Proskauer

SEC Adopts New Securities Lending Reporting Rule

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On October 13, 2023, the Securities and Exchange Commission (the "SEC") adopted new Rule 10c-1a (the "Securities Lending Rule"), requiring the reporting of certain securities lending transactions. Certain material terms of securities lending transactions relating to "reportable securities" are required to be reported to a registered national securities association ("RNSA") by the end of the day on which the loan is agreed or modified. The RNSA is required to make the information – other than that deemed confidential as defined below – public on the morning of the next business day. The amount of the loan is to be made public on the 20th business day following submission of the report. Of note, currently the Financial Industry Regulatory Authority ("FINRA") is the only registered RNSA and is expected to accept the securities lending reports once the Securities Lending Rule is effective.

The SEC states that the purpose of the new rule is to increase the transparency and efficiency of the securities lending market. The Securities Lending Rule will provide market participants with access to pricing and other material information in a timely manner, as well as aid regulators in their oversight of the securities lending market.

What Securities Are Covered by the New Rule?

All loans of “reportable securities” (with a few exceptions noted below) are required to be reported to an RNSA. Reportable securities 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 (CAT) as required by Rule 613 and the CAT National Market System Plan, FINRA’s Trade Reporting and Compliance Engine (TRACE), the Municipal Securities Rulemaking Board Real-Time Transaction Reporting System, or any reporting system that replaces one of these systems. Reportable securities include equity securities (both exchange traded and those traded OTC), debt securities subject to TRACE reporting, and digital asset securities that meet the definition of “reportable security” (each a “Reportable Security”). It is important to note that the definition of Reportable Securities is not limited to U.S. exchange traded securities or securities issued by U.S. public companies, and there may be overlap with EU or UK SFTR reporting requirements.

Who Is Required to Report?

The Securities Lending Rule applies to “covered persons”, which includes:

1. Any person lending a Reportable Security for their own account and not through an intermediary,
2. Any person acting as an intermediary on behalf of another person lending a Reportable Security (other than a clearing agency when acting as a central counterparty), and
3. Brokers or dealers when borrowing fully paid or excess margin securities pursuant to Rule 15c3-3 of the Securities Exchange Act.

The reporting obligation generally applies to the lender of the Reportable Security except where a broker or dealer is borrowing fully paid or excess margin securities. In that case, the SEC indicated that the customer may have agreed to a general lending program with their broker and may not be aware that their securities have been borrowed.

The definition of “covered person” is not limited to U.S. persons and includes any person in the above categories who effects, accepts, or facilitates a loan or borrowing in a Reportable Security in the U.S. Non-U.S. residents engaged in activities in the U.S. who lend (or borrow, if a broker or dealer) a Reportable Security are required to report the transaction to an RNSA.

Can I Have Someone Else Report on My Behalf?

Covered persons subject to the reporting requirement are permitted to engage a reporting agent (through a written agreement) to submit the required information on their behalf. The covered person must provide the reporting agent with timely transaction information to fulfill their obligations under the Securities Lending Rule. Reporting agents are limited to SEC registered brokers, dealers, and clearing agencies.

What Information Must Be Included in the Report?

Covered persons, either directly or through a reporting agent, must submit the following information about each loan of a Reportable Security by the end of the day on which the loan is agreed or modified:

Loan Data

- Information about the loaned security, including the legal name of the issuer, its LEI, whether the LEI is lapsed, and the ticker symbol, ISIN, CUSIP, FIGI, or other identifier
- Information about the loan, including the date and time the loan was effected, the name of platform where the loan was effected (if applicable), the termination date of the loan (if applicable), and the amount of the loan (size, volume or both)
- Information about the borrower, including whether the borrower is a broker or dealer, a customer (if the lender is a broker or dealer), a clearing agency, a bank, a custodian, or other person
- Information about collateral, including the type of collateral and percentage of the value of the loan
- Information about rebates, securities lending fees, and other charges

Confidential Data

- The parties to the loan, including the legal names of the parties, LEIs, the Central Registration Depository or Investment Advisor Registration Depository number, market participant identifier, and whether such person is the lender, the borrower, or an intermediary between the lender and the borrower
- If the loan is from a broker or dealer to its customer, whether the loan is from the broker’s or dealer’s securities inventory
- If known, whether the loan is being used to close out a fail to deliver under Rule 204 of Regulation SHO, or outside Rule 204 of Regulation SHO

Any modifications to the loan terms previously reported, along with the date and time of the modification and the previously assigned unique identifier (if any), must be reported to an RNSA by the end of the day on which the modification is effected. Of note, the SEC will not require reports to include information on which securities are “available to lend” or “on loan”, in contrast to the proposed rule.

Are There Any Exceptions to the Reporting Requirement?

There are few exceptions to the reporting requirements under the Securities Lending Rule. Clearing agencies, when acting as a central counterparty or a central securities depository, and related positions are exempt from the reporting requirement. Similarly, the use of margin securities by a broker or dealer is not deemed to be a loan for purposes of the Securities Lending Rule, but any loan of a margin security by a broker or dealer to another person could be subject to the reporting requirements of the Securities Lending Rule if the loaned margin security is a Reportable Security. Finally, as discussed below, certain pre-existing securities loans are exempt from reporting.

Do I Need to Report Pre-existing Securities Loans?

The SEC recognized the difficulties in reporting pre-existing securities loans. Pre-existing securities lending transactions will only need to be reported on the date they are first modified following the implementation date of the Securities Lending Rule. Pre-existing securities loans that are not modified following the implementation date of the new rule are exempt from the reporting requirement.

What Is the Timeframe for Reporting?

The required Loan Data and Confidential Data elements of each loan of a Reportable Security must be submitted to an RNSA by the end of the day on which the loan is agreed, even if it has not yet settled. Similarly, modifications to the material terms of securities lending transactions must be reported by the end of the day on which the modification is agreed.

What Information Will Be Public?

The RNSA is required to make the Loan Data and any modifications to the Loan Data (in each case, other than the loan amount) public by the morning of the business day after the report was submitted on a transaction-by-transaction basis. The loan amount will be made public on the 20th business day after the initial report and any modification. The Confidential Data will not be released to the public.

When Will the Securities Lending Rule Be Effective?

The requirement to report the Loan Data and Confidential Data on securities lending transactions in Reportable Securities is delayed 24 months following the effective date of the new rule. The Securities Lending Rule will be effective 60 days after publication in the Federal Register. RNSAs are required to propose rules to implement the Securities Lending Rule within four months of the effective date and must be approved by the SEC. The Loan Data will be made public beginning 90 days after the first required reports are submitted.

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