Commentary

October 24, 2023

Why Comment Periods Matter: The SEC Rulemaking on Securities Loans

The Securities and Exchange Commission (the "SEC") has received significant criticism for its rulemaking process, particularly for allowing inadequate time for public comment. This criticism has come from market participants (not surprisingly), from Congresspersons (both Democrats and Republicans)[1] and most frequently from Commissioner Uyeda and Commissioner Peirce. In increasingly blunt dissents, they have stated that the SEC rulemakings failed to provide sufficient opportunity for public comment or otherwise failed to comply with the requirements of the Administrative Procedure Act.[2]

The purpose of this memorandum is to try to demonstrate why comment periods matter and why insufficient opportunity to comment will likely result in flawed rulemaking. Regardless of whether one agrees or disagrees with the substance of a rule, the process by which a rule is adopted matters. The public comment period serves critical purposes: it allows the opportunities for ambiguities in a rule to be spotted and for assumptions to be challenged, even if the SEC does not ultimately concede to those challenges or agree with the commenters.

To illustrate why it is critical to ensure an adequate period for public comment, this memorandum examines a recent SEC release and adopted rule: Reporting of Securities Loans (the "Adopting Release"), adopting Rule 10c-1a (the "Rule") under the Securities Exchange Act of 1934 (the "SEA").[3]

I. Description of the Rule and its Policy

The Rule appears to be quite simple, at least on its surface: any person who agrees to enter into a loan of securities must by the end of the day provide specified information regarding the loan to FINRA, except that in certain cases a broker-dealer that borrows the securities, rather than the lender of the securities, must report the information to FINRA.

But even in such a seemingly simple rule, definitional ambiguities arise that could have been addressed by a more extensive and meaningful comment period.

II. The Process by Which the Rule Was Adopted

A. Proposing Release

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[1] See **Members of Congress Request that SEC Extend Comment Period on Advisers Act Rulemakings** (Apr.14, 2022).

[2] Each of Commissioner Peirce and Commissioner Uyeda issued dissenting statements on the SEC's adoption of its rule on the disclosure of securities loans. See **SEC Adopts Disclosure Requirements on Securities Loans** (Oct. 13, 2023) (linking to each of the Peirce Dissent and the Uyeda Dissent).

[3] SEC Release No. 34-98737. As the Federal Register version of the Adopting Release has not yet been published, I will be referring to the version of the Adopting Release published by the SEC.

The original proposed version of the Rule was voted forward on November 18, 2021 and published in the Federal Register on December 8, 2021, beginning the legal comment period.[4] The Rule as originally proposed (the "Proposal") was far more complicated than the version as adopted, both in terms of what it required and in terms of the technology that would have been required to fulfill the requirements. In spite of the complexity of the Proposal, the SEC allowed the bare legal minimum of time to comment, 30 days, so the comment period ended on January 7th.

The Federal Register was published on a Wednesday. Assuming that market participants could coordinate at warp speed, suppose they could meet the following Monday, December 13th. Since the comment period took place over the Christmas and New Year holidays, that gave the market approximately 16 business days to comment.[5] This, of course, assumes that no one was planning to take a vacation during the Christmas/New Year period or that they were not preoccupied with other urgent work matters in preparation for year end.

While the adopted version of the Rule may appear (deceptively) simple, the Proposal was complex even on its surface. It included at least two requirements that were, from a market practice standpoint, completely inconsistent with market practice:

- Real time reporting of any agreement to enter into a securities loan, and
- Reporting of the availability of securities to be loaned that are not actually on loan.[6]

I will refer to these requirements in the Proposal as the "Novel Requirements." The first was inconsistent with the way that the securities lending markets work and the second was a completely novel reporting requirement that would have required securities lenders to build significant new reporting systems. Even ignoring the rest of the Proposal, the Novel Requirements constituted a good deal of complexity for the market to unpack, with a very short period of time to provide comment.

B. The Short Sale Proposal

In late February 2022, the SEC issued another very significant rule proposal, proposed Rule 13f-2, requiring the reporting by institutional investment managers of securities short positions. This proposal was published in the Federal Register on March 16, 2022.[7] For this proposal, the SEC allowed approximately a 40-day comment period.

C. The Extension of the Securities Loan Comment Period

On March 2, 2022, the SEC published in the Federal Register a notice providing another 30 days to comment on the Proposal, "so that commenters may consider whether there would be any effects

[4] 86 FR 69802 (Dec. 8, 2021) (the "Proposing Release").

