July 31, 2024

Via Electronic Mail: rule-comments@sec.gov

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

> Re: **File No. SR-FINRA-2024-007 (Release No. 34-100046)—Securities Lending and Transparency Engine (SLATE) Rule 6500 Series**

Dear Ms. Countryman:

MFA[1] appreciates this opportunity to submit comments to the U.S. Securities and Exchange Commission ("**Commission**" or "**SEC**") regarding the Financial Industry Regulatory Authority, Inc.'s ("**FINRA")** proposed Rule 6500 Series (the "**Proposed SLATE Rules**").[2] We thank the Commission for considering our comments.

MFA acknowledges the Commission and FINRA's goal of increasing transparency regarding the borrowing and lending of securities through the adoption of Rule 10c-1a under the Securities Exchange Act of 1934 ("**Exchange Act**")[3] and the Proposed SLATE Rules. However, we are concerned that FINRA's proposed rule change will only further exacerbate the significant market risks created by the

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[1] Managed Funds Association (MFA), based in Washington, DC, New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 member fund managers, including traditional hedge funds, credit funds, and crossover funds, that collectively manage over $3.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

[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 ("**Rule 10c-1a**"); *see* Release No. 34-98737 (Oct. 13, 2023), 88 FR 75644 (Nov. 3, 2023) (Reporting of Securities Loans).

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Commission's rulemaking, resulting in a further chilling effect on short selling activity across the industry in contravention of the Commission's historical recognition of the positive effects of short selling on price efficiency, among other benefits.

The Commission's adoption of Rule 10c-1a already requires FINRA to publish detailed terms of loan transactions on a loan-by-loan basis, risking the public disclosure of confidential position and trading information in a manner that is directly at odds with the Commission's statements in its adopting release (published on the same day) for Rule 13f-2 under the Exchange Act,[4] which mandates that data on large gross short positions must be aggregated, anonymized, and delayed before publication. As FINRA is aware, on behalf of the industry MFA, along with the National Association of Private Fund Managers and the Alternative Investment Management Association, have challenged the sufficiency of the Commission's adoption of Rule 10c-1a and Rule 13f-2 under the Administrative Procedure Act ("**APA**").[5] **The Proposed SLATE Rules go *even further* than Rule 10c-1a in proposing to require the reporting and publication of an even greater number of detailed loan transaction terms than Rule 10c-1a mandates, along with far more granular data than contemplated by the Commission's rulemaking.**

As a result, the Proposed SLATE Rules significantly exceed FINRA's rulemaking mandate under Rule 10c-1a(f) to "implement rules regarding the format and manner of its collection of information described in paragraphs (c) through (e) of [Rule 10c-1a] and make publicly available such information." Therefore, it is improper to implement them through a Notice of Proposed Rulemaking pursuant to Rule 19b-4 under the Exchange Act.[6] If the Commission intended to implement such requirements as part of its new reporting and disclosure regime for securities loans, the Commission should have included them in the proposing release for Rule 10c-1a and afforded the public notice and the opportunity to comment on them.[7] Moreover, by imposing new substantive requirements that were not contemplated by the

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[4] 17 CFR § 240.13f-2 ("**Rule 13f-2**"); *see* Release No. 34-98738 (Oct. 13, 2023), 88 FR 75100 (Nov. 1, 2023) (Short Position and Short Activity Reporting by Institutional Investment Managers).

[5] Pub. L. 79-404 (codified at 5 U.S.C. § 551 *et seq.*).

[6] 17 CFR § 240.19b-4.

[7] FINRA indicated that it intends separately to file a proposed rule change to establish SLATE reporting fees and fees for fee-liable data products and indicates that interested parties may subscribe to these fee-liable data products. Similar to views expressed by other commenters, we believe that understanding FINRA's proposed fees for securities loan data products is necessary to understand how FINRA plans to package and sell covered persons' data and enable us to identify potential confidentiality concerns. *See* Letter from the Investment Company Institute (ICI), Canadian Securities Lending Association (CASLA), International Securities Lending Association (ISLA), Securities Lending Council of the Risk Management Association ("RMA Council"), Securities Industry and Financial Markets Association (SIFMA), and SIFMA's Asset Management Group (SIFMA AMG) to the SEC on Reporting of Securities Loans, Release No. 34-93613

Commission in Rule 10c-1a on non-FINRA members, the Proposed SLATE Rules exceed FINRA's statutory authority to "promulgate and enforce rules governing the conduct of [its] members, under the oversight of the SEC."[8]

EXECUTIVE SUMMARY

We appreciate the opportunity to share our views in connection with the Proposed Rule. The following is a summary of our comments, which we explain more fully below:

- The Proposed SLATE Rules Would Further Increase the Risk to Market Participants Already Posed by SEC Rule 10c-1a.

