) 962-7383.

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).")" (other citation omitted).

Sincerely,

Robert Toomey
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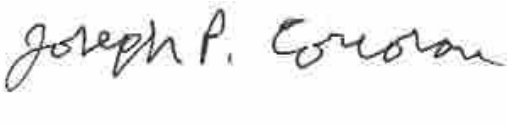
Head of Capital Markets
SIFMA



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