[5] I have assumed that New Year's Eve would not be a working day and that work on the comment letter would have to be completed the day before the comment was due.

[6] Proposing Release at 69812. The SEC seems to have agreed that they were impractical since it ultimately dropped them from the final version of the Rule.

[7] 87 FR 14950 (Mar. 16, 2022).

of proposed Rule 13f-2 that the Commission should consider in connection with proposed Rule 10c-1."[8]

Again, the comment period was the bare legal minimum. Further, the SEC did not request comments on the Proposal as a whole, but only on the interaction between the Proposal and proposed Rule 13f-2. Somewhat strangely, the re-opened comment period on Rule 10c-1 began on March 2, but the official version of proposed Rule 13f-2 was not published in the Federal Register until March 16. How could the industry possibly have analyzed Section 13f-2 and determined its interaction with the proposed Rule 10c-a1 in that time period?

D. A Word on Commenting

Commenting on SEC rule proposals is not actually a simple matter for market participants, particularly for a complicated rule proposal. Analyzing the legal requirements is only the first step. Those requirements then have to be communicated to a good number of others, including, at a minimum, the relevant business people, operations professionals and the information technology professionals who will have to build the necessary systems. If the rule will also impact the firm's customers or suppliers, then the impact on them must be considered. Firms must consider whether the proposed rule may impact their foreign affiliates. If the rule proposal requires interaction between the firm and other entities, then consideration must be given as to how that will work. The firm must consider how the proposal interacts with other regulations or proposed regulations, including non-U.S. regulations.

In the case of the Proposal, every complicating factor was present:

- The Proposal was quite legally complicated;
- The Proposal had a material business impact, particularly the Novel Requirements;
- The Proposal required new types of information gathering and reporting;
- The Proposal required new technology;
- The Proposal impacted both buy-side and sell-side, as well as requiring services to be provided by vendors;
- Compliance with the Proposal would require co-ordination between buy-side and sell-side, as well as with lending agents and vendors;
- The Proposal would impact foreign affiliates; and
- Analysis of the Proposal required consideration of its interaction with existing rules as well as its interaction with new proposed Rule 13f-2.

In light of the above, a 16-business day comment period seems quite short, much less one that took place during the holiday season.

E. The Rule, as Adopted

[8] 87 FR 11659 (Mar. 2, 2022) (the "Extension Release").

The Rule was adopted on October 13, 2022, by a 3-2 vote with Commissioners Peirce and Uyeda dissenting. As adopted, the Rule was quite significantly different from the Proposal. The Novel Requirements were largely eliminated. (I say "largely" because although real-time trade reporting was eliminated, time of trade reporting was still required.[9])

There is no doubt that the Rule as adopted reflected some of the comments on the Proposal. In fact, a good part of the Adopting Release discussed the changes made between the Proposal and the Rule. This was one of the points made by Commissioner Uyeda in his dissenting remarks, saying "Even taken in isolation [meaning without considering the impact of the short position reporting rule], the changes from the proposal to final Rule 10c-1 on the reporting of securities loans are qualitatively of such a nature as to warrant a proposal, along with an updated economic analysis, so as to provide public feedback on this new set of regulatory and policy choices."[10]

III. Definitional Issues

Against the foregoing background of the Rule adoption process, the memorandum now turns to the Rule itself and the Adopting Release. The fundamental question to be asked is whether the ambiguities and various other issues in the Rule could have been addressed by a more extensive comment period and perhaps by an opportunity to comment on a version that was revised from the Proposal.

To state the obvious, a key aspect of any rule is the definitions. The defined terms give meaning to the provisions of the rule that either require or prohibit a specified activity.

A. Broker or Dealer

To begin, the phrase "broker or dealer" is not defined in the Rule. Although not defined in the Rule, the terms broker and dealer are defined in the SEA as entities that are in the business of buying and selling securities as principal or as agent. These may be either (i) entities that are located in the United States and registered with the SEC, or (ii) they may be entities located outside the United States that are permitted to engage in certain transactions with U.S. persons without registering with the SEC ("foreign broker-dealers").