- FINRA Should Limit the Proposed SLATE Rules to What is Mandated by SEC Rule 10c-1a(f).

The Proposed SLATE Rules Would Further Increase the Risk to Market Participants Already Posed by Rule 10c-1a

Through its current litigation, MFA has already stated its concerns with the significant risks posed by Rule 10c-1a.[9] MFA and other industry associations have pointed out that Rules 10c-1a and 13f-2 reflect fundamentally inconsistent reporting and disclosure regimes, and that the Commission failed to consider the extent to which the two rules are interrelated, including in its economic analysis for each rule.[10] As a result of these and other failures by the Commission, we have asserted that the adoption of both rules violates the APA.[11]

Troublingly, the Proposed SLATE Rules appear to reflect a doubling-down on the approach taken by the Commission in Rule 10c-1a of publishing overly-detailed information on individual covered securities loan transactions. Indeed, FINRA has proposed the reporting of *even more* loan data

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(May 24, 2024), available at: https://www.sec.gov/comments/sr-finra-2024-007/srfinra2024007-477911-1366774.pdf.

[8] *E.g.*, *Bloomberg v. SEC*, 45 F.4th 462, 466 (D.C. Cir. 2022) (alteration in original).

[9] Opening Brief for Petitioners at 46–50, National Association of Private Fund Managers, Managed Funds Association & Alternative Investment Management Association v. SEC, No. 23–60626 (5th Cir. Mar. 5, 2024).

[10] *Id.* at 27, 39–46.

[11] The APA requires courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or should of statutory right" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See* 5 U.S.C. §§ 706(2)(A), (C).

elements,[12] confidential data elements,[13] and loan modification data elements[14] that go far beyond Rule 10c-1a(f)'s mandate, as well as an entirely new set of "modifiers and indicators"[15] that are not even contemplated in the Commission's adopting release for Rule 10c-1a. Under the Proposed SLATE Rules, FINRA would make publicly available—on a loan-by-loan basis—all non-confidential loan data elements and loan modification data elements set forth in Rules 10c-1a(c) and (d), its proposed additional non-confidential loan data elements and loan modification data elements, *and* its proposed modifiers and indicators.

Moreover, the Proposed SLATE Rules seek to transform the SEC's mandate to FINRA under Rule 10c-1a(g)(5) to compile and publish more generalized, consolidated "information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security" to into yet another trove of granular loan transaction data to be made available for public consumption.[16] FINRA has proposed the daily publishing of *five* different categories of aggregate transaction activity, most of which would be provided both in total and by collateral type.[17] Moreover, FINRA has proposed two different categories of distribution for loan rates data, based on the loan's rebate rate (where collateralized by cash) or lending fee (where not collateralized by cash), each of which would provide the highest number, lowest number, and a volume weighted average.[18]

Of particular concern is the proposal to daily publish aggregate transaction activity by borrower type.[19] MFA acknowledges that under Rule 10c-1a, covered persons must report, for publication by FINRA, "[w]hether the borrower is a broker or dealer, a customer (if the person lending securities is a

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[12] In addition to the 12 data elements already required to be reported to FINRA for publication under Rule 10c-1a(c), the Proposed SLATE Rules would require the reporting of another three data elements. *See* Proposed FINRA Rules 6530(a)(2)(E), (K), (Y).

[13] In addition to the three confidential data elements already required to be reported to FINRA for publication under Rule 10c-1a(e), the Proposed SLATE Rules would require the reporting of another three confidential data elements. *See* Proposed FINRA Rules 6530(a)(2)(V)–(X).

[14] In addition to the three loan modification data elements already required to be reported to FINRA under Rule 10c-1a(d), the Proposed SLATE Rules would require the reporting of another four loan modification data elements. *See* Proposed FINRA Rules 6530(b)(2)(B), (F), (G), (I).

[15] *See* Proposed FINRA Rule 6530(c).

[16] FINRA has proposed publishing five different categories for aggregate transaction activity and two different categories of distribution for loan rates including, for aggregate transaction activity, breakdowns by borrower type and collateral type. *See* Proposed FINRA Rules 6540(c)(1)–(2).

[17] *See* Proposed FINRA Rules 6540(c)(1).

[18] *See* Proposed FINRA Rules 6540(c)(2).

[19] *See* Proposed FINRA Rule 6540(c)(1)(D).

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broker or dealer), a clearing agency, a bank, a custodian, or other person."[20] However, by also deconstructing its daily publication of aggregate transaction activity data by these borrower categories, the information FINRA publishes could (particularly for thinly-traded securities) effectively disclose individual loan amounts—which the Commission expressly determined, in its final rulemaking, should be delayed by 20 business days. The Commission recognized in its adopting release for Rule 10c-1a that "customer" loans, especially, are "tightly linked to short selling positions" and so loans identified this way "could give a strong indication of aggregate short interest."[21] The Commission determined to delay the dissemination of loan amount/volume information by 20 business days so as not to "significantly expand market participants' abilities to discern short selling strategies."[22] Thus, FINRA's proposal to publish, *on the next business day*, aggregate transaction activity by borrower type, is directly at odds with the Commission's stated position in the adopting release for Rule 10c-1a.[23]

Furthermore, Proposed SLATE Rules would appear to perpetuate the ongoing lack of clarity regarding whether certain uses of securities that are not documented or priced as securities loans in the market may nonetheless be reportable under Rule 10c-1a as "covered securities loans." For example, as reflected in MFA's January 7, 2022[24] and August 4, 2023[25] letters to the SEC commenting on proposed Rule 10c-1, MFA and other industry associations are in agreement that rehypothecating shares to make delivery on short positions should not be treated as a "covered securities loan" for purposes of the SEC securities lending reporting rules.

FINRA's only apparent attempt to mitigate the negative consequences of publicly disclosing so much sensitive granular loan information lies in its proposal to give itself the option to omit, *in its sole discretion*, information from its daily compilation of aggregate transaction activity where there are three

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[20] *See* Rule 10c-1a(c)(12).

[21] Release No. 34-98737, 88 FR at 75710.

[22] *Id.* at 75709.

[23] *See also* Release No. 34-98738, 88 FR at 75131 (indicating, with respect to Rule 13f-2 the Commission's intent to "safeguard against the concerns noted . . . related to retaliation against short sellers, including short squeezes, and the potential chilling effect that [disclosure of too much information] may have on short selling").

[24] MFA Letter to the SEC on Reporting of Securities Loans, Release No. 34-93613 (Jan. 7, 2022), available at: https://www.mfaalts.org/wp-content/uploads/2022/03/MFA-Comment-Letter-SEC-Securities-Lending-Proposal.final_.1.7.2022.pdf.

[25] MFA Letter to the SEC on Reporting of Securities Loans, Release No. 34-93613 (Aug. 4, 2023), available at: https://www.mfaalts.org/wp-content/uploads/2023/08/MFA-Securities-Lending-Supplemental-Comment-Letter-080423-FINAL.pdf.

or fewer loan transactions or modifications in the applicable security.[26] While FINRA states that this proposed exclusion of "*de minimis*" loan transaction activity is included in the Proposed SLATE Rules "[t]o address concerns regarding potential information leakage," it did not explain why "FINRA believes" that "the threshold of three or fewer [loan transactions or modifications] appropriately balances these considerations"[27] of information leakage with those of transparency, nor did it address why it believes the proposed exclusion should be discretionary rather than mandatory. FINRA also did not address how it determined that this extremely limited, discretionary authority would mitigate the aforementioned significant potential negative effects on short selling. To the contrary, MFA believes that FINRA's proposed discretionary authority to exclude "*de minimis*" loan transaction activity would have no mitigating effect whatsoever.

For example, assume that in a particular security there are four covered securities loans reported, three of which identify a "broker-dealer" as the borrower and one of which identifies a "customer" as the borrower. Although these covered securities loans would, in accordance with Rule 10c-1a, not identify the quantity of the securities loaned for 20 business days, by proposing to also include in the Proposed SLATE Rules the identification of the borrower as "customer" as part of the public disclosure of aggregate transaction activity, this bears the real possibility of disclosing the short investment thesis of a particular institutional investor, which could then be exposed to the significant risk of manipulative short squeeze trading activity. Thus, FINRA is proposing to not only go beyond what is contemplated under the already-overbroad Rule 10c-1a, but to nullify one of the few safeguards that the Commission included in the final rule: the 20 business day delayed publication of loan amount data.