In the Rule, the SEC uses the term "broker or dealer" without limiting the term to SEC-registered entities. Thus, read literally, all of the broker or dealer provisions in the Rule apply to all brokers and dealers, including foreign broker-dealers. Reading the plain text of the Rule, it would seem as if that is what the SEC intended. For example, the Rule defines a "reporting agent" as "a broker, dealer or registered clearing agency . . ." Having used the word "registered" in front of clearing agency, one would logically assume that the SEC deliberately omitted the term in front of the words "broker" and "dealer".

In fact, in this particular case, it is clear from the Rule taken as a whole and from the Release that the SEC intended the term "reporting agent" to include only "registered" brokers and dealers. That

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[9] It is not clear why this requirement was retained as the Adopting Release states (at page 129) that "the terms of securities loans charge during the day and are generally not finalized until the end of the day." **T**his statement seems to make explicit that the "time" at which a loan is agreed is not useful information since the terms are generally not finally agreed until the end of the day or may be revised until the end of the day. Because the focus of comments on the Proposal would have been largely about real time reporting, there was less focus on time of trade reporting. This is an illustration of an issue where there might have been a benefit to the SEC in issuing a reproposal, with a new comment period, rather than going straight from the Proposal to the Rule without an intervening reproposal.

[10] SEC Commissioner Uyeda, Dissenting Statement on Reporting of Securities Loans (Oct. 13, 2023).

said, the phrase is used a number of times in the Rule. In some of these cases, it is reasonable to assume that the SEC intended to limit the term to just SEC-registered broker-dealers because the term is used in close connection with another SEA rule requirement to which only registered broker-dealers would be subject.[11]

Unfortunately, there is ambiguity in the use of the term "brokers and dealers" in the Rule's information reporting requirements. When a U.S. person lends a security, it must report whether the borrower is a "broker-dealer." Similarly, if the person lending a security is a broker-dealer, then it must disclose whether it obtained the security from inventory or from its customer. In both these cases, it actually matters how the term "broker or dealer" should be defined, and whether this term includes a foreign broker-dealer. In neither case does it seem possible to guess with any assurance what the SEC intended.

B. Covered Person

Perhaps the most important definition in the Rule is that of a "covered person." The Rule requires a "covered person" to report any agreement that it enters into to loan securities, and to report specified information as to the loan. There are three potential types of actors involved in a securities loan who might be deemed the covered person for that loan and these three actors are stated in the alternative as:

- The agent for the securities lender;
- Where there is no agent, the securities lender itself; or
- A broker or dealer borrowing fully paid or excess margin securities pursuant to SEA Rule 15c3-3(b)(3). (I am going to assume that a broker or dealer, as the term is used here, means an SEC-registered broker-dealer as a foreign broker-dealer would not be subject to SEA Rule 15c3-3.)

As between these three actors, the Rule does not establish any hierarchy. In the case of the first two types of actors, the absence of any hierarchy does not matter. Either an agent entered into the securities loan agreement for the principal or the principal acted for its own account; there is no overlap between the two situations. However, the third situation overlaps with both of the first two. So which prong of the covered person definition governs when a broker-dealer borrows securities? Does the first prong trump the third, does the second prong trump the third or does the third prong trump them both?

It is a reasonable guess that the SEC intended the third prong of the covered person definition to trump the second, but what about the first? The answer to that question may be resolved as we go to the next definitional ambiguity.

C. Borrowing Fully Paid or Excess Margin Securities (the third prong of the Covered Person definition)

[11] I want to dispel any notion that the SEC in its rulemaking commonly fails to specify whether a broker or dealer is registered. That is not true. SEC Rules typically refer, where the intent is to limit the application of the requirement either to a "registered broker" or a broker that is registered pursuant to Section 15 of the SEA.

A registered broker-dealer that borrows securities from a customer is subject to Rule 15c3-3(b)(3), which is the third prong of the covered person definition. However, there are two possible readings of this phrase:

- One reading (which is the literal reading) is that it means every borrowing of securities by a registered broker-dealer from a customer since every borrowing of fully paid securities from a customer is subject to the requirements of Rule 15c3-3; and

- The alternative reading is that it means only those borrowings of securities by a registered broker-dealer that had previously been holding the securities in custody (as fully paid or excess margin securities) for the customer before it borrowed the securities.

There are a few reasons why I think the second reading, although not the literal reading, is the better reading.

- When a broker-dealer borrows securities from, for example, a registered investment company, those securities would not have been previously held in custody by the broker-dealer and thus would never have been fully paid or excess margin securities.

- If the SEC intended the phrase to mean "securities borrowed from any investment company or other institutional lender", then it would have been much simpler to say "any securities borrowed by a registered broker-dealer from a customer."

- If the SEC intended the phrase to include non-custodial securities borrowed as a result of an agreement with a lending agent, then the broker-dealer would not be able to report on a daily basis to FINRA the identity of the lender (as required by the Rule) since lending agents typically do not report that information to the broker-dealer every day. Further, the reporting by lending agents would become largely irrelevant since virtually all lending by lending agents is done through a broker-dealer.[12]

- There is also discussion in the Adopting Release of "fully paid lending programs" where a customer would not have real-time knowledge of which security it had loaned to the broker-dealer. This means that the security must have been in the custody of the broker-dealer before the loan was made, because if the customer had delivered it for the specific purpose of making the loan, the customer would have had the relevant information.

The best way to unravel the SEC's meaning is to think of the above ambiguities as if they were in a 2x2 matrix: (i) either the first prong of the covered person definition trumps the third or vice versa and (ii) the reference to a broker-dealer borrowing securities refers either to a literal reading of the term or only to a borrowing of these securities previously held in custody. That 2x2 matrix provides four possible interpretations of the two definitions. If the first prong of the covered person always trumps the third, then all advisers would be obligated to report securities loans even where the securities were previously in the custody of the broker-dealer which seems impractical because the lender would not always know which securities were borrowed. If the literal reading of the third prong is correct and the third prong trumps the first, then the first prong becomes almost irrelevant. So, by a process of elimination, the non-literal reading of the third prong of the definition is the best reading (that is the third prong is limited to situations where the borrowed securities were in the

[12] See text preceding footnotes 109 and 110.

custody of the broker-dealer before the borrowing) and, with that narrow reading of the third prong, the third prong trumps the first in the covered person definition.

That largely makes sense, though we should not have to draw a matrix to decode an SEC rule. But it does not solve the problem entirely. Suppose an investment adviser manages a private fund that has an account at a broker-dealer and an account at a bank. If the broker-dealer (i) sometimes borrows securities that it is already holding and (ii) sometimes borrows securities that the adviser transfers from the bank, and in all cases the adviser knows which securities are being borrowed by the broker-dealer, who is the covered person responsible for reporting, and is it the same in all situations? The matrix does not answer that question.

D. Any Person Who Agrees to a . . . Loan on Behalf of a Lender (an "Agent")

Market participants must act either directly (meaning in this case through their employees) or through corporate agents that act on their behalf. In the case of investment funds, they typically do not have employees; they typically act through investment advisers that are the funds' agents. Likewise, many businesses and even individuals, particularly high net worth individuals, act through advisers. Where an adviser acts on behalf of a fund, business or individual and agrees to a securities loan, that adviser is (or potentially is) a "covered person" under the Rule; clearly the actual lender is not the covered person since the lender did not agree to the loan.

Advisers both to funds and to retail persons can be covered persons subject to the Rule because they agree to loans on behalf of their clients. Yet when the SEC discusses the term "any person who agrees to a loan on behalf of a lender" in the Adopting Release, the SEC does so using the term "lending agent."[13] (Generally, a lending agent is an entity that acts on behalf of numerous investment funds or plans specifically in connection with their securities lending activities, and that does not provide general purchase and sale or valuation advice.)

However, in footnotes 730 and 985, the Adopting Release also makes clear that investment advisers fall within the first prong of the covered person definition.[14] But even in those footnotes, the SEC only references advisers to private funds and says nothing about advisers to retail individuals. Even as to advisers to private funds, the Adopting Release says at footnote 730 that such advisers "would not face any reporting obligations under [the final Rule] 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 associate with the [final Rule] is to be incurred directly by [private fund advisers.]"

This treatment of investment advisers by the SEC is puzzling for a number of reasons:

- Why is the discussion of the obligations of investment advisers limited to advisers to private funds with no mention of advisers to individuals?

- Why does the SEC assume that advisers would not have any reporting obligations under the Rule when paragraph (a)(2) of the Rule is quite explicit then even if an adviser hired

[13] The term "lending agent" is used 155 times in the Adopting Release.

[14] Although the word "adviser" is used 23 times in the Adopting Release, in virtually every instance the word is used in reference to some other document, such as the "Private Fund Adviser Release". The only places where there was discussion of the impact of the Rule on advisers was in those two footnotes and the discussion in the footnotes is limited to advisers to private funds, with no mention of advisers to individuals.

a reporting agent, it still is legally obligated to report the relevant data to the reporting agent?