MFA firmly believes that the Proposed SLATE Rules would only increase the likelihood that Rule 10c-1a will have a chilling effect on broader short selling activity across the industry, in contravention of the Commission's stated goals that both Rule 10c-1a and Rule 13f-2 are "designed to minimize the risk of chilling the short sale market."[28] The Commission has historically recognized the positive effects of short selling on price efficiency, among other benefits.[29] It has also recognized the dangers of being too transparent about short positions, such as potentially revealing the trading strategies of short sellers and

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[26] *See* Proposed FINRA Rule 6540.01 (De Minimis Loan Transaction Activity).

[27] *See* Exchange Act Release No. 100046, 89 FR at 38217.

[28] *See* Brief for Respondent at 21, National Association of Private Fund Managers, Managed Funds Association & Alternative Investment Management Association v. SEC, No. 23–60626 (5th Cir. Mar. 6, 2024) ("Brief for Respondent"); *see also* Release No. 34-98738 (Oct. 13, 2023), 88 FR 75100, 75133 (Nov. 1, 2023) (Short Position and Short Activity Reporting by Institutional Investment Managers) (describing the SEC's goal to prevent the chilling of short selling).

[29] Release No. 34–98738, 88 FR at 75151 (describing the benefits of short selling).

encouraging retaliation against short sellers.[30] Yet, this is exactly what the Proposed SLATE Rules would do. Even if the published data is anonymized, it still will disclose confidential position and trading information. This will further facilitate the ability for other market participants to reverse-engineer individual transactions, thereby disclosing firms' confidential position and trading information, and exposing the market to manipulative short squeezes like those that occurred in GameStop and other "meme stocks" in early 2021. MFA is deeply concerned that the new data that FINRA is proposing to publish, including the six new modifiers and indicators, the additional loan data elements, and the additional loan modification data elements, would expose market participants to the very same risks the Commission stated in the adopting releases for Rule 10c-1a and Rule 13f-2, as well as in connection with the current legal challenge, that it was trying to prevent.[31]

FINRA Should Limit the Proposed SLATE Rules to What is Mandated by Rule 10c-1a(f)

For the aforementioned reasons, MFA believes that FINRA should limit its Proposed SLATE Rules to only what is required to comply with Rule 10c-1a(f)'s mandate to "implement rules regarding the format and manner of its collection of information described in paragraphs (c) through (e) of [Rule 10c-1a] and make publicly available such information," and withdraw its proposal to collect additional loan data elements and modification data elements and new modifiers and indicators, as well as its proposal to make public all such information that is non-confidential. Moreover, FINRA should withdraw its proposal to publish the granular categories of aggregated loan transaction activity and loan rate distribution data, and instead limit its publication of any such information to a limited number (*i.e.*, one or two) of generalized categories. Rule 10c-1a already breaches the limits of the Commission's mandate under Section 984(b) of the Dodd-Frank Act to "promulgate rules that are designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities."[32] FINRA should not seek to do further damage through the Proposed SLATE Rules.

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[30] *Id.* at 75164.

[31] *Id.* at 75131 (stating that the Commission believes anonymizing and aggregating information prior to making it publicly available "would help safeguard against the concerns noted above related to retaliation against short sellers, including short squeezes, and the potential chilling effect that such public disclosure may have on short selling"); *see also* Brief for Respondent at 21.

[32] Pub. L. 111-203, sec. 984(b) (codified at 15 U.S.C. § 78j note).

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We appreciate the opportunity to provide our comments to the Commission regarding the Proposed Slate Rules, and we would be pleased to meet with the Commission and its staff to discuss our comments. If the staff has questions or comments, please do not hesitate to contact Matthew Daigler or the undersigned at (202) 730-2600 with any questions regarding this letter.

Respectfully submitted,

/s/ Jennifer W. Han

Jennifer W. Han
Executive Vice President
Chief Counsel and Head of Global Regulatory Affairs
MFA

cc: The Hon. Gary Gensler, Chair
        The Hon. Hester M. Peirce, Commissioner
        The Hon. Caroline A. Crenshaw, Commissioner
        The Hon. Mark T. Uyeda, Commissioner
        The Hon. Jaime Lizárraga, Commissioner
        Dr. Haoxiang Zhu, Director, Division of Trading and Markets