- Why does the SEC assume that only the direct costs of the Rule to advisers are significant and not the indirect costs; e.g., providing data to the reporting agent and then paying the reporting agent for transmitting the relevant information to FINRA?

All of these questions would have been worth exploring through public comments. It is possible that the issues were missed because they were given so little attention by the SEC itself. Certainly, there is nothing in the Adopting Release that would highlight that advisers to retail investors are subject to the Rule and may have compliance costs, even if those costs are indirect.

E. Jurisdiction

According to the Adopting Release, the Rule applies "whenever a covered person "effects, accepts or facilitates (in whole or in part) in the U.S. a lending or borrowing" transaction.[15]

This explanation of the Rule's jurisdictional scope does not parse with the terms of the Rule. There are three activities that may bring a person within the definition of covered person:

- Agreeing to a loan of securities as agent;
- Agreeing to a loan of securities as principal; and
- Borrowing securities pursuant to SEC Rule 15c3-3.

All three of the above activities fall within the term "accepting" a lending or borrowing. On the other hand, a person who effects or facilitates a securities loan is not a covered person if it did not engage in one of the three specified activities. The use of the phrase "(in whole or in part)" does not provide any additional clarity.

Ordinarily, when the SEC wishes to make clear that it is asserting regulatory jurisdiction over foreign persons that transact with U.S. persons, the phrase that it employs is that the foreign person is using "interstate commerce," a term that is defined in SEA Section 3(a)(17) to include communications from outside the United States to a person inside the United States. Alternatively, the SEC may employ the phrase "using U.S. jurisdictional means," which is understood to have the same meaning. However, in footnote 648 of the Adopting Release and the related text, the SEC makes clear that it does not subscribe to the use of these terms in interpreting the scope of the Rule.[16]

[15] The discussion of cross-border jurisdiction begins on page 161 of the Adopting Release. The quoted language is on page 164.

[16] I do not know why the SEC rejected the use of the phrase "any means or instrumentality of interstate commerce." That is, in fact, the jurisdictional language that begins SEA Section 10 and that would potentially apply to Rule 10c-1. The SEC does not have authority to extend the application of Rule 10c-1 beyond the jurisdictional language in Section 10, but it does have authority to narrow that language. The quoted language from the Adopting Release appears to be narrower that the language in SEA Section 10.

To repeat the SEC's language, quoted above, the Rule applies "whenever a covered person "effects, accepts or facilitates (in whole or in part) in the U.S. a lending or borrowing" transaction.[17] On the basis of those words, the following results apply to cross-border transactions:

- When a U.S. person lends securities to a foreign broker-dealer, the Rule applies because the lender is a covered person and is in the United States.

- When a U.S. person borrows securities from a foreign broker-dealer, the U.S. person would not be a covered person because it is not a lender of securities and the foreign person is not subject to SEC jurisdiction because it is not "in" the United States (if it were in the United States, then it would be required to register with the SEC).

I also note that the SEC's discussion in the Adopting Release of jurisdiction refers to the case of *Morrison v. National Australia Bank*, 561 U.S. 247 (2010), which is the leading Supreme Court case on the application of the U.S. securities laws to fraudulent activities having a limited U.S. connection. That case, involving fraud, is not generally viewed as relevant with respect to regulatory requirements, such as the Rule. Leaving that aside, it is not clear what the SEC intends by citing to the Morrison case in the Adopting Release. Nothing in the case speaks to the definition of covered person.

Again, this is an instance where a fuller comment period and a reopened comment period would have served both the regulator and the market. At a minimum, the SEC might have explained how it would apply the Morrison case to the Rule.

F. Loan

The term "Loan" is not defined in the Rule. As discussed in the Adopting Release, various commenters said that there were a variety of circumstances in which a loan of securities should not be treated as a "loan" subject to the Rule; e.g., where the purpose of the transaction was for funding by the securities lender or where the loan of the securities was not collateralized. The SEC rejected these arguments saying that every transaction documented as a loan of securities must be reported pursuant to the Rule, regardless of the reason for the transaction or the terms.[18]

There is also discussion in the Adopting Release of repurchase transactions, which can be a way of lending securities or obtaining financing, and as to whether they should be treated as "loans" under the Rule. Around page 73 of the Adopting Release, the SEC reports that, in the Proposal, it did not intend to treat repurchase agreements as securities loans. The Adopting Release then recounts various of the commenters' reactions to the Proposal's position that repurchase agreements are not securities loans. Strangely enough, the Adopting Release then seems to lose interest in the question and does not actually seem to reach any definitive conclusion on the issue. However, 150 pages later, footnote 776 on page 202 of the Adopting Release cites a ten-year-old article that explains why securities loans are different from repurchase transactions. Additionally, footnote 777 explains that most securities loans do not have a fixed term, and repurchase transactions commonly do, so the two transaction types are fundamentally different. The only practical takeaway from this is that repurchase transactions are not securities loans subject to the Rule.

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[17] The discussion of cross-border jurisdiction begins on page 161 of the Adopting Release. The quoted language is on page 164.

[18] See generally the discussion in the Adopting Release from pages 65-72.

Another question that has come up is whether a delivery by a broker-dealer on behalf of customer's short position in a margin account is a securities loan. The Adopting Release states (at pages 72-73) a "covered person" (meaning in this case a broker-dealer) "will not be required to report short sales . . . but will be required to report loans that are used for short sales." I don't think there is any way to read this other than that the covering of a short sale in a margin account is not a securities loan, although the lending of a security to a third party where that third party may use the security to deliver into a short sale would be reportable. Also, page 66 of the Adopting Release provides that the Rule's reporting requirements do not apply to "certain uses of margin securities by a broker or dealer that are not consistent with, or traditionally recognized as, securities lending transactions." Since the Adopting Release is very clear that a broker-dealer that actually lends rehypothecated securities to a third party would report that loan, it seems that the use of margin securities to which the reporting requirement does not apply must be the use of rehypothecated securities to deliver into a customer short sale. Further, footnote 300 contains a laundry list of commenters' explanations as to why the delivery in respect of a margin position is distinguishable from a securities loan. As is the case with respect to footnote 777 and repurchase transactions, the SEC appears to cite the reasoning in footnote 300 favorably. I also note that there are numerous SEC rules that regulate securities lending transactions that do not apply to delivery into short sales (SEA Rule 3a5-3, SEA Rule 15c3-1, SEA Rule 15c3-3, SEA Rule 17a-3) or that distinguish between securities loans and short positions. If the SEC had meant to ignore the distinction made in all these other rules, then it certainly did not say so in the Adopting Release or in the Rule.

Further support for the conclusion that neither repurchase transactions nor deliveries in respect of margin account short sales are "loans" of securities for purposes of the Rule is also provided by the SEC's description of the size of the securities lending market. In footnote 4 of the Adopting Release, it reports the size of the U.S. securities lending market based on information contained in the FSOC 2021 Annual Report. Similarly, in the first paragraph of the Proposing Release, the SEC estimated the size of the securities lending market based on FSOC's 2020 Annual Report. Reading the two FSOC reports, it is obvious that FSOC was referring only to transactions documented as securities loans and not to repurchase transactions or to deliveries into short sales. I have been told that there are currently reported to FINRA over $1 trillion in short positions. It is a little hard to believe that the SEC would have ignored that $1 trillion in describing the size of the securities lending market and relied only on FSOC's number had the SEC intended to treat short sales as securities loans.

IV. Conclusion

This memorandum is not intended to provide a complete explication of the Rule or the Adopting Release, but only to illustrate a few of the ambiguities within the Rule that have a material impact on its application. Had there been a longer comment period on a version of the rule that was much closer to the Rule as finally adopted, the definitional ambiguities would certainly have been raised and perhaps resolved.

I would also like to reiterate Commissioner Uyeda's comment that a significant change in the form of a rule after its proposal should require a new cost-benefit analysis and a new period of public comment. Likewise, major ambiguities or uncertainties in the interpretation of a rule can throw the cost analysis into doubt, since neither the benefits nor the requirements of the rule have been defined with any certainty.

In this memorandum, I have purposely avoided any discussion of whether the Rule itself is, in my view or on the view of market participants generally, good or bad. I have tried only to discuss the ambiguities of the Rule to make the point that process matters. While my discussion of process has been limited to this Rule, Commissioners Uyeda and Peirce, among others, have made the same procedural observation as to a number of the SEC's recent rule adoptions.

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Authors:

This commentary is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this commentary, please call your regular Fried Frank contact or an attorney listed below:

Contacts:

New York

Steven Lofchie	+1.212.859.6700	Steven.Lofchie@friedfrank.com